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PROSECUTING ATTORNEY — EXPRESSLY ADVISED COMMON PLEAS COURT OF HIS COUNTY HE WAIVED HIS SALARY DURING PERIOD OF SERVICE IN ARMED FORCES—CAN NOT LATER DEMAND SALARY.

SYLLABUS:

A prosecuting attorney, who expressly advises the Common Pleas Court of his county that he waives his salary during his period of service in the armed forces, can not later demand that salary.

Columbus, Ohio, June 2, 1949

Hon. Marvin E. Young, Prosecuting Attorney
Warren County, Lebanon, Ohio

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

“I would be pleased to receive your opinion on the following:

THE FACTS.

“Mr. Meryl B. Gray was elected County Prosecuting Attorney of Warren (this) County and took office in January, 1941. In January, 1943, he was inducted into the Armed Services and on taking his leave of absence and reporting to the Army an Entry was set down in the Common Pleas Court, a copy of which is hereto attached and made a part hereof.

"Charters D. Maple, a local attorney, was appointed as his assistant and served as his assistant during the balance of Gray's term, which, of course, ended in January, 1945. Mr. Maple had had no previous connection with either the office or Mr. Gray.

"Mr. Gray served in the Armed Forces until some time in November, 1944, as an enlisted man. In November, he graduated from O. C. S. and was commissioned. Thus, he served about one year and ten months as an enlisted man and about two months as an officer, while still being the Prosecuting Attorney of this County.

"Mr. Gray was discharged from the service in April, 1946, after his term as Prosecutor had expired and in December, 1946, filed his bill with the Warren County Commissioners for his salary during the time he was in the service. No action to date has been taken on said bill either allowing or rejecting payment of the same.

QUESTIONS.

"1. Assuming that under present law and decisions Mr. Gray would normally be entitled to his salary, how is his claim affected by paragraph three of the entry attached hereto?

"2. If he is entitled to his salary, then to what extent? For the entire period of his disability, or only during the time he was an enlisted man?

"3. If he is entitled to salary, and can legally collect same, is he entitled to collect interest, and, if so, from what date?"

Attached to your request is a copy of the following order:

"Filed January 2nd, A. D. 1943.

"In Re: PROSECUTING ATTORNEY

"The Court having been fully advised that beginning January 2, 1943, and for an indefinite period of time thereafter, Meryl B. Gray is under disability which prevents him from actively serving as Prosecuting Attorney of Warren County, Ohio, to which office he was elected for a term ending the first Monday of January, 1945 said disability being due to the fact that he has been inducted into the United States Army, having been sworn into the armed forces on Wednesday, December 30, 1942, and ordered to report for active duty on Wednesday, January 6, 1943.

"NOW THEREFORE, in accordance with General Code Section 2912, it is ordered that Charters D. Maple be, and he hereby is appointed Assistant Prosecuting Attorney with the title of Acting Prosecuting Attorney effective January 2, 1943; that he exercise all of the powers and duties of the Prosecuting Attor-

ney of Warren County, Ohio, during the absence of the said Meryl B. Gray, Prosecuting Attorney, or until the end of the term for which the said Meryl B. Gray was elected, as he hereinbefore set forth.

“AND WHEREAS, the said Meryl B. Gray having advised the Court that he waives the payment of his salary during the extent of his said disability, therefore, the salary of the said Charters D. Maple, with the approval of the Warren County Commissioners, be, and the same hereby is, fixed at \$1600.00 per year. It is further ordered that the said Charters D. Maple be required to give a bond in the sum of \$2500.00 dollars. This order is effective at 12:01 A. M., Saturday, January 2, 1943.

CHAS. B. DECHANT, Judge.”

In view of the case of *State ex rel. Clinger, Prosecuting Attorney v. White, et al., Board of County Commissioners of Adams County, et al.*, 143 O. S. 175, the third branch of the syllabus of which refers to Section 2397-2 of the General Code and reads as follows:

“By specific provisions thereof, nothing contained in those sections ‘shall apply to a county officer while in the active military service of the United States.’ A prosecuting attorney who enlists in such service does not by reason of his absence while in such service vacate his office as prosecuting attorney, and upon demand is entitled to receive the salary prescribed by law.”

we may assume that without waiver the prosecuting attorney would be entitled to his salary while in the armed forces. See also: 1942 Opinions of the Attorney General, page 637, and 1940 Opinions of the Attorney General, page 982.

In this situation we have the additional factor of waiver to deal with. There appears to be no constitutional nor statutory prohibition against the waiver of the right to full salary by a public official. In 43 Am. Jur. 146, under “Public Officers,” §355, it is provided in part:

“A public officer may, unless prevented from doing so by some constitutional or statutory provision, waive his right to the full salary attached to the office or otherwise consent to such diminished compensation, and this notwithstanding the Constitution prohibits any reduction of salary during the term for which he was elected or appointed. * * *” (Emphasis added.)

In 40 O. Jur. 1235, under “Waiver,” §3, it is provided as follows:

“As a general rule, a person may waive all personal rights or privileges to which he is individually entitled, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided the waiver does not constitute a violation of public policy.
* * *

In *The State, ex rel. Hess v. City of Akron, et al.*, 132 O. S. 305, the syllabus reads as follows:

“1. The occupant of a public office may waive part of the established salary thereof.

“2. Such a waiver is not contrary to public policy.”

In the case of *Allenbaugh v. City of Canton*, 137 O. S. 128, the second branch of the syllabus provides:

“While a civil service employee may waive any right he has as such under the law, in order to establish a waiver the evidence must be sufficient to warrant a court in saying that his intent to waive is unmistakable.”

While this case is not exactly in point, it indicates that waiver of salary is not against public policy. Thus, it is shown that a public officer may waive part of his salary and that such waiver is not against the public policy of the State of Ohio.

In 40 O. Jur. 1233, under “Waiver,” §2, it is provided:

“A waiver is a voluntary relinquishment of a known right. It is a matter of intention with knowledge of the right involved. It may be by express words or by necessary implication.”

In this case, the prosecuting attorney had a known right. That is, he knew he had the right to compensation. He voluntarily appeared before the court and freely gave up this known right.

It is, therefore, my opinion that the prosecuting attorney of Warren County, who took office in 1941, waived his right to compensation while in the armed forces.

Therefore, it is unnecessary to answer questions numbered 2 and 3.

Respectfully,

HERBERT S. DUFFY,
Attorney General.