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PERSON ELECTED TO SERVE AN UNEXPIRED TERM IN THE COURT OF COMMON PLEAS MUST PRESENT A LEGAL CERTIFICATE OF HIS ELECTION, RECEIVE GOVERNORS COMMISSION, TAKE REQUIRED OATH OF OFFICE BEFORE HE IS ENTITLED TO SERVE IN SUCH CAPACITY AND RECEIVE SALARY—§§3.23, 107.05, 141.04, 141.05, R.C. §7 ARTICLE XV, OHIO CONSTITUTION.

SYLLABUS:

1. In view of the provisions of Sections 3.23 and 107.05, Revised Code, and of Section 7 of Article XV, Ohio Constitution, a person who has been elected to serve an unexpired term in the court of common pleas must present a legal certificate of his election, receive a governor's commission to fill such office, and take the required oath of office before he is entitled to serve in such capacity and receive the salary provided therefor.

2. A person who was appointed on January 1, 1959, to fill a vacancy in a court of common pleas, and who at the November 8, 1960 general election was elected to the unexpired term of the judge whom he replaced, served under the original appointment until he qualified for the elective term, and was bound by the salary provisions of Sections 141.04 and 141.05, Revised Code, as existing on January 1, 1959, until such qualification.

3. Such person having presented his legal certificate of election, received his commission from the governor, and taken the required oath of office on December 9, 1960, qualified to serve as judge for the unexpired term as of that date, and was then entitled to the compensation provided by Sections 141.04 and 141.05, Revised Code, as amended effective October 22, 1959.

Columbus, Ohio, March 7, 1961

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“A qualified person was appointed to the office of Common Pleas Judge of Wood County by the Governor of Ohio, effective as of January 1, 1959. This person then ran for the unexpired term and on November 8, 1960, was elected without opposition.

“On November 9, 1960, the Judge went to the office of the Board of Elections to file his expense account. The office was

not open until the following day, at which time demand was made of the clerk of the Board of Elections asking that the certificate of the County Board of Elections be forwarded immediately to the Secretary of State, so that a commission might be forwarded to the newly-elected Judge. The clerk of the Board of Elections refused to issue such a certificate until the Board had officially certified the vote; and, further, until after the date for a recount had expired.

“The commission was not received by the Judge until December 9, 1960, at which time he immediately took the oath of office.

“The Judge now asks that his salary be predicated upon the new or increased rate, as that rate is effective in Wood County from and after November 9, 1960.

“An opinion is respectfully requested as to whether or not a person elected to the office of Judge of the Court of Common Pleas, at an uncontested election, is entitled to such salary prior to the time that the commission is furnished and the oath of office taken.”

The judge in question was appointed on January 1, 1959 to serve until a successor could be “elected” and “qualified” (Section 13 of Article IV, Ohio Constitution). As of January 1, 1959, Section 141.04, Revised Code, provided:

“The annual salaries of the chief justice of the supreme court and of the judges named in this section payable from the state treasury are as follows:

“* * *

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“Judges of the court of common pleas, five thousand dollars;

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* * *

And, as of the same date, Section 141.05, Revised Code, provided:

“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. Such additional annual compensation shall not be more than ten thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor.”

The salary of the judge, therefore, for the period served under the appointment, was governed by the provisions of Sections 141.04 and 141.05, *supra*, as set forth above. These sections were amended in 1959 (128 Ohio Laws, 772), effective October 22, 1959, the salary under Section 141.04 being increased to seven thousand dollars and a minimum of two thousand dollars per capita amount being provided under Section 141.05. The judge in question, however, was precluded from receiving an increase as of October 22, 1959 because such would have constituted an increase *in term*, which is barred by Section 14 of Article IV, Ohio Constitution, which section reads in part:

“The judges * * * 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*; * * *

(Emphasis added) * * *

Section 13 of Article IV, Ohio Constitution, provides:

“In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired terms.”

In an election held pursuant to this section, the judge here concerned was elected to fill the unexpired term of the judge whom he replaced. He, therefore, was elected to serve a term other than the one he was serving as an appointee. Accordingly, in such new term, which commenced after October 22, 1959, his salary is governed by the provisions of Sections 141.04 and 141.05, Revised Code, as amended effective on that date. The salary increase having taken effect prior to the date on which the *new* term commenced, the salary for the *new* term should include said increase. The question to decide, therefore, is on what date the judge commenced serving the *new* term.

The language of Section 13 of Article IV, Ohio Constitution, clearly provides that a person appointed under the circumstances described in your request serves until a “successor is elected and qualified.” (Also see

Section 3.01, Revised Code) The words “elected” and “qualified” indicate that the individual who has received a majority of the votes in the general election must meet all of the requirements of the law before he may assume the position and be entitled to compensation. Concerning the use of similar words in a provision of the state constitution of Indiana, it is stated in the case of *State v. Harrison*, 16 N.E. 384, 388, 113 Ind. 434, 3 Am. St. Rep., 663, (cited in 14 Words and Phrases, 230) :

“* * * the terms ‘elected’ and ‘qualified’ should be construed to mean until the successor shall have been designated in whatsoever manner is provided by the Constitution or law creating the office; * * *”

Section 3505.38, Revised Code, provides that the election officials shall, unless otherwise provided by law, and after the time provided for a request for a recount, supply the candidate who received the highest vote with a certificate of election. Section 3515.02, Revised Code, provides for the filing of an application for recount within five days from the date the board of elections or the secretary of state discloses the result of the election. Thus, a candidate could not obtain a certificate of election before that time.

Section 107.05, Revised Code, provides :

“A judge of a court of record, state officer, county officer, militia officer, or judge of a county court, shall be ineligible to perform any duty pertaining to his office until he presents to the proper officer a legal certificate of his election or appointment, and receives from the governor a commission to fill such office.”
Section 7 of Article XV, Ohio Constitution, provides :

“Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office.”

Section 3.23, Revised Code, prescribes the oath of office to be taken by a judge of a court of record. The law appears clear that a person is not clothed with any judicial power until the required commission is issued and the person takes the oath of office. *Loomis v. Moffet*, 5 Ohio 538.

I note that one of my predecessors rendered an opinion concerning the date upon which a person should begin to draw salary upon being elected to an unexpired term in the Ohio House of Representatives. In Opinion No. 4584, Opinions of the Attorney General for 1954, page 589, the first paragraph of the syllabus reads :

“1. The certificate of election issued pursuant to the provisions of Section 3505.38, Revised Code, to a person elected to fill a vacancy in the office of Representative to the General Assembly pursuant to the provisions of Article II, Section 11 of the Ohio Constitution and Section 3521.03, Revised Code, shall be prima facie evidence of the right to membership of the person therein certified. In the event of a contest as to such person’s right to membership, the House of Representatives shall be judge of his election.

In view of the statutory and constitutional requirements applying to the elected position of common pleas judge, as discussed herein, I am of the opinion that the newly elected judge in the present case did not qualify for the elected unexpired term until December 9, 1960 when he received his commission and took the oath of office. Accordingly, his service as judge during the period from November 8, 1960 to December 9, 1960 was part of the “term” served under the appointment of January 1, 1959, and his salary for that period was governed by the provisions of Sections 141.04 and 141.05, Revised Code, as effective on January 1, 1959. His salary on and after December 9, 1960 is governed by said sections as effective October 22, 1959.

Answering your question, therefore, it is my opinion and you are advised:

1. In view of the provisions of Sections 3.23 and 107.05, Revised Code, and of Section 7 of Article XV, Ohio Constitution, a person who has been elected to serve an unexpired term in the court of common pleas must present a legal certificate of his election, receive a governor’s commission to fill such office, and take the required oath of office before he is entitled to serve in such capacity and receive the salary provided therefor.

2. A person who was appointed on January 1, 1959, to fill a vacancy in a court of common pleas, and who at the November 8, 1960 general election was elected to the unexpired term of the judge whom he replaced, served under the original appointment until he qualified for the elective term, and was bound by the salary provisions of Sections 141.04 and 141.05, Revised Code, as existing on January 1, 1959, until such qualification.

3. Such person having presented his legal certificate of election, received his commission from the governor, and taken the required oath of office on December 9, 1960, qualified to serve as judge for the unexpired

term as of that date, and was then entitled to the compensation provided by Sections 141.04 and 141.05, Revised Code, as amended effective October 22, 1959.

Respectfully,

MARK McELROY

Attorney General