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COUNTY OFFICIALS WHO WERE ELECTED OR APPOINTED TO OFFICE PRIOR TO APRIL 1, 1960, SHOULD BE PAID SALARIES BASED ON THE POPULATION OF THEIR RESPECTIVE COUNTIES AS SHOWN BY THE 1950 FEDERAL CENSUS, HOWEVER, SUCH OFFICIAL ELECTED OR APPOINTED ON OR AFTER APRIL 1, 1960, SHOULD BE PAID BY THE POPULATION SHOWN IN THE 1960 FEDERAL CENSUS—§§325.03 THRU 325.15, 141.05, R. C.

SYLLABUS:

1. County officials who were elected or appointed to office prior to April 1, 1960, should be paid salaries under Sections 325.03, 325.04, 325.06, 325.08, 325.09, 325.10, 325.11, 325.14, and 325.15, Revised Code, based on the population of their respective counties as shown by the 1950 federal census; however, such an official elected or appointed on or after April 1, 1960, should be paid a salary under the appropriate section based on the population of his respective county as shown by the 1960 federal census, effective April 1, 1960.

2. The *per capita* salary of a probate or common pleas judge under Section 141.05, Revised Code, should on and after April 1, 1960, be based on the population of the county as shown by the federal census taken as of that date.

Columbus, Ohio, August 18, 1960

Hon. Hugh I. Troth, Prosecuting Attorney
Ashland County, Ashland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Your opinion is requested on the following question:

“ ‘What effect does the 1960 census have upon the salaries of county officials elected to office?’

“My investigation has disclosed the following which might be of interest to you: 1931 O.A.G. 22856, 1955 O.A.G. 5199, 1957 O.A.G. 1440, 1951 O.A.G. 1151, 153 O.S. 1, and 139 O.S. 273.”

While your request refers only to “county officials” the question also involves the salaries of the various probate and common pleas judges. Accordingly, I will consider the judges’ salaries in this opinion as well as the salaries of other officials.

The statutes providing the salaries of county officials are Sections 325.03 (auditor), 325.04 (treasurer), 325.06 (sheriff), 325.08 (clerk of courts), 325.09 (recorder), 325.10 (commissioner), 325.11 (prosecuting attorney), 325.14 (engineer), and 325.15 (coroner). Each of these sections of law contains a provision that puts the salary of the particular officer on a *per capita* basis according to the population of the county as shown *by the federal census next preceding his election*. For example, Section 325.03, Revised Code, reads in part:

“Each county auditor shall be classified according to the population of the county as shown by the federal census next preceding his election. All such county auditors shall receive annual compensation in accordance with the following schedule:

CLASSIFICATION AND COMPENSATION SCHEDULE

Class	Population Range	Annual Compensation
1	1 to 15,000	\$4,500
“* * *		
35	1,500,001 and over	\$15,000”

The presently existing salary provisions for county officers, noted above, were enacted in Amended Substitute Senate Bill No. 34 of the 103rd General Assembly, effective November 6, 1959. Since under Section 20 of Article II, Ohio Constitution, the salaries of these officers could not be changed by the legislature during their existing terms, their salaries are provided by the law as existing prior to November 6, 1959, and found in Sections 325.03, 325.04, 325.06, 325.08, 325.09, 325.10, 325.11, 325.14, and 325.15, Revised Code, as contained in Amended Substitute Senate Bill No. 219 of the 101st General Assembly, effective October 11, 1955. I note that all of these sections contained the same references to the federal census as the present sections which were referred to earlier. For example, Section 325.03, *supra*, as effective October 11, 1955, read in part:

“Each county auditor shall be classified according to the population of the county as shown by the federal census *next preceding his election * * **” (Emphasis added)

I note that the terms of the present county auditors and one county commissioner in each county started in 1959 (election in 1958), and that the terms of the present treasurers, sheriffs, clerks of court, recorders, engineers, coroners, prosecuting attorneys, and two county commissioners in each county started in 1957 (election in 1956). Under the terms of the

salary sections for these offices, therefore, they are classified according to the population of the county as shown by the 1950 *federal census*; the 1950 census being the federal census next preceding the election of the officers concerned.

While the above conclusion governs those persons who were elected to office, it does not necessarily pertain to persons appointed to fill vacancies in county offices. As to salary changes effective as of November 6, 1959, a person appointed to office on or after that date would not be subject to the limitation of Section 20 of Article II, Ohio Constitution, and would receive the salary prescribed by the existing law as enacted by Amended Substitute Senate Bill No. 34, *supra*. (*State, ex rel. Glander v. Ferguson*, 148 Ohio St., 581). As noted, however, the federal census provision would remain the same.

Regarding the effective date of a federal census, it was stated in Opinion No. 3982, Opinions of the Attorney General for 1941, page 551 at page 555 :

“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.”

The 1941 opinion was cited with approval in Opinion No. 2611, Opinions of the Attorney General for 1950, page 808, the syllabus of the later opinion reading :

“1. Additional compensation provided for judges of the Courts of Common Pleas by Section 2252, General Code, is due

and payable monthly from and after April 1, 1950, based on the increase or decrease in a county's population as ascertained by the 1950 federal census.

"2. Computation and payment of the salary of a judge of the Court of Common Pleas may be made, based on the 1950 census from and after April 1, 1950, before any official report is made by the Secretary of State."

I might further note that since the issuance of the 1941 opinion the census law (Section 141 of Title 13 U.S.) was amended to provide that the census shall be taken in the year 1960 and every ten years thereafter "as of the first day of April, *which shall be known as the census date.*" (Emphasis added.)

In view of the above it appears that the population of any given area is determined as of April 1, 1960, regardless of when the actual announcement of such population is made (Also see *The State, ex rel. Mack, Judge v. Guckenburger, Auditor*, 139 Ohio St., 273), and a person appointed to a county office on or after April 1, 1960, would be entitled to a salary based on the population as shown by the federal census as taken on April 1, 1960. Likewise, the county officers elected at the 1960 general election will be elected after the April 1, 1960, federal census and will be entitled to have their salaries based on the population as shown by the federal census as taken on that date.

Coming to the question of the salaries of common pleas and probate judges, Section 141.05, Revised Code, as enacted by Substitute House Bill No. 475, of the 103rd General Assembly effective October 22, 1959, reads in part:

"In addition to the salary allowed by section 141.04 of the Revised Code, each judge of the court of common pleas and each judge of the probate court shall receive an annual compensation equal to twelve cents per capita for the first thirty-five 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 six cents per capita for the population of such county in excess of thirty-five thousand. * * *" (Emphasis added)

The same language pertaining to the census appeared in Section 141.05, *supra*, as existing immediately prior to October 22, 1959, and as enacted in Amended Substitute Senate Bill No. 219 of the 101st General Assembly, effective October 11, 1955; and also as existing from October 2, 1953 to

October 11, 1955 (See Amended Senate Bill No. 42 of the 100th General Assembly, 125 Ohio Laws, 107).

The present probate judges, excluding those appointed to fill vacancies, were all elected in 1954 and took office in 1955. Because of the variance in the number of common pleas judges per county, these judges are not all elected in the same year. Some of those now serving were elected in 1954, some in 1956, and some in 1958; but none before 1954.

It will be noted that Section 141.05, *supra*, bases the *per capita* salary of judges on the "latest federal census of the United States" and not on the federal census next preceding election as is the case with the county officials discussed above. Since the latest federal census is the 1960 federal census, taken on April 1, 1960, the *per capita* salaries of probate and common pleas judges now serving should be based on the population of their respective counties as shown by the federal census of April 1, 1960.

I am aware that the April 1, 1960 federal census may show losses or decreases in the populations of counties and that this could result in an increase or decrease in a judge's salary during his term. I believe, therefore, that some discussion of the constitutional bar against a change in an officer's salary during his term of office is in order.

Section 14 of Article IV, Ohio Constitution, reads in part:

"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; * * *."

Section 20 of Article II, Ohio Constitution, reads as follows:

"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."

The leading Ohio case on the question here presented is *The State, ex rel. Mack, Judge, v. Guckenberger, Auditor*, 139 Ohio St., 273, in which the syllabus reads:

"1. By reason of Section 14, Article IV of the Constitution, a legislative act diminishing or increasing the compensation of common pleas judges on the basis of change of population of the county in which they are elected, has no application to a judge of the Common Pleas Court whose term of office commenced before the act became effective.

“2. One of the tests of the constitutionality of a statute is whether it attempts to validate and legalize a course of conduct, the effect of which the Constitution specifically forbids.

“3. A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court ‘shall not be diminished or increased during his term of office.’ ”

The opinion in the *Mack* case, *supra*, by Hart, J., states at pages 282 and 283 :

“The inhibition found in Section 14, Article IV of the Constitution, to the effect that the compensation of common pleas judges ‘as may be provided by law,’ that is, by the Legislature, ‘shall not be diminished, or increased, during their term of office,’ is directed to the Legislature and not to the officer who pays the compensation or to the judge who receives it. The inhibition, according to the language of the Constitution thus directed to the Legislature, is that *it* shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that *basis*, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits.

“This court has not heretofore passed upon the specific question presented by the record in this case. While there is a conflict in the cases construing the same or similar constitutional limitations, the weight of authority is that a statute effective before the beginning of the term of a public officer whereby his compensation is automatically increased or diminished during his term by reason of increase or decrease of the population or of the valuation of the taxable property as shown by a later census or tax duplicate, is not in conflict with a constitutional inhibition to the effect that the compensation of such officer shall not be increased or decreased during his term of office.”

The statute in question in the *Mack* case, *supra*, Section 2252, General Code, read in part :

“ ‘In addition to the salary allowed by Section 2251, each judge of the Court of Common Pleas shall receive an annual com-

pensation equal to three cents per capita for the first 50,000 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 * * * (Italics ours.)”

The then Attorney General in Opinion No. 2611, Opinions of the Attorney General for 1950, page 808, the syllabus of which was set forth earlier, followed the *Mack* case, *supra*, in arriving at his conclusion.

Also, in Opinion No. 5199, Opinions of the Attorney General for 1955, page 231, the reasoning of the *Mack* case, *supra*, is discussed, beginning at page 233, as follows:

“The theory upon which the reasoning of the court was chiefly based in the *Mack* case, is that the constitutional limitation therein involved was a limitation of the power of the legislature to act, *during an officer's term*, to increase or diminish his compensation. This notion was based, in part, on the earlier decision of the court in *State ex rel. v. Raine*, 49 Ohio St., 580, the syllabus which is as follows:

“‘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.*’ (Emphasis added)

“Judge Hart, speaking of the inhibition found in Section 14, Article IV of the Constitution, made the following observation:

“‘* * * The inhibition, according to the language of the Constitution thus directed to the Legislature, is that *it* shall not by legislative act during his term diminish or increase the compensation of any common pleas judge. Such compensation must be fixed before his term begins, but there is no inhibition against the Legislature fixing such compensation before the term begins on a basis which may vary it in amount as time advances, provided that *basis*, within the contemplation and understanding of both the judge and the people who elect him, is fixed, certain and unchangeable during his term. Such action upon the part of the Legislature does not thereby sanction or attempt to legalize an evil or vice which the Constitution prohibits.’

“Further, on this point, it was said by Judge Hart:

“‘* * * The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected

what his compensation will be, with the assurance that it cannot be changed *by the Legislature* during the term; that the judge is precluded from using his personal influence or official action *to have the Legislature increase his salary*; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present status, albeit the compensation of the judge is made variable, from and after the last federal census becoming effective during his term. * * *.' (Emphasis added)

"Judge Hart then referred to the provisions of Sections 1 and 20, Article II, Ohio Constitution, the constitutional authority under which the compensation of judges is fixed by the General Assembly, and said:

"* * * The command in the Constitution, 'shall not be diminished, or increased,' is in the passive voice, denoting that the subject (in this case compensation) of which it is the predicate, is not to be acted upon. Acted upon by whom and when? Clearly, by the Legislature and during the 'term.' The only other possible construction is to hold that the Constitution prohibits the Legislature from acting on (increasing or decreasing (compensation prior to the term, if that action fixes a sum, or a standard or basis of compensation whereby compensation may vary in amount during the term. *Past experience in this state discredits such construction.*'

(Emphasis added)

"Judge Hart then referred to Section 20, Article II, Ohio Constitution, and noted that the inhibition therein was almost identical with that contained in Section 14, Article IV of the Constitution.

"In view of these pronouncements it seems quite clear that the provisions of Section 20, Article II of the Ohio Constitution are likewise limitations on the action of the legislature and upon the legislature only. Moreover, it is quite clear that the Supreme Court has given sanction to an increase in compensation during an existing term provided such increase results from the operation of a 'standard or basis of compensation whereby compensation may vary in amount during term' provided such 'standard or basis of computation' is established by a law enacted prior to the beginning of such term."

In view of the foregoing, I am of the opinion that the salaries of judges whose terms started after the time that the "federal census pro-

visions" affecting their salaries were enacted are subject to the population figures of the 1960 federal census, effective April 1, 1960.

As seen earlier, the same federal census provision has been in Section 141.05, *supra*, since October 2, 1955 and no incumbent judge was elected prior to that date. Under the accepted rule of law, therefore, the per capita salaries of all probate and common pleas judges under Section 141.05, *supra*, should be based on the population of their respective counties as shown by the federal census of April 1, 1960.

In conclusion, it is my opinion and you are advised :

1. County officials who were elected or appointed to office prior to April 1, 1960, should be paid salaries under Sections 325.03, 325.04, 325.06, 325.08, 325.09, 325.10, 325.11, 325.14, and 325.15, Revised Code, based on the population of their respective counties as shown by the 1950 federal census; however, such an official elected or appointed on or after April 1, 1960, should be paid a salary under the appropriate section based on the population of his respective county as shown by the 1960 federal census, effective April 1, 1960.

2. The *per capita* salary of a probate or common pleas judge under Section 141.05, Revised Code, should on and after April 1, 1960, be based on the population of the county as shown by the federal census taken as of that date.

Respectfully,

MARK McELROY

Attorney General