

OPINION NO. 73-083

Syllabus:

1. In calculating the per diem rate of compensation of an acting judge of a municipal court, pursuant to R.C. 1901.11, the total salary of the incumbent judge is divided by the annual number of working days of the court. (Opinion No. 66-107, Opinions of the Attorney General for 1966, approved and followed.)

2. An acting judge of a municipal court must be paid in the same manner and at the same rate as the incumbent judge.

To: James R. Scott, Guernsey County Pros. Atty., Cambridge, Ohio
By: William J. Brown, Attorney General, August 23, 1973

Your request for my opinion poses the following questions.

1. In calculating the per diem to be paid acting judges in the absence of the duly elected municipal judge, should the total salary paid the elected judge be divided by the number of "working days" of the court, or by the total number of calendar days in the year?

2. Does the duly elected judge of the municipal court have authority to determine the per diem to be paid for acting judges so long as he does not expend more money than that appropriated for such purpose by the legislative authority of the city?

R.C. 1910.10 reads in part as follows:

When a judge of a municipal court having only one judge is temporarily

absent or incapacitated, the judge may appoint a substitute who has the qualifications required by section 1901.06 of the Revised Code, and if such judge is unable to make the appointment the chief executive shall appoint a substitute. Such appointee shall serve during the absence or incapacity of the incumbent, shall have the jurisdiction and powers conferred upon the judge of the municipal court, and shall be styled "acting judge." He shall sign all process and records during the time he is serving, and shall perform all acts pertaining to the office, except that of removal and appointment of officers of the court. All courts shall take judicial notice of the selection and powers of the acting judge, who shall be paid in the same manner and at the same rate as the incumbent judge. (Emphasis added.)

Since your questions relate to the compensation to be paid to an acting judge who replaces a temporarily absent or incapacitated judge, rather than a judge who fills a permanent vacancy in the municipal court, this Opinion is written accordingly. See Opinion No. 1017, Opinions of the Attorney General for 1964. Thus the acting judge is to be paid in the same manner and at the same rate as the incumbent judge.

R.C. 1901.11 provides for the compensation of municipal judges. R.C. 1901.11 reads in part as follows:

Judges designated as part-time judges by section 1901.08 of the Revised Code shall receive as compensation not less than six thousand dollars per annum as the legislative authority prescribes, and such judges shall be disqualified from the practice of law only as to matters pending or originating in the courts in which they serve during their terms of office.

Judges designated as full-time judges by section 1901.08 of the Revised Code and all judges of territories having a population of more than fifty thousand regardless of designation are subject to section 4705.01 of the Revised Code and shall receive as compensation ten thousand dollars per annum,
* * *

The compensation of municipal judges shall be paid in semi-monthly installments, three-fifths of such amount being payable from the city treasury and two-fifths of such amount being payable from the treasury of the county in which such city is situated.
* * *

D.C. 1901.12 provides as follows:

A municipal judge is entitled to thirty days vacation in each calendar year. Not less than two hundred forty days of open session of the municipal court shall be held by each judge during the year unless all business of the court is disposed of sooner.

When a court consists of a single judge, a qualified substitute may be appointed in accordance with section 1901.10 of the Revised Code to serve during the thirty days vacation period, who shall be paid in the same manner and at the same rate as the incumbent judge * * *.

(Emphasis added.)

In Opinion No. 66-107, Opinions of the Attorney General for 1966, the then Attorney General in discussing D.C. 1901.12 stated as follows:

* * * * *

Your attention is directed to the fact that the same word [days] is used in the prescription of both vacation time and the minimum time a judge may hold a court in open session. Two hundred forty days of open session could not be presumed to mean that number of consecutive days. Similarly, "Thirty days" should not be interpreted as meaning thirty consecutive days. The word "days" should have the same meaning in both contexts. Therefore, the "thirty days vacation" refers to thirty days on which the judge might normally have held the court in open session, and these would not necessarily be consecutive days. It is my opinion that in drafting Section 1901.12, supra, the legislature intended to reflect the normal exercise of discretion by municipal judges to not hold open session of municipal court on Saturday afternoons and Sundays except for special circumstances.

Therefore, it is my opinion that pursuant to Section 1901.12, supra, a municipal court judge is entitled to thirty working days annual vacation.
(Emphasis added.)

Under my predecessor's construction of D.C. 1901.12, the minimum time a municipal court judge may hold open session during a year is defined in terms of working days, not by the

total number of calendar days encompassed by the session. Since the legislature has chosen to define the open session of a municipal court by the number of working days, the per diem compensation of an acting judge should be computed on this basis. Clearly this procedure is more workable and fair than the alternative because it bases the compensation on the number of days actually worked. Thus, it avoids the question of whether to compensate an acting judge for a Saturday afternoon and Sunday, when he may have served only one or two days immediately prior to, or following, the weekend. This construction therefore complies with the rules of statutory construction set out in R.C. 1.47, which presume that: "(C) A just and reasonable result is intended" and "(D) A result feasible of execution is intended."

I conclude, then, that in calculating the per diem rate to be paid to acting judges, the total salary paid the elected judge is divided by the number of working days of the court. Of course, the acting judge is paid according to the number of days actually worked.

Your second question involves R.C. 1901.10. This section states that the acting judge shall be paid in the same manner and at the same rate as the incumbent judge. A rule of statutory construction utilized by the courts of Ohio is that unless the context otherwise indicates, the use of the term "shall" indicates a mandatory intent. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102 (1971), Dennison v. Dennison, 165 Ohio St. 140, 149 (1956) - Opinion No. 72-027, Opinions of the Attorney General for 1972.

Thus, an acting judge must be paid at the same rate as the incumbent judge. The latter has no discretion to fix the compensation of the acting judge. Nor does the legislative authority have such discretion, except insofar as it determines the acting judge's rate of compensation by fixing the elected judge's salary, as it may do within limits in the case of part-time judges only (R.C. 1901.11). Thus, the rate of compensation of an acting judge does not depend upon the amount appropriated for such purpose, but rather upon the rate of compensation of the incumbent judge.

In specific answer to your question, it is my opinion and you are so advised that

1. In calculating the per diem rate of compensation of an acting judge of a municipal court, pursuant to R.C. 1901.11, the total salary of the incumbent judge is divided by the annual number of working days of the court. (Opinion No. 66-107, Opinions of the Attorney General for 1966, approved and followed.)

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