

1302.

CLERK OF MUNICIPAL COURT OF AKRON—MAY RESIGN AND BE APPOINTED TO SAME POSITION AT INCREASED COMPENSATION—OLD OFFICE ABOLISHED BY AMENDMENT OF 88TH GENERAL ASSEMBLY.

SYLLABUS:

When Section 1579-535, General Code, as amended by the 88th General Assembly, 113 Ohio Laws, 657, became effective, the office of Clerk of the Municipal Court of Akron, provided for by the original section, became abolished, and there is no legal objection to the clerk who held such original office from being appointed as Clerk of said Municipal Court under the new act.

COLUMBUS, OHIO, December 16, 1929.

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

GENTLEMEN:—Acknowledgment is made of your communication which reads:

“Section 1579-535 G. C., before amended, provided that the salary of the Clerk of the Municipal Court of Akron, Ohio, should be \$2,500 per year, and that such clerk should be elected for a term of four years. The present clerk was elected in November, 1927, for a term of four years, beginning on January 1, 1928. Section 1579-535 as amended, 113 O. L., 657, provides that the clerk of the Municipal Court shall receive a salary of \$3,600 per year, and that he shall be appointed by the judges of the court.

On or about October 1, the Clerk of the Municipal Court of Akron, resigned and was immediately thereafter appointed as clerk by the judges of such court to hold his office during the pleasure of the appointing power as provided in Section 1579-542 G. C., as amended 113 O. L., p. 657. The syllabus of Opinion No. 1381, to be found at page 1764, Opinions of the Attorney General for 1914, reads:

‘It is not legal for a person to resign an office, have council increase salary and thereafter be duly appointed to fill his own vacancy and receive increase.’

Question: Is the party who resigned as the elected clerk and was immediately thereafter appointed clerk, entitled to the increased compensation provided for in amended Section 1579-535 G. C., during the years 1929, 1930 and 1931?”

As suggested in your communication, Section 1579-535, General Code, expressly provided that the clerk of the Municipal Court of the City of Akron should be nominated and elected for a term of four years, in the manner provided for the nomination of municipal officers in the City of Akron. The act further provided that the first election should be held at the regular municipal election in 1919. The salary therein provided for was twenty-five hundred dollars per annum, payable in monthly installments. Five hundred dollars of such amount was to be paid out of the treasury of Summit County and fifteen hundred dollars out of the municipal treasury. Said section, as amended by the 88th General Assembly, now provides:

“The judges shall appoint a clerk of the municipal court who shall receive a salary of three thousand six hundred dollars per year, payable in monthly installments, nine hundred dollars of which shall be paid out of the

treasury of Summit County, and two thousand seven hundred dollars of which shall be paid out of the treasury of the city of Akron. The said clerk, with the consent of the judges, shall appoint a chief deputy clerk, a cashier for the civil branch, and a cashier for the criminal branch of the court, all of whom shall be electors of the city of Akron, and receive as compensation two thousand seven hundred dollars per year, payable in monthly installments out of the treasury of the city of Akron, and with the consent of the judges, such other deputy clerks as may be necessary who shall be such electors and who shall receive as compensation two thousand four hundred dollars per year, payable in monthly installments out of the treasury of the city of Akron. The said clerk, with the consent of the judges, shall appoint such stenographers as he may need, at such salary as shall be commensurate with the work done by such stenographers, and fixed by the judges. Such chief deputy clerk, cashiers, deputy clerks, and stenographers shall have such powers and perform such duties as are herein imposed upon the clerk, except the power of appointment."

It will be observed that there were many changes made in said section. Instead of the clerk being an elective official, he is now appointed. In lieu of a regular four year term, such officer holds his position apparently at the will of the appointing authority. There are other changes that need not be considered for the purpose of your inquiry. The opinion to which you refer, considered the provisions of section 4213 of the General Code in connection with the salary of "an officer of a municipality," which section provides:

"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."

From the facts considered in said case, it appeared that a municipal officer had simply resigned his position and thereafter the salary was increased and he was appointed to the same position. However, the conclusion therein reached was because of the express provisions of Section 4213, above quoted, which relates to municipal officers, and it is believed that said section is not applicable to the Clerk of a Municipal Court, for the reason that such official in the technical sense is not to be regarded as a municipal officer. The Constitution of the State of Ohio authorizes the legislature to provide for such judicial officers as are not expressly provided for in the Constitution. It follows, therefore, that the Legislature creates such offices and fixes the compensation. Therefore, Section 4213 would not have application. However, Section 20 of Article II of the Constitution of Ohio, which should be noted in this connection, provides:

"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."

If the Clerk of a Municipal Court is an officer within the meaning of the constitutional provision above mentioned, it follows that no change therein could affect the salary during his existing term unless the office would be abolished. It seems clear in the case you present that what has taken place is that the original office has been abolished. There is no longer a four year term at the salary fixed, and in some respects the duties of the newly created clerk have been changed, although it must

be conceded that his duties generally are the same as before. The present clerk has no definite term, but holds his office during the will apparently of the appointing authority. The act amending Section 1579-535, to which you refer, expressly repeals the former section, and when the act became effective there was no Clerk of the Municipal Court of the city of Akron until action had been taken under the new law. The original office was terminated by operation of law, and it is believed that the resignation to which you refer would have no effect upon the situation. Of course, the clerk could resign before the termination of the office, but if the resignation took place after the termination, it could not alter the conditions which were automatically created by operation of law.

Based upon the foregoing and in specific answer to your inquiry, it is my opinion that when Section 1579-535, General Code, as amended by the 88th General Assembly, 113 Ohio Laws, 657, became effective, the office of Clerk of the Municipal Court of Akron, provided for by the original section, became abolished, and that there is no legal objection to the clerk who held such original office from being appointed as Clerk of said Municipal Court under the new act.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1303.

TRANSFER OF FUNDS—ACCUMULATED EXCESS UNDER \$5,000 IN
COUNTY DOG AND KENNEL FUND NOT TRANSFERABLE TO GEN-
ERAL FUND.

SYLLABUS:

Transfers from the dog and kennel fund of a county to the general fund in accordance with the provisions of Section 5625-13, Subdivision "D", General Code, as enacted by the 88th General Assembly, are not authorized.

COLUMBUS, OHIO, December 17, 1929.

HON. BENJAMIN F. PRIMMER, *Prosecuting Attorney, Hamilton, Ohio.*

DEAR SIR:—I am in receipt of a letter signed by your assistant, H. H. Haines, which reads as follows:

"The County Commissioners of Butler County, Ohio, have asked for the opinion from the Prosecuting Attorney of said County whether the said Commissioners can transfer monies from the Dog and Kennel Fund, being a special fund, to the General Fund.

There is money in the Dog and Kennel Fund that is in said fund under the provisions of Section 5653, as amended in Ohio Laws, Volume 112, at page 352, but said amount is not in excess of \$5,000.00; that all the obligations incurred and payable from such special fund have been discharged and further that no obligation against said fund for the year 1929 can be created, and that no activity or service can in any manner create any obligations against said fund for the year 1929.

It is the opinion of the undersigned Assistant Prosecuting Attorney, that if all demands against said special fund have been satisfied for the year