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1. TOWNSHIP CLERK—BOARD OF TOWNSHIP TRUSTEES—BUDGET \$5,000.00 OR OVER—FAILURE TO PAY CLERK DURING HIS TERM—TRUSTEES HAVE POWER TO PAY CLERK COMPENSATION FOR PRIOR YEARS' SERVICE—SECTION 3308 G. C.
2. INCREASE IN COMPENSATION OF TOWNSHIP CLERK—PROHIBITED—BUDGET \$5,000.00 OR OVER—EXISTING TERM—ARTICLE II, SECTION 20, CONSTITUTION OF OHIO, PROHIBITS INCREASE—MAXIMUM COMPENSATION FOR OFFICE PROVIDED BY AMENDMENT TO SECTION 3308 G. C.

SYLLABUS:

1. A board of township trustees of a township having a budget of \$5,000 or over has the power to pay a former township clerk the compensation provided by Section 3308, General Code, for prior years service, having failed to compensate such clerk during his term.

2. Article II, Section 20, of the Ohio Constitution, prohibits an increase in the compensation of a township clerk of a township having a budget of \$5,000 or over, during the existing term of such clerk, through the increase in the maximum compensation for such office provided by the amendment to Section 3308, General Code, effective September 7, 1949.

Columbus, Ohio, June 19, 1952

Hon. Seabury H. Ford, Prosecuting Attorney
Portage County, Ravenna, Ohio

Dear Sir:

I have before me your request for my opinion, reading as follows:

“Please render your opinion on the following state of facts and question:

“The Board of Trustees of Franklin Township, Portage County, Ohio, finds that the duly elected and qualified clerk of that township for the years 1949, 1950 and 1951, retired at the end of his term, December 31, 1951, without standing for re-election, a new clerk having been elected at the regular election in November, 1951, who assumed office January 1, 1952, and who is now the duly elected, qualified and acting clerk of said township.

During said three years, the former clerk, now retired, drew no compensation whatsoever for his services for that period of time. Their budget exceeds \$30,000.00 per year so that, under General Code 3308, he would have been entitled to \$350.00 per year, plus 2% for the years 1950 and 1951.

“Question: Can the township trustees now pay said former clerk, now retired, compensation for said 3 years and, if so, is he entitled to the percentage provided by General Code 3308 from and after September 7, 1949, the date it became effective?”

Your request presents two questions for my consideration: First, can a board of township trustees compensate a township clerk for past services and, second, in what amount if the answer to the first question is in the affirmative. I will consider the questions in this order.

Section 3308, General Code, to which you refer, provides for the fees and compensation of township clerks. It is provided therein:

“The clerk shall be entitled to the following fees, to be paid by the parties requiring the service: twenty-five cents for recording each mark or brand; ten cents for each hundred words of record required in the establishment of township roads, to be opened and repaired by the parties; ten cents for each hundred words of records or copies in matters relating to partition fences, but not less than twenty-five cents for any one copy, to be paid from the township treasury; ten cents for each hundred words of record required in the establishment of township roads, to be opened and kept in repair by the superintendent; for keeping the record of the proceedings of the trustees, stating and making copies of accounts and settlements, attending suits for and against the township, and for any other township business the trustees require him to perform, such reasonable compensation as they allow. *Provided, however, in those townships having a budget less than five thousand dollars, the township trustees shall determine the salary of the clerk which in no event shall exceed three hundred and fifty dollars per year; and in townships having a budget of five thousand dollars or over, the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars in addition to the amount above provided in townships having a budget of less than five thousand dollars, provided, however, no township clerk shall receive for his compensation in excess of twelve hundred dollars in any one calendar year for said services as such township clerk.*” (Emphasis added.)

While the language of this section which I have emphasized above is not entirely free from doubt, I think it must be concluded that the Legislature intended that a clerk in a township having a budget of \$5,000

or over would, in every case, receive \$350.00, plus a percentage of expenditures, by way of compensation. The provision which I find to be far from clear is that which provides that, in addition to a percentage of the township expenditures, the clerk shall receive "the amount above provided in townships having a budget of less than five thousand dollars." Referring back it is found that no amount of compensation is provided for a clerk in a township having a budget of less than \$5,000, but that a maximum of \$350.00 is set, the actual amount of the salary being left up to the determination of the township trustees. I think it is clear, however, that in referring to the amount provided for clerks in townships with budgets of less than \$5,000, the Legislature had reference to the sum of \$350.00 and not to an indefinite amount that the township trustees might provide. The language itself seems to have reference to a fixed sum and the only fixed sum is the \$350.00 maximum set on the salaries of clerks in townships having a budget of less than \$5,000.

Again, it would seem that if, in the second class of townships, the township trustees were to have the power to fix the salary of the clerk, this power would be spelled out. This conclusion was reached by one of my predecessors in office in Opinion No. 6612, Opinions of the Attorney General for 1944, page 17. While this precise question was not under consideration, it was stated, at page 21 of the opinion, that :

"* * * The compensation of the clerk, however, in the second class above mentioned (in those townships in which the budget exceeds \$5,000), is computed on actual expenditures. The statute in effect provides that when, in the course of a calendar year, the expenditures have reached a total of \$5,000.00, then 'the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars' in addition to the salary fixed at three hundred and fifty dollars per annum. * * *"

(Parenthetical matter added.)

I appreciate the fact that in the case you have presented to me the township trustees intend voluntarily to pay this retired clerk the compensation which he may be entitled to and, apparently, will set, if it is their prerogative to do so, the base salary of \$350.000 in any event. Nevertheless, I feel justified in having examined Section 3308, supra, in this particular because I believe the legal consequences of compensating a township clerk for past services may well differ depending on whether compensation is fixed by statute or left to the determination of the township trustees.

It is my opinion, therefore, that under Section 3308, supra, the clerk of a township having a budget in excess of \$5,000 is entitled to receive \$350.00 by way of salary, plus two per cent of the expenditures of the township in excess of \$5,000.

The compensation of a township clerk being fixed by statute, the next question presented is whether the township trustees may pay a clerk this statutory compensation after his retirement, having failed to compensate such clerk during his term. In considering this question, I am assuming that the right to the compensation set by Section 3308, has not been expressly waived.

In Opinion No. 2616, Opinions of the Attorney General for 1950, page 833, my immediate predecessor in office had occasion to consider the question of whether the commissioners of a county could pay a county secret officer compensation for past services. The salary of this secret service officer was fixed by a judge of a court of common pleas in pursuance of Section 2915-1, General Code. It was concluded therein, as disclosed by the syllabus, that:

“1. The salary of a county secret service officer is a liability fixed by law.

“2. County commissioners are authorized to appropriate unexpended balances in the general fund which have accumulated in or reverted to that fund at the end of any prior fiscal year for salaries of county officers or employes whose salaries are fixed by law and have accrued in such prior fiscal year when such unexpended balance remains in the general fund unexpended or unencumbered in subsequent years.

“3. County commissioners have no authority to make appropriations for salaries fixed by law, which accrued in prior years, from other funds than those designated in the next preceding paragraph, as moral obligations.”

In the body of the opinion the following language taken from the opinion of the court in the case of *Jenkins v. The State, ex rel. Jackson County Agricultural Society*, 40 O. App. 312, was quoted:

“* * * At the time the new budget law was passed there were many sections, of which 9894 was but one, creating fixed and inescapable liabilities of the county, such as salaries of county officers, and it is unthinkable that it was the purpose of the Legislature to make any claims of this character subject to the action or nonaction of the county commissioners. * * *”

The court in the Jenkins case held that a county agricultural society was entitled to the benefits fixed by statute and could not be deprived thereof by the failure of the county commissioners to appropriate the necessary funds. After quoting the above language from the Jenkins case the author of the 1950 opinion stated :

“If they are fixed and inescapable liabilities at the time they accrue it seems that their character could not be changed at any subsequent date merely by the passage of time, except in so far as they may be barred by a statute of limitations. The point which I wish to stress is that the conclusions reached herein are necessarily based upon the lack of power vested in the county commissioners and not upon the nature or validity of the claim. Consequently this opinion is limited to the power of the commissioners to make an appropriation therefor upon their own initiative and is not to be construed to bar an appropriation to pay any final judgment which might be recovered thereon in a court of law.”

I am unable to agree with the conclusion that the taxing authority of a subdivision lacks the power to make an appropriation for a fixed liability of this character on their own initiative. It seems to me that the nature and validity of the claim is determinative of the power of the taxing authority in such a case. To hold otherwise would mean that an obligation fixed by statute was subject to the action or non action of the township trustees, the very effect condemned in the case of Jenkins v. The State, ex rel. Jackson County Agricultural Society, supra.

The compensation of a township clerk being a liability fixed by law, I see no legal reason why such compensation, unpaid in prior years, cannot be paid in a current year by a board of township trustees out of funds not otherwise earmarked.

Having determined that a township clerk can recover compensation for past services, it is necessary to consider the amount of his compensation in this particular case.

Section 3308, supra, was amended during the term of office of the clerk with whom we are concerned. Prior to this amendment it was provided in part therein :

“* * * Provided, however, in those townships having a budget less than five thousand dollars, the township trustees shall determine the salary of the clerk which in no event shall exceed three hundred and fifty dollars per year ; and in townships having

a budget of five thousand dollars or over, the clerk shall receive two per cent of the total expenditures of such township in excess of five thousand dollars in addition to the amount above provided in townships having a budget of less than five thousand dollars, *provided, however, no township clerk shall receive for his compensation in excess of six hundred dollars in any one calendar year for said services as such township clerk.*"

(Emphasis added.)

In all other particulars Section 3308 read then as now. It will be seen that the amendment of September 7, 1949 had the effect of increasing the maximum amount of compensation a township clerk might receive from \$600.00 per year to \$1,200 per year. It is necessary, therefore, to consider whether this amendment affected the clerk with whom we are concerned or whether his compensation remained, until the end of his term, to be subject to the \$600.00 maximum. Article II, Section 20 of the Constitution of Ohio 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."

It has been held that the indicia of an office, within the meaning of this section, are durability of tenure, oath, emoluments and the independency of the functions exercised. See, *State, ex rel. v. Commissioners*, 95 Ohio St., 157, 115 N. E. 919. A township clerk is elected for a term of four years, he must post a bond before entering on the discharge of his duties, he is entitled to fees and compensation for his services and his duties are of a governmental nature. I think it is clear, therefore, that the office of township clerk is an office within the meaning of Article II, Section 20 of the Ohio Constitution, set out above. I think it is also clear that the effect of this constitutional provision cannot be circumvented by indirection. An increase in salary would be no less an increase during the officer's existing term merely because payment was not forthcoming until after his term of office.

The specific question then is whether an increase in the compensation of a township clerk brought about through the amendment of Section 3308, *supra*, by which the limitation on a clerk's compensation was increased from \$600.00 to \$1,200.00 per year, would be an increase in the "salary" of an officer during his existing term and be precluded by Article II, Section 20, Ohio Constitution.

In Opinion No. 978, Opinions of the Attorney General for 1951, I had occasion to consider the effect of this section of the Constitution and to review the decisions of the courts and prior opinions of the attorney general in which this section had been examined. I concluded, as disclosed by the syllabus of that opinion, that:

“1. The terms ‘compensation’ and ‘salary,’ as used in Article II, Section 20 of the Constitution of Ohio, are not synonymous. (Opinion No. 749, Opinions of the Attorney General for 1939, page 947, approved and followed).

“2. Under the provisions of Article II, Section 20 of the Constitution of Ohio, the Legislature may change the per diem compensation of any officer whose total compensation is based upon such per diem payment and who receives no ‘salary’ in the sense of an annual or periodical payment for services dependent upon the time and not on the amount of service rendered. (Opinion No. 387, Opinions of the Attorney General for 1945, page 473, distinguished).

“3. Under the provisions of Section 1317, General Code, as amended by Amended Senate Bill No. 365, effective September 18, 1951, members of the Ohio State Dental Board are entitled to receive \$15.00 for each day actually employed in the discharge of official duties after the effective date of such amendment.”

As the syllabus also indicates, the compensation of the officer involved in that case was based entirely on per diem payment. In the present case, however, a township clerk in a township having a budget of \$5000.00 or over is partially compensated by a definite and fixed “salary” within the meaning of Article II, Section 20 i.e. a compensation dependent upon the lapse of time only, and in nowise dependent upon the amount of services performed. Thus, the compensation of such a clerk includes a base salary of \$350.00 plus two per cent of all expenditures of the township in excess of \$5000.00. Because of this fact, it is my opinion that Article II, Section 20, is applicable in this instance and prohibits an increase in the total compensation of such clerk during his term.

The total compensation of a township clerk being a composite, a compensable ceiling of this nature affects, at least indirectly, every component part of the whole. It is significant, as pointed out in my Opinion No. 978, discussed above, that the Supreme Court in those cases in which an officer’s total compensation has consisted even in part of a fixed and definite salary not dependent on services rendered, has held that Article

II, Section 20, was applicable. Having reviewed those decisions extensively in the 1951 opinion, I will not cite them here. I feel compelled, therefore, to conclude that Article II, Section 20 of the Ohio Constitution is applicable in the case under consideration.

In specific answer to your question, it is my opinion that:

1. A board of township trustees of a township having a budget of \$5,000 or over has the power to pay a former township clerk the compensation provided by Section 3308, General Code, for prior years service, having failed to compensate such clerk during his term.

2. Article II, Section 20, of the Ohio Constitution, prohibits an increase in the compensation of a township clerk of a township having a budget of \$5,000 or over, during the existing term of such clerk, through the increase in the maximum compensation for such office provided by the amendment to Section 3308, General Code, effective September 7, 1949.

Respectfully,

C. WILLIAM O'NEILL

Attorney General