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COURTS, MUNICIPAL: CLERK — DEPUTY CLERK; MAY SERVE FOR TWO SEPARATE MUNICIPAL COURTS—§ 1901.31 RC—COMPENSATION OF SUCH DEPUTY CLERK TO BE SET BY CLERK—SETTING OF BAIL BY SUCH DEPUTY CLERK— §§ 4549.17, 2937., *et seq.*, RC.

SYLLABUS:

1. A deputy clerk may be appointed pursuant to Section 1901.31, Revised Code, and such deputy may, if physically possible, serve in such capacity for two separate municipal courts.

2. The clerk of the municipal court is granted authority by Section 1901.31, Revised Code, to fix the compensation of the deputy clerk. Since this power is limited only by reasonableness, the clerk may base such compensation on the volume of work done, provide for a straight salary, or adopt a combination of the two.

3. It is lawful, under the provisions of Section 4549.17 and Chapter 2937., Revised Code, for a deputy clerk to set bail for persons accused of a traffic code violation amounting to a misdemeanor.

Columbus, Ohio, December 4, 1957

Hon. John S. Ballard, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“1. May one individual be employed as a deputy clerk for two or more municipal courts within the same county.

“2. In the event that one person may act as and be employed as a deputy clerk for two or more municipal courts in the same county, may the clerks of the municipal courts contribute towards the salary of the deputy clerk in proportion to the volume of work performed for each court.

“3. In the event that such deputy clerk may be employed, can the municipal court clerks employing him contribute towards this salary on a percentage basis, not based upon the volume of work performed.”

Section 1901.31, Revised Code, authorizes the clerk of a municipal court to appoint a deputy clerk. This section reads in part as follows:

“(H) Deputy clerks may be appointed by the clerk and shall receive such compensation payable in semimonthly installments out of the city treasury as the clerk may prescribe. Each deputy clerk shall take an oath of office before entering upon the duties of his office, and when so qualified, may perform the duties appertaining to the office of the clerk. The clerk may require any of the deputy clerks to give bond of not less than three thousand dollars, conditioned for the faithful performance of his duties.

“The clerk or a deputy clerk shall be in attendance at all sessions of the court, although not necessarily in the courtroom, and may administer oaths to witnesses and jurors and receive verdicts.”

There is no specific requirement that the deputy clerk be a resident of the municipality which he serves, and no statute has been found which requires such residence as a general qualification for this position. Since this is true, I see no reason why an individual may not serve as a deputy clerk of two municipal courts unless such service gives rise to incompatibility of one sort or another.

The test most frequently applied to determine compatibility is that formulated in *State, ex rel Attorney General v. Gebert*, 12 C. C. (N.S.) 274, 275, wherein it was stated that:

“Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both. * * *”

In the present situation there is no subordination but rather complete equality of office. One office will not in any way serve as a check upon the other and there is no indication that one man will find it physically impossible to perform the duties of each position, although this remains a question of fact to be determined. There is no legal reason why the positions in question should not be considered completely compatible.

Your second and third questions may be answered by considering again Section 1901.31, *supra*, which reads in part:

(H) Deputy clerks * * * shall receive such compensation payable in semimonthly installments out of the city treasury *as the clerk may prescribe.* * * * (Emphasis added.)

There can be no doubt that the clerk of the court may prescribe any method of payment he so desires, subject to the test of reasonableness, of course. Should he decide to base such compensation on the volume of work done, or put it on a straight salary basis, it would seem that it is perfectly within the discretion of the clerk to do so. And nothing could prevent two clerks from establishing a mutually satisfactory method for compensating their common deputy.

Were it not for the particular circumstances outlined in your request, what has thus far been said would be sufficient to answer your whole query. However, the deputy in this case is to perform a function specifically covered by statute in Ohio and for that reason certain other considerations should be explored.

As I understand it, the deputy clerk is to accept affidavits and arrange bond in cases involving arrests for traffic violations on the Ohio Turnpike. To do this, the deputy would maintain an office outside the limits of the municipality wherein the court normally sits. Inasmuch as the municipal courts were given jurisdiction over territory formerly within the domain of the justices of the peace, and since the deputy is purely a ministerial officer, I find no objection to such an arrangement. The question then becomes one of the legality of the function to be performed. Section 4549.17, Revised Code, sets forth in detail the procedures to be followed when an arrest is made by a state highway patrolman. Pertinent portions of that section read as follows:

“A person arrested without a warrant because of the violation of any of the provisions of Chapters 4501., 4503., 4505., 4507., 4509., 4511., 4513., 4517., and 4549., inclusive, of the Revised Code, or of a provision of any ordinance substantially corresponding to any provision of the said Chapters, punishable solely as a misdemeanor, shall without delay be taken before a magistrate having jurisdiction and shall be entitled to an immediate hearing or to give bail in any one of the forms as provided and defined in sections 2937.21 to 2937.45, inclusive, of the Revised Code, without the necessity of a warrant being issued. If such hearing cannot be had, said person shall be released from custody on giving his personal undertaking to appear in answer for such violation at such time or place as shall then be indicated; his future appearance shall be secured, if security is required by the judicial officer, by a deposit of bail as provided and defined in section 2937.21 to 2937.45, inclusive, of the Revised Code, in an amount to be set by the judicial officer, or in lieu thereof, if he is the owner, by leaving the motor

vehicle. If the arrested person is not the owner, he can leave the motor vehicle with a written consent given at the time by the owner, who must be present before such judicial officer.

“If a judicial officer is not accessible, the accused person, if a resident of the state, shall forthwith be released from custody by giving his name and address to the officer making the arrest and such officer shall notify the person arrested to appear before the most accessible magistrate, naming such magistrate and specifying the date, place, and hour for appearance; * * *”

It is immediately apparent that in the situation you outline no judicial officer will be accessible, in which case the arresting officer is empowered to release the accused person after notifying him to appear before a particular magistrate on a particular date, naming the place and hour for appearance. In the event that the arresting officer wishes to secure the future appearance of the accused, he may do so as provided in the following paragraph of Section 4549.17, *supra* :

“In case such undertaking, bail, or a deposit, is not made as provided by this section, sections 2937.01 to 2937.45, inclusive, chapter 2937 of the Revised Code, in reference to preliminary examination and bail in cases of misdemeanor, shall apply. * * *”

Thus, it is permissible for the clerk of courts to set bail in the case of a misdemeanor such as a traffic violation. This authority is given pursuant to Section 2937.22, Revised Code, which reads :

“In cases of felony the amount of bail may be fixed by the judge or magistrate, but in cases of misdemeanor such amount may be fixed by the judge, magistrate, or clerk of the court. The amount of bond shall be fixed with consideration of the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial of the cause.”

Section 3.06, Revised Code, reads in pertinent part :

“A deputy, when duly qualified, may perform any duties of his principal. * * *”

A deputy clerk may, therefore, set bail in the manner prescribed above. This being true, it is my opinion and you are advised that :

1. A deputy clerk may be appointed pursuant to Section 1901.31, Revised Code, and such deputy may, if physically possible, serve in such capacity for two separate municipal courts.

2. The clerk of the municipal court is granted authority by Section 1901.31, Revised Code, to fix the compensation of the deputy clerk. Since this power is limited only by reasonableness, the clerk may base such compensation on the volume of work done, provide for a straight salary, or adopt a combination of the two.

3. It is lawful, under the provisions of Section 4549.17 and Chapter 2937., Revised Code, for a deputy clerk to set bail for persons accused of a traffic code violation amounting to a misdemeanor.

Respectfully,
WILLIAM SAXBE
Attorney General