

Note from the Attorney General's Office:

1925 Op. Att'y Gen. No. 25-2836 was overruled by
1983 Op. Att'y Gen. No. 83-036.

2836.

DEPUTY CITY AUDITOR—SALARY—PROVISIONS OF SECTION 4213
G. C. NOT APPLICABLE.

SYLLABUS:

A deputy city auditor, or other employe, while holding his position during the pleasure of the appointing officer, is not subject to the provisions of section 4213, and the salary of such employe may be increased or diminished at the will of council.

COLUMBUS, OHIO, October 6, 1925.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—I am in receipt of your communication as follows:

“We respectfully request your written opinion upon the following:

“Question 1. Can salary of deputy city auditor be modified at will of council? Sections 4276-1 and 4213 G. C.

“Question 2. If ordinance provides that said deputy shall hold position at the pleasure of the auditor, has this any bearing?

“Question 3. Can salaries of any employes of city auditor, who are not in the classified service, when ordinance provided that ‘they shall hold their positions during the pleasure of the auditor’ be modified at will of council?”

Section 4276-1, General Code, provides as follows:

“The auditor of any city may, when authorized by council ordinance, appoint a deputy who, in the absence or disability of the auditor, shall perform the duties of the auditor.”

This section authorizes the city auditor to appoint a deputy to act in his absence, or during his disability, when authorized by ordinance.

Section 486-8, General Code, provides in part as follows:

“The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.

“(a) POSITIONS IN UNCLASSIFIED SERVICE.—The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.

* * * * *

“(9) The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals.”

Section 486-17a in part provides:

“The tenure of every officer, employee or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; * * *”

The latter section fixes the tenure of office of persons in the classified service for the period of good behavior and efficient service. The tenure of office of officers or employees under the unclassified service is not fixed.

Section 4213 in part provides:

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

The first question which arises in considering the office of deputy city auditor is whether the tenure of office is fixed so that he may be said to have a term such as is contemplated by section 4213.

In the case of *State ex rel vs. Massillon*, 2 C. C. (n. s.), p. 167, it was held that a person who holds a position during the pleasure of the appointing power has no term as provided in section 4213 G. C. The court, in the opinion of Vorhees, J., says:

"The statute now applies to cases where there is an increase during the term. The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is, during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. It is not a term, for the reason there is no limit to it. It may be likened unto a tenancy at will, not a term, because it has no limitation."

In the case of *State ex rel vs. Painesville*, 13 C. C. (n. s.), 577, in which the question was raised whether a patrolman of the police department of a city came within the provisions of section 4213, it was held that the patrolman came within such provisions for the reason that he was appointed under the civil service provision of the Municipal Code and that his term was during good behavior, that this was a limitation of term and that the salary could not be increased or diminished. It is believed that this case may be distinguished from the case of *State ex rel vs. Massillon* for the reason that the civil service provisions do not enter into the *Massillon* case. As the civil service provisions are not applicable to the case under consideration, it is believed that tenure of office of a deputy city auditor is not such as would bring him within section 4213.

It is therefore my opinion that a deputy city auditor, or other employe, not in the classified service, while holding his position during the pleasure of the appointing officer, is not subject to the provisions of section 4213, and the salary of such employe may be increased or diminished at the will of council.

Respectfully,

C. C. CRABBE,

Attorney General.