

OPINION NO. 81-085

Syllabus:

A newly-appointed county auditor becomes entitled to compensation upon giving bond and taking the oath of office required by Ohio Const. art. XV, §7 and R.C. 3.22 and 3.23. (1917 Op. Att'y Gen. No. 502, vol. II, p. 1432, overruled.)

To: Arthur M. Elk, Ashland County Pros. Atty., Ashland, Ohio
By: William J. Brown, Attorney General, December 16, 1981

I have before me your request for my opinion concerning the time when a newly-appointed county auditor becomes entitled to compensation. The person in the question you pose was appointed to the position on September 8, 1981. On the same day, the county central committee certified his appointment to the county board of elections and to the Secretary of State, pursuant to R.C. 305.02. The newly-appointed auditor's bond was issued on September 14, 1981. The bond became effective on September 16, 1981, and, on the same date, the individual took his oath of office. You specifically ask on which of these dates the newly-appointed county auditor became entitled to compensation.

The right of a public officer to compensation is an incident of the title to the office. State ex rel. Wilcox v. Woldman, 157 Ohio St. 264, 105 N.E.2d 44 (1952). As a general rule, "[t]itle to a public office is vested by appointment. The investiture of title operates from the date of appointment and qualification. . . ." State ex rel. Gahl v. Lutz, 132 Ohio St. 466, 470, 9 N.E.2d 288, 290 (1937). The court in Gahl stated further, 132 Ohio St. at 470, 9 N.E.2d at 290: "By the act of appointment title is vested. By the act of qualification the investiture of title is accepted by the appointee. . . . Investiture and acceptance of title give appointee a complete present right to the office. . . ."

In order to determine the date upon which the newly-appointed county auditor became entitled to compensation, it is necessary to determine when he completed the acts necessary for qualification. In State ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109, 218 N.E.2d 729 (1966), the court stated, in part three of the syllabus, that "[q]ualification relates to the acts which the appointee must perform before he is entitled to enter upon the duties of the office" (emphasis added).

Pursuant to Ohio Const. art. XV, §7 and R.C. 3.22 and 3.23, a person must take the oath of office before discharging the duties of county auditor. In addition, R.C. 319.02 requires the county auditor, before entering upon his duties, to give a bond.¹ Thus, qualification for the office of county auditor consists of giving bond

¹R.C. 319.02 reads, in part, as follows:

Before entering upon the discharge of the duties of his office, the county auditor shall give a bond. . . as the board [of county commissioners] requires, conditioned for the faithful discharge of the duties of his office. . . . Such bond, with the oath of office required by sections 3.22 and 3.23 of the General Code, and Section 7 of Article XV, Ohio Constitution, and the approval of the board indorsed upon it shall be deposited by such board with the county treasurer, who shall record and carefully preserve it.

See R.C. 319.25, which discusses the appointment of a person to perform the duties of the county auditor when the county auditor is suspended.

and taking the oath of office. In the situation you pose, the newly-appointed county auditor, therefore, completed the acts necessary for qualification on September 16, 1981, upon taking the oath of office.

I must also note the application of R.C. 107.05 to the situation you present. R.C. 107.05 reads as follows:

A judge of a court of record, state officer, county officer, militia officer, or judge of a county court, shall be ineligible to perform any duty pertaining to his office until he presents to the proper officer a legal certificate of his election or appointment, and receives from the governor a commission to fill such office.

This section states that a county officer is not eligible to perform any of the duties of his office until he receives a commission from the governor. Because the officer has no control over the governor's issuance of the commission, receipt of the commission is not a part of qualification for an office. Gahl, supra. Such commission, although it merely evidences vesting of title, Gahl, supra, must, however, be received before one may discharge the duties of county auditor.² Thus, even though a person may have been appointed to and qualified for the office of county auditor, and may be, therefore, presently entitled to compensation as such officer, Wilcox, supra, such person is not entitled to perform the duties of the office until he receives the commission required by R.C. 107.05. Gahl, supra.

In 1917 Op. Att'y Gen. No. 502, vol. II, p. 1432, one of my predecessors concluded, in the syllabus, that "[n]o one can be a county officer without receiving a commission for the office in question, and one acting as a county officer, never having received a commission for such office is not entitled to receive the compensation provided by law therefor." The opinion relies on State ex rel. Loomis v. Moffitt, 5 Ohio 358 (1832), which discussed the validity of acts performed by a person exercising the office of judge. The court stated, at 365, that "it is not the commission issued in pursuance of these statutes which confers the right upon the officer. The right is derived from the election or appointment, of which the commission is only evidence. But it is evidence without which the officer can not proceed to act officially." Based on this language, my predecessor concluded that a commission is a necessary accompaniment of the existence of the right of office, and that a person who never receives a commission never becomes an officer. I believe, however, that Moffitt merely states that a public officer may not perform the duties of the office until he has received a commission, although the person holds title to the office from the time of appointment and qualification. See Gahl, supra. As discussed above, the right to compensation is incident to the title of the office. Thus, once a person has been appointed to and qualified for office, he is entitled to compensation, even if he has not yet received a commission. I, therefore, overrule 1917 Op. Att'y Gen. No. 502, vol. II, p. 1432.

You have also asked about the possible relevance of R.C. 305.02(E) to the question you present. That section reads as follows:

Appointments made under this section shall be certified by the appointing county central committee or by the board of county commissioners to the county board of elections and to the secretary of state, and the persons so appointed and certified shall be entitled to all remuneration provided by law for the offices to which they are appointed. (Emphasis added.)

R.C. 305.02, as it pertains to compensation of an appointed official, must be harmonized, if possible, with other statutory provisions concerning the

²But see R.C. 319.25, which states that a person appointed to perform the duties of county auditor upon suspension of the auditor may perform the duties of such office upon giving bond and taking the oath of office.

compensation of the office which the appointee will assume. See Roberts v. Briscoe, 44 Ohio St. 596, 10 N.E. 61 (1887). Thus, rather than entitling an appointee to compensation immediately upon appointment and certification and possibly prior to qualification, I believe that this section merely states that a person appointed and certified to one of the offices listed in R.C. 305.02(A) is, upon qualification for such office, entitled to the remuneration set for that office, even though he did not take office through the normal procedure of election.

It appears, therefore, that upon giving bond and taking the oath of office required by Ohio Const. art. XV, §7 and by R.C. 3.22 and 3.23, the newly-appointed auditor became qualified for the office of county auditor and, thus, became entitled to receive compensation for that office. Because the individual in the situation you pose completed qualifying for the office of auditor by taking the oath of office on the date his bond became effective, he became entitled to compensation as of that date.

Based on the foregoing, it is my opinion that a newly-appointed county auditor becomes entitled to compensation upon giving bond and taking the oath of office required by Ohio Const. art. XV, §7 and R.C. 3.22 and 3.23. (1917 Op. Att'y Gen. No. 502, vol. II, p. 1432, overruled.)