

4042

1. FEDERAL CENSUS, SIXTEENTH, 1940 — DATE APRIL 1, 1940, LEGAL ASCERTAINMENT, POPULATION OF COUNTIES, TO FIX SALARIES, CERTAIN PUBLIC OFFICERS.
2. COMPENSATION, PRECINCT JUDGES AND CLERKS OF ELECTIONS, PRIMARY ELECTION MAY, 1940 — SECTIONS 4785-28, 4785-25b, 4785-25c 4785-25d G.C.
3. HOW COMPENSATION DETERMINED FOR THOSE WHO SERVED, REGULAR ELECTION, NOVEMBER 5, 1940.
4. COUNTY BOARDS OF ELECTIONS — CLERKS — “ANNUAL” SALARY — SECTIONS 4785-18, 4785-19 G.C.
5. “CALENDAR YEAR” — COUNTY BOARD OF ELECTIONS.
6. HOW TO COMPUTE “ANNUAL SALARY” BASED ON POPULATION, FEDERAL CENSUS.
7. WHEN 1930 CENSUS APPLIES.
8. INCUMBENTS NOW IN OFFICE — 1940 CENSUS.

**SYLLABUS:**

1. *The date of the legal ascertainment of population of counties according to a federal census, upon which classification of counties for purposes of fixing salaries of certain public officers is predicated, was April 1, 1940, for the Sixteenth Federal Census of 1940.*

2. *Precinct judges and clerks of elections who served as such at the primary election in May, 1940, should have been compensated for such services as provided by Section 4785-28, General Code, on the basis of whether or not the county wherein the service was rendered had a popu-*

lation of 250,000, according to the 1940 census, except in those counties where precinct officials were appointed and the election conducted in the manner provided by Sections 4785-25b, 4785-25c and 4785-25d, General Code.

3. Precinct judges and clerks of elections who served as such at the regular election on November 5, 1940, should have been compensated for such services in accordance with the provisions of Section 4785-28, General Code, on the basis of whether or not the county wherein the service was rendered had a population according to the federal census of 1940, except in those counties where counting officials were appointed and the election conducted in the manner provided by Sections 4785-25b, 4785-25c and 4785-25d, of the General Code of Ohio.

4. The word "annual" as applied to the stated salary or compensation fixed by Section 4785-18, General Code, for members of county boards of elections, and by Section 4785-19, General Code, for clerks of county boards of elections, means not the calendar years but the years of the particular officer's term of office according to the time of the year when the term commences.

5. The years of the term of a member of a county board of elections for which annual compensation is provided by Section 4785-18, General Code, extends from March 1st of each calendar year to and including the last day of February of the following calendar year.

6. An "annual" salary based on population as shown by a federal census must be computed on the year as a whole which year may not be split up into periods by fluctuations of population as so ascertained which may occur during the year.

7. The annual salary of all members of a county board of elections for the years of their respective terms extending from March 1, 1940 to February 28, 1941, should be computed on the basis of the 1930 census.

8. The annual salaries for members of a county board of elections and the clerks of such boards, now in office should be computed for the annual period beginning in March, 1941, and for each succeeding annual

*period during their respective terms of office, on the basis of the 1940 census, regardless of when they may have been appointed or when their terms of office may have begun.*

Columbus Ohio, August 6, 1941

Hon. A. C. L. Barthelmeh, Prosecuting Attorney,  
Canton, Ohio.

Dear Sir:

This is to acknowledge receipt of your request for my opinion, which reads as follows:

“We respectfully request your very early opinion upon the following matter. It concerns the salaries due the members of the Board of Elections for Stark County during the year 1940.

The taking of the census in Stark County was fully completed in the month of August in said year, and the reports were published in the newspapers and were given general publicity. The judges and clerks of the election held in November, 1940, were not appointed until more than a month following the completion of the taking of the census above referred to. But of course, the judges and clerks of the primary election held in said year in the month of May were appointed and performed their services prior to the completion of the taking of said census.

Sometime in the month of November, the Board of Elections, acting under the rule as set forth in Attorney General's Opinion No. 1137 for the year 1929, estimated the increase in compensation for said board members upon the new census for Stark County as completed in August, 1940, and thereupon vouchers were issued for said increased compensation and the same were presented to the County Auditor and approved, and the increased amounts received by said board members. In other words, the board members of the Board of Elections of Stark County received compensation for the whole of the year 1940, upon the basis of the new census taken and completed in August of the year 1940. Since that time some question has been raised whether or not they were entitled to said increased amount, and since the question has apparently not been fully answered by any opinion of your predecessors in office and since I feel the same is of statewide importance, I therefore submit these facts to you with the query as to whether or not these members of said Board of Elections for Stark County were or were not entitled to said added compensation for the year 1940. The question as to whether or not said board members are entitled to be compensated upon the basis of the 1940 census

during the year 1941 might well now be clarified.

The matter above submitted, I feel, should be answered promptly, so that the money may be received back from these board members if they are not entitled to it, or that the question may be quieted if they are."

The law provides in Section 4785-8, of the General Code of Ohio, that there shall be in each county of the state a board of elections consisting of four qualified electors of the county. They are to be appointed by the Secretary of State, who is by law constituted the chief election officer of the state, as his representatives. Appointments to this board are to be made on the first day of March, of even numbered years, for terms of four years, and until their successors are appointed and qualified. The compensation for members of county boards of elections is fixed by Section 4785-18, General Code, which reads in part as follows:

"The annual compensation of members and clerks of the boards of elections shall be determined on the basis of the population of the county according to the next preceding federal census, and shall be paid monthly out of the appropriations made to the board of elections and upon vouchers or payrolls certified by the chairman, or a member of the board designated by it, and countersigned by the clerk, or in his absence by the deputy clerk."

For each election precinct there is to be appointed by the county board of elections, on or before the 15th day of September before each November election, six precinct election officials, four as judges and two as clerks. Their terms shall be for one year, unless sooner removed by the board of elections in the manner provided by law, Section 4785-25, General Code. The compensation of such judges and clerks is provided for by Section 4785-28, General Code, wherein it is provided that they shall receive for their services "when actually serving", not more than "eight dollars for each general, primary and special election in counties of less than two hundred and fifty thousand population according to the next preceding federal census", and not more than ten dollars for each general, primary and special election in counties of more than two hundred and fifty thousand population. Obviously, therefore, the population as ascertained by the federal census next preceding the time when the services of precinct election officials were rendered is to be used as a criterion in determining whether or not such official shall receive eight dollars or ten dollars for such services. It therefore be-

comes necessary to determine when the Sixteenth Federal Decennial Census (1940) became effective.

In an opinion rendered by me on July 11th of this year (Opinions, Attorney General, 1941, No. 3982) I held:

“The date of the legal ascertainment of the result of the sixteenth federal decennial census (1940), so far as the population of counties in Ohio is concerned upon the basis of which salaries of county officials are determined, was April 1, 1940.”

It therefore follows that the precinct election officials who served at any general primary or special election held subsequent to April 1, 1940, should be compensated on the basis of the population of the county as ascertained by the 1940 census.

Of course, if the election is conducted in the manner provided by Sections 4785-25a, 4785-25b, 4785-25c and 4785-25d, General Code, the provisions of those sections govern as to the compensation to be paid judges and clerks of elections, and the amount paid is not dependent upon the population of the county where the service is rendered.

A different question is presented with respect to the compensation payable to members and clerks of county boards of elections. It will be observed, upon consideration of the terms of Section 4785-8, General Code, that members of county boards of elections are appointed for terms of four years, beginning on the first day of March of even numbered years. Under Section 4785-10, General Code, the term of a clerk of a county board of elections is two years, beginning not later than five days after the first day of March of each even numbered year, and the same is true of deputy clerks in counties where deputies are appointed. By the terms of Section 4785-18, General Code, it is provided that the *annual* compensation of such members and clerks to be paid monthly, shall be determined on the basis of population of the county “according to the next preceding federal census.” Manifestly, the clause “according to the next preceding federal census”, although not limited or qualified in any respect in the text, means the federal census “next preceding” and in effect or legal existence at the time of the determination of the annual compensation provided for these officers, and it is equally manifest that an annual compensation to be paid monthly should be determined for the entire period the annual compensation covers, and should be made prior to or at the time the period to be covered by the

annual compensation begins. It would clearly follow that no change in that annual compensation should or could consistently be made during the period the compensation covers, else the proportionate monthly payments thereof could not be determined at the beginning of the period so that the monthly portions would be uniform throughout the period.

I am convinced therefore, that the compensation fixed at the beginning of the time covered by an annual compensation period for members and clerks of boards of elections must continue under the applicable law now existent for the whole of that annual period. Manifestly, if the time covered by an annual compensation period for the officials began prior to the legal effectiveness of the 1940 census, their compensation for that entire period is governed by the 1930 census.

In the case of *Overstreet, Sheriff v. Boyle County Fiscal Court*, 95 S.W. (2d), 584, 588, 264 Ky. 761, it is held that a public officer's "annual salary" based on population as shown by an election, must be calculated for the year as a whole, and the year cannot be split up into periods by enumerations revealing fluctuations in population which occurred during the year. See also *Corpus Juris*, Vol. 46, page 1019, Sec. 250.

It becomes necessary to determine what period the annual compensation for these officers covers. The word "annual" imports a period of a year. The word itself is derived from the Latin, "annus", meaning "year". It is defined by lexicographers as meaning, "reckoned by the term of a year", or, "covering a period of a year", "pertaining to a year", or "recurring every year." Courts have variously defined it as, "every twelve months; yearly." (*State v. McCullough*, 3 Nev. 202, 224; *Gluckman v. Board of Education of the City of New York*, 164 N.Y.S. 351, 358). In particular connections the term has been used in the sense of "regular; in usual course", signifying that which recurs periodically or once a year, without reference to the specific date of the year. (*Roberson v. Standard Life Insurance Company*, 244 S.W. 845 (Tex.) or the calendar year.

Upon examination of a great many authorities, where the meaning of the word in various settings has been the subject of judicial decision, I have found none that holds that the word "annual" imports a period necessarily conforming to a calendar year unless the context or subject

matter in its relation to other statutes or the history of the legislation where it is found necessarily requires such a meaning to be imported to it, although all authorities are agreed that it refers to a period covered by twelve calendar months or to some event recurring periodically every twelve months. The authorities where the term "annual salary" or "annual compensation" has been the subject of judicial consideration are not numerous. The field, however, is not entirely barren. In the case of *State ex rel. Harvey v. Linville, et al.*, 300 S.W., 1066, 318 Mo. 698 decided by the Supreme Court of Missouri in 1927, it is held as stated in the syllabus:

" 'Annual salary' of officers provided for expressly by Revised Statutes, 1909, Section 10938 and intended to be provided for by Revised Statutes 1919, Section 11352 fixing salary of county superintendent of schools according to population as shown by elections does not refer to salary by calendar years but by the years of incumbent's term according to time of year when the term commences, and salary must be calculated for the year as a whole."

See also *Sims v. Clinton County (Mo.)* 8 S.W. (2d), 69.

To pursue the question further, let us consider the situation at the time the law relating to county boards of elections was first enacted in 1929 (113 O.L. 307). As then enacted, Section 4785-8, General Code, provided that appointments to county boards of elections should be made for four years, beginning on the first day of May of even numbered years and that the then existing boards of deputy supervisors of elections should act until the new boards were appointed and qualified. Section 4785-10, General Code, then provided for appointments of clerks biennially for terms of two years, beginning not later than five days after the organization of the county boards of elections, the same as is now provided for the appointment and terms of such officers. An "annual compensation" was provided for these officers at that time by Section 4785-18, General Code. Clearly, the Legislature used the word "annual," knowing the meaning of the word and with full knowledge that the years of these officials' terms did not correspond to a calendar year, yet the compensation provided for was an "annual" compensation, and obviously, the Legislature did not mean that the annual compensation should be a compensation for a year corresponding with the calendar year.

The matter will be more clear, perhaps, if we consider it in the light of what would be meant if a contract were entered into between two persons for the rendering of a service to begin August first in any year, and continue for two years, at an "annual salary" of a stated amount per year. Clearly, if, during the course of the two year period from August first mentioned, the contract should be broken by one of the other of the parties under circumstances entitling the other to damages the time covered by the "annual salary" specified would not be a salary from January first to December 31st, but from August first to July 31st. This very question arose in the case of *Tait Mfg. Co. v. Tinsman*, 138 Ill, App. 76, and it was so held. I conclude, therefore, that the word "annual" as applied to compensation of members and clerks of county boards of elections under Section 4785-18, General Code, means not calendar years but the years of these officers' terms which begin on March 1st of each year in the case of members of the county board of elections, and not later than five days thereafter, in the case of clerks of county boards of elections.

I am aware that in several opinions of a former Attorney General rendered in 1929 and 1930, the compensation provided by law for members of county boards of elections is loosely referred to as compensation "for the year 1930" or "for the year 1931." The precise question as to what the word "annual," as used in the statute with reference to such compensation means, and how its use affects the matter, was not raised or considered in these opinions, and I find nothing therein that is contrary to the conclusion I have reached with respect to the matter.

I come now to the question of how the amount of compensation which was payable to members of county boards of elections then in office for the annual period which began March 1, 1940, should have been determined and how the compensation for such officers for succeeding annual periods during their respective terms of office should be determined.

As to the compensation to be paid these officers for the annual period beginning March 1, 1940, no difficulty exists as the Sixteenth Decennial Census (1940) did not become effective until April 1, 1940, and it clearly follows that the annual compensation payable to members of county boards of elections and their clerks, for annual periods which began prior to that time should have been computed on the basis of the 1930 census.



With respect to the compensation of those officers whose terms of office had begun prior to April 1, 1940, for the years of their terms beginning subsequent to that time, consideration should be given to the provisions of Section 20, of Article II, of the Constitution of Ohio, which reads as follows:

“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.”

A proper construction of the terms of the above quoted constitutional provision does not, in my opinion, import the prohibition of the change in salary during the term of an officer brought about by reason of any action or circumstances other than by some action of the General Assembly. It therefore does not, in my opinion, prohibit a change of salary as a result of a change in population when the basis of the salary in question is population. The first part of the section unquestionably refers to legislative duty and the latter part from its association should be considered as a limitation on that power and nothing more.

When, prior to the beginning of the term of office of an officer, the General Assembly in pursuance of its duty enjoined by the above constitutional provision, fixed the compensation of the officer by denominating a standard or measure by means of which the computation of the amount of the compensation to be paid the officer is made, a change in the basis of computation occurs during the term of the officer by reason of circumstances and conditions entirely independent of the General Assembly and without any action whatever on its part, the change in the officer's salary thus automatically brought about is not, in my opinion, included within the prohibition established by the constitutional provision referred to.

A search of the reported decisions of courts in this state reveals that the question of the effect a change of population of a county as ascertained by a federal census during the term of office of a county officer had on his salary has never been definitely decided or considered except in the case of *Bordenkircher v. Lingrel*, Auditor, 29 O.N.P. (N.S.), 559. It appeared in that case that the 1930 census showed that Hardin County had decreased in population to such an extent as to decrease the salaries of the county auditor, probate judge, common pleas judge and clerk of

courts, if their annual salaries for the remaining years of their respective terms were to be computed on the basis of the reduced population. Suit was instituted to enjoin the payment of the salaries of these officers for the remaining years of their terms on the basis of the 1920 census which was in effect at the time of their election. The court held that any such change of salaries was forbidden by Section 20 of Article II of the Constitution of Ohio. Little consideration seems to have been given to Section 14 of Article IV of the Constitution, although it was mentioned.

The Bordenkircher case was decided in 1932. No Ohio authority was cited by the court for the reason that none existed, nor was any consideration given to authorities outside the state.

In 1931, the then Attorney General, in two opinions found in the reported Opinions of the Attorney General for that year, at pages 68 and 71, held that any change in salaries of county officials whose terms extended into a succeeding decennial census period was forbidden, regardless of a change in population, by reason of Section 20, of Article II of the Constitution of Ohio. No authority was cited either from Ohio or elsewhere, and no effect given to the fact that the language in the constitutional provision is not such as to warrant an implication that the change of compensation during the term of an office is any other change than one brought about by legislative action.

In other states having similar constitutional provisions the courts are not entirely in accord as to the applicability of the prohibition of changes in salaries during terms, where the change is brought about by reason of a change of population. The later cases, however, which are supported by what seems to be the substantial weight of authority hold that such a change is not contemplated by the prohibition contained in constitutional provisions similar to Section 20, of Article II, of the Constitution of Ohio.

In a well considered case, decided by the Supreme Court of Indiana in 1938, Board of Commissioners vs. Crowe, 15 N.E., 2d, 1016, it was held:

“Where statute fixed salary of clerk of circuit court according to population of county, the increase of clerk’s salary, upon filing of census showing county’s population to have increased

so as to entitle clerk to greater salary, was not an 'increase of salary during term of office' within constitutional prohibition thereagainst, since the salary was fixed by statute before clerk was elected to office, to be determined by population."

The constitutional provision (Article XV, Section 2, of the Constitution of Indiana) upon which the above decision is predicated, reads as follows:

"When the duration of any office is not provided for by this constitution it may be declared by law and if so declared such office shall be held during the pleasure of the authority making the appointment. But the General Assembly shall not create any office, the tenure of which shall be longer than four years, nor shall the term of office or salary of any officer fixed by this Constitution or by law be increased during the term for which the officer was elected or appointed."

The court, in deciding the above case, cited and quoted from a companion case in Indiana, and from several cases in other states:

Crowe v. Board of Commissioners,  
210 Ind. 404, 3 N.E., 2nd, 76, 78;

State, ex rel. Harvey v. Linville,  
318 Mo. 698, 300 S.W. 1066;

Board of Commissioners v. Williams,  
38 Okla. 738, 135 P. 420;

Puterbaugh v. Wodham, et al. (1912)  
162 Cal. 611, 123 P. 804;

Yuma Co. v. Sturges,  
15 Ariz. 538, 140 P. 504;

Board of Commissioners v. Mathews,  
147 Okla. 296, 296 P. 481.

Based on what heretofore has been said, I am of the opinion:

1. The date of the legal ascertainment of population of counties according to a federal census, upon which classification of counties for purposes of fixing salaries of certain public officers is predicated, was April 1, 1940, for the Sixteenth Federal Census of 1940.

2. Precinct judges and clerks of elections who served as such at the primary election in May, 1940, should have been compensated for such services as provided by Section 4785-28, General Code, on the basis of

whether or not the county wherein the service was rendered had a population of 250,000 according to the 1940 census, except in those counties where precinct officials were appointed and the election conducted in the manner provided by Sections 4785-25b, 4785-25c, and 4785-25d, General Code.

3. Precinct judges and clerks of elections who served as such at the regular election on November 5, 1940, should have been compensated for such services in accordance with the provisions of Section 4785-28, General Code, on the basis of whether or not the county wherein the service was rendered had a population according to the federal census of 1940, except in those counties where counting officials were appointed and the election conducted in the manner provided by Sections 4785-25b, 4785-25c and 4785-25d, of the General Code of Ohio.

4. The word "annual" as applied to the stated salary or compensation fixed by Section 4785-18, General Code, for members of county boards of elections, and by Section 4785-19, General Code, for clerks of county boards of elections, means not the calendar years but the years of the particular officer's term of office according to the time of the year when the term commences.

5. The years of the term of a member of a county board of elections for which annual compensation is provided by Section 4785-18, General Code, extends from March 1st of each calendar year to and including the last day of February of the following calendar year.

6. An "annual" salary based on population as shown by a federal census must be computed on the year as a whole which year may not be split up into periods by fluctuations of population as so ascertained which may occur during the year.

7. The annual salary of all members of a county board of elections for the years of their respective terms extending from March 1, 1940 to February 28, 1941, should be computed on the basis of the 1930 census.

8. The annual salaries for members of a county board of elections and the clerks of such boards, now in office should be computed for the

annual period beginning in March, 1941, and for each succeeding annual period during their respective terms of office; on the basis of the 1940 census, regardless of when they may have been appointed or when their terms of office may have begun.

Respectfully,

THOMAS J. HERBERT,

Attorney General.