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1. MUNICIPAL COURT CLERK—LIMA—OFFICE FILLED BY PERSON APPOINTED BY MUNICIPAL JUDGE—ON AND AFTER JANUARY 1, 1952—TERM OF PRESENTLY ELECTED CLERK EXPIRES DECEMBER 31, 1951—SECTIONS 1610, 1617 G. C.—AM. S. B. 14, 99 G. A.
2. NO AUTHORITY TO ELECT CLERK AT NOVEMBER, 1951 ELECTION—FOUR YEAR TERM OR ANY OTHER TERM.
3. IN NO CASE SHALL FILING FEE BE RETURNED TO CANDIDATE—PROHIBITION AGAINST FILING FEES PAID TO BOARD OF ELECTIONS BY PERSONS FILING DECLARATIONS OF CANDIDACY OR PETITIONS FOR ELECTION TO OFFICE NOT ANTHORIZED BY LAW—SECTION 4785-73 G. C.

SYLLABUS:

1. Under the terms of Sections 1610 and 1617, General Code, as provided in Amended Senate Bill No. 14, enacted by the 99th General Assembly and effective on June 13, 1951, the office of clerk of the Lima Municipal Court will be filled, on and after January 1, 1952 by a person appointed by the municipal judge of such court, since the territory of such court has population of less than one hundred thousand and since the existing term of the presently elected clerk expires December 31, 1951.

2. There is no authorization in law to elect a clerk of the Lima Municipal Court at the November, 1951 election for a four year term beginning January 1, 1952 or for any other term.

3. Section 4785-73, General Code, by providing that in no case shall the filing fee be returned to a candidate, specifically prohibits the return of filing fees paid to a board of elections by persons filing declarations of candidacy or petitions for election to a term of office not authorized by law.

Columbus, Ohio, September 4, 1951

Hon. Anthony J. Bowers, Prosecuting Attorney
Allen County, Lima, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The passage of the Uniform Municipal Court Act effective June 13, 1951, presents us with the problem of whether or not there should be an election for the Municipal Clerk of Lima to be held on November 6th of this year.

“General Code Section 1579-1349 which governs the municipal elections of the City of Lima specifies that ‘At the municipal election of 1931, and every four years thereafter, there shall be nominated and elected a clerk of the municipal court, in the same manner as other municipal officers are nominated and elected, and who shall serve until his successor is elected and qualified.’

“The City of Lima operates under the charter system and the section governing the selection of candidates is Section 10 of the Lima City Charter which reads as follows: ‘The number of candidates for any office at any regular municipal election, in the city at large or in each ward, as the case may be, shall be the two candidates on the primary election ballot receiving the highest number of votes at the primary election. In case there shall not be for any office more than two persons who shall have filed petitions as provided for in this Charter, then said persons shall be the candidates at the regular municipal election and the primary for the particular office shall not be held.

“‘The name of each person who is nominated in compliance herewith shall be printed on the official ballot at the general election, and the names of no other candidates shall be printed thereon.’

“The municipal election for clerk is scheduled to be had in 1951 and two candidates have duly filed their petitions for the clerk position at the primary election and as provided under Section 10 above it was not necessary to have a primary election for clerk and the two automatically under the provisions of the above section are to be the candidates for the clerk position at the November election.

“Under the new Municipal Court Act which became effective June 13, 1951, Section 1610, the part that pertains to the City of Lima, which is a municipality under 100,000 specifies: ‘The clerk and deputy clerks of a municipal court shall be selected,

compensated, give bond, and have powers and duties as follows:
(A) There shall be a clerk of the court appointed or elected in the following manner:

“(2) If the population of the territory is less than one hundred thousand the clerk shall be appointed by the court and said clerk shall hold office until his successor is duly appointed and qualified, except that in the Lorain, Alliance and Massillon municipal courts the clerk shall be elected.

“During the temporary absence of the clerk due to illness, vacation or other proper cause, the court may appoint a temporary clerk who shall be paid the same compensation and have the same authority and perform the same duties as the clerk.’

“Under the above section it would seem that the Judge to be elected in November would appoint the clerk under the new Municipal Court Act. However, the Uniform Municipal Court Act which repeals Section 1579-1349 which pertains to the election of the clerk in the city of Lima, is not effective until December 31, 1951, thereby leaving the intention that the regular election for municipal clerk should be held as provided by Section 1579-1349 and that the duly elected clerk would assume his office and that the Uniform Municipal Court Act which pertains to the appointment of a clerk in cities under 100,000 would not become effective until after the expiration of the term of the clerk to be elected in the November election.

“Therefore, we would like to have your opinion as to whether or not an election shall be held for the office of clerk of the Municipal Court of Lima on November 6, 1951.

“In the event that your opinion should hold that no election for clerk need be held, is there any provision under the law to reimburse the two candidates the filing fee of \$18.00 which they paid at the time of filing their petitions?”

The first question presented by your request for my opinion is whether, in view of the enactment by the 99th General Assembly of Amended Senate Bill No. 14, Sections 1581 to 1617, inclusive, General Code, referred to in your letter as the Uniform Municipal Court Act, the office of clerk of the Lima Municipal Court on and after January 1, 1952, will be filled by a person appointed by the municipal judge pursuant to the provisions of new Section 1610, General Code, or by a person elected at the November, 1951 election in accordance with the provisions of old Section 1579-1349, General Code. If such office, on and after January 1, 1952, is to be filled by appointment, there obviously would be no occasion at the November, 1951 election to elect such clerk since the only term to which he could be elected would cease to exist prior to the time of taking office.

The present Municipal Court of Lima exists pursuant to the provisions of Sections 1579-1320 to 1579-1373, inclusive, General Code. The only provision of these sections relating to the selection and tenure of office of the clerk of the Municipal Court of Lima is that contained in Section 1579-1349, General Code, and quoted in your letter. This section provides for the election of a clerk in 1931 and every four years thereafter to serve until his successor is elected and qualified. It should be noted that this section does not provide specifically when the term of such clerk shall begin. Section 1579-1324, General Code, provides for the election of the judge of the Municipal Court of Lima in 1931 and that the term of such judge "shall commence on the first day of January next after his election for a period of four years, and until his successor is elected and qualified." Since the judge elected in 1931 took office January 1, 1932, I must assume that the General Assembly intended that the clerk elected in 1931 took office at the same time and that the existing four year term of the present clerk, elected in 1947, expires on December 31, 1951.

As indicated by your letter the doubt in your mind as to the legislative intent arises from the fact that Amended Senate Bill No. 14, in so far as its *express* terms provide, repeals all of the old municipal court code sections, including Sections 1579-1320 to 1579-1373, inclusive, General Code, *as of December 31, 1951*. This is specifically provided by Section 2 of the Act which reads:

"That existing sections 1558-1 to 1558-93j, inclusive, 1579-1 to 1579-650, inclusive, sections 1579-666 to 1579-957, inclusive, and sections 1579-978 to 1579-1705, inclusive, of the General Code be, and the same are hereby repealed as of December 31, 1951."

At the same time the General Assembly, by Section 3 of the Act, provided that it should go into immediate effect. Section 3 of the Act reads:

"This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that an opportunity should be afforded to municipalities to elect judges at the general election in 1951, in order that the municipal courts established by this act may be instituted on January 1, 1952. Therefore, this act shall go into immediate effect."

Amended Senate Bill No. 14 was passed by the General Assembly May 24, 1951 and became effective as an emergency measure on June 13,

1951 upon its approval by the Governor. One of the sections becoming effective as a law on June 13, 1951 was Section 1610, General Code, the pertinent portions of which also are quoted in your letter. With the exception of the three cities of Lorain, Alliance and Massillon, this section provides that if the population of the territory of the court is less than one hundred thousand, the clerk shall be appointed by the court and hold office until his successor is duly appointed and qualified.

Since, as stated in your letter, the population of the territory of the Lima Municipal Court is less than one hundred thousand, the provisions of new Section 1610, General Code, as applied to Lima, obviously are inconsistent with the provisions of old Section 1579-1349, General Code. The problem arises because of the fact that, in so far as the express language of Amended Senate Bill No. 14 is concerned, both of these sections are now in full force and effect and will continue so until Section 1579-1349, General Code, is repealed as of December 31, 1951.

A somewhat similar problem was considered by me in Opinion No. 535, Opinions of the Attorney General for 1951 under date of July 14, 1951. One of the questions there involved was whether the nomination and election of judges of the Cleveland Municipal Court were governed by the provisions of the new Act or by the provisions of Section 1579-5, General Code, one of the existing sections repealed as of December 31, 1951. I quote from that opinion:

“* * * The apparent purpose of Section 2 of the Act in not expressly repealing, until December 31, 1951, the sections dealing with the various separate municipal courts was to prevent a complete void between the effective date of the Act and the institution of the new courts on January 1, 1952. To have repealed all of such sections before then would be to abolish the power of all presently existing municipal courts.

“Another consideration which leads me to the conclusion that Section 1587, General Code, is controlling as to the method of nomination and election of municipal court judges in 1951, except as otherwise provided in Section 1617, General Code, is the well-established principle that in case of conflict between existing statutes, the provisions of the statute of later date of passage are governing.

“I conclude, therefore, that the nomination and election of judges of the Cleveland Municipal Court are governed by the provisions of Section 1587, General Code, except as otherwise provided in Section 1617, General Code, and are not governed by the provisions of Section 1579-5, General Code.”

The well known rule of statutory construction, referred to in my previous opinion, that, in case of conflict between existing statutes dealing with the same subject matter, the provisions of the statute of later passage are governing, appears equally applicable to the existing conflict between the provisions of old Section 1579-1349, General Code, and new Section 1610, General Code. However, I need not predicate my opinion solely on the basis of this rule of statutory construction.

Section 1617, General Code, a part of the Act, reads in part :

“* * * The *existing terms* of the municipal judges or elected clerks shall not be diminished, but shall continue for the period for which they were created. The term of an existing appointed clerk in a territory having a population in excess of one hundred thousand shall end December 31, 1951. * * *”

(Emphasis added.)

It will be noted that this language clarifies and, in my opinion, eliminates any doubt as to the intent of the General Assembly. By providing only that the *existing terms* of elective clerks shall continue, the necessary implication is that no such *new* term should begin subsequent to the effective date of the Act except in compliance with the new provisions of the Act. And in accordance with the new provisions of the Act as contained in Section 1610, General Code, no elective clerks are authorized in courts in a territory with a population of less than one hundred thousand with three enumerated exceptions not including the City of Lima.

As of January 1, 1952, the *only* authorization for the assumption of or continuance in office of an elective clerk will be Section 1610, General Code, and the above quoted language of Section 1617, General Code. By that time Section 1579-1349, General Code, expressly will be repealed. Neither of these sections permits the assumption of or continuance in office of the clerk of the Lima Municipal Court on and after such date. It follows that the *de jure* clerk, on and after such date, of necessity must be a person appointed to such office by the municipal court judge in compliance with Section 1610, General Code, and that any person purportedly elected to such office at the November, 1951, election under the guise of Section 1579-1349, General Code, could not legally assume or continue in such office at such time. Any such election, therefore, would be a vain and useless action not recognized or contemplated by existing law.

The second question presented by your request is whether, in the

event that no election for clerk need be held, there is any provision under the law to reimburse the two candidates the filing fee which they paid at the time of filing their petitions.

Section 4785-73, General Code, reads in part as follows:

“At the time of filing a declaration of candidacy for nomination for any office each candidate shall pay a fee of one-half of one per cent of the annual salary of such office; but in no case shall such fee be more than fifty dollars, nor less than one dollar; * * * All such fees shall forthwith be paid by the officer receiving them into the treasury of the state in the case of fees received by the secretary of state, and into the treasury of the county to the credit of the county general fund in the case of fees received by a board of elections, *and in no case shall the filing fee be returned to a candidate.*” (Emphasis added.)

It thus appears that the specific language of Section 4785-73, General Code, answers your second question by providing unequivocally that *in no case* shall the filing fee be returned.

In conclusion, it is my opinion that:

1. Under the terms of Sections 1610 and 1617, General Code, as provided in Amended Senate Bill No. 14, enacted by the 99th General Assembly and effective on June 13, 1951, the office of clerk of the Lima Municipal Court will be filled, on and after January 1, 1952 by a person appointed by the municipal judge of such court, since the territory of such court has population of less than one hundred thousand and since the existing term of the presently elected clerk expires December 31, 1951.

2. There is no authorization in law to elect a clerk of the Lima Municipal Court at the November, 1951 election for a four year term beginning January 1, 1952 or for any other term.

3. Section 4785-73, General Code, by providing that in no case shall the filing fee be returned to a candidate, specifically prohibits the return of filing fees paid to a board of elections by persons filing declarations of candidacy or petitions for election to a term of office not authorized by law.

Respectfully,

C. WILLIAM O'NEILL

Attorney General