

1907

COURTS ; COUNTY, JUDGE—COUNTY COMMISSIONERS CANNOT INCREASE SALARY OF JUDGE DURING HIS EXISTING TERM—§1907.082 R.C.—ART. II, SEC. 20, OHIO CONSTITUTION.

SYLLABUS:

By reason of the provisions of Section 20, Article II, Ohio Constitution, a board of county commissioners is without power, under the provisions of Section 1907.082, Revised Code, to increase the salary of a county court judge during his existing term.

Columbus, Ohio, April 1, 1958

Hon. James I. Shaw, Prosecuting Attorney
Auglaize County, Wapakoneta, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I have been requested by the County Commissioners of Auglaize County to obtain your Opinion on the payment of additional compensation to our two County Judges.

"Ohio Revised Code Section 1907.081 fixes the compensation of County Judges and Section 1907.082 sets forth that

"'In addition to the compensation provided for in Section 1907.081 of the Revised Code, the Board of County Commissioners may provide for payment of a fixed annual amount, not to exceed One Thousand Dollars, to each County Court Judge.'

"At the November 1957 election two County Judges were elected to serve in Auglaize County. One was assigned to hold Court in St. Marys and the other was assigned to hold Court in Wapakoneta. At that time the County Commissioners did not provide for additional compensation to be paid to the Judges under Section 1907.082 since they did not know the number of cases that would be handled by the County Judges nor what the income would be to the County from the County Courts by way of fines and Court costs. At the conclusion of the first month of operation of the two County Courts, the Commissioners were surprised at the number of cases that were handled by each of the Judges and the fines and costs which were placed in the County Treasury by each Court. At that time each of the County Judges appeared before the Commissioners and requested that they be given additional compensation because of the volume of work they were handling and the number of hours spent in their office to conduct this business. At that time the County Commissioners passed a Resolution increasing their compensation \$500.00 per year, taking effect as of January 1, 1958.

"The question is therefore presented whether or not the additional compensation can be paid to the County Judges after they had been elected and assumed the duties of the office under Revised Code Section 1907.082."

Section 1907.082, Revised Code, to which you refer, reads as follows:

"In addition to the compensation provided in section 1907.081 (1907.08.1) of the Revised Code, the board of county commis-

sioners may provide for payment of a fixed annual amount, not to exceed one thousand dollars, to each county court judge.”

Section 1907.081, Revised Code, referred to in this section, reads :

“Judges of the county court shall receive as compensation one thousand five hundred dollars per annum plus an additional amount equal to three cents per capita of the population of the county court district as determined by the last federal decennial census. Such additional amount shall not exceed the sum of two thousand five hundred dollars per annum.

“The compensation of judges of the county court shall be paid in semimonthly installments payable from the treasury of the county in which the court is situated.

“A judge of a county court shall be disqualified from the practice of law only as to matters pending or originating in said county court during his term of office.”

The provisions of these sections were briefly considered in my Opinion No. 812, Opinions of the Attorney General for 1957, p. 320. In that opinion I noted the decision in *Neff v. Commissioners*, 166 Ohio St., 360, in which the court held invalid the provisions of Section 1907.47, Revised Code, and I quoted the following from the *per curiam* opinion in that case, p. 362:

“* * * The law applicable to the case is expressed, as follows, in paragraphs four and five of the syllabus in the case of *State, ex rel. Godfrey, a Taxpayer, v. O'Brien, Treas.*, 95 Ohio St., 166, 115 N. E., 25:

“4. The General Assembly of Ohio cannot delegate the authority conferred upon it by Section 20 of Article II of the Constitution, to fix the compensation of officers.

“5. The provisions of an act of the General Assembly purporting to confer authority upon the * * * Board of County Commissioners to fix the salary of county or township officers within certain limits, without providing a uniform rule for determining such compensation in the several counties of the state, are in conflict with Section 26 of Article II of the Constitution of Ohio, and void.’

“Under the statute in its present form, the Board of County Commissioners in each of the 88 counties could adopt a different formula for fixing salaries, which would not be in conformity with Section 26, Article II of the Constitution. This court is of the opinion that there is a definite lack of direction in Section 1907.47, Revised Code, as to the manner or method of fixing annual sal-

aries for justices of the peace, which renders the section unconstitutional.”

This language suggests that the court found (1) a want of uniformity of operation of this statute in the several counties of the state, and (2) an unauthorized delegation of the legislative function of fixing compensation. In my Opinion No. 812, *supra*, after quoting this language in the *Neff* case, *supra*, I observed:

“The last paragraph just quoted may well be thought equally applicable to Section 1907.082, *supra*, and it must, therefore, be conceded that in this instance a serious constitutional question is encountered. Here again, however, I must confine myself to noting the presence of the question and for reasons stated above refrain from any attempt to rule on it. I may say in passing, however, that where the commissioners undertake to vary the amount of this added compensation among the several county court judges of the same district, serving in different areas, the seriousness of the constitutional question would seemingly be heightened for such a variance within the county was present in the *Neff* case, the annual salaries there ranging from \$25.00 to \$3600.00 within the county.”

In your own case there would appear to be no lack of uniformity *within* the county, although we may suppose that there is a lack of such uniformity throughout the state. Here again, however, I must refrain from any ruling as to the constitutional validity of the statute, that being beyond the scope of my office.

I can, however, examine the actions of the county commissioners under the statute in question, and that examination must clearly be made with reference to Section 20, Article II, Ohio Constitution. That section 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.”
(Emphasis added)

Although the courts have, on occasion, upheld the power of local authorities to fix the compensation, or a portion of it, of state officers such as municipal judges, it seems that an increase during term by such local authorities has not met with approval.

This matter was considered in Opinion No. 5805, Opinions of the Attorney General for 1955, p. 478, the syllabus in which is in part:

“* * * 3. A salary may properly be fixed for a public officer during his existing term in a case where no salary has theretofore been provided for the office concerned; but after such salary is thus fixed no change therein, under existing constitutional limitations, may affect the salary of any officer during his existing term unless the office be abolished. * * *”

In that opinion the writer, after noting *Godfrey v. O'Brien*, 95 Ohio St., 166, in which the court held invalid an attempted delegation of power to certain county officers to fix the compensation of certain local officers, went on to observe, pp. 482, 483:

“* * * It should be observed, however, that the Supreme Court has not applied this rule in the case of municipal judges. In *State ex rel. Dempsey v. Zangerle*, 114 Ohio St., 435, the per curiam opinion is as follows:

“This is an action instituted under the original jurisdiction of this court, praying a writ of mandamus to require the auditor of Cuyahoga county to issue a warrant on the treasurer of Cuyahoga county in the sum of \$250; that amount being relator's compensation from the county of Cuyahoga for the month of January, 1926, due him as chief justice of the municipal court of Cleveland, it being alleged that the commissioners of said county had made due appropriation therefor. General Code, Section 1579-3, makes provision for payment out of the treasury of Cuyahoga county of a portion of the salaries of the judges of the municipal court of the city of Cleveland. The answer filed by the auditor raises the question of the constitutionality of the law. On consideration of the issue involved, it is the unanimous judgment of this court that the writ of mandamus must be allowed, upon the authority of *State, ex rel. Mathews, v. Andrews*, 97 Ohio St., 333, 120 N. E., 879, and *Commissioners of Butler County v. State ex rel. Primmer*, 93 Ohio St., 42, 112 N. E. 145.’

“Section 1579-3, General Code, mentioned in this decision, provided for the fixing of the compensation of judges of the Cleveland Municipal Court, subject to prescribed minima, in part by the county commissioners, and in part by city council, a provision quite comparable to that found in Section 1907.47, supra, except that in the latter case no minimum is prescribed. This decision was mentioned in *State ex rel. Holmes v. Thatcher*, 116 Ohio St., 113, in considering quite similar provisions in former Section 1558-48, General Code, relative to the compensation of judges of the Columbus Municipal Court. In the per curiam opinion in this case the court said, p. 115:

“This court has heretofore, in the case of *State, ex rel. Dempsey, v. Zangerle*, Aud., 114 Ohio St., 435, 151 N. E., 194, in effect declared a similar statute to be valid. But neither that case nor any other case decided by this court has ever approved any statute, or any other legislative authority or quasi legislative authority, to increase the salary of any officer during an existing term in office. The action of the board of commissioners and of the city council, in so far as it applies to judges of the municipal court of the city of Columbus who were in office at the time of the enactment of such provisions and the making of such appropriations, is in violation of the provisions of section 20 of Article II of the Constitution of Ohio, which 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.’

* * *

“more specifically, we may assume that the courts will apply the rule in the *Holmes* case, *supra*, to inhibit a change during the existing term of a justice, in the salary thus fixed by the county commissioners. * * *”

I concur in this reasoning, and specifically I deem the rule in the *Holmes* case applicable here. We may conclude, therefore, that in the case at hand the courts will regard the action of the commissioners here as that of a “legislative authority or quasi legislative authority, to increase the salary of an officer during an existing term of office,” and hence without legal efficacy.

It is my opinion, therefore, that by reason of the provisions of Section 20, Article II, Ohio Constitution, a board of county commissioners is without power, under the provisions of Section 1907.082, Revised Code, to increase the salary of a county court judge during his existing term.

Respectfully,
WILLIAM SAXBE
Attorney General