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1. TOWNSHIP CLERK — TOWNSHIP HAS ANNUAL BUDGET IN EXCESS OF \$5,000.00 — ENTITLED TO SALARY STIPULATED BY SECTION 3308 G. C. FOR SERVICE DURING PORTION OF YEAR SERVED — BASIS \$350.00 PER YEAR — ADDITIONAL COMPENSATION — 2% EXCESS OF EXPENDITURES OF TOWNSHIP DURING PERIOD OF INCUMBENCY OVER SUM \$5,000.00 PROVIDED TOTAL COMPENSATION SHALL NOT EXCEED \$600.00.
2. VACANCY — TOWNSHIP CLERK — TOWNSHIP HAS ANNUAL BUDGET IN EXCESS OF \$5,000.00 — SUCCESSOR TO CLERK MAY RECEIVE IN ADDITION TO STIPULATED SALARY \$350.00 PER ANNUM, 2% TOTAL TOWNSHIP EXPENDITURES DURING INCUMBENCY IN EXCESS OF \$5,000.00 — PROVISIO, TOTAL COMPENSATION SHALL NOT EXCEED \$600.00 IN ANY ONE CALENDAR YEAR.

SYLLABUS

1. A township clerk of a township which has an annual budget in excess of \$5,000, who serves during only a portion of a calendar year, is entitled during the portion of the year served by him to receive the salary stipulated by Section 3308, General Code, on the basis of \$350.00 per year, and in addition thereto to receive as compensation 2% of the excess of the expenditures of such township during the period of his incumbency over the sum of \$5,000, provided that his total compensation shall not exceed \$600.00.

2. Where a vacancy occurs in the office of township clerk in a township having an annual budget in excess of \$5,000, the person appointed as successor to such clerk may receive in addition to the salary stipulated by Section 3308, General Code, at the rate of \$350.00 per annum, 2% of the total expenditures of said township during the period of his incumbency which are in excess of the sum of \$5,000, provided that his total compensation for the period served by him shall not exceed \$600.00 in any one calendar year.

Columbus, Ohio, January 15, 1944

Hon. Lester W. Donaldson, Prosecuting Attorney
Painesville, Ohio

Dear Sir:

I am in receipt of your communication requesting my opinion, reading as follows:

"In July of 1943, the duly elected clerk of the Board of Township Trustees of Perry Township, Lake County, Ohio, resigned his office during his term and a successor was appointed who served as clerk until December 1, 1943, at which time another successor was appointed and is now serving as clerk.

Perry Township has a budget of over \$5,000.00 and the original elected clerk who resigned in July of 1943 had received his salary for the months which he served upon the basis of \$350.00 per year, and the total expenditures of the township during said year was \$6,000.00, so that the original elected clerk received in addition to his salary 2% of \$1,000.00.

Section 3308 of the General Code of the state of Ohio, provides as follows:

'Section 3308. Fees of Clerk. * * * and in townships having a budget of \$5,000.00 and over the clerk shall receive 2% of the total expenditures of such township in excess of \$5,000.00 * * *.'

The successor appointed clerk who served from July, 1943, to December 1st, had been paid the monthly salary upon the basis of \$350.00 per year and likewise has handled expenditures of the township.

He now requests your opinion as to whether the wording of the statute, 'total expenditure of such township in excess of \$5,000.00' is applicable to each separate clerk in that there must be expenditures of \$5,000.00 during the period that that particular clerk is serving whether he be elected or appointed or, as in our particular case, \$6,000.00 having been expended during that portion of the year that the elected clerk served, is the successor appointed clerk who served from July to December entitled to draw 2% upon all expenditures that are made while he is clerk, the first \$5,000.00 having been expended while the elected clerk was serving, or as soon as the appointed clerk takes office must there be another \$5,000.00 expended during his period of service before he can begin to draw his 2%?

Also we request your opinion in reference to that portion of Section 3308 which reads, 'no township clerk shall receive for his compensation in excess of \$600.00 in any one calendar year for said services as such township clerk'. Does that mean that the total amount paid as salary and fees to the office of clerk during any one year shall not exceed \$600.00, or does that mean that in the event there are two or more successive elected or acting clerks during one year that the salary and compensation shall not exceed \$600.00 for each clerk who serves, either elected or appointed for any one year?"

In order to arrive at the intention of the Legislature in its enactment of Section 3308, General Code, in its present form, it may be helpful to look briefly at the legislative history back of this and related sections of the General Code. I note that on March 21, 1917 (107 O. L. p. 651), Sections 3308 and 3318 of the General Code were amended by an act entitled "An Act to amend Sections 3308 and 3318, providing a maximum compensation for township clerks and treasurers." Section 3308, as then amended, retained the same form until it was amended to its present reading in 1939. As it then stood it read as follows:

"The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendents; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. In no one year shall he be entitled to receive from the township treasury more than two hundred and fifty dollars."

Section 3318, as then amended, provided as follows:

"The treasurer shall be allowed and may retain as his fees for receiving, safekeeping and paying out moneys belonging to the township treasury, two per cent of all moneys paid out by him upon the order of the township trustees, but in no one year shall he be entitled to receive from the township treasury more than one hundred and fifty dollars, except that in a township wherein a city is located and such city is a part of such township, a township treasurer shall be entitled to receive from the township treasury not more than three hundred dollars in one year."

In 1923 the Legislature repealed the sections of the General Code which established the position of township treasurer, including Section 3318, above quoted, and enacted Section 3316-1, reading as follows:

"When a depository has been provided for the township moneys, as authorized by this act (G. C. Sec. 3320 et seq.), the township trustees shall dispense with a treasurer. The township clerk shall perform all the services, discharge all the duties and

be subject to all the obligations formerly required by law of the township treasurer.”

The act making this change became effective January 1, 1924. No compensation was provided for the clerk acting as such treasurer. However, in 1939 Section 3308, General Code, was amended by eliminating the last sentence relating to the \$250.00 maximum and substituting therefor the following language.

“Provided, however, in those townships having a budget less than five thousand dollars, the township trustees shall determine the salary of the clerk which in no event shall exceed three hundred and fifty dollars per year; and in townships having a budget of five thousand dollars or over, the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars in addition to the amount above provided in townships having a budget of less than five thousand dollars, provided, however, no township clerk shall receive for his compensation in excess of six hundred dollars in any one calendar year for said services as such township clerk.”

This last amendment, which had the effect of increasing the compensation of a township clerk in a township such as the one mentioned in your letter, was not made for a considerable time after the office of treasurer was abolished, so that it is probably unsafe to assert that the increase was made because of the additional duties thrown on the clerk by making him also the township treasurer. However, it appears to me to be a reasonable assumption that the increase in the clerk's compensation was brought about, in part at least, by that circumstance.

It will be observed that the compensation attached to the office of treasurer by Section 3318, when in force, was “two per cent of all moneys *paid out by him*”, whereas in the amendment to Section 3308 the provision is that “*the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars.*”

This statutory provision as to the clerk's compensation would be quite plain so long as it is applied to the compensation of a township clerk who holds through a calendar year. Manifestly that was the only situation which was present in the legislative mind in enacting it. But we are called upon to apply it to a situation where three persons have held the same office during portions of the same year, a situation with which the Legislature was not attempting to deal. We cannot, therefore, invoke the usual rules for resolving or explaining an ambiguity, for there is no

ambiguity in the language used. It seems to me, therefore, that we can only meet the situation which you present by applying the rules of common sense.

By way of definition, townships are divided into two classes, viz.: (1) those which have a *budget* of less than five thousand dollars, and (2) those which have a *budget* of five thousand or over. This budget is based on a mere *estimate* of probable revenues and expenditures for the coming year (Section 5625-21, General Code). The compensation of the clerk, however, in the second class above mentioned, is computed on actual expenditures. The statute in effect provides that when, in the course of a calendar year, the expenditures have reached a total of \$5,000.00, then "the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars" in addition to the salary fixed at three hundred and fifty dollars per annum. The statute does not say when the clerk may claim this percentage. But for the outside limitation of six hundred dollars, he might claim it as each excess expenditure is made. At the very latest he would be entitled to it at the end of the year unless he gives up the office sooner, in which case the full amount payable to him could be ascertained and paid.

If the original incumbent sees fit to resign before the expenditures have reached the figure at which the percentage compensation begins to accrue, he voluntarily relinquishes the right he would otherwise have had to enjoy that extra benefit; if he quits his office by means not voluntary, the loss of this extra compensation is a part of his misfortune. The second man who comes in enjoys this extra benefit if and to the extent that it accrues during his incumbency; and likewise, in the case you present, does the third man. It certainly would lead to an absurd result if we construed the language of the statute as giving each of the three who held the office for part of the year two per cent of the excess expenditure for the year. Let us assume that the total expenditure for the entire year amounted to \$8,000.00, that the original incumbent received in addition to his salary two per cent on the *entire* excess of \$3,000.00. He must then have been paid after the end of the year though he had resigned in July. Possibly the major portion of the \$8,000.00 expenditure was made when he no longer was connected with the office. To be fair to his successor we would have to take from the township another two per cent, and, in case of a third incumbent, still another. I cannot believe that the Legislature could have intended to divide the cake by giving each

of the three a whole cake. Nor do I believe it could have intended to give it all to the one who had the job first and gave it up. So far as this percentage compensation is concerned, it was, by the language of the statute, due to "the clerk" just as was the three hundred and fifty dollars. It was the total emolument of the office.

Likewise, it would be absurd, in my opinion, to contend that if incumbent No. 1 had, during the first half of a calendar year, drawn a percentage based on an excess of expenditures over five thousand dollars, then his successor must wait until another five thousand dollars of expenditures had accumulated before he could receive a percentage compensation. The statute plainly negatives such an idea. Five thousand dollars is the total township expenditure which is *not* subject to the two per cent and all over that amount is the excess on which the clerk is to receive two per cent.

It is my opinion that each of the three persons who occupied this office, as stated in your letter, during the portions of the year 1943, would have the right to receive, in addition to his share of the regular salary, 2% of the expenditures after the original total of \$5,000 had once been reached, in so far as such excess of expenditures took place during his tenure, subject, however, to the maximum named in the statute.

This brings me to the question as to the application of the \$600.00 limitation. The closing words of Section 3308, General Code, are:

"provided, however, no *township clerk* shall receive for *his compensation* in excess of six hundred dollars in any one calendar year for said services as such township clerk."

Does this mean that if the clerk who first held the office and has drawn salary and fees up to a total of \$600.00, the clerk who succeeded him would have to serve out the rest of the term without any compensation whatsoever?

One of my predecessors had presented to him substantially the same question relative to the compensation allowed by law to township trustees and held in an opinion found in 1931 Opinions Attorney General, p. 339, as follows:

"The amount earned by the predecessor of a person appointed to fill a vacancy in the office of township trustee shall not be taken into consideration in determining whether

the \$250.00 yearly limitation of a township trustee's compensation to be paid from the township treasury has been exceeded."

The statute involved in that opinion, Section 3294, General Code, contains slightly different wording. The compensation of the township trustees was fixed at a certain amount per diem, with the following limitation:

"The compensation of any trustee to be paid from the treasury shall not exceed two hundred and fifty dollars in any year including services in connection with the poor."

The then Attorney General dwelt upon the use of the words "any trustees" and held that any was equivalent to "every". It was further said in that opinion:

"In the instant case, upon the appointment and qualification of the person to the office of township trustee for the unexpired term caused by the death of the prior trustee, the person so appointed and qualified became a township trustee; and, as such trustee, his compensation from the township treasury would be subject to the limitation of Section 3294, supra. To say that compensation paid to his predecessor in office amounts to payment to him would be contrary to reason.

If the words 'any trustee' are to be construed to limit the compensation of the office for one year, it would follow that not more than \$250.00 could be paid to holders of the office for such period. This conclusion is negated by an examination of the section cited. The language therein used clearly indicates a reference solely to a township trustee in person, and not to the term of office. To hold otherwise would also be to discriminate against a trustee because the term of office to which he was appointed included an unexpired portion of the fiscal year of the township."

I reached a similar conclusion in a matter relating to the right of a probate judge, successor to one who had died, to receive fees up to the maximum prescribed by the statute in inheritance tax determinations. My opinion is found in 1939 Opinions of Attorney General, p. 1883.

The statute which I have been considering uses the language — "No township clerk shall receive for *his compensation* in excess", etc. This is a limitation not on the office but upon "any" or "every" clerk, and falls clearly within the reasoning of the opinion above quoted. I am of the opinion, therefore, that, subject to the basis of computation previously outlined herein, each of the incumbents of the office of

clerk during a given year would have the right to receive compensation up to a maximum of \$600.00.

Accordingly, and in specific answer to your questions, I am of the opinion:

1. A township clerk of a township which has an annual budget in excess of \$5,000, who serves during only a portion of a calendar year, is entitled during the portion of the year served by him to receive the salary stipulated by Section 3308, General Code, on the basis of \$350.00 per year, and in addition thereto to receive as compensation 2% of the excess of the expenditures of such township during the period of his incumbency over the sum of \$5,000, provided that his total compensation shall not exceed \$600.00.

2. Where a vacancy occurs in the office of township clerk in a township having an annual budget in excess of \$5,000, the person appointed as successor to such clerk may receive in addition to the salary stipulated by Section 3308, General Code, at the rate of \$350.00 per annum, 2% of the total expenditures of said township during the period of his incumbency which are in excess of the sum of \$5,000, provided that his total compensation for the period served by him shall not exceed \$600.00 in any one calendar year.

Respectfully,

THOMAS J. HERBERT
Attorney General