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COMMON PLEAS JUDGE—INCREASE IN SALARY UNDER AMENDED SECTION 2252, GENERAL CODE—ENTITLED TO IF APPOINTED SUBSEQUENT TO EFFECTIVE DATE THEREOF.

SYLLABUS:

*A common pleas judge, appointed subsequent to the effective date of the amendment of Section 2252 of the General Code (112 O. L. 345), to fill an unexpired term, is entitled to the increased compensation provided by the amendment of that section.*

COLUMBUS, OHIO, February 2, 1928.

HON. D. H. PEOPLES, *Prosecuting Attorney, Pomeroy, Ohio.*

DEAR SIR:—This will acknowledge your recent communication as follows:

“Hon. Fred W. Crow was appointed judge of the Court of Common Pleas of Meigs County, Ohio, on September 15, 1927, by Governor A. V. Donahey, for a term ending when a successor is elected and qualified. He thereafter duly qualified as such judge and began his term of office as such official on October 1, 1927, which office he has held at all times since, and is now holding same.

Judge Crow has been receiving from the state treasury a salary of \$250 per month, payable after the end of each month's service, for his services as judge, but has not drawn any additional compensation for such service from the county treasury as provided by law.

I would like to have your opinion as to the amount of additional salary he is entitled to receive, monthly or quarterly as the case may be, for such services as such official, from the treasury of the county; and whether or not he is entitled to draw such additional salary monthly from the county treasury as provided by Section 2252, G. C., as amended in Vol. 112, page 345, O. L. or quarterly as provided by Section 2252, G. C., prior to said amendment.

In view of the fact that I have not at hand a copy of the latest Federal census of the U. S., I wish you would compute said additional salary that he is entitled to draw for said services from the county treasury monthly or quarterly as the same may be payable, in dollars and cents.

I would like also to have your opinion on the following question:

In case Judge Crow is assigned during his said term of office, by the Chief Justice of the State by virtue of Section 1469, G. C., of Ohio, to aid in disposing of business other than in Meigs County, will he be entitled to a salary of twenty dollars per day for each day of such assignment, and necessary expenses incurred in holding court under such assignment as provided by Section 2253, G. C., as amended in 112 O. L. 345; or will his salary in such case be ten dollars per day for each day of such assignment and actual and necessary expenses incurred as provided by Section 2253, G. C., of Ohio, prior to said amendment?”

Section 14 of Article IV of the Constitution of Ohio provides as follows:

"The judges of the Supreme Court, and of the court of common pleas, shall at stated times, receive, for their services, such compensation as may be provided by law; which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any office of profit or trust, under the authority of this state, or of the United States. All votes for either of them, for any elective office, except a judicial office, under the authority of this state, given by the General Assembly, or the people, shall be void."

By reason of the inhibition of this section it is quite obvious that common pleas judges in office at the time of the amendment of Section 2252 of the General Code could not benefit by the increased compensation therein provided during their then existing terms of office. Judge Crow, however, was not appointed to fill the unexpired term until September 15, 1927, which was subsequent to the effective date of the amendment of Section 2252 of the Code. Nevertheless, the constitutional term of his predecessor had not at that time nor has it yet expired. Section 12 of Article IV provides for the term of office of judges of the common pleas court in the following language:

"The judges of the courts of common pleas shall, while in office, reside in the county for which they are elected; and their term of office shall be for six years."

Vacancies are filled in accordance with the provisions of Section 13 of that article, which is as follows:

"In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and qualified; and such successor shall be elected for the unexpired term, at the first annual election that occurs more than thirty days after the vacancy shall have happened."

Our specific question, therefore, is whether the language of Section 14 of Article IV of the Constitution, prohibiting the increase in compensation of judges during "their term of office" refers to the full term of office for which a person is elected or appointed or to the officer. Is it personal or does it have reference solely to the constitutional span of six years? If the latter be true, then obviously Judge Crow, who is merely serving temporarily during the constitutional span of his predecessor, would not be entitled to the benefit of the increase. On the other hand, if the term of office refers to the time of service of the particular incumbent, whether that be for the full period or for such period as he may actually serve by reason of contingencies, then in my opinion the benefits of the increase may be had.

Were I to approach this question without the benefit of any judicial authority in this state, its solution would be of considerable difficulty. Authorities of other jurisdictions under similar constitutional provisions are hopelessly at variance. Throop on Public Officers, paragraph 465, makes the following unequivocal statement:

"An officer, appointed to fill a vacancy for the unexpired portion of

a term, is not entitled to an increase of salary voted after the beginning of his predecessor's term and before the vacancy occurred."

In support of this statement is cited a California case and I find there are several in that jurisdiction to the same effect. There are other jurisdictions which hold categorically to the contrary. I do not find it necessary, however, to go farther than a fairly recent decision of the Supreme Court of Ohio. In the case of *Zangerle vs. State ex rel.* 105 O. S. 650, is a per curiam opinion involving the right of all of the judges of the common pleas court of Cuyahoga County to participate in a similar increase in compensation by amendment of Section 2252 of the Code, adopted in 1920. The opinion is short and does not state any of the facts involved, but the court held that those judges who were in office at the time of the enactment of that section were not entitled to its benefits. The court, however, made the following finding:

"A majority of this court are of the opinion and find that the defendant, Bernon, whose service and term of office began subsequent to the passage of the statute involved in this case is entitled to the salary fixed thereby."

An examination of the pleadings in this case discloses that Judge Bernon had been appointed to fill a vacancy just prior to the effective date of the amendment of Section 2252 and, at the November election subsequent to the effective date of the act, he had been elected to fill the unexpired term pursuant to Section 13 of Article IV of the Constitution. Apparently it was the conclusion of the court that his election to the unexpired term having been subsequent to the amendment of Section 2252, he was entitled to the increased salary. This conclusion was evidently reached in spite of the fact that Judge Bernon was merely filling the unexpired term of his predecessor which had commenced prior to the amendment of the section in question. This case is, therefore, in principle exactly the same as that of Judge Crow and I am accordingly of the opinion that he is entitled to draw from the county treasury additional monthly compensation in accordance with the provisions of Section 2252 of the General Code, as amended by the last legislature.

I am confirmed in this conclusion by a recent case of the Court of Appeals of Muskingum County, which is the case of *State ex rel. vs. Tanner*, 27 O. C. A. 385. This was a very well considered opinion and, while it dealt with a statutory rather than a constitutional inhibition, the reasoning is applicable. There a new member of a municipal civil service commission had been appointed to fill an unexpired term after the enactment of an ordinance increasing the compensation of the commissioners. The court used the following language:

"Acting under constitutional authority, the Legislature of this state enacted Section 4213 of the General Code, which provides that:

'The salary of any officer, clerk or employee shall not be increased or diminished during the term for which he was elected or appointed.'

In the investigation made we have failed to find that the question here made has been passed upon by the courts of this state, although it appears to have been the subject of judicial action by the courts in some other states, not, however, with unvarying unanimity of view and decision, to which we will refer later on.

At the outset we deem it unnecessary to say, in view of the constitutional provision that there shall be no change in 'the salary of any officer during his existing term,' that the relator would not be entitled to any

increase in salary under any legislation passed after his appointment nor during the term for which he was appointed, nor that his appointment made under favor of Section 486-19 was not for the unexpired term of said Bailey, as urged on behalf of the defendant in error. But as already stated, this is not the question made here. The question to be met here arises under a proper interpretation to be given the terms employed in said section of the statute. It is unnecessary to remark that the intent and meaning of a statute are to be ascertained by the language employed therein, and if such language is plain and unambiguous and such statute is within the constitutional authority of the lawmaking power, the plain duty of the courts is to enforce it according to its terms. All the authorities seem to agree that the constitutional and statutory inhibition against a change in the compensation of an officer during his incumbency of an office is founded upon considerations of public policy in guarding and protecting the public against a possible combination of office-holding interests and log-rolling Legislatures in an effort to raise their salaries. With the limitation of power laid upon the law-making body as if to prevent such influences and abuses, it would seem that the Legislature in framing this law had in mind the incumbent of the office rather than the office itself; for, among other things, the statute declares that 'the salary of any officer \* \* \* shall not be increased \* \* \* during the term for which he was elected or appointed.' What does 'during the term for which *he* was elected or appointed' refer to? Does it refer to the full term of office for which a person is elected or appointed, or to the officer? Does it refer to the time of the incumbency of the office, or to the incumbent of the office? If to the former, in either instance, then 'during the term' is to be treated as an unbroken and indivisible unit, without reference to an intervening vacancy in the office by death, disability, resignation or otherwise, and without reference to the number of incumbents of the official term. Is this the correct interpretation to be given the statute referred to? As stated, we have found no case directly in point decided by the courts of this state, except the reference made in *State, ex rel. vs. Raine, Auditor*, 49 O. S. 580, wherein the court say:

'A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes Section 20 of Article II of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted.'

After discussing the authorities in other jurisdictions and pointing out their irreconcilability, the court, referring to a Wisconsin case from which it had quoted, said at page 390:

"It is said that an opinion is valuable only as it appears to be supported by reason and authority. The opinion last cited appears to rest on the interpretation of a constitutional provision forbidding a change in the salary of an officer during the time for which *he* was appointed, not unlike the constitutional provision in this state, and it appears to us as being logically sound in principle and in accord with the letter and spirit of the fundamental law and statute of this state."

The reasoning of this case is, in my opinion, sound. Undoubtedly the con-

stitutional inhibition was to prevent the possible exertion of official power in an attempt to secure pecuniary benefit to such officials. In the case you present there could not possibly have been any such action and, the reason for the restriction failing, I feel that it is of no application and that, correctly interpreted, the constitutional inhibition is directed against a change of salary during the personal occupancy of the office.

You further ask me to compute in dollars and cents the amount to which Judge Crow is entitled in view of the present provisions of Section 2252 of the General Code. That section is in the following language:

"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 fifty thousand 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, and four cents per capita for the population of such county in excess of fifty thousand and not in excess of one hundred thousand, and four and one-third cents per capita for the population of such county in excess of one hundred thousand and not in excess of one hundred and eighty thousand, and one-third cent per capita for the population of such county in excess of one hundred and eighty thousand. Such additional annual compensation shall not be more than nine thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor."

I find upon reference to the 1920 Federal census that the population of Meigs County was 26,189. At the rate of three cents per capita, therefore, Judge Crow would be entitled to an additional compensation of \$785.67. The section in question makes this amount payable monthly out of the treasury of the county and, on a monthly basis, the amount would be \$65.47, there remaining an additional three cents which should be added at such time during the year as may be convenient.

You further inquire as to Judge Crow's right to receive \$20.00 per day for services in other counties when assigned pursuant to Section 1469 of the General Code. This \$20.00 per day allowance is in pursuance to Section 2253, as amended in 112 O. L. p. 345. The reasoning applicable to your first question would also be pertinent here. The Supreme Court however, on December 21, 1927, decided the case of *Walter D. Jones vs. Zangerle*, in which it was held that the \$20.00 per day allowance is available to all common pleas judges irrespective of whether they were in office at the time of the amendment of Section 2253 of the General Code. It follows, therefore, that Judge Crow is entitled to the increased allowance.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*