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1. ELECTIONS, BOARD OF—CLERK AND DEPUTY CLERK—NOT OFFICERS WITHIN MEANING OF ARTICLE II, SECTION 20, CONSTITUTION OF OHIO.
2. SALARIES—CLERKS AND DEPUTY CLERKS—BOARDS OF ELECTIONS—APPOINTED PRIOR TO AMENDMENT OF SECTION 4785-15 G.C., AMENDED SUBSTITUTE SENATE BILL 269, 99 GENERAL ASSEMBLY—MAY BE CHANGED ON OR AFTER JANUARY 1, 1952, EFFECTIVE DATE OF AMENDMENT—OPINION 4862, O.A.G. 1932, PAGE 1464, OVERRULED.

SYLLABUS:

1. A clerk and a deputy clerk of a board of elections are not officers within the meaning of Article II, Section 20 of the Constitution of Ohio.

2. The salaries of clerks and deputy clerks of boards of elections appointed prior to the amendment of Section 4785-15, General Code, Amended Substitute Senate Bill 269, 99th General Assembly may be changed on or after January 1, 1952, the effective date of said amendment. (Opinion No. 4862, Opinions of the Attorney General for 1932, page 1464, overruled.)

Columbus, Ohio, January 11, 1952

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“1. Does the Wage Stabilization Board have any constitutional jurisdiction over salaries of Members of Boards of Elections and/or employees of the Boards.

“2. In view of Article II, Section 20, of the Constitution of Ohio, may the Boards of Elections increase the salaries of Clerks and Deputy Clerks on the effective date of General Code 4785-15, which is January 1, 1952, or after the reorganization of the Boards of Elections is held pursuant to General Code 4785-10, within five days after March 1.”

In answering your first question it is not necessary for me to decide the constitutional issue, since it does not appear that the Board has under-

taken to regulate the salaries of the boards of elections or their employes. Acting pursuant to grants of authority contained in the Defense Production Act of 1950, C. 962, 64 Stat. 798; 50 U. S. C. A. (App.) Section 2061, et seq. and Executive Order No. 10,161, the Wage Stabilization Board issued its General Wage Regulation No. 4 on February 1, 1951. That order provides in part as follows:

“Increases in the wages, salaries and other compensation of state, county, municipal and other non-federal governmental employees, whose wages, salaries and other compensation are fixed by statute, ordinance or regulation of duly constituted authorities of such governmental bodies, may be made without prior authorization of the Wage Stabilization Board. * * *”

Your second question arises from the following situation:

Both before and after its recent amendment Section 4785-10, General Code, provided in part as follows:

“Biennially, within five days after such appointments are made, the members of the board shall meet and organize by selecting one of their number as chairman, who shall preside at all meetings, and a resident elector of the county, other than a member of the board, as clerk, and in counties containing a registration city, a resident elector of the county as deputy clerk, all of which officers shall continue in office for two years. * * *”

Prior to its recent amendment Section 4785-15, General Code, prescribed the maximum salaries of deputy clerks, and Section 4785-19, General Code, prescribed the salary to be received by the clerk of a board of elections. Effective January 1, 1952, Section 4785-19, supra, was repealed and Section 4785-15, supra, was amended to provide in part as follows:

“The board of elections in each county shall, by a vote of not less than three of its members, fix the annual compensation of its clerk and deputy clerk who are selected in accordance with the provisions of section 4785-10 of the General Code.

“The board may, when necessary, appoint a deputy clerk who shall not be a member of the same political party of which the clerk is a member, and one or more assistant clerks and other employees, prescribe their duties and, by a vote of not less than three of its members, fix their compensation. The deputy clerk and assistant clerks shall take and subscribe to the same oath for the faithful performance of their duties as is required of the clerk of the board, and they shall have the same power as the clerk to administer oaths. * * *”

(Before proceeding further, it should be pointed out that under the law both before and after its recent amendment it is possible to have two classes of deputy clerks. Those deputies chosen under the provisions of Section 4785-10, supra, in counties containing a registration city, are appointed for a term of two years. Those deputies chosen under the provisions of Section 4785-15, supra, are not appointed for a fixed term. This distinction is referred to, post, but is not dispositive of the question which you have raised.)

As a result of the statutory changes referred to above, this problem has arisen: A board of elections organized on March 1, 1950, and chose a clerk and deputy clerk for terms of two years whose salaries were fixed by statute. Effective January 1, 1952 the board was authorized to fix those salaries in its discretion. Can the board now change those salaries prior to the expiration of the two year term?

The answer to your question turns on the proper interpretation of Article II, Section 20 of the Constitution of Ohio. That section provides 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.”

More particularly, your question turns upon whether the clerks of boards of elections and their deputies are officers.

The decisions of the court and the opinions of my predecessors in cases bearing on this question have not been uniform. In the case of State ex rel. Reardon v. McDonald, 124 Ohio St., 315, the question before the Supreme Court was whether an assistant clerk appointed pursuant to the provisions of Section 4785-15, supra, was an officer who could maintain an action in quo warranto to test the right of his successor to the position. In a short per curiam opinion the Court held that he was not, the basis of its reasoning being that the relator was only an employe of the board who was subject to dismissal at the board's discretion. It should be pointed out that this reasoning is equally applicable to a deputy clerk appointed pursuant to Section 4785-15, since such a *deputy* is not appointed for a term.

A short time after the *Reardon* case, the question was presented to the then Attorney General whether a deputy clerk, appointed for a term, could have his salary reduced during that term. Without referring to the *Reardon* case, the then Attorney General in Opinion No. 4862, Opinions of the Attorney General for 1932, page 1464, held that the salary could not be reduced for the reason that the deputy clerk was an officer. In so holding, the then Attorney General must necessarily have been holding that the deputy's principal, the clerk, was also an officer.

I find it difficult to reconcile this opinion with the Supreme Court's holding in the *Reardon* case. The only difference between the assistant and the deputy clerks involved, other than the fact that the deputy was authorized to certify the board's payroll, was the deputy's appointment for a term. Their other statutory duties and powers were the same. I do not believe that the factor of appointment for a term so distinguishes them as to make one an officer and the other a mere employe.

When the question was again considered by one of my predecessors he reached an opposite conclusion. In two opinions, being Opinion No. 659, Opinions of the Attorney General for 1949, page 321, and Opinion No. 927, Opinions of the Attorney General for 1949, page 566, my immediate predecessor held that the *members* themselves of boards of elections were not public officers but merely representatives of the Secretary of State. These opinions in turn were based upon the decision of the Court of Common Pleas of Trumbull County in the case of *Wilkins, et al, v. Trimbur, Auditor*, 39 O. O. 178. In so ruling the then Attorney General must necessarily have overruled the 1932 Opinion, *supra*, although he did not expressly so state.

The 1949 Opinions, *supra*, were in turn superseded as applied to the members of boards of elections by the decision of the Supreme Court in the case of *State ex rel. Milburn v. Pethtel*, 153 Ohio St., 1, decided February 15, 1950. That case reviewed the existing authorities defining public officers, and held as indicated by the syllabus:

"1. A public officer, as distinguished from an employe, is one who is invested by law with a portion of the sovereignty of the state and who is authorized to exercise functions either of an executive, legislative or judicial character.

"2. An appointee, upon whom the specific duties imposed by law are in relation to the exercise of the police powers of the state or in whom is vested independent power in the disposition of

public property or authority to incur financial obligations upon the part of the county or state or to act in cases involving business or political dealings between individuals and the public, is thereby clothed with a part of the sovereignty of the state.

“3. The members of a county board of elections, who are appointed by the Secretary of State for a definite term and who take an oath of office, and upon whom authority is conferred by law to designate the places where elections are to be held, to arrange for the registration of voters, to make the rules and regulations necessary for the guidance of the other election officers and voters, to investigate irregularities, non-performance of duties or violations of law by election officers or other persons, and, in connection therewith, to subpoena witnesses and hold hearings, to review, examine and certify the sufficiency and validity of petitions and nominating papers and issue certificates of election, perform duties which are a part of the sovereign powers of the state. Such members are, therefore, officers whose compensation is subject to the provisions of Section 20 of Article II of the state Constitution, which precludes a change of compensation of any officer during his existing term.”

So under the existing precedents it has been held by the Supreme Court that members of boards of elections are officers, and that assistant clerks are not. On the question of deputy clerks there are conflicting opinions of the Attorney General. In such a situation I feel free to examine the question of the status of clerks and deputy clerks as original matter.

It is my opinion that the question can be answered by comparing the statutory duties of the clerk with the language from the *Milburn* case, supra. Section 4785-14, General Code, both before and after the recent changes in the election law provides as follows :

“The clerk shall keep a full and true record of the proceedings of the board and of all monies received and expended, file and preserve in its office all orders and records pertaining to the administration of registrations, primaries and elections; receive and have the custody of all books, papers and property belonging to the board; and shall perform such other duties in connection with his office and the proper conduct of elections as the board shall from time to time determine. He shall subscribe to an oath before entering upon the duties of his office to perform all the duties of the clerk to the best of his ability, and to preserve all records, documents, and other property pertaining to the conduct of elections placed in his custody. He may administer oaths to such persons as are required by law to file certificates or other

papers with the board, to judges and clerks of elections, and to witnesses who may be called to testify before the board, and to voters filling out blanks at the board's offices. The records of the board and papers and books filed in its office shall be public records and open to inspection under such reasonable regulations as shall be established by the board."

It is my opinion that none of the duties there enumerated involves the exercise of a portion of the sovereignty of the state. All of the clerk's duties are ministerial, and involve acting in matters only after the board has exercised that part of the sovereignty vested in it. He has no vote in any matters within the board's discretion, and has no discretion of his own except as to purely ministerial matters. It follows, of course, that in my opinion the deputy clerk is likewise not an officer.

In view of the above it is therefore my opinion that a clerk and a deputy clerk of a board of elections are not officers within the meaning of Article II, Section 20 of the Constitution of Ohio. The salaries of clerks and deputy clerks of boards of elections appointed prior to the amendment of Section 4785-15, General Code, Amended Substitute Senate Bill 269, 99th General Assembly, may be changed on or after January 1, 1952, the effective date of said amendment. (Opinion No. 4862, Opinions of the Attorney General for 1932, page 1464, overruled.)

Respectfully,

C. WILLIAM O'NEILL
Attorney General