

OPINION NO. 77-082

Syllabus:

Where the General Assembly by legislative enactment increases the compensation of a clerk of courts of a county, thus entitling the clerk of a municipal court to an increase in salary under R.C. 1901.31, such an increase is not payable to an incumbent clerk of a municipal court during his existing term, as such an in-term increase is proscribed by Article II, Section 20 of the Ohio Constitution.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, December 1, 1977

I have before me your request for my opinion as to whether Am. Sub. H.B. No. 784, effective January 1, 1977, through its amendment of R.C. 325.08, operates to permit an in-term increase in the compensation of a clerk of a municipal court pursuant to R.C. 1901.31.

From information you have supplied, it is my understanding that your question arises from a situation where the clerk of a municipal court took office January 1, 1974. Pursuant to R.C. 1901.34, the compensation of such clerk was fixed at 85% of the salary of the judge of such court. However, R.C. 1901.31 further provides that the clerk's compensation shall not exceed that of the clerk of courts of the county in which the municipal court is located.

You have indicated that at the time the clerk of the municipal court in question took office, the salary of the judge of such court was fixed at \$30,000. The 85% formula set forth by R.C. 1901.31 thus would indicate that the clerk's compensation would be \$25,500. However, due to the limitation that the compensation of a clerk of a municipal court shall not exceed the compensation of the clerk of courts of the county in which the municipal court is located, the municipal clerk's salary was fixed at \$20,900, which was the amount payable pursuant to R.C. 325.08 to the clerk of courts of the county.

Am. Sub. H.B. No. 784, effective January 1, 1977, amended R.C. 325.08 to provide that the compensation due to the clerk of courts of the county involved would be \$27,500. Your question is whether this amendment permits the compensation of the clerk of the municipal court located therein to be increased to \$25,500.

The Supreme Court of Ohio has determined that a clerk of a municipal court is not an officer "provided for" in the Ohio Constitution and that the prohibitions of Article II, Section 20 of the Constitution thus are applicable to such clerk. State, ex rel. Edgecomb v. Rosen, 29 Ohio St. 2d 114 (1972). Article II, Section 20 provides:

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.

Thus, an analysis of your question turns upon whether an alteration in compensation such as you describe is an in-term change prohibited by Article II, Section 20 of the Ohio Constitution.

The Ohio Supreme Court in State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942), interpreted the provisions then in effect of Article IV, Section 14 of the Ohio Constitution relative to the compensation of judges. The court described the prohibition against in-term changes in compensation contained therein at that time as "almost identical" to the prohibition of Article II, Section 20. *Id.*, p. 279. The situation under consideration, however, involved a statutory provision for an automatic increase in the compensation of a judge by reason of an increase in the population of his county. The court, noting that the statutory provision for such increase was effective before the judge commenced his term, concluded that such increase was not prohibited by the provisions of Article IV, Section 14, as the compensation due the judge was fixed at the outset of his term.

Relying, in part, upon the analysis set forth in Guckenberger, the Common Pleas Court of Stark County, in Grass v. Garrett, No. 109-259 (1966), concluded that an increase such as you describe in the compensation of a clerk of a municipal court did not violate the prohibition of Article II, Section 20 of the Ohio Constitution. The court found that legislation which increased the compensation of the clerk of courts of the county pursuant to R.C. 325.08 modified the limitation of R.C. 1901.31 applicable to the clerk of a municipal court and that such modification of this limiting factor did not constitute a constitutionally prohibited change in compensation.

However, in State, ex rel. Edgecomb v. Rosen, 29 Ohio St. 2d 114 (1972) the Ohio Supreme Court clarified the Guckenberger exception to in-term changes in compensation. The situation therein under consideration involved a claim by a clerk of a municipal court to an entitlement to an increase in compensation pursuant to R.C. 1901.31 based upon an increase in the salary of the judge of such court. The clerk argued that the provisions of R.C. 1901.31 had been in effect at the time she took office, that the statutory formula used for computing her salary had not been changed and that an increase based upon the increase in the judge's salary amounted to merely a recalculation rather than a constitutionally prohibited change in compensation. The court, however, rejected this argument and concluded that such an increase would be constitutionally impermissible, stating, at pp. 118-119:

The Guckenberger case and the present case are similar in that in each case the salary is based upon a contingency expressed in a statute, and the statute was not changed after the officeholder assumed office. There is, however, one fundamental difference which makes Guckenberger distinguishable and not controlling in the instant case. There, the happening upon which the salary increase was predicated was a population increase, an event which made the increase automatic, without further legislative action.

Here, although appellee's salary is based upon that of the Municipal Court judge, an act of the General Assembly raising the judge's salary was a condition

precedent to an increase in appellee's salary. The salary terms in R.C. 1901.31 (C), although pre-set themselves, required a legislative act providing an increase in the salary of the Municipal Court judge to, in turn, provide an increase for appellee.

By granting an increase to Municipal Court judges the General Assembly concomitantly made a "change" in the compensation of Municipal Court clerks to whom the provisions of R.C. 1901.31(C) were applicable which would "affect" the salary of such clerks. Such a change is prohibited by Section 20, Article II, from affecting the salary "of any officer during his existing term." Therefore, appellee is not now entitled to the increase allowed by R.C. 1901.31(C).

We hold that where the General Assembly by legislative enactment increases the salary of a Municipal Court judge, thus entitling the clerk of a Municipal Court to an increase in salary under R.C. 1901.31(C), such increase is not payable to an incumbent clerk during his existing term, as such act by the General Assembly constitutes a "change" in compensation affecting the salary of an officer "during his existing term" which is proscribed by Section 20, Article II of the Ohio Constitution.

The critical factor, thus, in addressing your question is whether the claim for additional compensation arises "automatically" by operation of R.C. 1901.31 itself or whether an act of the General Assembly was a condition precedent to such an increase. Because the situation you describe arises only by virtue of an act of the General Assembly which increased the compensation payable to the clerk of courts of the county, it follows that such an increase cannot be characterized as automatic.

It is, therefore, my opinion, and you are so advised that where the General Assembly by legislative enactment increases the compensation of a clerk of courts of a county, thus entitling the clerk of a municipal court to an increase in salary under R.C. 1901.31, such an increase is not payable to an incumbent clerk of a municipal court during his existing term, as such an in-term increase is proscribed by Article II, Section 20 of the Ohio Constitution.