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1. JUDGES, COURTS OF COMMON PLEAS—ADDITIONAL COMPENSATION—DUE AND PAYABLE MONTHLY FROM AND AFTER APRIL 1, 1950—BASED ON INCREASE OR DECREASE IN COUNTY'S POPULATION—1950 FEDERAL CENSUS—SECTION 2252 G. C.
2. COMPUTATION AND PAYMENT OF SALARY OF JUDGE, COURT OF COMMON PLEAS—MAY BE MADE, BASED ON 1950 CENSUS, FROM AND AFTER APRIL 1, 1950, BEFORE ANY OFFICIAL REPORT IS MADE TO SECRETARY OF STATE.

SYLLABUS:

1. Additional compensation provided for judges of the Courts of Common Pleas by Section 2252, General Code, is due and payable monthly from and after April 1, 1950, based on the increase or decrease in a county's population as ascertained by the 1950 federal census.
2. Computation and payment of the salary of a judge of the Court of Common Pleas may be made, based on the 1950 census from and after April 1, 1950, before any official report is made by the Secretary of State.

Columbus, Ohio, December 20, 1950

Hon. Mathias H. Heck, Prosecuting Attorney  
Montgomery County, Dayton, Ohio.

Dear Sir :

Your request for my opinion is as follows :

"The Judges of the Common Pleas Court of this county maintain that the additional compensation provided for their office under Section 2252 G. C., based on the increase in the population of Montgomery County disclosed by the 1950 federal census ;

First

"Is presently due and payable monthly from April 1st, 1950.

Second

"That the amount may be determined upon the basis of the recent preliminary figures released by the Census Bureau. This conflicts with the opinion of the Bureau of Inspection and Supervision of Public Offices in circular No. 1105 issued October 23rd, 1950.

"The Bureau in circular No. 1105 maintains that :

First

"That the salary changes brought about through salary increase disclosed by the 1950 census will apply to each term year of the office which begins after April 1st, 1950.

Second

"That the new computation can not be made until the Certificate of the Secretary of State has been issued.

"The circular cites the opinion of the Attorney General issued in 1941, being Number 3982, also the Attorney General's Opinion Number 2243 issued as of September 1st, 1950.

"The County Auditor of Montgomery County desires the opinion of this office, and I feel that the matter being of state-wide importance, the answer to this question should come from the office of the Attorney General."

In my opinion No. 2243 issued September 1, 1950, I felt that I had answered your first question. However, upon re-reading this opinion, I find that some ambiguity is present which I shall attempt to clear up in this opinion.

It is my opinion that the additional compensation provided for judges of the Courts of Common Pleas by Section 2252, General Code, is due and

payable monthly from and after April 1, 1950, based on the increase or decrease in a county's population as ascertained by the 1950 Federal census.

My reasons for reaching this conclusion are based first, on the decision rendered by the Supreme Court of Ohio in the case of *The State ex rel. Mack, Judge v. Guckenberger*, Auditor, 139 Ohio St. 273. The Guckenberger case was an original action in the Supreme Court for a writ of mandamus wherein the relator sought a writ to require the auditor to issue him a warrant for the balance of salary which he claimed was due him. According to the court, the relator's petition alleged:

"The relator's petition alleges in substance that at the November election in 1938, he was elected as common pleas judge for a term of six years commencing January 3, 1939; that on the latter date the population of Hamilton county as determined by the federal census on April 1, 1930, the then last federal census, was 589,356; that by virtue of Section 2252, General Code, relator was entitled to an annual compensation of \$8,331.12, *payable monthly* from the county treasury upon the warrant of the county auditor; that the population of Hamilton county as determined by the latest federal census, April 1, 1940, was 621,987; that by virtue of the same section of the General Code, *he was and is, since April 1, 1940, entitled to an annual compensation of \$8,439.92, payable monthly as aforesaid*; that the respondent is the elected and qualified Auditor of Hamilton county; and that on October 31, 1941, the relator applied to the respondent for a warrant for his compensation for the month of October 1941, in the sum of \$703.32, which is one-twelfth of the sum of \$8,439.92, but respondent refused to draw his warrant on the county treasury for such compensation for any sum in excess of \$694.26, which is one-twelfth of the sum of \$8,331.12, the annual salary of the relator at the commencement of his term. The prayer of the petition is that the auditor be required to issue to relator a warrant upon the treasurer of the county for the sum of \$703.32."

(Emphasis added.)

The court in the Guckenberger case allowed the writ to issue and required the Auditor to issue a warrant for \$703.32 for the relator's compensation for the month of October in the year 1941, which sum was  $\frac{1}{12}$  of the annual compensation to which the relator was entitled subsequent to April 1, 1940, under the provisions of Sections 2251 and 2252, General Code, in effect in the year 1938 when he was elected, in the year 1939 when his term commenced, and also throughout the year 1941, after giving effect to the population of Hamilton on April 1, 1940, as determined by the federal census.

The chief issue involved in the Guckenberger case was whether Section 2252, General Code, was in conflict with Section 14, Article IV, of the Ohio Constitution and the court held that it was not. In so far as pertinent to your two questions, Section 2252, General Code, was substantially the same when that case arose as it is today. It is quite evident from a reading of that case that the court was apprised of the question now before me and that their conclusion was to the effect that the increase in relator's compensation was due and payable from and after April 1, 1940. This is evident from the following quotations from the opinion :

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"Relator claims that by virtue of Section 2252, General Code, as amended effective August 11, 1927 (112 Ohio Laws, 345), his compensation payable to him by Hamilton county *after April 1, 1940*, is expressly made dependent upon the latest federal census, which in this instance *became effective as of that date*, during his term of office. Section 2251, General Code, provides that the annual salary of common pleas judges shall be \$3,000 payable from the state. Section 2252, General Code, provides for additional compensation to judges of the Common Pleas Court.

The pertinent portion of this section is as follows :

'In addition to the salary allowed by Section 2251, each judge of the Court of Common Pleas shall receive an annual compensation equal to three cents per capita for the first 50,000 of the population of the county in which he resided when elected or appointed, *as ascertained by the latest federal census of the United States \* \* \**' (Italics ours.)

"The relator claims that while the italicized portion of this section as above quoted entitles him to more money since April 1, 1940, \* \* \*."

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"In the case of Crowe v. Board of Commissioners of St. Joseph County, 210 Ind., 404, 3 N. E. (2d), 76 the plaintiff was county auditor during the years 1930, 1931 and 1932. He claimed his salary *from April 1930* should be \$15,000 per annum instead of \$10,000, as it was prior to April 1930, due to the increased population of the county. The defendants demurred to the appellant's petition assigning among other grounds that there was a deficiency of facts because 'appellant's salary could not be increased during his term of office.' The court below sustained the demurrer, but the Supreme Court of Indiana reversed, with instructions to overrule the demurrer as to this ground of the demurrer. The court said :

'There is no merit in the contention that an increase in the salary of an officer during his term is involved. The salary was

fixed before he was elected. *The amount he was to receive from time to time was made to depend upon the population of the county.* It is as though the statute in existence when the officer was elected had provided that he should receive \$1,000 the first year and \$2,000 the second year of his term. In the statute under consideration, the Legislature chose to make the amount of salary dependent upon population shown by the United States census. It might continue during the latter part of the term the same as before the census. It might be more if the population increased. It might be less if it decreased.' \* \* \*'' (Emphasis added.)

The second reason for my conclusion is based on 1943 Opinions of the Attorney General, page 586, No. 6462. Thus on page 589 the then Attorney General said as follows:

"I would not consider it within my province to decide an issue of fact thus raised between the examiner and the judges whose salary is under criticism. *Assuming, however, that the vouchers were issued to the judges as claimed by the examiner and that payments of salary were made pursuant thereto for the period from April 1, 1940, to December 31, 1941, on the basis of the 1930 census, it would appear clear that the judges did not then receive the salary to which they were entitled.* This conclusion would be strictly in accord with the first branch of the syllabus of my opinion No. 4967 rendered March 28, 1942, Opinions Attorney General for 1942, p. 214, where it was said:

'1. Under the holding of the Supreme Court in the case of *The State, ex rel. Mack, Judge, v. Guckenberger*, Aud., 139 O. S. 273 (1942), a Common Pleas Judge who took office on January 1, 1929, to serve a term extending to January 1, 1935, should have been paid by the county, in so far as the county's share of his salary is concerned, on the basis of the 1930 Federal census.'

*It should be noted in passing that the above quoted syllabus is inaccurately worded in that the salary which was to be paid on the basis of the 1930 federal census should have been limited to the period beginning April 1, 1930, that being the date when the population of the county, according to the new census, was ascertained.*

"\* \* \* It follows that the judges named in your communication, who were in office prior to the taking of the 1940 census, *were entitled from and after April 1, 1940, to the increase of salary brought about by the increased population of the county as shown by that census.*

"\* \* \* Therefore, if the judges involved in your inquiry were seeking to obtain or to recover the increased salary to which they were entitled for the period *from April 1, 1940, to December 31, 1941*, they would under the conclusion expressed in the second branch of the syllabus of the opinion aforesaid, and assuming

that the facts were as set forth by your examiner, be barred from such recovery by virtue of their waiver. \* \* \*”

(Emphasis added.)

It is obvious from a reading of the 1943 opinion that the additional compensation provided for in Section 2252, General Code, as ascertained by the 1940 Federal Census should have been paid from and after April 1, 1940.

Your second question is whether a computation and payment of the judges' new compensation may be made before an official report is made by the Secretary of State.

I am unable to find any provision of law which would require a computation to be delayed until the Secretary of State has made an official report. There is at the present time in the office of the Secretary of State a preliminary bulletin showing the population of the counties and municipalities in Ohio with more than one thousand population as ascertained by the seventeenth decennial census published and distributed by the Department of Commerce, Bureau of the Census at Washington under date of September 13, 1950. The bulletin is designated "1950 Census of Population, Preliminary Count."

In the opinion of the Attorney General for 1941, No. 3982, at page 555, after citing the various titles and sections of the United States Code applicable to the census, the following is found:

"From the foregoing, it will be noted that the census shall be taken as of April 1, and that the Director of the Census is given three years to complete his report but is authorized to make preliminary reports from time to time within said period. *No specific provision is made for publishing final reports and, furthermore, the statute does not fix a definite date when the new census becomes effective.* It therefore seems to me that the only logical conclusion is to determine the population of any given county as of the date fixed by law for its determination, without reference to the time at which the announcement thereof, either preliminary or final, official or unofficial, is made. The adoption of any other rule, it appears to me, would result in irregularity and non-uniformity. For example, the population in each of two counties in this state might show an increase as of April 1, 1940; the population of one might be officially determined on November 1 following, and the other on December 1 following. In such case, the officials of the former county would draw the increased salary during their terms of office, while those of the latter would draw salary on the basis of the 1930 census. This, of course, would result in inequality and injustice.

“Furthermore, it must be borne in mind that the census is the enumeration of the population and not the announcement of the result of such enumeration.

“There is of course no statute in Ohio which fixes the time when the federal census becomes effective for the purpose of computing the salaries which by law are based on population as ascertained by a federal census, nor are there any court decisions in this state that discuss or refer to the question. In fact, the decisions of other states are not numerous and are not in all respects consistent. In the case of *Underwood v. Hickman*, 162 Tenn. 689, it was held :

‘1. The effective date of the decennial census of 1930 provided for by act of Congress was the date as of which the enumeration was taken, i. e., April 1, notwithstanding evidence of the new population may not have been available for several months thereafter.

‘2. County officials whose county changed class under the act fixing the salaries of county officials as a result of a change in population are entitled to the salary of the new class into which their county moved as of April 1, 1930, because that was the date as of which the decennial census of 1930 provided for by act of Congress was taken.’

“See also *Etowah Light and Power Company v. Yanzey*, 197 Fed. 845, wherein it was held that, where a federal census was taken and under it an act became applicable to a particular county, such applicability could not be defeated by reason of the fact that the supervisor of the census had not sent a certificate of the population to the clerk of the county court; there being nothing in the act requiring such certificate as a condition of applicability.

“\* \* \*I might also point out, in connection therewith, that the Supreme Court of Pennsylvania, in deciding the *Lewis* case, reversed a decision of the Superior Court of Pennsylvania in said case, which latter court held that the date of determination was that as of which the census was taken.

“The answer to your question would be the same, however, in either event. In other words, if the date of the determination of the 1940 census was April 1, 1940, or the date on which the preliminary population figures of Ohio were first released by the Director of the Census, the salaries of the officers in question would not be affected in either case. A preliminary bulletin showing the population of the counties of Ohio as ascertained by the sixteenth federal decennial census was published and distributed by the Department of Commerce, Bureau of the Census at Washington, under date of September 23, 1940. This bulletin is designated ‘Preliminary Population Figures for the State of Ohio.’

“Each of the above dates was, of course, prior in time to the date of the general election held in 1940 and, therefore, if either one is accepted as the effective date of the 1940 federal census, the county officers in question would receive salaries during their terms of office based upon the 1940 census.”

(Emphasis added.)

From the above language and on the basis of the Tennessee case, the conclusion is obvious that a certificate of the Secretary of State is not necessary. See also *Ervin v. State*, 119 Tex. Cr. 204, 44 S. W. 2d, 380.

In summary and conclusion it is my opinion that:

1. Additional compensation provided for judges of the Courts of Common Pleas by Section 2252, General Code of Ohio, is due and payable monthly from and after April 1, 1950, based on the increase or decrease in a county's population as ascertained by the 1950 federal census.

2. Computation and payment of the salary of a judge of the Court of Common Pleas may be made based on the 1950 census from and after April 1, 1950, before any official report is made by the Secretary of State.

Respectfully,

HERBERT S. DUFFY,  
Attorney General.