

1960

PRESIDING JUDGE—COMPENSATION OF LIMITED TO \$500
IN ADDITION TO BASE SALARY—§1901.09, .11 R. C., OAG NO.
1082-1952—P. 18.

SYLLABUS:

1. A judge of a municipal court who took office in January, 1956, at a salary of \$12,500.00 per year and who, in February, 1957, was selected as the presiding judge pursuant to Section 1901.09, Revised Code, was, under Section 1901.11, Revised Code, entitled at that time to \$500.00 annually as presiding judge, in addition to his annual salary, a total of \$13,000.00. (Opinion No. 1082, Opinions of the Attorney General for 1952, page 18, approved and followed.)

2. Although the maximum salary of judges of that court was increased to \$13,000.00 in 1957, and to \$15,000.00 in 1959, said judge was serving "in term" at the time of such increases and, because of the restrictions of Section 20 of Article II, Ohio Constitution, was not eligible to receive such increases.

3. The compensation of a presiding judge under Section 1901.11, Revised Code, is limited to an annual amount of \$500.00 in addition to his base salary as judge, and a judge serving in such capacity may not receive more than that amount on the basis of an increase in the base salaries of other judges of the court, even though his term as presiding judge commenced after said increase became effective.

Columbus, Ohio, January 19, 1961

Hon. Earl W. Allison, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"We request your opinion on the amount of compensation that a Judge of the Columbus Municipal Court is authorized under the following facts:

"(a) Judge D. was re-elected as Judge for the term January 1, 1956 to December 31, 1961, at the salary of \$12,500;

"(b) In February 1957, he was elected Presiding Judge for the term ending January, 1958, and has since that time received a salary of \$13,000 annually (\$12,500 base salary and \$500 additional compensation as Presiding Judge);

“(c) As of November 23, 1957, the base salary for Judges of the Municipal Court was increased to \$13,000 annually;

“(d) On January 13, 1958, Judge D. was re-elected as Presiding Judge;

“(e) As of November 2, 1959, the base salary for Judges of the Municipal Court was increased to \$15,000 annually;

“(f) On January 11, 1960, Judge D. was again elected Presiding Judge for the subsequent two-year term.

“Section 1901.11 of the Revised Code at all times pertinent to this problem, has read in part as follows:

“‘The presiding judge of a municipal court shall receive an additional five hundred dollars and the chief justice of a municipal court shall receive an additional one thousand dollars, over and above the salaries paid to *any* other judge of the same court.’ (emphasis added).

“As you know, Article II, Section 20, of the Constitution of the State of Ohio prohibits the change of salary of an officer during his existing term. Opinion No. 1082, Opinions of the Attorney General for 1952 at page 18 might afford some assistance in resolving this issue, but I do not consider it dispositive of the question.”

Section 20 of Article II, Ohio Constitution, 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.”

The first question to be considered is whether Judge D., upon being elected presiding judge in 1957, could, in view of the provisions of Section 20, *supra*, be paid the \$500.00 additional compensation allowed for that position. In this regard, it was stated by one of my predecessors in Opinion No. 1082, Opinions of the Attorney General for 1952, page 18:

“Under the provisions of the Municipal Court Act, Sections 1581 to 1617, inclusive, General Code, enacted by the 99th General Assembly by the passage of Amended Senate Bill No. 14, a judge of a municipal court who, on and after January 1, 1952 is designated or selected as the presiding judge pursuant to Section 1589, General Code, is entitled, during his term of office as such presiding judge, to the additional five hundred dollars provided by Section 1591, General Code, although elected judge of

a municipal court prior to the enactment of the Municipal Court Act and continued in the office of municipal judge during his existing term of such office by the Municipal Court Act.”

The reasoning of my predecessor in Opinion No. 1082, *supra*, followed the general rule as stated in 43 American Jurisprudence, at page 152, as follows :

“* * * Where the duties newly imposed upon the officer are not merely incidents of and germane to the office, but embrace a new field, and are beyond the scope and range of the office as it theretofore existed and functioned, the incumbent may be awarded extra compensation for the performance of such duties without violating a constitutional inhibition against increase of salary during the term. * * *”

At page 24 of said Opinion No. 1082, my predecessor concluded :

“It is my considered opinion, therefore, that such duties are not germane to and within the ordinary scope of the duties of the office of municipal judge and that the additional compensation of five hundred dollars per year provided for presiding judges by Section 1591, General Code, may lawfully be paid to any municipal judge selected or designated as presiding judge whether such judge has assumed his term of office as municipal judge before or after January 1, 1952.”

Applying the above-noted general rule and reasoning to the instant question, I conclude that the \$500.00 salary as presiding judge was lawfully paid to Judge D., as of February, 1957.

Next to consider is whether the salary increases of November 23, 1957, and November 2, 1959, had any effect upon the compensation of Judge D.

Obviously, Section 20 of Article II, Ohio Constitution, precluded Judge D. from receiving the two increases in base salary, as the allowance of such would have clearly constituted an increase during term within the purview of that section. The basic question, therefore, is whether said increases could operate to increase Judge D.'s salary as presiding judge—remembering that the *term* of a presiding judge is two years (Section 1901.09, Revised Code) and that Judge D. served in three such terms during the period here in question.

Judge D. was elected presiding judge in February, 1957. The provision of law as to the compensation of the presiding judge, Section 1901.11, Revised Code, read then (as it now does) as follows :

“* * * The presiding judge of a municipal court shall receive an additional five hundred dollars * * * over and above the salaries paid to any other judge of the same court.”

As of February, 1957, the maximum salary allowed for any judge of the court (Columbus), including Judge D., was \$12,500.00. Thus, the salary of Judge D. as presiding judge at that time was clearly \$500.00 in addition to said \$12,500.00. Assuming, however, that a judge of the court was entitled to a \$13,000.00 base salary as a result of the November 23, 1957 increase, should the salary of the presiding judge (Judge D.) elected in January, 1958, have been \$500.00 over and above \$13,000.00 (\$13,500.00)? Further, assuming that later a judge of the court was entitled to a \$15,000.00 base salary as a result of the November 2, 1959 increase, should the salary of the presiding judge (Judge D.) elected in January, 1960, be \$500.00 over and above \$15,000.00 (\$15,500.00)? Or, should the total salary of the presiding judge (Judge D.) have remained at \$13,000.00 since February, 1957?

Prior to its amendment in 1953 (125 Ohio Laws, 168) Section 1901.11, *supra* (then Section 1591, General Code), clearly provided that the compensation of the presiding judge was limited to \$500.00 annually in addition to his base salary as judge. The pertinent provision then read:

“* * * except the presiding judge of a municipal court shall receive an additional five hundred dollars * * *.”

In amending a law, the legislation is generally assumed to have intended to make some change in the law (37 Ohio Jurisprudence, Section 439, page 769). I must, however, confess to some doubt as to the meaning of the provision as amended (set forth earlier). First, there is the positive language that the presiding judge is to receive an additional five hundred dollars. Then follows the words “over and above the salaries paid to any other judge of the same court.” It is this latter language which causes the difficulty.

Referring to this language the words “any other judge” refer to one judge; thus, why is the plural, “salaries,” used? Also, what is the meaning of the words “over and above”? Given their common application, these words would mean that a judge is entitled to a specified amount in addition to what is already due *him*. As used in Section 1901.11, *supra*, however, the words appear to apply to an amount in addition to what is already due *another judge*.

The position might be taken that, as of January, 1958, Judge D. was entitled to his salary of \$12,500.00, plus \$1,000.00 (\$500.00 over and above the salary of any other judge of the court—\$13,000.00 being the maximum base salary at that time), and that, as of January, 1960, he was entitled to his base salary of \$12,500.00, plus \$3,000.00 (\$500.00 over and above the salary of any other judge of the court—\$15,000.00 being the maximum base salary at that time). I do not, however, believe that the language used is specific enough to accomplish this result. If the legislature had intended to increase the salary of the presiding judge, it could have easily done so by increasing the \$500.00 to \$1,000.00 or to whatever amount was desired. It might be argued that the intent was to increase the salary of only those judges who are not receiving the maximum base salary allowed judges of the court. But such an intent would clearly be in violation of the provisions of Section 20 of Article II, *supra*.

I am aware that Judge D. has served separate terms as presiding judge and that if the salary as presiding judge were increased during one term he would not be precluded from receiving the increase in the next term. In this case, however, the allowance of an amount in excess of \$500.00 annually to Judge D. for his services as presiding judge would necessarily be based on the *base salary* increases made in 1957 and 1959. Without these increases there would be no doubt that the salary of the presiding judge should be limited to \$500.00 per year. But under the provisions of Section 20 of Article II, *supra*, Judge D. is precluded from benefitting from an increase in the base salaries of municipal judges, and to allow him to do so in this case would constitute a violation of that constitutional provision.

Strengthening my belief in this regard, is the situation which would prevail if the presiding judge were to receive \$500.00 more than the salary of any other judge of the court. In the Columbus court, for example, the salary of Judge D., as presiding judge, would have been \$500.00 as of February, 1957; \$1,000.00 as of January, 1958; and \$3,000.00 as of January, 1960; all with no change being made in the law as to the salary of the presiding judge. At the same time, if another judge had been chosen as presiding judge, the salary might have been only \$500.00 during all of these years and the duties would have been the same. Also, in other courts throughout the state there would be no fixed salary for the presiding judge, the salary in any case being dependent on what judge holds the office and the base salary of that judge. The salaries of the presiding judges would

not, therefore, be uniform throughout the state and there would be a strong possibility of conflict with Section 26 of Article II, Ohio Constitution, which provides that all laws of a general nature shall have a uniform operation throughout the state. In view of the general rule that a statute should be construed in such a manner as to render it constitutional (37 Ohio Jurisprudence, page 627), the question of uniform application might alone, therefore, be decisive of the instant question.

Answering your specific questions, therefore, I conclude that as of February, 1957, Judge D. was entitled to an annual salary of \$12,500.00, as judge, and \$500.00 as presiding judge, a total of \$13,000.00; and that the later increases in the salaries of judges of the court did not affect this annual compensation.

Accordingly, it is my opinion and you are advised:

1. A judge of a municipal court who took office in January, 1956, at a salary of \$12,500.00 per year and who, in February, 1957, was selected as the presiding judge pursuant to Section 1901.09, Revised Code, was, under Section 1901.11, Revised Code, entitled at that time to \$500.00 annually as presiding judge, in addition to his annual salary, a total of \$13,000.00. (Opinion No. 1082, Opinions of the Attorney General for 1952, page 18, approved and followed.)

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Respectfully,

MARK McELROY
Attorney General