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JUDGES, COURTS OF COMMON PLEAS—ADDITIONAL COMPENSATION—SECTION 2252 G. C.—SHOULD BE COMPUTED FOR EACH YEAR OF TERM WHICH BEGINS AFTER APRIL 1, 1940—BASIS OF 1950 FEDERAL CENSUS—OPINIONS ATTORNEY GENERAL, 1941, OPINION 3982, PAGE 551, APPROVED AND FOLLOWED.

SYLLABUS:

Additional compensation provided for judges of the courts of common pleas by Section 2252, General Code, should be computed for each year of their term which begins after April 1, 1950, on the basis of the 1950 federal census. (1941 Opinions of the Attorney General, No. 3982, page 551, approved and followed.)

Columbus, Ohio, September 1, 1950

Hon. John S. Phillips, Prosecuting Attorney
Ross County, Chillicothe, Ohio

Dear Sir:

Your request for my opinion is as follows:

“The salary of a judge of the court of comon pleas is governed by the provisions of Sections 2251 and 2252 of the Ohio General Code. The latter section establishes the amount of salary to be paid by the county on the basis of the population of the county in which the judge resided when elected or appointed ‘as ascertained by the latest federal census of the United States.’

The Judge of the Court of Common Pleas who was elected in 1944, has entered a request for an increase in salary effective as of April 1, 1950, based upon the 1950 population of Ross County as ascertained by the latest federal census.

Our question is: At what date does the increase in salary of a Common Pleas judge due to an increase in population become effective?”

Sections 2251 and 2252, General Code, were amended in 1947. The judge referred to in your request, having been elected in 1944 and his term of office having commenced in 1945 prior to the amendment, will receive his increase under Section 2252, General Code, as it read at the time his term of office commenced. It may be noted that the amendment

to Section 2252, General Code, by its own terms does not apply to a common pleas judge whose term of office had commenced prior to the effective date of said amendment. See the case of *State ex rel. Mack v. Guckenberger*, 139 O. S. 273.

The answer to your question, as of what date the increase in salary of a common pleas judge, due to an increase in population, becomes effective, is contained in 1941 Opinions of the Attorney General, No. 3982, page 551. The only difference is, the date April 1, 1940 would be April 1, 1950, as applied to the instant case. The first and fifth paragraphs of the syllabus of the 1941 opinion read as follows:

"1. The date of the legal ascertainment of the result of the sixteenth federal decennial census (1940), so far as the population of counties in Ohio is concerned upon the basis of which salaries of county officials are determined, was April 1, 1940."

"5. Additional compensation provided for judges of courts of common pleas who were elected in 1936 and 1938 by section 2252, General Code, should be computed for each year of their terms which begin after April 1, 1940 on the basis of the 1940 federal census."

On page 554 of the opinion a complete discussion is made of the federal statutes relating to the census. It is provided as follows:

"The federal statutes providing for the taking of the census which are pertinent hereto, are in part as follows:

"Title 13, section 201, U. S. C. A.

'A census of population, agriculture, irrigation, drainage, distribution, unemployment and mines shall be taken by the Director of the Census in the year 1930 and every ten years thereafter.'

"Title 13, section 202, U. S. C. A.

'The period of three years beginning with the first day of January in the year 1930, and every tenth year thereafter, shall be known as the decennial census period and the reports upon the inquiries provided for in said section shall be completed within such period: * * *'

"Title 13, section 206, U. S. C. A.

'The census of the population and of agriculture required by section 201 of this title shall be taken as of the first day of April, and it shall be the duty of each enumerator to commence

the enumeration of his district on the day following unless the Director of the Census in his discretion shall change the date of commencement of the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; * * *

“Title 13, section 213, U. S. C. A.

* * * that he (the Director of the Census) is further authorized to have printed by the Public Printer, in such editions as the director may deem necessary, preliminary and other census bulletins * * *’
(Parenthetical matter the writer’s.)

“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.

"The population of the various counties of Ohio as shown by the 1940 federal census having been determined as of April 1, 1940, it clearly follows that sheriffs, clerks of courts, probate judges, county treasurers, county recorders, prosecuting attorneys and county commissioners who were elected on November 5, 1940, should each be paid during the terms served by them an annual salary based on the sixteenth federal decennial census taken in the year 1940.

"For a like reason, a county engineer elected on November 5, 1940 should be paid a salary during his term based on the population of his county as ascertained by the 1940 census.

"In arriving at the conclusion that the sixteenth federal decennial census was determined as of April 1, 1940, I am not unmindful of an opinion rendered by the then Attorney General on January 23, 1931, reported in the *Opinions of the Attorney General for 1931*, page 68, wherein it was held that, the date of the determination of the 1930 census figures, so far as they affect county officers, was the date when the preliminary population figures of Ohio by counties were first released in a press release by the Director of the Census at Washington. Said opinion was based entirely upon the holding of the Supreme Court of Pennsylvania, in the case of *Lewis v. Lackawanna County*, 200 Pa. 590, which decision of course is in conflict with the case of *Underwood v. Hickman*, supra.

"After carefully reading the opinions in each of the above cases, I am inclined to consider the *Underwood* case as being the more well reasoned of the two.

"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 term of office based upon the 1940 census."

The federal statutes quoted in the 1941 opinion have remained unchanged. Title 13, Section 201 U. S. C. A. states that a census shall be taken in 1930 and every year thereafter. Section 206 states that the census required by Section 201 shall be taken *as of* the first day of April. Therefore, the 1950 census required by Section 201, must be determined as of April 1, 1950.

In summary and conclusion, it is my opinion that additional compensation provided for judges of the courts of common pleas by Section 2252, General Code, should be computed for each year of their term which begins after April 1, 1950, on the basis of the 1950 federal census.

Respectfully,

HERBERT S. DUFFY,
Attorney General.