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WORDS AND PHRASES — INTERPRETATION “COMPENSATION”, “SALARY”—ARTICLE II, SECTION 20 CONSTITUTION OF OHIO—POWER OF LEGISLATURE TO CHANGE COMPENSATION OF ANY OFFICER — TIME — EXISTING TERM—OFFICE ABOLISHED—TOWNSHIP TRUSTEES—CLERKS—HOUSE BILL 477, 93rd GENERAL ASSEMBLY.

SYLLABUS:

1. *The terms “compensation” and “salary”, as used in Article II, section 20 of the Constitution of Ohio, are not synonymous.*

2. *Under the provisions of Article II, section 20 of the Constitution, the Legislature may change the compensation of any officer so as to affect those in office at the time of such change, but may not so do with respect to the salary of any officer during his existing term, unless the office be abolished.*

3. *Township trustees and clerks who are in office on September 2, 1939, the effective date of House Bill No. 477 of the 93rd General Assembly, are subject to the provisions thereof and may receive the compensation therein provided.*

COLUMBUS, OHIO, June 12, 1939.

HON. LESTER W. DONALDSON, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR: I am in receipt of a request from your office for my opinion on the following:

“House Bill No. 477 as passed at the present legislature provides in general for the increase in the number of days allowed the Township Trustees to devote to their office and also increases the allowance of pay which they are to receive per diem, being based upon the population and it also provides for the increase of the maximum salary to be paid to the Clerk of the Board of Township Trustees.

Since the passage of this bill we have had many requests from Township Trustees and Clerks to know whether or not the increase in the number of days allowed to the Township Trustees becomes effective as to the present trustees in office during their present term of office, and whether the increase in per diem pay is applicable to the present trustees in their present term of office or whether the new provision as to the number

of days in increased pay will be applicable only at the expiration of the present terms of the present trustees.

Also relative to the clerks of the Board of Township Trustees, does the increase of the maximum salary allowed to them apply and become effective as to clerks during their present term of office or is it applicable only after the expiration of the present term? In other words, if a clerk is receiving \$250.00 per year, the maximum, at the present time during his present term, can his pay be increased to \$600.00, the maximum, under House Bill No. 477 immediately or must we wait until his term expires and make the increased maximum apply to the then newly elected or re-elected clerk?"

Recently, the 93rd General Assembly enacted House Bill No. 477, by which it amended sections 3294 and 3308, General Code, relative to the compensation of township trustees and the fees of township clerks. In view of these amendments, you seek my opinion as to whether or not the provisions thereof will apply, at such time as said amendments become effective, to township trustees and clerks now holding office.

Before entering a discussion of the question presented by your inquiry, I direct your attention to the changes brought about by the recent legislation above referred to. Section 3294, as it now appears in the General Code, reads as follows:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and two dollars and fifty cents for each day of service in the business of the township, to be paid from the township treasury. The compensation of any trustee to be paid from the treasury shall not exceed two hundred and fifty dollars in any year including services in connection with the poor. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any persons interested."

The same section as amended by House Bill No. 477 of the 93rd General Assembly, which will become effective September 2, 1939, provides:

"Each trustee shall be entitled to one dollar and fifty cents for each day of service in the discharge of his duties in relation to partition fences, to be paid in equal proportions by the parties, and three dollars and fifty cents for each day of service in the

business of the township, to be paid from the township treasury. Provided, however, that in townships having a budget of less than ten thousand dollars, the trustees shall be entitled to compensation for not more than one hundred days at said rate of three dollars and fifty cents per day; in townships having a budget of from ten thousand to twenty thousand dollars, the trustees shall be entitled to compensation for not more than one hundred and twenty-five days at said rate of three dollars and fifty cents per day; and in townships having a budget of twenty thousand dollars or over, the trustees shall be entitled to compensation for not more than one hundred and fifty days at said rate of three dollars and fifty cents per day. Each trustee shall present an itemized statement of his account for such per diem and services, which shall be filed with the clerk of the township, and by him preserved for inspection by any persons interested."

Section 3308, as it now appears in the General Code, reads as follows:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than two hundred and fifty dollars."

The same section as amended by House Bill No. 477, supra, provides:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred

words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. Provided, however, in those townships having a budget less than five thousand dollars, the township trustees shall determine the salary of the clerk which in no event shall exceed three hundred and fifty dollars per year; and in townships having a budget of five thousand dollars or over, the clerk shall receive two percent of the total expenditures of such township in excess of five thousand dollars in addition to the amount above provided in townships having a budget of less than five thousand dollars, provided, however, no township clerk shall receive for his compensation in excess of six hundred dollars in any one calendar year for said services as such township clerk."

It will be observed from a comparison of the statutes above that by virtue of the amendments the daily and maximum compensation permitted township trustees is increased, and in like manner the maximum compensation of township clerks is also raised. The question is, whether present incumbents of the offices of township trustee and clerk may lawfully earn the increased compensation, or whether the recent amendments, supra, apply only to those township trustees and clerks who are chosen after the effective date of said amendments.

The answer to the question above propounded requires an interpretation of Article II, section 20 of the Constitution of Ohio, the provisions of which follow:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

It will be noted that in the opening clause the term "compensation" is used, while the prohibitory clause refers to "salary". It follows that the two terms are not used synonymously and do not bear the same meaning. "Compensation" may be said to include money received by a public officer in direct proportion to services rendered, for example, \$10.00 per day,

whereas "salary" denotes a fixed wage, such as \$100 per month, irrespective of the time or labor put forth.

The following pertinent language is contained in 32 O. Jur. at page 1026:

"Obviously, from the change of expression in the two clauses of art. 2, sec. 20, the word 'salary' was not used in a general sense embracing any compensation fixed for an officer, but in its limited sense of an annual or periodical payment for services—a payment dependent on the time, not on the amount, of service rendered. Hence, the prohibition against a change during the existing term of office applies to only those officers receiving salaries and excepts those who are compensated otherwise."

See also *Thompson v. Phillips*, 12 O. S. 617; *Gobrecht v. Cincinnati*, 51 O. S. 68. The following will also be noted in 32 O. Jur. at page 1028:

"Certainty as to the amount to be paid an officer for services is the distinguishing feature of a salary. Compensation, based upon a method of ascertainment producing different amounts at different times, is not salary."

See also *State, ex rel. Taylor v. Madison Co.* 13 O. D. (N. P.) 97.

The first and second branches of the syllabus of the *Gobrecht* case above cited afford additional support to the view expressed herein:

"Compensation of a public officer fixed by a provision that 'each member of the board who is present during the entire session of any regular meeting, and not otherwise, shall be entitled to receive five dollars for his attendance,' is not 'salary' within the meaning of section 20, of article 2, of the constitution, which provides that 'the general assembly, in cases not provided for in this constitution, shall fix the term of office, and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.'"

"An increase in the compensation of such officer during his term is not prohibited by the constitution."

At page 72 of that case, Spear, J., says:

"The question, therefore, is, whether or not the pay of a member of the board is 'salary' within the meaning of the above section?"

We think it is not. A general definition of salary includes compensation. General definitions, do not, however, cover all cases. Salary is compensation, but, under the section quoted, compensation is not, in every instance, salary. The point is emphasized by this court in the case of *Thompson v. Phillips*, 12 Ohio St. 617, where it is said that 'it is manifest from the change of expression in the two clauses of the section that the word 'salary' was not used in a general sense, embracing any compensation fixed for an officer, but in its limited sense, of an annual or periodical payment for services—a payment dependent on the time and not on the amount of the service rendered.' And it was there held that a percentage compensation allowed by law to a public treasurer for official duties, could be altered during his term. It is the 'salary' which shall not be changed during the term, not necessarily, the compensation."

In the case of *State, ex rel. Taylor, v. Madison County*, supra, the court in discussing Article II, section 20 of the Constitution, held as disclosed on page 99 of the opinion:

"This section empowers the General Assembly to fix compensation and forbids any change in the *salary* during the existing terms of office of a class of public officers to which relator belongs. In this section, 'compensation' and 'salary' are not used synonymously, because it is only as to salary that a change is forbidden; 'compensation' may be changed and there is nothing in the Constitution to prevent the change affecting those in office at the time of the change."

A problem very similar to the one at hand was discussed in Opinion No. 565 of the Opinions of the Attorney General for 1917, Vol. II, page 1614. That opinion was written pursuant to the enactment of legislation by which the compensation of township trustees and clerks was increased. The first branch of the syllabus of that opinion provides as follows:

"The sections of the statute modifying the compensation of township clerks, treasurers and trustees became effective on the same day that the acts of which they are a part became operative. Section 20 of article II of the constitution does not apply because said officers draw compensation and not salaries."

In the course of the opinion, at page 1617, the then Attorney General said:

“From the earliest times in this state it has been uniformly held that the word ‘salary,’ as used in this section, is designedly employed in contradistinction to the term ‘compensation’ as used in the same section; that a change of compensation other than salary, to take effect during the existing term of an officer, is not prohibited, and that a salary is compensation dependent upon the lapse of time only, and in nowise dependent upon the amount of official services performed.”

There being a difference in meaning between “compensation” and “salary”, as used in Article II, section 20, *supra*, the one subject to change so as to affect existing officers and the other not, the question is, does the official pay of township trustees and clerks provided for by sections 3294 and 3308, *supra*, respectively, come within the definition of the term “salary” as used in said constitutional provision? The amount of compensation which township trustees and clerks are paid depends entirely upon the amount of time and service each renders in the performance of duties imposed by statute. True, the maximum amount which such officers may receive is fixed, but there is no assurance that each will be paid the maximum. In other words, their compensation is not definite and certain, as is true in the case of a salary. Our constitution prohibits a change in salary of any officer during his existing term. It would follow that a change of compensation, as distinguished from salary, is permissible and in no wise violates the provisions of Article II, section 20, *supra*.

It is my opinion that the moneys received by township trustees and clerks under the provisions of sections 3294 and 3308, General Code, as they now exist, constitute compensation and not salary, and therefore may be changed so as to affect those in office at the time of such change.

Respectfully,

THOMAS J. HERBERT,
Attorney General.