

OPINION NO. 78-023**Syllabus:**

A person who is appointed to complete an unexpired term as county auditor after December 6, 1976 shall receive a salary according to the salary schedule contained in R.C. 325.03 prior to its amendment by 1976 H.B. 784, plus any increase in that salary allocated by Section 4 of the amending act. After the calendar year 1978 all county auditors will receive the salary set out in the amended salary schedule, but in no event will that salary be less than that received during calendar year 1978.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, April 21, 1978

I have before me your request for my opinion regarding the salary of the county auditor. You indicate that the present auditor was appointed to fill an unexpired term. He took office on February 1, 1977. The problem you have encountered stems from 1976 House Bill 784 which amends R.C. 325.03 (effective December 6, 1976). As amended, the statute provides:

Each county auditor shall be classified, for salary purposes, according to the population of the county. All such county auditors shall receive annual compensation in accordance with the following schedule:

CLASSIFICATION AND COMPENSATION SCHEDULE

Class	Population Range	Compensation
1	1- 20,000	\$13,000
. . .		
14	1,000,001 and over	\$29,000

Section 4. Notwithstanding the provisions of section 325.03 of the Revised Code as amended by Section 1 of this act, commencing in 1977 the salary paid to a county auditor shall be increased by five percent of the annual salary paid to him as of December 31, 1976 and for each year thereafter until the end of calendar year 1978, by five percent of the preceeding year's annual salary . . . For calendar years after 1978, a county auditor shall be paid in accordance with the salary schedule provided in section 325.03 of the Revised Code as amended by Section 1 of this act, except that no salary of a county auditor shall be less than that received in calendar year 1978.

Therefore, you have raised the following question:

Should the present Auditor of Cuyahoga County be paid according to the schedule set forth in Section 1 of 1976 H.B. 784, or should he be paid at 5% more than the salary of the previous auditor as set forth in Section 4 of the bill?

Before addressing your specific question, some preliminary discussion is required. Art. II, §20 of the Ohio Constitution provides 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. (Emphasis added.)

The prohibition contained in this section applies to county officers, and there is no question that the county auditor's compensation may not be increased during an existing term in office. See, 1960 Op. Att'y Gen. No. 1155, p. 105.

The General Assembly may, however, establish a "sliding scale" salary schedule for officers, and where it is in effect prior to the officer's existing term in office, his salary can vary according to the schedule. See, State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942). 1977 Op. Att'y Gen. No. 77-083. Thus, where the population of a county increases in the middle of an existing term, the salary of the incumbent may increase accordingly. Moreover, under State, ex rel. Glander v. Ferguson, 148 Ohio St. 581 (1947), if the general assembly adopts a new pay scale during a term, and a new officer is appointed to fill an unexpired term after the effective date of the amendment, then the appointee is entitled to the newer pay rate since it did not occur during his term in office. Therefore, the county auditor could be paid under the new pay schedule in R.C. 325.03 since he took office after the effective date of the amendment.

As you indicate by your question, Section 4 of 1976 H.B. 784 makes the act ambiguous. Several interpretations are possible. It could be read as allowing all county auditors a five per cent salary increase, regardless of the time they took office. The problem with that interpretation is obvious, however, for it would involve an in-term increase in salary to the auditors which is clearly prohibited by art. II, §20. Under Cooperative Legislative Committee v. Public Utilities Commission, 177 Ohio St. 101 (1964), a construction which renders a statute unconstitutional should, if possible, be avoided. Therefore, other alternatives must be explored.

Another possible interpretation is to read the entire act as giving all auditors taking office after the effective date of the Act a salary as set forth in the new schedule. However, several problems exist under such a construction. First, Section 4 specifically provides that:

For calendar years after 1978, a county auditor shall be paid in accordance with the salary schedule provided in section 325.03 of the Revised Code as amended by Section I of this act, except that no salary of a county auditor shall be less than that received in calendar year 1978.

This portion of Section 4 implies that the salary schedule is not to take effect until after calendar year 1978. Moreover, the first sentence of Section 4, supra, clearly contemplates a five per cent per annum pay increase for county auditors. If the new auditors are to be paid under the amended schedule, that sentence would require a new salary plus five percent. Such a result would conflict with that part of Section 4, quoted above, which provides that auditor's salaries be based on the new schedule after 1978, but "that no salary of a county auditor shall be less than that received in calendar year 1978."

I therefore am inclined to construe Section 4 as postponing the effective date of the salary schedule until the end of calendar year 1978. Under this construction, all county auditors who enter office after December 6, 1976 would receive the salary under the old schedule, plus five per cent in 1977 and five percent more in 1978. When calendar year 1978 ends, all auditors will then switch over to the amended schedule in Section 1. I find support for this construction in the observation that by calendar year 1979 all of the auditors will have commenced a new term in office since county auditors are elected quadrennially in even numbered years. R.C. 319.01. R.C. 3501.02 (C).

Accordingly, it is my opinion and you are so advised that;

A person who is appointed to complete an unexpired term as county auditor after December 6, 1976 shall receive a salary according to the salary schedule contained in R.C. 325.03 prior to its amendment by 1976 H.B. 784, plus any increase in that salary allocated by Section 4 of the amending act. After calendar year 1978 all county auditors will receive the salary set out in the amended salary schedule, but in no event will that salary be less than that received during calendar year 1978.