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BASIS FOR *PER CAPITA* SALARY OF A PROBATE OR COMMON PLEAS JUDGE AFTER APRIL 1, 1960. §141.05 R.C. OAG No. 1644-1960.

SYLLABUS:

The *per capita* salary of a probate or common pleas judge under Section 141.05, Revised Code, should on and after April 1, 1960, be based on the population of the county as shown by the federal census taken as of that date, and may be increased as a result of such census; provided, because of the restrictive language of Section 14 of Article IV and Section 20 of Article II, Ohio Constitution, the compensation of judges who began their terms of office prior to October 11, 1955, is governed by the provisions of Section 141.05, *supra*, as existing when such judges took office and, under such provisions, the maximum annual compensation for any judge under the section may not exceed \$9,000. (Opinion No. 1644, Opinions of the Attorney General for 1960, issued on August 18, 1960, explained.)

Columbus, Ohio, October 28, 1960

Hon. Thomas A. Beil, Prosecuting Attorney  
Mahoning County, Youngstown, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Re: Judges’ Salaries—Based on 1960 Census.

This office has had presented to it, by one of the Common Pleas Judges of this County, a request for an opinion on the above subject matter. A copy of such request is enclosed.

“The question seems to be this:—

“‘With particular reference to Ohio Attorney General’s Opinion No. 1644, dated August 18, 1960, is an increase permitted to the salary of judges based on the additional per capita compensation set out in R. C. 141.05 *as amended*, and following the census figures published on April 1, 1960. The period affected by such increase would be April 1, 1960 through December 31, 1960.’”

My Opinion No. 1644, Opinions of the Attorney General for 1960, issued on August 18, 1960, referred to in your letter, states in the second paragraph of the syllabus as follows:

“The *per capita* salary of a probate or common pleas judge under Section 141.05, Revised Code, should on and after April 1, 1960, be based on the population of the county as shown by the federal census taken as of that date.”

The judge here concerned took office in January, 1955, having been elected to office in 1954. As of January, 1955, Section 141.05, Revised Code, provided as follows:

“In addition to the salary allowed by section 141.04 of the Revised Code, each judge of the court of common pleas *and each judge of the probate court* shall receive an annual compensation equal to twelve cents per capita for the first twenty-five thousand of the population of the county in which he resided when elected or appointed, as ascertained by the latest federal census of the United States, and six cents per capita for the population of such county in excess of twenty-five thousand. Such additional annual compensation shall not be more than nine thousand dollars, payable monthly from the treasury of such county upon the warrant of the county auditor.”

Section 141.05, *supra*, was amended in 1955, effective October 11, 1955, to allow 12 cents *per capita* for the first 35,000 population, six cents *per capita* for population in excess of 35,000, and to change the maximum annual compensation from \$9,000 to \$10,000. (126 Ohio Laws, 195.)

In 1959, the section was again amended (128 Ohio Laws, 772) to provide that the annual compensation shall be not less than two thousand dollars nor more than ten thousand dollars.

A judge who took office in January, 1955, was "in his term" as of October 11, 1955, when the *per capita* change and increase in maximum compensation under Section 141.05, *supra*, took effect. Because of Section 14 of Article IV, Ohio Constitution, however, such change and increase could not act to increase the compensation of a judge of the court of common pleas serving in office at that time. Said Section 14 reads in part as follows:

"The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; \* \* \*."

Coming to the question at hand, I am unable to see how the conclusion reached in Opinion No. 1644, *supra*, could be construed to allow a judge who was serving his term prior to October 11, 1955, to receive an increase in salary under the change in law effective on that date. Said Opinion No. 1644 was concerned strictly with the determination of population under Section 141.05, *supra*. The rule relied on, and quoted in the opinion, was stated in Opinion No. 5199, Opinions of the Attorney General for 1955, page 231 at page 235, as follows:

"In view of these pronouncements it seems quite clear that the provisions of Section 20, Article II of the Ohio Constitution are likewise limitations on the action of the legislature and upon the legislature only. Moreover, it is quite clear that the Supreme Court has given sanction to an increase in compensation during an existing term provided such increase results from the operation of a 'standard or basis of compensation whereby compensation may vary in amount during term' provided such 'standard or basis of computation' is established by a law enacted prior to the beginning of such term."

Under Section 141.05, *supra*, as existing immediately prior to October 11, 1955, the maximum annual amount allowed a judge serving his

term at that time was \$9,000. To allow an increase to \$10,000 as of October 11, 1955, or as any time during such judge's term would constitute an increase during term within the purview of Section 14 of Article IV, Ohio Constitution, and would, therefore, be barred. Although an increase in population under the 1960 federal census might have occurred in the county concerned, this could not act to increase the compensation of a judge in excess of the maximum amount allowed under the law in existence at the time he took office. While in the instant case the maximum amount was increased, the authorization for the increase was enacted "during the term" of the judge and within the purview of the constitutional restriction. Had there been no specific maximum of \$9,000, an increase in excess of this amount and resulting from increased population as shown by the census would not have been barred by the constitution, as such increase would have resulted from a law enacted *prior* to the time that the judge took office. In order to allow an increase in excess of \$9,000 in the present case, it would be necessary to rely on the \$10,000 maximum later enacted; but, because of the constitutional provision, this cannot be done.

While Section 14 of Article IV, Ohio Constitution, applies only to judges of the Supreme Court and judges of courts of common pleas, Section 20 of Article II, Ohio Constitution, containing similar language, would apply in the same way to the compensation of a probate court judge. (*State, ex rel. Metcalfe v. Donahey*, 101 Ohio St., 490.)

Said Section 20 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."

In the instant case, it appears that all of the judges concerned were serving in their existing terms prior to October 11, 1955. Thus, their compensation should be governed by the \$9,000 maximum even though the *per capita* amount as determined under the new census would amount to more than \$9,000.

Answering your specific question, therefore, it is my opinion and you are advised that the *per capita* salary of a probate or common pleas judge under Section 141.05, Revised Code, should on and after April 1, 1960, be based on the population of the county as shown by the federal census

taken as of that date, and may be increased as a result of such census; provided, because of the restrictive language of Section 14 of Article IV and Section 20 of Article II, Ohio Constitution, the compensation of judges who began their terms of office prior to October 11, 1955, is governed by the provisions of Section 141.05, *supra*, as existing when such judges took office and, under such provisions, the maximum annual compensation for any judge under the section may not exceed \$9,000. (Opinion No. 1644, Opinions of the Attorney General for 1960, issued on August 18, 1960, explained.)

Respectfully,

MARK McELROY

Attorney General