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1. COUNTY COMMISSIONER—ELECTED, TERM FOUR YEARS, BEGINNING JANUARY, 1937—RESIGNED 1940—SUCCESSOR APPOINTED TO FILL VACANCY—ENTITLED TO RECEIVE INCREASED SALARY—AMENDMENT, SECTION 3001 G. C., EFFECTIVE AUGUST 5, 1937.

2. APPOINTEE WAIVED RIGHT TO RECOVER AMOUNT OF INCREASED SALARY—PRESENTED VOUCHERS FOR LOWER SALARY AS IT STOOD, BEGINNING OF FOUR YEAR TERM, AND ACCEPTED LESSER AMOUNTS.

SYLLABUS:

1. When a county commissoner elected for a term of four years beginning in January, 1937, resigned in 1940, his successor appointed to fill the vacancy thus created was entitled to receive the increased salary of such office provided by the amendment of Section 3001 of the General Code, which became effective on August 5, 1937.

2. Such appointee by presenting vouchers during the period of his incumbency for the lower salary provided by Section 3001 of the General Code as it stood at the beginning of such four year term, and by the acceptance of such lesser amounts, has waived his right to recover the amount of the increase of salary provided by the amendment of said statute.

Columbus, Ohio, January 30, 1943

Hon. Harry A. Mettler, Prosecuting Attorney,
Athens, Ohio.

Dear Sir:

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

> "The board of county commissioners has requested an opinion upon the following fact situation. As I have been unable to find conclusive authorities determining the issues involved, I will appreciate your opinion.
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> H. G. H. and M. N. were appointed members of the board of county commissioners April 5, 1940, to fill vacancies occasioned by the resignation of two members whose terms expired January 4, 1941. The officers whose unexpired terms were being served by the appointees took office in January, 1937, prior to the salary increase passed by the legislature. They were therefore drawing only $88.64 per month and the appointees continued to present vouchers to the county auditor in the same

amount. The salary appropriation for the year 1940 was $4342.00 based upon the salary of $88.64 for two members and $184.16 per month for a member taking office January, 1939. On December 31, 1940, the commissioners appropriated the sum of $1687.54 for county commissioners' salaries but failed to submit a voucher or a bill to the county auditor, and this appropriation expired with the ending of that year. This deficiency appropriation had been intended to compensate the two appointees for the difference between the salary drawn of $88.64 and the salary claimed of $184.16 per month. These appointees now present their claims to the county auditor for the difference between the amount they draw and the amount which would have been payable under the revised salary act.

The question thus presented is whether appointees taking office as county commissioners are entitled to the same salary as that of the officers whose vacancies they are filling or whether they should be entitled to the increased salary under General Code 3001 effective August 5, 1937, shortly after the original office holders took office, but before the appointment of their successors; and further, if they have a right to such increased salary provided by Section 3001 as amended, whether they forfeited such right and became estopped from claiming such difference after having signed vouchers and having accepted the lesser amount and having made no claim during their term of office for such increase."

The questions you raise involve a consideration of Section 3001 of the General Code.

Prior to August 5, 1937, the effective date of the present statute, the section in question, as found in 108 O. L. p. 1120, passed January 14, 1920, read as follows:

"The annual compensation of each county commissioner shall be determined as follows:

In each county in which on the twentieth day of December, 1911, the aggregate of the tax duplicate for real estate and personal property is five million dollars or less, such compensation shall be nine hundred dollars, and in addition thereto, in each county in which such aggregate is more than five million dollars, three dollars on each full one hundred thousand dollars of the amount of such duplicate in excess of five million dollars. That the compensation of each county commissioner for the year 1912, and each year thereafter, shall not in the aggregate exceed 115 per cent of the compensation paid to each county commissioner for the official year ending on the third Monday of September, 1911.

Such compensation shall be in equal monthly installments from the county treasury upon the warrant of the county auditor."

As amended, Section 3001 reads as follows:

"The annual compensation of each county commissioner shall be determined as follows:

Each county commissioner shall receive sixty dollars for each full one thousand of the first fifteen thousand of the population of the county, as shown by the last federal census next preceding his election;

fifty dollars per thousand for each full one thousand of the second fifteen thousand of such population of the county;

forty dollars per thousand for each full one thousand of the third fifteen thousand of such population of the county;

twenty-five dollars per thousand for each full one thousand of the fourth fifteen thousand of such population of the county;

fifteen dollars per thousand for each full one thousand of the fifth fifteen thousand of such population of the county;

ten dollars per thousand for each full one thousand of the sixth fifteen thousand of such population of the county;

and five dollars per thousand for each full one thousand of such population of the county, in excess of ninety thousand.

Such compensation shall be paid in equal monthly installments from the county treasury upon the warrant of the county auditor, provided that in no case shall the annual compensation paid to a county commissioner exceed five thousand dollars; except that in counties having a population of over one million, the salaries of county commissioners in such counties shall at no time be less than that paid to the auditor in said counties. The minimum salary shall not be less than twelve hundred dollars, but in no case shall the compensation be less than that received by the commissioners in any county at the time this bill becomes effective."

It will thus be seen that the basis of determining the salary of the county commissioners was radically changed. From your communication I understand that the amendment had the effect of increasing the salary of the office from $88.64 to $184.16 per month.

Your first question turns on the right of the men who were appointed in 1940 for the unexpired term of the original incumbents ending in January, 1941, to receive the increased salary occasioned by the amendment of the salary law in 1937.

Section 20 of Article II of the Constitution of Ohio reads 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."

This constitutional provision would of course eliminate any question as to the right of those commissioners who were holding the office at the time of the amendment of the salary law to benefit by the increase, and I do not understand that any question is raised as to them.

The question as to the right of one who is appointed to fill the vacancy in an office for the remainder of the term under such circumstances to have the benefit of the increased salary is one upon which the courts and authorities generally have not been wholly in agreement.

In 43 Am. Jur., "Public Officers", Section 351, it is said:

> "The courts have experienced some difficulty in applying the foregoing constitutional prohibitions against changing salaries of public officers to persons elected or appointed to fill out the balance of an unexpired term. Some courts have held that the successor so chosen to fill out the term after the death, resignation, or removal of his predecessor stands for all purposes in the latter's shoes, and cannot claim the increased compensation provided for during that officer's incumbency. Other cases have taken a different view and have allowed the increased salary to the person filling the balance of the term. The lack of uniformity upon this point is perhaps due to differences in the wording of the constitutional restriction."

In 46 Corpus Jur. p. 1023, the same uncertainty and divergence of opinion are also noted and cases are cited on both sides of the proposition. However, the Ohio courts seem to have settled the question rather definitely in favor of the right of an appointee to fill a vacancy under such circumstances to have the benefit of the increase in salary which was made after the beginning of the original term to which he succeeds but before his appointment to fill the vacancy.

In the case of State ex rel. v. Tanner, 27 O. C. A., 385, it was held:

> "The salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term he is to complete."

This case related to a municipal officer and arose directly under the provisions of Section 4213, General Code, which provided:

"The salary of any officer, clerk or employee shall not be increased or diminished during the term for which he was elected or appointed."

The court said at page 386 of the opinion:

"In the investigation made we have failed to find that the question here made has been passed upon by the courts of this state, although it appears to have been the subject of judicial action by the courts in some other states, not, however, with unvarying unanimity of view and decision, to which we will refer later on.

* * * All the authorities seem to agree that the constitutional and statutory inhibition against a change in the compensation of an officer during his incumbency of an office is founded upon considerations of public policy in guarding and protecting the public against a possible combination of office-holding interests and log-rolling Legislatures in an effort to raise their salaries. With the limitation of power laid upon the law-making body as if to prevent such influences and abuses, it would seem that *the Legislature in framing this law had in mind the incumbent of the office rather than the office itself.*" (Emphasis mine.)

The court cited a number of cases from other states, including State ex rel. v. Frear, 138 Wisc. 536, 557, where the court, construing a constitutional provision quite similar to ours, uses this language:

" 'Section 26. The Legislature shall never grant any extra compensation to any public officer *** nor shall the compensation of any public officer be increased or diminished during his term of office.'

I construe this as wholly personal to each of the classes therein mentioned, including the 'public officer,' and the expression 'during his term of office' accords with this construction. Otherwise the framers of the Constitution would have used the expression 'public office' instead of 'public officer,' and 'the term' instead of 'his term.' *** I regard the provision as personal to the incumbent of the office."

In the case of Zangerle v. State ex rel., 105 O. S., 650, there was involved the question of the right of the judges of the Common Pleas Court of Cuyahoga County to participate in a similar increase in compensation by amendment of the statute fixing their salary. The opinion is very short and does not disclose any of the facts in the case, but an examination of the pleadings discloses that certain of the judges had been appointed to fill vacancies prior to the effective date of the act increasing the salary. The court held that those judges who were in office at the

time of the enactment of that section were not entitled to its benefits. The court, however, made the following additional finding:

> "A majority of this court are of the opinion and find that the defendant, Bernon, whose service and term of office began subsequent to the passage of the statute involved in this case is entitled to the salary fixed thereby."

This case was cited with approval by the court in State ex rel. v. Guckenberger, 139 O. S., 273.

In a much earlier case, State ex rel. v. Raine, 49 O. S., 580, it was held:

> "A statute, whatever terms it may employ, the only effect of which is to increase the salary attached to a public office, contravenes section 20, of article II, of the Constitution of this state, in so far as it may affect the salary of an incumbent of the office during the term he was serving when the statute was enacted."

There is a fair inference from the language above quoted that this impediment would not extend to one whose incumbency began after the enactment of the statute. This case is cited in State ex rel. v. Tanner, and State ex rel. v. Guckenberger, both supra.

A question similar to that which you have presented was before one of my predecessors, and in an opinion found in 1928 Opinions Attorney General, page 256, it was held:

> "A Common Pleas Judge, appointed subsequent to the effective date of the amendment of Section 2252 of the General Code (112 O. L., 345), to fill an unexpired term, is entitled to the increased compensation provided by the amendment of that section."

In a more recent opinion my immediate predecessor had before him a question arising upon facts substantially identical with the present inquiry. This opinion is found in Opinions Attorney General for 1938, page 628, and related to a vacancy in the office of county commissioner who was elected in November, 1936, took office in January, 1937, and died in October, 1937. The then Attorney General held:

> "A person who was appointed to fill a vacancy in the office of county commissioner in October, 1937, as well as the successful party at the 1938 election who will be elected to fill the unexpired term in the office of county commissioner, should receive the annual compensation provided for in Section 3001, General Code, as amended in 117 O. L., 147, effective August 5, 1937."

Your second question raises the question whether the commissioners who were appointed to fill vacancies occurring after the enactment of the law increasing the salary of the office, and who were therefore entitled to the benefit of the increase, have forfeited such right or have become estopped from claiming the increase by reason of having signed vouchers for and accepted the lesser amounts without making any claim for the increase until after they were out of office.

The case of State ex rel. v. Akron, 132 O. S., 305, has a direct bearing on this question. This was an action in mandamus brought on the relation of a bailiff of the Municipal Court of Akron to compel the payment of a portion of his salary which had been withheld, due to a shortage in public funds arising from tax delinquencies. The statement of facts as set out by the court quotes from the admitted averments of the answer as follows:

> "Defendants further aver that each month from October 15, 1931, to January 31, 1934, relator signed the payroll of the City of Akron and accepted without protest the amount in monthly installments which the Judges of the Municipal Court of Akron had determined he was to receive, and which the Clerk of the Municipal Court of Akron had certified was due and owing him, which monthly installments were less than the amount which he now claims is due and owing him.
>
> Defendants further state that the relator agreed to accept the amount which the Judges of the Municipal Court of the City of Akron apportioned to him and which was certified by the Clerk of said court, and to refrain from demanding more than such amount in such monthly installments for the period from October 15, 1931, to January 31, 1934, in consideration of his being retained as a Deputy Bailiff of the Municipal Court of Akron, and for the purpose of preventing a reduction in the number of employees of said Municipal Court, which reduction would otherwise have been necessary had he demanded the amount of salary which he now demands, and that by such action and by such failure to protest the amount he was receiving, he has now waived any rights he may have had to be entitled to any larger amount of salary than he so received, and that he cannot now object to or deny such action on his part, that he is not now entitled to any of the amount which he now sues for."

The syllabus of the case is as follows:

> "1. The occupant of a public office may waive part of the established salary thereof.
>
> 2. Such a waiver is not contrary to public policy."

It will be noted that in the pleading from which I have quoted, the agreement of the relator was alleged to be *"in consideration* of his being retained," etc. The court, however, did not base its holding on the theory of a binding agreement based on a consideration, and made no reference to this "consideration" as having any influence on its finding, but placed its decision solely on the idea of a voluntary waiver of a known right. In the opinion at page 307 the court says:

> "The most frequently employed definition of waiver is that it is the voluntary relinquishment of a known right. As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy.
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> Applying these fundamentals to the conduct of this relator, what is the result? In addition to the circumstances already outlined, it is conceded that during this period the relator was paid in semi-monthly installments, and on each occasion he presented his voucher, received payment, and then receipted a payroll sheet which expressly recited either that this was the 'Am't due' or that he 'received pay in full to date.' According to the agreed statement of facts this occurred a total of 56 successive times over the period of 2 years and 4 months. Furthermore, the relator makes no claim that he ever protested this procedure; nor does he contend that his rights were unknown by him. Thus it is apparent that his conduct was wholly inconsistent with any theory except the plainest and simplest sort of waiver. Indeed, it is difficult to suggest how this result could have been accomplished more effectively without actually using the word 'waiver' itself—a thing which of course the law does not require as to any variety of waiver.
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> Is it contrary to public policy to hold that the occupant of a public office may waive part of his salary? The relator offers no authority or reason in support thereof. On the contrary, public policy would seem to require that the law be just as prompt to scrutinize the conduct of a public officer as that of a private citizen—especially when that conduct involves an uninterrupted sequence of 56 repeated and consistent acts during a period of more than two years."

The analogy of that case to the situation presented in your inquiry is evident. If anything, the principle of waiver will apply more forcibly to the county commissioners than to the court bailiff, relator in the Akron case. The commissioners were themselves the officers having the right and duty to make up the county budget and to make the necessary appropriations to cover the county's expenditures, including their own salaries; they did as a matter of fact make an appropriation to cover what they

believed to be their additional salary for the portion of the year 1940 during which they served, and then allowed it to lapse by failing to present vouchers for its payment. In the meantime, they had from time to time presented a series of vouchers for their salaries on the basis of $88.64 per month and accepted and presumably receipted for the lesser amount.

In the light of these facts, I cannot reach any other conclusion, under the authority of State ex rel. v. Akron, supra, than that they waived their right to receive the increased salary to which they were then entitled.

In an opinion which I rendered on March 28, 1942, being 1942 Opinions Attorney General, No. 4967, I held:

> "1. Under the holding of the Supreme Court in the case of The State, ex rel. Mack, Judge, v. Guckenberger, Aud., 139 O. S. 273 (1942), a Common Pleas Judge, who took office on January 1, 1929, to serve a term extending to January 1, 1935, should have been paid by the county, in so far as the county's share of his salary is concerned, on the basis of the 1930 federal census.
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> 2. Where a judge of a Common Pleas Court over a period of years issued his vouchers for his salary, receives his warrants, accepts the same, and is paid upon the basis of the federal census at the time he took office, he may not now recover back pay, due to an increase of population of the county where he resides as determined by a subsequent federal census."

In that opinion I discussed the proposition presented from the standpoint of "estoppel," "waiver" and "laches." It is not necessary here to repeat all that was there said. As bearing on the making of an appropriation to cover the salary of a particular office, I said:

> "It should require no argument to demonstrate that an appropriation to pay the salary of the judge of the Court of Common Pleas is imperative and mandatory as to the pay, as is the salary or compensation of the attaches of the court. Such appropriations are, of course, based upon the estimate or certification of the Common Pleas judge, and when the judge of the court submits an estimate covering his own salary, it would seem to follow that he is thereafter estopped from recovering a greater amount after the lapse of the particular fiscal year for the reason that the allowance and payment of an additional sum might and probably would disturb the current balance sheet of the county; work an injury to the officers and employes presently employed; and possibly add additional burdens on the taxpayers."

In specific answer to your questions, I am of the opinion:

1. When a county commissioner elected for a term of four years beginning in January, 1937, resigned in 1940, his successor appointed to fill the vacancy thus created was entitled to receive the increased salary of such office provided by the amendment of Section 3001 of the General Code, which became effective on August 5, 1937.

2. Such appointee by presenting vouchers during the period of his incumbency for the lower salary provided by Section 3001 of the General Code as it stood at the beginning of such four year term, and by the acceptance of such lesser amounts, has waived his right to recover the amount of the increase of salary provided by the amendment of said statute.

Respectfully,

THOMAS J. HERBERT,
Attorney General.