

1439

COMPENSATION OF POLICE JUDGE—PART PAID BY COUNTY MAY BE RAISED OR LOWERED BY COMMISSIONERS DURING TERM OF AN INCUMBENT.

*SYLLABUS:*

*The part of a police judge's compensation paid by a county may be raised or lowered by the commissioners during the term of an incumbent, and such action is not limited by Section 4213, General Code.*

COLUMBUS, OHIO, May 8, 1924.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

Gentlemen:—

This will acknowledge receipt of your letter of March 12, 1924, as follows:

"You are respectfully requested to furnish this department your written opinion upon the following question:

"Section 4568 of the General Code provides that 'the judge of a police court shall receive such annual compensation, not to exceed two thousand dollars, as the council prescribes, payable quarterly, from the city treasury, and such further compensation, payable quarterly from the county treasury as the commissioners of the county may designate by resolution duly entered on the journal.'

"Section 4567 G. C., as amended, 109 O. L., p. 174, fixes the term of the police judge at four years.

"Question: When the commissioners of a county have once fixed the compensation to be paid to the police judge out of the county treasury, may such county commissioners during the four year term of the judge, legally increase such compensation to be paid by the county?"

Section 4568, General Code, reads as follows:

"The judge of the police court shall receive such annual compensation, not to exceed two thousand dollars, as the council prescribes, payable quarterly, from the city treasury, and such further compensation, payable quarterly from the county treasury, as the commissioners of the county may designate by resolution duly entered on the journal."

Section 45775, General Code, reads:

"The police court shall have jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for, any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city, or within four miles thereof. The jurisdiction of such court to make inquiry in criminal cases shall be the same as that of a justice of the peace. Cases in which the accused is entitled to a jury trial, shall be so tried, unless a jury be waived."

Article II, Section 20, Ohio Constitution, reads:

"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."

Section 4213, General Code, is as follows:

"The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed,

and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury."

Section 4219, General Code, is as follows:

"Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year."

A police judge is a city official elected for a term of four years and given final jurisdiction in cases arising under ordinances within the city limits, and in misdemeanors, under state laws, within the city limits and within four miles thereof. He also has the same jurisdiction in investigation of other state cases that a justice of the peace has.

There is no question but that the part of his salary payable by the city could not be raised or lowered during his term of office. The statute, by use of the word "annual", makes it quite definite that this part of his compensation is "salary" within the meaning of Section 4213, General Code; but as to whether the compensation to be paid him by the county is a fixed salary within the meaning of such section, is not so clear.

The statute, after fixing the annual compensation to be paid by the city, goes on to say, "and such *further compensation*, payable quarterly from the county treasury, as the commissioners of the county may designate by resolution duly entered on the journal."

The part paid by the county is not defined by the statute as an annual salary, as the city's part is, but is merely designated as "further compensation." Some courts have considered salary and compensation as synonymous terms, but compensation is generally considered to have a broader import.

Section 4568 does not seem to limit the commissioners in the fixing of the compensation of police judges, but only fixes the time of payment of such compensation as they may allow. This might be fixed at so much a day, a week, a month, a year, or at so much a case—in the discretion of the commissioners.

Sections 4312 and 4219, General Code, do not apply, as these sections only govern action of councils.

Section 20 of Article II of the Ohio Constitution does not apply, as the legislature has not fixed a salary for this office.

Thomas, Jr. vs. Commissioners, 88 O. S. 489, and 13 N. P. (n. s.) 33.  
Mechem's Public Offices and Officers, Sec. 859:

"When Officer may recover compensation of two Offices.—An officer who holds two or more separate and distinct offices, not incompatible with each other, to each of which compensation is attached, may recover the compensation provided by law for each office. He cannot, however, recover a *per diem* from each of two or more sources for the same day's service."

Farwell vs. Rockland, 62 Me. 296, (syllabus) reads:

"The authority which establishes the compensation may increase or diminish it, unless there be constitutional prohibition to the contrary."

See also:

- 77 N. C. 283;
- 10 How. (U. S.) 402 and 416;
- 2 Sandford (N. Y.) 355-369;
- 5 N. Y. 285;
- 46 Mich. 22 and 478;
- 100 U. S. 559;
- 2 Denio (N. Y.) 272;
- 43 Amer. Dec. 740;
- 7 Amer. Rep. 87.
- 76 Pennsylvania St. 154:

"There can be no express or implied contract for the permanence of a salary of a public officer, unless as specifically provided in the Constitution."  
18 Minn., 199:

"Public offices in this state are mere agencies of the government, created for the benefit of the public, not for the benefit of the incumbent. Unless it is expressly forbidden by the constitution, their emoluments, when they are, as in this instance, prescribed by law, may be altered, increased, reduced, and regulated by law."

67 Ill., 333:

"It is a general rule, that where an office is created by statute, it is wholly within the control of the legislature creating it. The length of term and mode of appointment may be altered at pleasure, and the office may be abolished and the compensation taken away from the incumbent, unless forbidden by the constitution."

50 Wis., 178:

"An act of the legislature creating a county court of limited civil and criminal jurisdiction, and fixing the salary of the judge, payable out of the county treasury, may be amended so as to change the salary of the judge of such court during the term for which he has been elected; and the constitutional provision which forbids the 'compensation of any public officer' to be 'increased or diminished during his term of office' (Const., art. IV, sec. 26), is inapplicable to such a case."

Abbott on Mun. Corp., 1647;

Mechem's Public Offices and Officers, Sec. 857.

It is not a contractual relation. The commissioners are not authorized to contract or bargain, but are given a duty to perform which the courts have held mandamus lies to compel.

2 Wyo. 126;

7 Ind. 157;

12 Bush. (Ky.) 438;

2 S. C. 81.

This case differs from the Lueders vs. Beaman case, 106 Ohio St. 650, as the compensation of probate judges is fixed by law.

In this case, neither the legislature nor the constitution has fixed the part of the police judge's compensation paid by the county.

In the case of Clark vs. Cook, Auditor, 103 Ohio St. 465, the county board of

education, by authority of Section 4744, General Code, fixed the term of its county superintendent at three years, and *fixed* his *salary* under Section 4744-1, which says:

"The *salary* of the county superintendent shall be *fixed* by the county board of education and be not less than twelve hundred dollars *per year*."

This was clearly the fixing of a *yearly* salary and vastly different from the *compensation* county commissioners may allow a police judge, there being no limitations on the commissioners, either by the constitution or by statute; but the matter has been left entirely in their hands and is in no sense a fixed salary.

This is not part of the work required of a police judge as a city official, but is an additional service performed for the state, because he has jurisdiction in state cases. It is an extra service. Other minor courts have like jurisdiction, but for such services are allowed fees and so police judges are compensated for such extra service by the county commissioners, and in such manner and amount as they see fit.

On page 494 of 88 Ohio St., we read the following, concerning solicitors:

"In the recent codification of the statutes, the sections under investigation here are included in Section 4306 and 4307, General Code. In Section 4306 it is provided that the solicitor may designate an assistant to perform such services, and in Section 4307 it is provided that the person thus appointed shall be subject to approval of council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, *and the county commissioners may allow such further compensation as they deem proper.*"

Opinions of the Attorney General for 1912, Volume II, p. 1546:

"If the purpose has been set forth in the annual budget, and the appropriation is within the amount fixed by the budget commissioners as provided by Section 5649-3d, General Code, and the council has not fixed the allowance for compensation of a city solicitor for services performed as prosecutor in the police or mayor's court, it may fix such allowance during the incumbency of such offices.

"The duties of the prosecutor are not so germane or incidental to those of city solicitor as to make a fixing of compensation for one of the offices a change or increase in the compensation of the other."

Opinions of the Attorney General for 1913, Vol. II, p. 1455:

"Under section 4306, as amended, county commissioners may allow a city solicitor or assistant, or assistants designated by the solicitor, to act as prosecuting attorney, or attorney of the police or mayor's court, such compensation as they may deem advisable."

"While it is true that there is a seeming difference in the language between 'may' and 'shall' yet I am of the opinion that it is optional with the county commissioners as to whether or not they allow any additional compensation to a city solicitor for the prosecution of state cases in the mayor's court. Or, in other words, that the words 'shall allow' are simply directory in their application or construction.

"Third. One of the meanings of compensation, as given by the dictionary is:

'To recompense or compensate for work or labor done.'

"As you state that as city solicitor you have prosecuted a number of state cases in the mayor's court in the last year, and as the law permits the county commissioners to allow additional compensation for such services, I am of the opinion you are entitled to receive compensation from the county commissioners for said cases should they see fit to allow you therefor. As I view it, the compensation provided for in Section 4307, General Code, may be either fixed at a lump sum in advance, or as I view it, the more proper way by fixing the compensation after the services are performed."

The above opinion, covering Section 4307, would be applicable to Section 4568, as the wording of both concerning the allowance of compensation by the county commissioners is practically the same.

I am not unmindful of the general rule as to construction of statutes under which public moneys are spent, but I am of the opinion that if the legislature intended the commissioners should fix an annual compensation, or a term compensation, they would have said so and not left the matter entirely at the discretion of the commissioners. In *State, ex rel., vs. Wall*, 17 Ohio Nisi Prius (N. S.) 33, the court held that the legislature had a right to so leave the fixing of compensation to local authorities, for the reason that such "local authorities are better able to determine as to what that amount should be."

It is plain that the part of a police judge's compensation paid by the county was in addition to the police judge's salary as fixed by the council of the city of which he is an officer, and is not part of his salary governed by Section 4213, General Code, and the commissioners may raise or lower such compensation during the four year term of the incumbent.

Respectfully,  
C. C. CRABBE,  
*Attorney General.*

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1440.

APPROVAL, BONDS OF CENTER TOWNSHIP, MONROE COUNTY,  
\$9,047.18, TO IMPROVE FAIR GROUND ROAD.

COLUMBUS, OHIO, May 8, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*

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1441.

APPROVAL, BONDS OF JEFFERSON COUNTY, \$38,000.00, TO IMPROVE  
RAYLAND-MT.PLEASANT, SECTION "B" ROAD.

COLUMBUS, OHIO, May 8, 1924.

*Department of Industrial Relations, Industrial Commission of Ohio, Columbus, Ohio.*