

Note from the Attorney General's Office:

1988 Op. Att'y Gen. No. 88-014 was overruled in part by
2005 Op. Att'y Gen. No. 2005-032.

OPINION NO. 88-014**Syllabus:**

1. An elected municipal court clerk is entitled to receive any salary increase which results from application of the formula contained in R.C. 1901.31(C) to increases in the salary of a municipal court judge caused by amendments to R.C. 141.04 and R.C. 1901.11, and such increase in salary for the municipal court clerk does not violate art. II, §20 of the Ohio Constitution when paid to the clerk while in term.
2. The term "salary of the judge of the court," used in R.C. 1901.31(C) as a factor in determining the salary of the municipal court clerk, means all moneys which the municipal court judge is entitled to receive pursuant to R.C. 141.04 and R.C. 1901.11.

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 30, 1988

I have before me your opinion request concerning the effects of Am. Sub. H.B. 171, 117th Gen. A. (1987) (eff. July 1, 1987) on the salary of a municipal court clerk pursuant to R.C. 1901.31(C). Based upon a telephone conversation

between a member of your staff and a member of my staff, I have rephrased your specific questions as follows:

1. Is an elected clerk of a municipal court, whose salary is computed pursuant to R.C. 1901.31(C), entitled to a pay increase during term, when that increase is due to a statutory change in the judge's salary?
2. Does R.C. 1901.31(C) require that the municipal clerk's salary be computed on the municipal judge's total salary or only on that portion of the judge's salary paid pursuant to R.C. 1901.11?

Your questions arise because of the passage of Am. Sub. H.B. 171, which increased the salaries of municipal court judges by amending R.C. 141.04 and R.C. 1901.11. Prior to these amendments, R.C. 1901.11 provided for the entire salary of the municipal court judges, dividing responsibility for payment between the county and city where the court was located. Am. Sub. H.B. 171 increased the judge's salary through an additional payment from the state treasury under R.C. 141.04. As amended, R.C. 141.04 now provides:

(A) 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:

...

(5) For the full-time judges of a municipal court or the part-time judges of a municipal court of a territory having a population of more than fifty thousand, the following amounts effective in the following years, which amounts shall be in addition to all amounts received pursuant to section 1901.11 of the Revised Code from municipal corporations and counties:

- (a) Beginning July 1, 1987, four thousand five hundred dollars;
- (b) Beginning January 1, 1988, seven thousand dollars;
- (c) Beginning January 1, 1989, nine thousand dollars.

In addition to provision for payment of a portion of a municipal court judge's salary from the state treasury pursuant to R.C. 141.04, Am. Sub. H.B. 171 also increased the amount paid to certain municipal court judges pursuant to R.C. 1901.11. As amended, that section provides in part:

(A)(1) Judges designated as part-time judges by section 1901.08 of the Revised Code shall receive as compensation an amount, not to exceed ten thousand dollars per annum, equal to eighteen cents per capita for the population of the territory in which they reside when elected or appointed plus the following amounts per annum effective in the following years:

- (a) Beginning January 1, 1987, twenty-eight thousand eight hundred dollars;
- (b) Beginning July 1, 1987, twenty-nine thousand five hundred fifty dollars;
- (c) Beginning January 1, 1988, thirty thousand three hundred dollars;
- (d) Beginning January 1, 1989, thirty-one thousand fifty dollars.

...

(B)(1) 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 pursuant to this section, shall receive as compensation fifty-one thousand seven hundred fifty dollars per annum, plus an amount equal to eighteen cents per capita for the population of the territory in which they reside when elected or appointed.

(2) The compensation of any municipal judge, other than a presiding judge who is also an administrative judge, that is received

pursuant to this section shall not be more than the lesser of three thousand dollars per annum less than the statutory compensation of a judge of the court of common pleas of the county in which the municipal court is situated, or sixty-one thousand seven hundred fifty dollars.

Am. Sub. H.B. 171 also added language to R.C. 1901.11 to clarify that the county and city are responsible for paying only that portion of the judge's salary paid pursuant to R.C. 1901.11. No change was made in the method by which the county and city determine their respective shares. As amended, this subsection of R.C. 1901.11 provides:

(C) The compensation of municipal judges *that is received pursuant to this section* shall be paid in semimonthly installments, three-fifths of the amount being payable from the city treasury and two-fifths of the amount being payable from the treasury of the county in which the municipal corporation is situated, except that all of the compensation of the judges of a county-operated municipal court *that is received pursuant to this section* shall be payable out of the treasury of the county in which the court is located. If the territory is located in two or more counties, a total of two-fifths of the amount *that is received pursuant to this section* shall be payable by all of the counties in proportionate shares from the treasury of each of the counties in accordance with the respective populations of that portion of each of the several counties within the jurisdiction of the court. Notwithstanding any other provision of this section, the compensation of all the judges of each municipal court shall not be less than that to which the judges of each court are entitled on the effective date of this section. (Emphasis shows language added by Am. Sub. H.B. 171.)

Thus, as a result of Am. Sub. H.B. 171, the salary of municipal court judges has increased, and that salary is now payable from three sources: the city, the county and the state.

Am. Sub. H.B. 171 made no changes in R.C. 1901.31, the statute which governs the salaries of municipal court clerks, nor did it make any reference to clerks in the amendments to R.C. 141.04 or R.C. 1901.11. However, R.C. 1901.31(C) links the salaries of certain municipal court clerks, including the clerk in your question, to that of the municipal court judge. R.C. 1901.31(C) provides, in part:

In a municipal court other than the Hamilton county, Portage county, and Wayne county municipal courts for which the population of the territory is one hundred thousand or more, the clerk of a municipal court shall receive annual compensation in a sum equal to eighty-five per cent of the salary of a judge of the court. The compensation is payable in semimonthly installments from the same sources and in the same manner as provided in section 1901.11 of the Revised Code.

Thus when the salary of the municipal court judge goes up, a corresponding increase will occur in the salary of the clerk by application of R.C. 1901.31(C). The amendments to R.C. 141.04 and R.C. 1901.11, which I have just set out, have clearly increased the salaries of municipal court judges. What I must now examine is how and when R.C. 1901.31(C) is to be applied.

Your first question asks: "Is an elected clerk of a municipal court, whose salary is computed pursuant to R.C. 1901.31(C), entitled to a pay increase during term, when that increase is due to a statutory change in the judge's salary?" To answer this question, I must determine whether the pay increase is of the type prohibited by the Ohio Constitution. Ohio Const., art. II, §20 states:

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.

Municipal court clerks are officers for purposes of this section, therefore their salaries are subject to its provisions. *State ex rel. Edgecomb v. Rosen*, 29 Ohio St. 2d 114, 279 N.E.2d 870 (1972) (syllabus, paragraph one), *overruled on other grounds*, *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E. 2d 794 (1983).

The court in *Edgecomb* held that art. II, §20 prohibited an in-term increase to a municipal court clerk which resulted from an increase in the municipal court judge's salary by amendment to R.C. 1901.11. *Edgecomb*, (syllabus, paragraph two). This result was expressly overruled in *Schultz v. Garrett*, 6 Ohio St. 3d 132, 451 N.E.2d 794 (1983). The court stated, in the syllabus of *Schultz*:

Where a statute setting forth the formula for the compensation of an officer is effective before the commencement of such officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term. (*State, ex rel. Edgecomb, v. Rosen*, 29 Ohio St.2d 114, overruled.)

The court further explained that in-term increases are constitutionally forbidden "when such changes are the result of direct legislative action on the section(s) of the Revised Code which are the basis of the officers' salaries." *Schultz*, 6 Ohio St. 3d at 135, 451 N.E.2d at 798.

The only factual distinction between your question and *Edgecomb*, is that Am. Sub. H.B. 171 has changed the source of the judge's salary, as well as the amount. However, as was the case in both *Schulzz* and *Edgecomb*, there has been no direct legislative action on R.C. 1901.31(C). *Schultz*, 6 Ohio St. 3d at 135, 451 N.E.2d at 798 ("[t]he occasion which changed appellant's salary was an amendment of R.C. 325.08—not a change in R.C. 1901.31(C), the section setting forth the formula for calculating the salary of [a municipal court clerk]"). In the absence of such direct legislative action, I conclude that an elected municipal court clerk is entitled to any salary increase resulting from application of the formula contained in R.C. 1901.31(C) to increases in the salary of a municipal court judge caused by amendments to R.C. 141.04 and R.C. 1901.11, and such increase in salary for the municipal court clerk does not violate art. II, §20 of the Ohio Constitution when paid to the clerk while in term.¹

I turn now to your second question, which concerns how R.C. 1901.31(C) is to be applied. You ask: "Does R.C. 1901.31(C) require that the municipal clerk's salary be computed on the municipal judge's total salary or only on that portion of the judge's salary paid pursuant to R.C. 1901.11?" R.C. 1901.31(C) provides in pertinent part that:

[T]he clerk of a municipal court shall receive annual compensation in a sum equal to eighty-five per cent of *the salary of a judge of the court*. The compensation is payable in semimonthly installments from the same sources and in the same manner as provided in section 1901.11 of the Revised Code. (Emphasis added.)

The phrase "salary of a judge of the court" has no modifier which limits the judge's salary to that provided by a particular statute or paid from a particular source. In contrast, R.C. 141.04(A)(5), which establishes a direct payment to the municipal court judge from the state treasury, refers to amounts "*in addition to* all amounts received pursuant to Section 1901.11." (Emphasis added.) Similarly, R.C. 1901.11(C)

¹ *Schultz* also requires that the formula-setting statute be effective before the commencement of the officer's term. R.C. 1901.31(C) has not been amended since 1981. See 1981 Ohio Laws 1891-1892 (Am. H.B. 121, eff. Nov. 2, 1981). Since municipal court clerks are elected to a six-year term, R.C. 1901.31(A)(1)(a), no elected municipal court clerk now in office is subject to this limitation.

refers to "[t]he compensation of municipal judges that is received pursuant to this section." (Emphasis added.) Thus each statute states that it provides only a part of the municipal judge's salary. Absent a legislative directive to limit the meaning of "the salary of a judge of the court" for purposes of R.C. 1901.31(C), I must assume that the phrase means the entire salary of the judge, regardless of how many statutes authorize payment of a part of that salary. See *Black's Law Dictionary*, 1200 (5th ed. 1979) (defining "salary" as a "reward or recompense for services performed....A stated compensation paid periodically as by the year, month or other fixed period"). See also *Baker v. Powhatan Mining Co.*, 146 Ohio St. 600, 67 N.E.2d 714 (1946) (syllabus, paragraph three) ("[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment they will, in the interpretation of the act, be given their common, ordinary and accepted meaning").

R.C. 1901.31(C) does direct that the clerk be paid "from the same sources and in the same manner as provided in section 1901.11." Thus the language in R.C. 1901.11 which relates to "sources" and "manner" of payment is incorporated into R.C. 1901.31(C) as if it were written therein. See generally *State ex rel. Fritz v. Gongwer*, 114 Ohio St. 642, 649, 151 N.E. 752, 754 (1926) ("[t]he effectiveness of legislation by reference has been...generally recognized in Ohio"); see also *Lenbo v. State*, 14 Ohio Dec. 384, 385-86 (Cuyahoga County C.P. 1904) ("[w]here a statute is incorporated in another, the effect is the same as if the provisions of the former were reenacted in the latter, for all the purposes of the latter statute") (citation omitted). R.C. 1901.11(C) names the city and county as sources of payment and specifies the manner in which they determine their respective shares. As I noted earlier, Am. Sub. H.B. 171 made no changes in these provisions, therefore the proportionate shares of the city and county with regard to the municipal court clerk's salary have not changed. The phrase "as provided in R.C. 1901.11" as it appears in R.C. 1901.31(C), modifies only "sources" and "manner of payment." It does not modify "salary of a judge of the court," which occurs in a separate sentence. Although R.C. 1901.11 limits the portion of the judge's salary the city and county use to determine their payments to the judge, this limitation does not apply to R.C. 1901.31(C) for purposes of payment to the clerk. I therefore conclude that R.C. 1901.31(C) directs the clerk be paid eighty-five percent of the judge's entire salary, as paid to the judge pursuant to both R.C. 141.04 and R.C. 1901.11.

I note that the effect of Am. Sub. H.B. 171 is to impose an additional financial burden on city and county treasuries by providing an increase to municipal court judges from state funds while making no corresponding adjustment in the payment provisions for municipal clerks. While this result might have been inadvertent, I need not speculate on the intention of the legislature in the absence of clear and manifest error. *State ex rel. Fay v. Archibald*, 52 Ohio St. 1, 9-10, 38 N.E. 314, 316 (1894) ("[t]he error or mistake, as well as the proper correction, must appear beyond doubt from the face of the act, or when read in connection with other acts in *pari materia*"). Am. Sub. H.B. 171 provides no indication of the legislative intent with respect to the salaries of municipal court clerks. Nor do any of the amendments contained in Am. Sub. H.B. 171 make it impossible to apply R.C. 1901.31(C) in accord with its plain meaning. As the court stated in *Archibald*: "Even granting that there may be a latent mistake in the act, yet, in case of so much doubt, it would make a dangerous precedent for the judiciary to undertake its correction. It is safer to endure temporary inconvenience, than to lay the foundation for future judicial usurpation." 52 Ohio St. at 11, 38 N.E. at 317.

Therefore, it is my opinion, and you are hereby advised that:

1. An elected municipal court clerk is entitled to receive any salary increase which results from application of the formula contained in R.C. 1901.31(C) to increases in the salary of a municipal court judge caused by amendments to R.C. 141.04 and R.C. 1901.11, and such increase in salary for the municipal court clerk does not violate art. II, §20 of the Ohio Constitution when paid to the clerk while in term.

2. The term "salary of the judge of the court," used in R.C. 1901.31(C) as a factor in determining the salary of the municipal court clerk, means all moneys which the municipal court judge is entitled to receive pursuant to R.C. 141.04 and R.C. 1901.11.