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SALARIES, COMBINED, ALLOWANCES AND COMPENSATION—PROBATE-JUVENILE JUDGE—TERM COMMENCED FEBRUARY 9, 1949—MAY INCLUDE WITHIN \$1,500.00 LIMITATION AN AMOUNT EQUAL TO INCREASE IN SALARY RECEIVED BY COMMON PLEAS JUDGE, SAME COUNTY—POPULATION INCREASE—1950 FEDERAL CENSUS—SECTIONS 1639-7a, 2252 G. C.

SYLLABUS:

The combined salaries, allowances and compensation of a probate-juvenile judge whose term commenced February 9, 1949, properly may include, within the \$1,500.00 limitation provided by Section 1639-7a, General Code, an amount equal to the increase in salary received by a common pleas judge in the same county under the provisions of Section 2252, General Code, by reason of a population increase in said county as ascertained by the 1950 federal census.

Columbus, Ohio, October 29, 1951

Hon. Stanley N. Husted, Prosecuting Attorney
Clark County, Springfield, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Probate Judge of Clark County, Ohio, receives compensation of \$4,900.00 by virtue of Section 2992 of the General Code of Ohio; he also receives in compensation \$1,875.00 by virtue of Section 5348-10a of the General Code of Ohio, and the sum of \$550.88 by virtue of Section 1639-7a of the General Code of Ohio, making a total salary of \$7,325.88. The sum of \$550.88 is paid from the \$1,500 paid into the County Treasury under Section 1639-7a of the General Code of Ohio.

“The Common Pleas Judge was elected in November, 1946, and his term expires in 1953. By virtue of Section 2252 of the General Code of Ohio, his salary from the County is \$3,325.88. By reason of the increase of population according to the 1950 census his salary is \$4,005.31 as of April 1, 1950, or an increase of \$679.43. For the term beginning in January, 1953; his total salary will be \$8,005.31.

“The question presented is whether or not as Judge of the Juvenile Court, the Probate Judge is now entitled to the addi-

tional sum of \$679.43 from the balance of the \$1,500.00 provided in Section 1639-7a, which will equal the amount the Common Pleas Judge will receive in the term commencing January, 1953."

This entire subject of the salaries of probate-juvenile judges has been discussed at considerable length in my Opinion No. 843, dated October 19, 1951, addressed to the Hon. Webb D. Tomb, Prosecuting Attorney of Seneca County, and my Opinion No. 866, issued under this date to the Hon. J. L. MacDonald, Prosecuting Attorney of Columbiana County. I refer you to those opinions for other aspects of this problem not directly involved here.

You state that the probate-juvenile judge of your county receives \$4,900.00 by virtue of Section 2992, General Code. That section provides, in part, as follows:

"Each probate judge shall receive * * * dollars for each * * * thousand of the population of the county, as shown by the last federal census next preceding his election; * * *"

You also state that he receives \$1,875.00 by virtue of Section 5348-10a, General Code. That section provides, in part, as follows:

"In lieu of fees for services performed by him in inheritance tax cases, each probate judge shall receive annually * * * cents per capita for each * * * thousand population of the county, as shown by the last federal census next preceding his election * * *"

Section 1639-7a, General Code, provides as follows:

"In all counties where the state is not paying a salary direct to the judge exercising the powers and jurisdiction conferred in this chapter the state shall pay into the county treasury of the county, wherein such judge was elected, the sum of fifteen hundred dollars annually. The juvenile judge in such counties shall receive as his annual compensation fifteen hundred dollars. Provided that the combined salaries, allowances and compensation, of the probate judge and juvenile judge of said county shall not exceed the total salary provided by law for the common pleas judge in said county. *Said limitation, however, shall be restricted only by the formula established by law for the total salary of a common pleas judge in said county whose term of office has begun, or will begin, subsequent to September 18, 1947. Any unused portion of said fund shall remain in the county treasury to be used in the maintenance and operation of the juvenile court.*"
(Emphasis added.)

You state that the probate-juvenile judge receives \$550.88 of the \$1,500.00 provided by this section, making his total salary \$7,325.88.

The common pleas judge of your county was elected in 1946. As then in force, Section 2251, General Code, provided in part as follows:

“The annual salaries of the * * * judges herein named payable from the state treasury shall be as follows: * * *

“Judges of the common pleas courts, each, three thousand dollars. * * *”

Prior to April 1, 1950 the common pleas judge received \$3,325.88 by virtue of Section 2252, General Code, which provided, both before and after its recent amendment, in part, as follows:

“In addition to the salary allowed by Section 2251, each judge of the court of common pleas shall receive an annual compensation equal to * * * cents per capita for the * * * thousand of the population of the county in which he resided * * * as ascertained by the latest federal census of the United States * * *.”

The total salary of the common pleas judge prior to April 1, 1950 was thus \$6,325.88.

The \$1,000.00 discrepancy between the salaries of the two judges came about by the following circumstances: By the terms of an act effective September 20, 1947, 122 Ohio Laws 444, the amount received by common pleas judges under the provisions of Section 2251, supra, was increased from \$3,000.00 to \$4,000.00. Under the clear provisions of Article II, Section 20, and Article IV, Section 14 of the Constitution of Ohio, this increase was not payable to incumbent common pleas judges and was not paid to the judge in your county who had assumed office in January, 1947. In his Opinion No. 2159, Opinions of the Attorney General for 1947, page 451, the then Attorney General expressed the opinion that a probate-juvenile judge could receive none of the \$1,500.00 provided by Section 1639-7a, supra, if the money thereby received would increase his total compensation beyond that received by the individual occupying the office of common pleas judge in the same county. The basis of this opinion was that the relation between the salaries of the two offices was tied to the salaries actually received by the individuals holding the offices.

Following this opinion by the Attorney General, the General As-

sembly amended Section 1639-7a in 123 Ohio Laws, page 3, by adding the words emphasized above. That amendment was as follows:

“* * * Said limitation, however, shall be restricted only by the formula established by law for the total salary of a common pleas judge in said county whose term of office has begun, or will begin, subsequent to September 18, 1947. * * *”

The amendment became effective February 5, 1949. The terms of probate judges began February 9, 1949 and since the formula created by the amendment of Section 1639-7a, General Code, had become effective prior to the beginning of those terms, it applied to those probate-juvenile judges then taking office. The result, as pointed out above, was that the probate-juvenile judge in your county received \$550.88 of the \$1,500.00 provided by Section 1639-7a, General Code.

Effective April 1, 1950, a federal census was taken. It revealed that the population of your county had increased and that, as a result, the common pleas judge was entitled to an increased salary under the terms of Section 2252, General Code, which refers to the “latest federal census.” This increase was payable to the incumbent common pleas judge under the exact holding of the case of *State, ex rel. Mack, Judge v. Guckenberger*, 139 Ohio St., 273. The third branch of the syllabus of that case held as follows:

“A statute, effective before the commencement of the term of a common pleas judge, whereby his compensation is automatically increased during his term by reason of the increase of the population of his county as shown by a later federal census, is not in conflict with Section 14, Article IV of the Constitution, which provides that the compensation of a judge of the Common Pleas Court ‘shall not be diminished or increased during his term of office.’”

The basis of the court’s reasoning was that the formula under which the judge’s compensation was computed had been enacted into law before his term began. His salary, therefore, had not been changed by legislative act during his term and the majority of the court held that it was only a change by the Legislature which was forbidden by the Constitution.

The amount of this increase payable to the common pleas judge was \$679.43 per year. The question which you ask is whether a similar in-

crease is payable to the probate-juvenile judge under the provisions of the formula established by Section 1639-7a, General Code.

It is my opinion that the increase is properly payable to the probate-juvenile judge. It is clear that the statute intended that the increase should be paid within the \$1,500.00 limitation and the case you have presented is within the limitation. The only question remaining, therefore, is whether the statute, as so construed, violates any provision of the Constitution.

The Supreme Court, in the Mack case, *supra*, has said that the constitutional inhibition is against a change in salary by *legislative action* during an existing term. In this case, the statutory formula was established before the term began and the change in one of the factors came about by a change in population and not through any action of the General Assembly. I find no constitutional inhibition against such a change.

In answer to your question, it is, therefore, my opinion that the combined salaries, allowances and compensation of a probate-juvenile judge whose term commenced February 9, 1949, properly may include, within the \$1,500.00 limitation provided by Section 1639-7a, General Code, an amount equal to the increase in salary received by a common pleas judge in the same county under the provisions of Section 2252, General Code, by reason of a population increase in said county as ascertained by the 1950 federal census.

Respectfully,

C. WILLIAM O'NEILL
Attorney General