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ELECTIONS, BOARD OF— AUTHORITY TO INCREASE SALARY OF CLERK, DEPUTY CLERK OR ASSISTANT CLERK— ANY TIME DURING TERM FOR WHICH APPOINTED—SECTION 3501.14 RC.

SYLLABUS:

A board of elections has authority to increase the salary of a clerk or deputy clerk or assistant clerk, which has been fixed under authority of Section 3501.14, Revised Code, at any time during the term for which he has been appointed.

Columbus, Ohio, August 11, 1954

Hon. Bernard T. McCann, Prosecuting Attorney
Jefferson County, Steubenville, Ohio

Dear Sir:

I have before me your communication in which you request my opinion upon the following question:

"On March 3rd, 1954, at the meeting of the Board of Elections of Jefferson County, Ohio, the board employed a clerk, deputy clerk and two additional clerks, fixing their salaries on a monthly basis.

"At a recent meeting of the board of elections it was decided to raise the salaries of the clerk, deputy clerk and assistant clerks but a question has been raised as to whether or not the board of elections has the legal authority to give these employees a raise commencing July 1st, since the first paragraph of Section 3501.14 uses the language 'annual compensation.'

"I have been unable to find any authority which answers this question, so I will appreciate receiving your opinion."

Section 3501.09, of the Revised Code, requires a board of elections to appoint a clerk, and in counties containing a registration city, a deputy clerk. It is further provided that: "All such officers shall continue in office for two years."

Section 3501.14 of the Revised Code, reads in part as follows:

"The board of elections 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 section 3501.09 of the Revised 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. The board may also employ additional assistants or employees, when necessary, for part time only at the prevailing rate of pay for such services. * * *."

This section was Section 4785-15 of the General Code. Prior to its amendment by the 99th General Assembly, it prescribed the maximum salary which the board might fix for deputy clerks, and Section 4785-19, General Code, prescribed the salary to be received by the clerk of a board of elections. The salary of the clerk was to be "50% more than the salary that is received by members of the board of elections," which, in turn, was fixed by Section 4785-18,

General Code, at a definite amount proportioned to the population of the county. It will thus be seen that the salary of the clerk was definitely fixed by the legislature.

Effective January 1, 1952, Section 4785-19 of the General Code, was repealed and Section 4785-15 of the General Code was amended to read substantially like Section 3501.14, Revised Code from which I have quoted. Accordingly, the amount of the salaries of the clerk and deputy clerk is left entirely to the discretion of the board.

In an opinion of one of my predecessors, to wit, No. 4862, Opinions of the Attorney General for 1932, page 1464, it was held that the salary of a deputy clerk could not be changed during the term for which he had been appointed, for the reason that the deputy clerk was an officer, and a change in his salary would fall within the prohibition of Section 20, of Article II of the Constitution, which provides:

> "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."

After the amendment of Section 4785-15, General Code, doing away with the provisions of the former statutes which fixed the salaries of the clerk and deputy clerk, I had occasion to re-examine the law as affected by the amendment, and in Opinion No. 1068, Opinions of the Attorney General for 1952 at page 5, it was held:

> "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.)"

I stated in that opinion, that the underlying question was whether the clerks of boards of elections and their deputies are officers. If they are not, then the section of the Constitution referred to, would have no bearing. In that opinion I pointed out that the duties of the clerk of a board of elections, as set out in Section 4785-14, General Code, both before and after its amendment, related only to ministerial

services, such as keeping the records of the proceedings of the board of elections, and of the monies received and expended by it, and I summarized my conclusion that neither the clerk nor his deputies are officers in the sight of the law, in the following statement:

> "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.
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> "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."

That opinion would seem to be a sufficient answer to your question but for the decision of the Supreme Court in State ex rel. Clark v. Cook, 103 Ohio St., 465, wherein the court held that a county board of education having appointed a county superintendent for a three year period, at a salary of $3,000 per annum, was without power during that term to increase his salary. The opinion discusses at some length the status of the county superintendent and declared that he is in the eyes of the law an officer, and as such, within the protection of Section 20, Article II, of the Constitution.

The court, however, went on to state that the statute authorizing the board of education to fix the salary of the superintendent, contained no provision authorizing the board to change such salary during the term of the appointment and therefore no such power existed. In the language of Judge Wanamaker:

> "The express power to fix a salary does not grant by implication the power to unfix such salary. The exercise of the power for the full three year term agreeable to the statute, exhausts the power conferred by the statute."

The court further indicated that notwithstanding its discussion of the protection afforded to an officer by the Constitution, the decision should rest entirely on the absence of *statutory* power.

If we take this decision literally and apply it to its fullest possible extent, it would seem to follow that even the salary of an employee of a public body, having been fixed for a term by that body, pursuant to legislative authority, could not be either increased or decreased, because the power to do so has not been expressly granted by the legislature. I am inclined to believe that the court in reaching that conclusion must have been strongly affected by the prior decision, in the case of Cleveland v. Luttner, 92 Ohio St., 493, where it was held that a public officer, whether elected or appointed, held his position by way of contract. The action that gave rise to that decision was by a policeman who had been discharged and later restored to his position, and sought to recover his salary during the time he was deprived of his position.

That proposition although viewed with disfavor by the court in later decisions, was apparently accepted, until the court, in State ex rel. Gordon v. Barthalow, 150 Ohio St., 499, expressly overruled the Luttner case, holding as shown by the first branch of the syllabus:

> "A public officer *or public general employee* holds his position *neither by grant nor contract,* nor has any such officer or employee a vested interest or private right of property in his office or employment. (The holding in the case of City of Cleveland v. Luttner, 92 Ohio St., 493, to the effect that there is a contract between a public officer and the public he serves, overruled.)" (Emphasis added.)

In the course of the opinion, it was said:

> "* * * It is universally held that, in the absence of constitutional or other legal restraint, the term, *emoluments*, and the duties of the office or employment may be changed or employment abolished *without right of redress* upon the part of the holder thereof." (Emphasis added.)

Accordingly, I do not feel bound by the remarks of Judge Wanamaker, in the case of State ex rel. Clark supra, as affecting the employes mentioned in your letter, since that case related only to an officer and not an employee.

I am clearly of the opinion that the clerk and deputy clerk of the board of elections are not officers but merely employes, and recurring to the language of the court in the case of State ex rel. Gordon, supra: "In the absence of constitutional *or other legal restraint,* the terms, *emoluments* and duties of the office or employment may be changed," I feel justified in following the principle there set forth.

In the case here presented, there is clearly no *constitutional restraint* since the employes, in question, are not officers, and there is no *legal restraint* so far as salaries are concerned, since the legislature has seen fit to repeal the former provisions of law wherein it had fixed the "emoluments" and has left that matter to the discretion of the board. The only "legal restraint" that can be found in the statute is as to the term.

The fact that these employes of the board of elections are referred to as "officers" does not make them such, so as to bring them within the purview of the constitutional provision referred to. Their character must be judged by the powers and duties conferred upon them by law. In 32 Oh. Jur. p. 860, it is said:

> "One of the distinguishing characteristics of a public office is that the incumbent, in an independent capacity, is clothed with some part of the sovereignty of the state, to be exercised in the interest of the public as required by law. * * *"

Certainly, neither the clerk nor his deputies or assistants have any of this essential quality of an officer.

The point which you stress in your letter, that Section 3501.14, supra, uses the language "annual compensation," does not appear to me to have an important bearing. That language does not in any way create a vested right to the position or the salary for the year, or limit the right of the board to change the salary. The words quoted can only mean that the board, when it fixes the salary, is to fix it on an annual basis.

Therefore, in specific answer to your question, it is my opinion that a board of elections has authority to increase the salary of a clerk or deputy clerk or assistant clerk which has been fixed under authority of Section 3501.14, Revised Code, at any time during the term for which he has been appointed.

Respectfully,
C. WILLIAM O'NEILL
Attorney General