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1. VILLAGE MARSHAL—APPOINTED UNDER SECTION 4384 G. C.—HOLDS OFFICE UNTIL REMOVED FOR CAUSE—DOES NOT HOLD FOR TERM WITHIN MEANING SECTION 4219 G. C., WHICH PROVIDES COMPENSATION OF AN OFFICER, CLERK OR EMPLOYE MAY NOT BE INCREASED OR DIMINISHED DURING TERM.

2. VILLAGE COUNCIL—HAS POWER TO INCREASE OR DECREASE SALARY OF VILLAGE MARSHAL—APPOINTED TO SUCH OFFICE UNDER SECTION 4384 G. C.

SYLLABUS:

1. A village marshal appointed pursuant to Section 4384 of the General Code holds his office until removed for cause, and does not hold for a term within the meaning of Section 4219, General Code, providing that the compensation of an officer, clerk or employe may not be increased or diminished during the term for which he may have been elected or appointed.

2. The council of a village has the power to increase or decrease the salary of the marshal of such village who is holding said office by virtue of appointment under Section 4384 of the General Code.

Columbus, Ohio, February 15, 1943.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

I have your request for my opinion, reading as follows:

"Section 4384, General Code, was amended by Senate Bill No. 3, effective September 5, 1941, to provide for the appointment of the marshal or chief of police in villages.

We have had a number of inquiries concerning the power of council under Section 4219, General Code, to change the salary of the marshal during his term of office, such term now being continuous during good behavior. The letter herewith inclosed is typical of such inquiries.

May we request that you examine the inclosure and give us your opinion in answer to the following question:

May the village council change the salary of the incumbent village marshal appointed on or after January 1, 1942, by ordinance adopted in accordance with the provisions of Section 4219 General Code?"

Section 4219 of the General Code, to which you refer and which has a bearing on your inquiry, reads as follows:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. In the case of officers, the council shall fix their compensation for the ensuing term of office at a meeting held not later than five days prior to the last day fixed by law for filing as a candidate for such office for the ensuing term. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

A similar provision as to change of salaries in cities is found in Section 4213, General Code, which reads as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed, and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

The same principle is embodied in Section 20 of Article II of the Constitution, which is as follows:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

Previous to an amendment by the 93rd General Assembly, Section 4384, relating to the marshal of a village, made him an elective officer and fixed his term at two years. That section read as follows:

> "The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council."

As amended (119 O. L., p. 699), effective September 5, 1941, this section was changed so that the office became an appointive office, the section as amended reading in part as follows:

> "In each village there shall be a marshal, who shall be designated chief of police, who shall be an elector thereof, appointed by the mayor with the advice and consent of council, and who shall continue in office until removed therefrom for the causes, and under the powers and procedure provided for the removal of officers by sections 4263 to 4267, inclusive, of the General Code. * * *"

It will be noted that the marshal is here designated as "chief of police" and that he is to be appointed by the mayor with the advice and consent of council, and is to continue in office until removed for cause and under the procedure set out in Sections 4263 to 4267, inclusive, of the General Code.

It will be observed that this section, as it stood before amendment, provided that the marshal should be elected *"for a term* of two years", whereas in the language used in the amendment there is no reference to any term, but merely the provision that he shall continue in office until removed for cause.

Let it be observed also that in Sections 4213 and 4219, above quoted, the prohibition against change is "during the term", and in the constitution the restriction against change is "during his existing term".

The question therefore arises whether these limitations as to change in salary of an officer apply to one who is appointed not for a definite term but for a wholly indefinite time, to continue during the pleasure of the appointing officer or during good behavior, or until removed for some of the causes in the statutes.

Generally speaking, the word "term" connotes a definite period. Webster calls attention to the fact that its Latin derivation is from "terminus", meaning "end", and he defines the word as a "limited or definite extent of time".

In Words and Phrases, Vol. 41, p. 390, a number of decisions are cited showing that "term of office" means a fixed and definite time; among others are State v. Rogers, 93 Mont., 355, 18 Pac. (2nd), 617; Suverkrubbe v. Ft. Calhoun, 127 Nebr., 472, 256 N. W., 47. No decisions are noted which are inconsistent with that interpretation. These words were so construed in a number of cases cited relative to constitutional provisions against changes of salary during "term of office", viz.: State ex rel. v. Board of Commissioners, 29 N. M., 209, 31 A. L. R., 1310; Bayley v. Garrison, 190 Cal., 690, 214 Pac. 871. By the same authority, cases are quoted in support of the proposition that "term of office" is not to be confused with "tenure of office". State v. Young, 127 La., 102, 67 So., 241; Halbrook v. Board, 8 Cal. (2nd), 158, 64 P .(2nd), 430.

In 43 Am. Jur., under the heading "Public Offices", Section 149, it is said:

> "The connotation of 'term' as applied to an office is that of a fixed and definite period. The term is distinct from the 'tenure of an office'."

In the case of State ex rel. v. Board of Commissioners, 29 N. M., 209, it was held:

> "Sec. 27 of Article 4 of the Constitution prohibits increasing or diminishing the compensation of an officer during his term of office.
>
> This prohibition applies to officers who have a definite and fixed tenure of office, and does not embrace those who hold their offices at the pleasure of the appointing power."

Likewise, in Bayley v. Garrison, 190 Cal., 690, the syllabus is as follows:

> "The inhibition of Constitution, Article 11, Section 9, providing that salary of a public officer shall not be increased during his term of office, applies only to officers who have a fixed and definite term, and does not preclude the increase of salary of a deputy holding office at the pleasure of his principal; such deputy having no term of office within the meaning of the constitutional provision."

Strangely enough the question of the right of a municipal council to change, either by increase or decrease, the salary of its police officers and firemen after they have been appointed and have entered on their duties, does not seem to have been the subject of decision by the Supreme Court of Ohio, and few lower court decisions are found directly on the subject.

In the case of State ex rel. v. Painesville, 13 C. C. (N. S.), 577 (affirmed without report 85 O. S., 483), I find the following syllabus:

> "1. A duly appointed patrolman of the police department of a city is an officer within the meaning of the laws of Ohio.
>
> 2. A city council has no power to increase or diminish the salary of a police officer, appointed under the civil service provisions of the municipal code, during the term for which he was appointed which is during good behavior."

When one reads the statement of facts in this case, one cannot avoid wondering why the court used a considerable amount of space, first in finding that a patrolman is an officer and second in holding that his office fell within the terms of the statute. The statute as it read then was to the same effect as Section 4213, and related not only to officers but to all employes of a city.

It appears from the realtor's petition that he was a patrolman who entered the police department at a salary previously fixed at $720.00; that thereafter the council passed an ordinance increasing his salary to $840.00; that still later the council passed an ordinance reducing his salary to the original sum of $720.00. His action was to compel the payment of the higher salary. In passing on a demurrer to his petition, it plainly made no difference whether the court held that the city council could or could not increase or diminish the salary of his office. If the council could not reduce his salary because of the statute, plainly it could not have increased it in the first place. If, on the other hand, council could have increased the salary, it had the same right to reduce it. In either event he had no cause of action.

The court said in opening its discussion that the case was an amicable proceeding to test the right of council to raise and lower the patrolman's salary. The court devoted most of the decision to showing that a patrolman is an officer within the meaning of the statute.

Referring to the matter of "term of office" of patrolmen, the court said at page 583:

> "But the increasing or diminishing of the salary of an officer or employe is limited to the term for which he is appointed, and it is suggested that a patrolman is not appointed for any term. If this be so, it would seem that he might be discharged at any time without violation of any statute and his place filled by another appointee. But in view of the fact that a patrolman once appointed serves until he is removed for cause, it necessarily fol-

lows *that he is appointed for a term, to-wit, for that period of time during which he is permitted to hold his office.*" (Emphasis mine.)

This holding seems to be out of line with the general rule to which I have already referred.

Another circuit court took a different view of this matter. In the case of State ex rel. v. Massillon, 2 C. C. (N. S.), 167, it was held:

> "A health officer does not come within the purview of Section 1717, prohibiting an increase of salary of an officer during his term."

Discussing the character of the position of health officer, the court said at page 168:

> "The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. *It is not a term, for the reason there is no limit to it.* It may be likened unto a tenancy at will, not a term, because it has no limitation. Therefore, it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed." (Emphasis mine.)

In two Nisi Prius cases there are well considered opinions rendered subsequent to the case of State ex rel. v. Painesville, *supra,* holding contrary to the syllabus of that case. One is the case of State ex rel. v. Bish, 12 N. P. (N. S.), 369, where is is held:

> "Policemen and firemen do not hold their positions for a fixed and definite term, and hence we are not subject to the provisions of Section 4213, P. & A. Anno. General Code, which forbids the increase or diminishing of salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected."

The court refers to the Painesville case at length, criticizing it rather caustically and pointing out that no matter which way the court ruled on the question before it, the relator was bound to be the loser. This decision was by Judge Sprigg of the Common Pleas Court of Montgomery County. A few days later a decision was rendered by Judge Lawrence of the Common Pleas Court of Cuyahoga County, in the case of State v. Coughlin, 12 N. P. (N. S.), 419, the syllabus being as follows:

"Members of the police and fire departments of a municipality are not appointed for a 'term' within the meaning of Section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment."

The court, referring to the several ordinances involved in the Painesville case, says at page 422:

"It makes no difference in the result whether it be said that the ordinance of December 18, 1907, was valid, or that it was invalid. If it was valid, it was repealed by the ordinance of January 12, 1910; and if it was invalid, it never had any legal operation. In neither case could the relator have any lawful claim based thereon."

So, as it seems to me, the action of the Supreme Court can not be considered as any controlling authority on the question here involved, because the case was not reported, and a decision on the point in controversy was not necessarily passed upon by the judgment of affirmance."

The court further on in its opinion quoted from Mechem on Public Offices, Section 385, where it is said:

"The word 'term', when used in reference to the tenure of office, means ordinarily a fixed and definite time, and does not apply to appointive offices held at the pleasure of the appointing power."

To the same effect see:

Throop on Public Officers, Section 303;
23 Am. & Eng. Ency. of Law, 404;
State v. Galusha, 74 Neb., 188;
People v. Brundage, 78 N. Y., 403 (407);
State v. Twichel, 9 Wash., 530 (535);
Cravatt v. Mason, 101 Ga., 246 (254);
State v. Stonestreet, 99 Mo., 361;
Somers v. State, 5 S. Dak., 321;
People v. Turney, 31 N. Y. App. Div., 309;
Lexington v. Rennick, 105 Ky., 779.

The absurdity of holding that a statute limiting the right of a municipal council to increase or decrease the salary of an officer *during his term* of office is to apply to one who is appointed to hold office until removed for certain causes, is apparent when we consider the possible consequences. Assume that a patrolman was appointed at a salary of $60.00 per month at a time when the average wage for a working man was $1.50 per day and the cost of living was correspondingly low. Assume that he continued

faithfully to perform his duties until the World War came on, when wages generally doubled and trebled and the cost of living was tremendously increased. Is it conceivable that the municipal council would have no power to adjust the compensation of this officer to meet the greatly increased cost of existence? The rule may with propriety be applied to the man who accepts an office for a limited term, knowing the length of the term and the salary pertaining to the office and who takes his chance of either a rise or fall in the cost of living, but not to one who enters on an employment that is to last indefinitely, possibly for life.

Specifically answering your question, I am of the opinion that a village council has the power to change the salary of a village marshal appointed on or after January 1, 1942, and that the provisions of Section 4219, General Code, prohibiting the village council from changing the salary of an officer during the term for which he may have been elected or appointed does not apply to the salary of the village marshal so appointed.

Respectfully,
THOMAS J. HERBERT,
Attorney General.