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1. JAIL MATRON—APPOINTED BY SHERIFF WHO THEREAFTER WAS RE-ELECTED TO SUCCEED HIMSELF IN OFFICE—MATRON'S SALARY AND APPOINTMENT FIXED BY PROBATE JUDGE—MAY CONTINUE IN POSITION WITHOUT RE-APPOINTMENT AT SAME SALARY FIXED AT TIME OF APPOINTMENT UNTIL REMOVED FOR CAUSE AFTER HEARING BEFORE PROBATE JUDGE OR UNTIL APPOINTMENT OTHERWISE LEGALLY TERMINATED—SECTION 3178, G. C.

2. SALARY, JAIL MATRON, FIXED BY PROBATE JUDGE—TIME OF APPOINTMENT BY SHERIFF WHO WAS RE-ELECTED MAY BE CHANGED DURING TIME MATRON CONTINUED TO HOLD POSITION UNDER SUCH APPOINTMENT.

SYLLABUS:

1. A jail matron appointed under Section 3178, General Code, by a sheriff who thereafter was re-elected to succeed himself in office, and whose appointment was approved and salary fixed by the probate judge, may continue in the position without re-appointment, at the same salary fixed at the time of her appointment, until removed for cause after hearing before the probate judge, or until her appointment is otherwise legally terminated.

2. The salary of a jail matron fixed by the probate judge at the time of her appointment by a sheriff who thereafter was re-elected to succeed himself in office, may be changed during the time she continues to hold the position under such appointment.

Columbus, Ohio, November 2, 1945

Hon. C. J. Borkowski, Prosecuting Attorney
Steubenville, Ohio

Dear Sir:

This will acknowledge receipt of your letter relating to the tenure of employment of a jail matron who was appointed by the sheriff of Jefferson county in January, 1941, during his second term of office, and requesting my opinion on two questions with respect thereto. Your letter reads as follows:

"Request for an opinion is made by virtue of the following facts which have occurred in this county:

On January 6, 1941, a few days after the newly elected Sheriff of this County had taken office, said Sheriff, being the former Sheriff of the County, having been re-elected to his second term, by virtue of the provisions of Section 3178 of the General Code of Ohio, appointed one Helen Bates, his wife, as matron of the jail of Jefferson County, Ohio, and on said date said appointment was approved by the Probate Judge of this County who fixed the compensation of said matron at a monthly salary of $72.50. The journal entry in the Probate Court in reference to this appointment contained the statement that said matron's appointment was for a period of four years. Pursuant to said appointment it is assumed that the said Helen Bates entered upon her duties as matron of Jefferson County, Ohio jail. The term of the Sheriff who appointed the above named matron in January, 1941, expired December 31, 1944. This Sheriff, however, was re-elected for a third term commencing with January 1, 1945. The term of office of the Probate Judge who approved the appointment and fixed the compensation from January, 1941, expired February, 1945. The same Probate Judge, however, was re-elected for another term commencing with the month of February, 1945, for a period of four years.

You will note from the above that there has been no reappointment of this jail matron by the Sheriff who took office January 1, 1945, and there has been no application to the Probate Judge of this County by the Sheriff who took office January 1, 1945, for any approval of the appointment of a jail matron or the fixing of any compensation for her.

The Auditor of Jefferson County, Ohio, continues to draw a warrant on the certificate of the Sheriff of this County made payable to Helen Bates, matron of the Jefferson County, Ohio jail since January 1, 1945, without any approval of the newly elected Sheriff's appointees, or without the Probate Court having fixed the compensation thereof.

The first question, therefore, in this matter is: Does a jail matron having once been appointed by a Sheriff of a County and said appointment having been approved and compensation fixed by the Probate Judge of a County, continue to serve indefinitely regardless of whether or not the term of office of the appointing authority has expired, as well as the term of office of the Court who approved said appointment and fixed said compensation and can the Auditor of the County continue to pay the salary of said employee up to and until she is removed from the position as matron?

> In the event your opinion would be that there would be no necessity of any new appointments or new approval or new compensation to be fixed by reason of the expiration of the terms of office of the Sheriff and the Probate Judge respectively, by what authority could the Probate Court fix a new compensation of such matron without first the necessity of the removal of said matron and the hiring of a new person therein. In other words, does the compensation once fixed become final until a matron is removed as provided in Section 3178 and a new matron is appointed?"

Section 3178, General Code, under and pursuant to the provision of which the jail matron was appointed in 1941, read as follows:

> "The sheriff may appoint not more than three jail matrons, who shall have charge over and care for the insane, and all female and minor persons confined in the jail of such county, and the county commissioners shall provide suitable quarters in such jail for the use and convenience of such matrons while on duty. Such appointment shall not be made, except on the approval of the probate judge, who shall fix the compensation of such matrons not exceeding one hundred dollars per month, payable monthly from the general fund of such county upon the warrant of the county auditor upon the certificates of the sheriff. No matron shall be removed except for cause, and then only after hearing before such probate judge."

The section just quoted was amended in 1943 by the 95th General Assembly, but the only changes made therein were to increase the maximum number of jail matrons that may be appointed from three to six, and to increase the maximum monthly compensation that may be fixed for each matron from one hundred dollars per month to one hundred and fifty dollars per month.

The statement of facts contained in your letter discloses that the sheriff who appointed the jail matron was re-elected for a third term, and has been in office since the appointment was made; that the probate judge who approved the appointment and fixed the matron's salary also has been in office since that time; and that the matron in question has continuously held the position without having been reappointed.

It will be noted that Section 3178, General Code, does not in terms fix or authorize the sheriff or any other officer to fix any definite term for jail matrons appointed thereunder, but that it does in express terms pro-

vide that "No matron shall be removed except for cause, and then only after hearing before such probate judge." It would seem therefore that in the absence of any applicable statute to the contrary, a jail matron once appointed might continue in the position indifinitely under her original appointment, especially if the sheriff in office desires her to do so.

Apparently, the exact question of the right of a jail matron to continue in the position indefinitely, without re-appointment, during successive terms of office of the sheriff who appointed her, when such continuation in service is with the approval of the sheriff, has never been decided by any Ohio court or by this office. There is, however, a case in which a jail matron appointed by one sheriff claimed the right to hold the position after the term of office of the appointing sheriff had expired, and against the wishes of the new incoming sheriff. The case referred to is State, ex rel. v. Cooper, Sheriff, 12 N. P., (N. S.) 659.

In that case the court held that the tenure of a jail matron appointed under Section 3178, General Code, is analogous to that of a deputy, and that the provision of Section 9, General Code, that "A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him," might be applied to the case, and the appointee held only during the pleasure of her principal. The court also quoted from 29 Cyc., page 1395, the general rule relating to the tenure of deputies, as follows:

> "Deputies, whether common law or statutory, are, where the terms are not fixed by statute, supposed to be appointed at the pleasure of the appointing power, and the deputation expires with the office on which it depends."

The opinion of the court in the case just referred to is quite lengthy, and extended quotations therefrom will not be made by me in this opinion. Suffice it to say, the court recognized the right of a jail matron, under the deputy doctrine, to continue in the position with the consent and acquiescence of a sheriff elected to succeed the one who made the appointment. I quote from page 670 as follows:

> "Now in the case at bar, no fixed term is given to the matron, and it would seem that her tenure is analogous to a deputy who holds without any fixed term * * *. This sheriff of this county holds his office for two years (now four years), and his deputies, clerks and appointees can hold no longer than he holds without

> the consent, acquiescence or appointment of his successor. It would indeed be an anomalous situation for the legislature to authorize one officer to appoint for an indeterminate or indefinite period a person as deputy or assistant and foist that deputy upon his successor without his consent, without his approval, in face of the fact that the person might be obnoxious to his successor, although subordinate to the officer, in the performance of his duties." (Parenthetical matter added.)

In view of the statement in your letter that the sheriff who appointed the jail matron continues to issue certificates to the county auditor for her compensation, I have assumed that the sheriff is making no objection to her continuing in the position under the appointment made by him in 1941, and therefore, I am making no attempt to pass upon the questions of whether or not the sheriff could have made a new appointment at the beginning of his third term of office, or may now remove her without cause, or otherwise terminate her employment under the 1941 appointment. What I am now deciding is, that the jail matron in question may continue in the position under the 1941 appointment, and receive the compensation fixed by the probate judge at that time, until she is removed for cause after hearing before the probate judge, or her employment is otherwise legally terminated. The mere re-election of the sheriff will not prevent her from holding over during the new term for which the sheriff was elected.

You also inquire if the compensation fixed for the jail matron by the probate judge under the appointment made by the sheriff during his preceding term of office, is final as long as she continues to hold the position under that appointment.

The statement of facts in the Cooper case, supra, discloses that the salary fixed for the jail matron in that case had been increased during the term of office of another sheriff who had been elected to succeed the appointing sheriff, but the question of the authority to make the increase apparently was not raised. The court, however, did decide that the jail matron was not an officer. That being the case, the inhibition in Section 20, Article II of the Ohio Constitution, that no change shall be made in the salary of any officer during his existing term, has no application.

The law with respect to the authority of a public board or officer to change the salary of an appointee, in cases where the power to make the

appointment and to fix the salary is expressly conferred by a statute which makes no provision for changing the salary during the time the appointee is holding under the appointment, and where there is no other applicable statute authorizing a change, is discussed in State, ex rel. v. Cook, 103 O. S. 465. In that case the county board of education had employed a school superintendent for three years, and fixed his salary at $3,000 per year. Later, during the term, the board increased the salary to $4,000 per year. In holding the increase to be invalid the court, at page 470, said:

> "The express power to fix a salary does not grant by implification the power to unfix such salary. The exercise of the power for the full three-year term, agreeable to the statute, exhausts the power conferred by the statute. The power to change after once having fixed the term and salary, to employ the language of the *Locher case, supra,* must be 'clear and distinctly granted.' The power not being so granted to the board of education cannot be exercised by the board of education, and its attempted exercise thereof is *ultra vires.* The action of the board in attempting to change the salary of the county superintendent, after once fixed, is illegal and void under the statute."

The decisions of courts in other states is to the same effect, as will appear from an examination of the following cases based on statutory grants of power to fix salaries, and in no way involving constitutional or statutory inhibition against changes during existing tenures of office or employment.

In Culberson v. Watkins, 156 Ga. 185, the court held that:

> "The word 'fix,' as ordinarily used, means to place securely, settle, determine, immovable, unalterable. The term imports finality and stability."

In that case it appears that the Georgia law creating juvenile courts in certain counties of the state, provided that "The judge of the superior court of the county shall appoint the judge of said juvenile court for a term of six years, and shall fix the compensation"; that at the time of the appointment of the juvenile judge his salary was fixed at $350 per month; that later on during the term the judge of the superior court increased the salary to $450 per month, which the county treasurer refused to pay, claiming the increase to be unlawful, whereupon the juvenile judge filed a petition in mandamus against the treasurer to compel payment.

It further appears from the case that no constitutional or statutory provision prohibiting increases in salary during terms of office were involved, and the case was decided on the premise that the authority to "fix" the salary conferred no authority to change or increase it after it had been fixed. I quote from the opinion, as follows:

> "The right given the judge of the superior court under this act is confined to fixing the compensation for a six-year term; and no right is given him in the act to change the compensation after the appointment has been made, unless the meaning of the word 'fix' can be so extended as to interline into the act the words 'and alter,' so as to give the word 'fix' an unstable instead of a stable significance. If the legislature had intended the word 'fix' to include the power to alter, necessarily it would have been the purpose of the general assembly to fix a variable salary of an entirely indeterminate scope, depending altogether upon the wish or wishes of successive judges of the superior court, who in turn would have this power of changing the salary of the judge of the juvenile court, each according to his own discretion. * * * Furthermore, the use of the word 'fix,' in the statutes creating the juvenile court, precludes the idea of variableness or alteration unless additional qualifying terms had been used. * * *
>
> We have been unable to find a Georgia case in which the word 'fix' has been judicially defined, but in other jurisdictions the use of the word 'fix' implies finality."

In Kendall v. Stafford, 178 N. C. 461, it appears that the salaries of certain municipal officers had been fixed at $2400 per annum pursuant to a legislative enactment which provided that: "The governing board of any city, may, by ordinance, fix the salary of the mayor of such city or heads of departments or other officers." Later on, the governing board voted an increase in salary for the appointees involved. The court, in holding the increase to be void, said that "The authority is to 'fix' the salary, not to increase it."

It should be stated at this point that the cases just referred to did not involve incumbents who had been appointed for indefinite periods, such as those appointed to hold during the pleasure of the appointing authority, or until removed for cause. The decisions in those cases, in the main, turned on the meaning of the word "fix," and no special emphasis was placed on the circumstance that the incumbents had been appointed for fixed and definite terms. However, the question of the power of a salary

fixing authority to change a salary fixed by it for an incumbent appointed for an indefinite period, is the subject of an opinion reported in Opinions of the Attorney General for 1943, at page 82. That case involved the authority of the village council to change the salary of a village marshal, who had been appointed by the mayor with the advice and consent of council to hold office until removed for certain causes therein referred to. Decisions of the courts of this and other states, as well as the views of the textwriters, were reviewed at length by the former Attorney General, and the conclusion reached that although the salary of a public officer or employe holding under an appointment for a fixed and definite term, may not be changed during the term, the prohibition did not apply to the salary of an incumbent who had been appointed for an indefinite term.

If the 1943 opinion of the Attorney General states the law correctly, the conclusion is justified that the salary of the jail matron fixed by the probate judge of your county at the time he approved her appointment in 1941, may be either increased or decreased by the judge at any time while she is holding under that appointment.

While, in my opinion, there is considerable merit in the contention that the authority of the probate judge was exhausted when he approved the appointment of the jail matron and fixed her compensation in 1941, or, stated differently, that the authority conferred upon the probate judge by Section 3178, General Code, to fix her compensation, is not a continuing authority which he may exercise as often as he may wish, I am inclined to adopt and apply the 1943 opinion of the Attorney General to your case, and to advise you that the compensation of the jail matron, fixed by the probate judge at the time of her appointment in 1941, may be changed by the probate judge during the time the matron continues to hold the position under that appointment.

You are, therefore, advised as follows:

1. A jail matron appointed under Section 3178, General Code, by a sheriff who thereafter was re-elected to succeed himself in office, and whose appointment was approved and salary fixed by the probate judge, may continue in the position without re-appointment, at the same salary fixed at the time of her appointment, until removed for cause after hearing before the probate judge, or until her appointment is otherwise legally terminated.

2. The salary of a jail matron fixed by the probate judge at the time of her appointment by a sheriff who thereafter was re-elected to succeed himself in office, may be changed during the time she continues to hold the position under such appointment.

Respectfully,

HUGH S. JENKINS

Attorney General