

DOCKET NO. 175

NUMBER	TERM	YEAR
449	November	1961

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EUGENE G. KITKO

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**VERSUS**

CLEARFIELD COUNTY

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IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

EUGENE G. KITKO )  
VS. ) No. 449 November Term 1961  
CLEARFIELD COUNTY )

NOW, EUGENE G. KITKO, the Plaintiff in the above captioned case, served the Petition for Declaratory Judgment on Clearfield County, the Defendant, by making a personal service on Lillian D. Eshelman, County Treasurer, on the 9th day of January 1962, by serving Stanley Zbieg, Chief Clerk of Clearfield County, on behalf of Fred L. Rhoads, Wesley J. Read and A.W. Pearson, Commissioners, on the 9th day of January 1962 and by serving Vincent Sturniola on behalf of Martin M. Brennan, County Controller, on the 9th day of January 1962. Service was made on all the above by personally leaving a certified copy of the Petition.

Eugene G. Kitko

Sworn to and subscribed to before  
me this 11 day of January, 1962.

Carl E. Walker  
PROSTANTY  
My Commission Expires  
1st Monday Jan. 1966

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

EUGENE G. KITKO )  
VS. ) No. 449 November Term 1961  
CLEARFIELD COUNTY )

PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JOHN J. PENTZ, PRESIDENT JUDGE:

The Plaintiff requests your Honorable Court for a Declaratory Judgment and respectfully represents:

1. That the Plaintiff, Eugene G. Kitko, is the District Attorney of Clearfield County, Pennsylvania, with offices in the Court House Annex Building, Clearfield, Pennsylvania.
2. That the Defendant, Clearfield County, is a political subdivision of the Commonwealth of Pennsylvania represented in the Administration of the same by the following persons: Fred L. Rhoads, Wesley J. Read and A.W. Pearson, all of whom are County Commissioners of Clearfield County; Martin M. Brennan, County Controller and Lillian D. Eshelman, County Treasurer.
3. That the Plaintiff was appointed District Attorney of Clearfield County by your Honorable Court on March 15, 1961, to fill the vacancy created by Joseph S. Ammerman through resignation.
4. That the Plaintiff was duly sworn into office on March 15, 1961 and assumed the duties of said office and has and is still assuming said duties.
5. On the first Monday of January 1958 when Joseph S. Ammerman was sworn into the office of District Attorney, the salary of said Joseph S. Ammerman was \$5,000.00 per annum as provided by the Act 1947, June 25 P.L. 928 Section 1 as amended by the Act of

1951 October 11, P.L. No. 4 Section 1 as further amended by the Act of 1955 October 21, P.L. 711 Section 1.

6. By the Act of 1959 September 8, P.L. 838; 16 P.S. 11102 salaries of officers of sixth class counties were raised. Said Act read as follows: Section 1 - The annual salaries of the following county officers of counties of the sixth class shall be as follows: The District Attorney, seven thousand (\$7,000.00) dollars . . . Section 3 - This act shall become effective and applicable to all of the pertinent county officers who shall begin a term of office on or after the first Monday of January, 1960.

7. After March 15, 1961, the Defendant, paid salary to the Plaintiff at the rate of \$5,000.00 per annum.

8. On December 20, 1961, Plaintiff wrote a letter to the Defendant through the Board of Commissioners and confirmation copy to the Controller, making formal request for back payment from March 15, 1961, until December 31, 1961 in an amount equal to the difference between \$5,000.00 per annum and \$7,000.00 per annum. A copy of said letter is hereto attached, made a part hereof and marked Exhibit "A".

9. On January 5, 1962, the Clearfield County Board of Commissioners met and passed a motion on their minutes refusing the request as stated in Paragraph 8 hereof and further stating that the salary of the Plaintiff would be \$5,000.00 per annum during his continuance in office. A certified copy of the said motion is attached hereto, made a part hereof and marked Exhibit "B".

10. That the amount of salary due to Plaintiff must be based upon an interpretation of Article 3 Section 13 of the Constitution of the Commonwealth of Pennsylvania and the Act of 1959, September 8, P.L. 838 16 P.S. 11102 as set forth in Paragraph 6 of this petition. The Plaintiff and Defendant differ in the interpretation of the same.

11. That if this Declaratory Judgment is not granted, it would lead to inevitable litigation, whereas, the Declaratory Judgment would end the dispute as to the interpretation.

WHEREFORE, your Petitioner prays your Honorable Court may enter your judgment or decree, construing Article 3 Section 13 of the Constitution of Pennsylvania and the Act of 1959, September 8, P.L. 838 that the Plaintiff was and is entitled to a salary of \$7,000.00 per annum commencing on the 15th day of March 1961 and continuing until the end of his term of office and that the Plaintiff is entitled to and the Defendant does owe the difference between \$5,000.00 per annum and \$7,000.00 per annum commencing from March 15, 1961, and that all future payment should be based on a salary of \$7,000.00 per annum.

Eugene G. Kitko  
Plaintiff

COMMONWEALTH OF PENNSYLVANIA )  
COUNTY OF CLEARFIELD ) SS:

EUGENE G. KITKO, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

Eugene G. Kitko

Sworn to and subscribed before  
me this 9<sup>th</sup> day of January,  
1962.

Carl C. Walker

PROTHO. C. WALKER  
My Commission Expires  
1st Monday Jan 1966

EUGENE G. KITKO  
XXXXXXXXXXXXXX

XXXXXX,XXX  
XXXXXXXXXXXX

EXH. A

December 20, 1961

Fred Rhoads, President  
Board of Commissioners  
Court House  
Clearfield, Pennsylvania

Gentlemen:

In checking the law on the matter of what salary I would receive if I stayed on as District Attorney after January 1, 1962, I discovered that at the time I was appointed by Judge Fanta on March 15, 1961 to fill the unexpired term of Mr. Ammerman as District Attorney, I should have at that time received a salary of \$7,000.00 annually. This salary, of course, is set by law and it is an obligation of the County even though at the time no issue was made of the matter. Please consider this letter as my request for the difference in payment between \$5,000.00 and \$7,000.00 annually from March 15, 1961 until the last of December 1961.

Sincerely yours,

EUGENE G. KITKO  
District Attorney

MSK:bsb

CC: Martin N. Bremner, Controller

Special Meeting January 5, 1962 at 2:00 o'clock, P. M.

EXH. B

County Commissioners Fred L. Phoenix, Wesley J. Read and A. W. Pearson present, together with Stanley M. Zbieg, Chief Clerk, Martin H. Bremer, County Controller, Clarence R. Kruger, County Solicitor, and Eugene G. Kitko, District Attorney.

A letter was presented and read from Eugene G. Kitko, District Attorney, requesting that he receive in his salary the difference in payment between \$5,000.00 and \$7,000.00 annually from March 15, 1961 to December 31, 1961.

There was discussion concerning this payment in salary. An opinion from Clarence R. Kruger, County Solicitor, was presented and read.

motion

After considerable discussion and explanation, the following was made:-  
Moved by A. W. Pearson that the opinion of the County Solicitor on the question of the salary of the District Attorney be duly filed and that the County Commissioners act in accordance therewith and refuse the request of the District Attorney set forth in his letter dated December 20, 1961; and that his salary during the time he holds over and until a successor qualifies, be \$5,000.00 per year. Motion seconded by Wesley J. Read, and unanimously carried.

There being no further business for consideration, it was moved by A. W. Pearson that the meeting be adjourned. This motion was seconded by Wesley J. Read, and carried unanimously.

Meeting adjourned,

/s/ Stanley M. Zbieg,

Chief Clerk.

STATE OF PENNSYLVANIA      ))  
                                    ))  
                                    )) ss:  
COUNTY OF CLEARFIELD      ))

I, Stanley M. Zbieg, Chief Clerk to Clearfield County Commissioners, hereby certify the foregoing to be a true and correct copy of the minutes of a meeting held on the 5th day of January, 1962, at 2:00 o'clock, P. M.

  
Stanley M. Zbieg  
Chief Clerk, Clearfield County Commissioners.

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNA.  
No. 44 November Term 1961

EUGENE G. KITKO

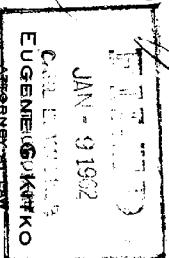
VS.

CLEARFIELD COUNTY

PETITION FOR  
DECLARATORY JUDGMENT

To the within Defendant:

You are hereby notified to  
plead to the within petition  
within 15 days from the date  
of service hereof.



KITKO  
CLEARFIELD, PA.  
4.50 atty

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

EUGENE G. KITKO :

vs. : No. 449 November Term, 1961

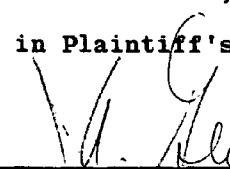
CLEARFIELD COUNTY :

ANSWER TO PETITION FOR DECLARATORY JUDGMENT

Martin M. Brennan, County Controller of Clearfield County,  
by his solicitor James A. Gleason, files this Answer:

- (1). Paragraph No. 1 of the petition is admitted.
- (2). Paragraph No. 2 of the petition is admitted.
- (3). Paragraph No. 3 of the petition is admitted.
- (4). Paragraph No. 4 of the petition is admitted.
- (5). Paragraph No. 5 of the petition is admitted.
- (6). Paragraph No. 6 of the petition is admitted.
- (7). Paragraph No. 7 of the petition is admitted.
- (8). Paragraph No. 8 of the petition is admitted.
- (9). Paragraph No. 9 of the petition is admitted.
- (10). Paragraph No. 10 of the petition is admitted.
- (11). Paragraph No. 11 of the petition is admitted.

WHEREFORE, the respondent, Martin M. Brennan, County  
Controller of Clearfield County, prays that the Court may enter  
its judgment or decree construing Article 3 Section 13 of the  
Constitution of Pennsylvania and the Act of 1959, September 8,  
P.L. 838 as to the facts set forth in Plaintiff's petition.

  
\_\_\_\_\_  
James A. Gleason, Solicitor  
for Martin M. Brennan, County  
Controller

STATE OF PENNSYLVANIA :  
COUNTY OF CLEARFIELD : SS.

Martin M. Brennan, County Controller of Clearfield  
County, being duly sworn according to law, deposes and says that  
the facts set forth in the foregoing Answer are true and correct  
to the best of his knowledge, information and belief.

Martin M. Brennan

Sworn to and subscribed before  
me this 26<sup>th</sup> day of January, 1962.

Carl E. Walker

PROTHONOTARY  
My Commission Expires  
1st Monday Jan. 1966

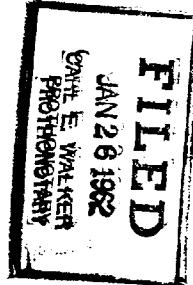
IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNA.  
No. 449 November Term, 1961

EUGENE G. KITKO

vs.

CLEARFIELD COUNTY

ANSWER TO PETITION FOR  
DECLARATORY JUDGMENT



LAW OFFICES  
GLEASON, CHERRY & CHERRY  
7-10 DAVIS BUILDING  
DU BOIS, PENNSYLVANIA  
109 N. BRADY STREET

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

EUGENE G. KITKO :  
VS. : No. 449 November Term, 1961  
CLEARFIELD COUNTY :  
:

ANSWER BY THE COUNTY  
COMMISSIONERS TO THE  
PETITION FOR DECLARATORY  
JUDGMENT

The County Commissioners of the County of Clearfield,  
in behalf of the said County, answer the Petition for Declaratory  
Judgment as follows:

1. The averment in paragraph one of the Petition  
is admitted.
2. Admitted
3. Admitted
4. Admitted
5. Admitted
6. Admitted
7. Admitted
8. Admitted
9. Admitted
10. Admitted
11. Admitted.

COUNTY OF CLEARFIELD

ATTEST:

*Stanley M. Greg*  
CHIEF CLERK

BY *Edgar L. Read*  
*Wiley Read*  
*W.H. Pearson*  
COUNTY COMMISSIONERS

COMMONWEALTH OF PENNSYLVANIA :  
COUNTY OF CLEARFIELD : SS.

Before me, Carl E. Walker, Esq., Prothonotary, personally appeared Fred L. Rhoads, Wesley J. Read and A. W. Pearson, County Commissioners of Clearfield County, who being duly sworn according to law depose and say that the facts set forth in the foregoing Answer to the Petition for Declaratory Judgment, are true and correct.

Fred L. Rhoads  
Wesley Read  
A. W. Pearson

Sworn to and subscribed before me  
this 19th day of January, 1962.

Carl E. Walker  
PROTHONOTARY

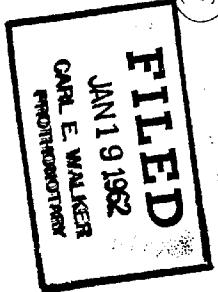
*Recd. 1/2/62*  
IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNA.  
No. 449 November Term, 1961

EUGENE G. KITKO

VS.

CLEARFIELD COUNTY

ANSWER BY THE COUNTY COMMISSIONERS  
TO THE PETITION FOR  
DECLARATORY JUDGMENT



CLARENCE R. KRAMER  
COUNTY SOLICITOR  
CLEARFIELD, PA.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

EUGENE G. KITKO

:

vs

: No. 449 November Term, 1961

CLEARFIELD COUNTY

:

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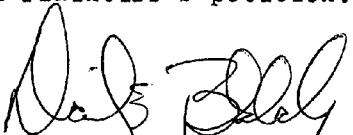
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ANSWER TO PETITION FOR DECLARATORY JUDGMENT

Lillian D. Eshelman, County Treasurer of Clearfield County, by her solicitor David E. Blakley, files this Answer:

- (1). Paragraph No. 1 of the petition is admitted.
- (2). Paragraph No. 2 of the petition is admitted.
- (3). Paragraph No. 3 of the petition is admitted.
- (4). Paragraph No. 4 of the petition is admitted.
- (5). Paragraph No. 5 of the petition is admitted.
- (6). Paragraph No. 6 of the petition is admitted.
- (7). Paragraph No. 7 of the petition is admitted.
- (8). Paragraph No. 8 of the petition is admitted.
- (9). Paragraph No. 9 of the petition is admitted.
- (10). Paragraph No. 10 of the petition is admitted.
- (11). Paragraph No. 11 of the petition is admitted.

WHEREFORE, the respondent, Lillian D. Eshelman, County Treasurer of Clearfield County, prays that the Court may enter its judgment or decree construing Article 3 Section 13 of the Constitution of Pennsylvania and the Act of 1959, September 8, P.L. 838 as to the facts set forth in Plaintiff's petition.



\_\_\_\_\_  
David E. Blakley, Solicitor  
for Lillian D. Eshelman, County  
Treasurer

STATE OF PENNSYLVANIA :  
: SS  
COUNTY OF CLEARFIELD :

Lillian D. Eshelman, County Treasurer of Clearfield County, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Answer are true and correct to the best of her knowledge, information and belief.



Sworn to and subscribed before  
me this 17<sup>th</sup> day of January, 1962.



PROTHONOTARY  
My Commission Expires  
1st Monday Jan. 1966

Ammerman, Gleason, Kitko  
No. 449 November Term, 1961

IN THE COURT OF COMMON PLEAS  
OF CLEARFIELD COUNTY, PENNA.

EUGENE G. KITKO

VS

CLEARFIELD COUNTY

ANSWER TO PETITION FOR  
DECLARATORY JUDGMENT



LAW OFFICES  
AMMERMAN & BLAKLEY  
DUBOIS, PENNA.

Now, this 17th day of Jan 1962 service accepted  
by copy.

For Jan 19 1962 served on me by Plaintiff

6 Lawrence R Kramer, County Solicitor

Jan 19 1962 Service accepted by copy

P. J. Gleason  
Attala Co. Sheriff

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA.

EUGENE G. KITKO :  
VS : No. 449 November Term 1961  
CLEARFIELD COUNTY :  
:

O P I N I O N

On the 16th day of March 1961, the petitioner, Eugene G. Kitko, was appointed to fill out the remainder of the term of the office of District Attorney of the County of Clearfield, because of the resignation of Joseph S. Ammerman, who had been elected to the office of District Attorney, at the Municipal Election in November 1957.

The salary of the District Attorney in a sixth class county had, by the terms of the Act of June 25, 1947, P.L. 928 Section 1, as amended October 11, 1951, P.L. 1704, and October 21, 1955, P.L. 711 (16 P.S. 11102), been fixed at the sum of \$5000.00 per annum, and this salary was in effect when Mr. Ammerman was elected at the November 1957 election, going into office the first Monday of January 1958.

By the Act of the 8th day of September 1959, P.L. 838 (16 P.S. 11102), the salary of district attorney of a county of the sixth class was increased to the sum of \$7000.00 per annum. Section 3 stating:

"This act shall become effective and applicable to all of the pertinent county officers who shall begin a term of office on or after the first Monday of January 1960."

Therefore, the increase did not benefit Mr. Ammerman, then District Attorney, because he had not begun his term on or after the first Monday of January 1960.

Article III, Section 13, of the Constitution of Pennsylvania, prohibits the increase or decrease of any salary, or change of any term of any public officer, after his election or appointment, in these words:

"No law shall extend the term of any public officer or increase or diminish his salary or emoluments, after his election or appointment." (Emphasis supplied)

It is the position of the County that this Section of the Constitution prohibits the increase of salary provided by the Act of 1959, supra, to be paid to Mr. Kitko, because he was appointed to this office, and that such appointment is to the term which had started prior to the first Monday of January 1960; and that the succeeding years until the next municipal election, after the first Monday of January 1962, is a prolongation of the term started in the 1957 election of Mr. Ammerman.

It has been determined that Mr. Kitko has the right to continue in the office of District Attorney, as a prolongation of the four year term beginning the first Monday of January 1958, because no vacancy has occurred by the death of Mr. Chase prior to the first Monday in January 1962, Mr. Kitko being lawfully, by virtue of his appointment, in the office of District Attorney.

The position taken by the County Commissioners, that the limitation stated in Section 13 of Article III of the Constitution prohibits payment of the increased salary to Mr. Kitko, fails to distinguish the difference between the office and the officer.

The Constitutional provision involved, speaks throughout, and the very words used, indicate an individual, or a person, is considered, not the office itself. Giving to the words "office" and "officer", the meaning ordinarily prescribed and conveyed by use of these words, indicates a wide difference. Webster's International Dictionary defines "office" as a special duty, trust, charge, or position conferred by an exercise of governmental authority, for a public purpose. An "officer" is defined as a person lawfully invested with an office, etc., or "one who holds an office".

Thus it will be readily observable that the Constitution forbids increased salary of an officer while he is in office, whether appointed or elected. This particular, precise question has been determined in MCKINNEY V. NORTHUMBERLAND COUNTY, 75 Superior 581, the Superior Court holding that on this constitutional provision, and under the Act of 1917 concerning salaries of county commissioners, that the plaintiff in the action had been appointed to fill out the unexpired term of a county commissioner. After the election of the county commissioner whose office became vacant, the salary of the commissioners was increased; but such increase did not apply to any of the county commissioners. However, when one of the commissioners resigned, the commissioner appointed to fill out

the unexpired term, demanded the increase of salary, and the Superior Court found that he was, and stated the law as follows, beginning on page 582:

"Was McKinney entitled to the former or the latter salary? Article III, Sec. 13 of the Constitution provides that, "No law shall extend the term of any public officer, or increase or diminish his salary or emoluments, after his election or appointment." It will be observed that the subject of this section is, "Public Officer." The term shall not be extended for any public officer nor shall his salary be increased or diminished after the election or appointment. The words are plain and the test to be applied is evident. If the salary be increased or diminished after his election or appointment, the prohibition of the section applies. The language being plain we are not aided by any rules of construction nor should our conclusion be changed by showing that certain inequalities may arise. There are three commissioners, and the commissioner who is appointed to fill the unexpired term gets more than any one of the others. Such arguments apply where there is a doubt in the meaning of the words but it is no aid to us in the present case. It is a forced construction to make the appointed officer take the place of the deceased officer and argue that he occupies the same position as the one who was elected prior to the passage of the act. The prohibition of that section is not during the term of the officer, but after his election or appointment: Evans v. Luzerne Co., 54 Pa. Superior Ct. 44."

To the same effect, more recently, is the decision in MANSELL V. LYCOMING COUNTY COMMISSIONERS, 89 D. & C. 239, in which the emoluments of a county controller, under the same circumstances, are allowed. In this case a controller was in office at the time of an increase of \$1000.00 per annum, payable to the controller, was authorized. The controller in office at the time of the enactment of the increase resigned, and the appointee to fill out the unexpired term, brought action to compel payment to him of the increase of the emoluments, from the time of his appointment.

As a consequence of the decisions of the Superior Court, it is quite obvious that Mr. Kitko is entitled to the increased salary from the date of his appointment, as so stated in *McKINNEY V. NORTHUMBERLAND COUNTY* *supra*, and *MANSELL V. LYCOMING COUNTY COMMISSIONERS* *supra*.

*McKINNEY V. NORTHUMBERLAND COUNTY* *supra*, was again before the Superior Court in *GOODWIN V. ALLEGHENY COUNTY*, 182 Pa. Superior Court 28. On page 33, President Judge Rhodes affirms the rule of *McKINNEY V. NORTHUMBERLAND COUNTY*, namely, that the status of a public officer is fixed at his election or appointment, and if such election or appointment occurs after the date the salary increase is authorized, that officer is entitled to the increase.

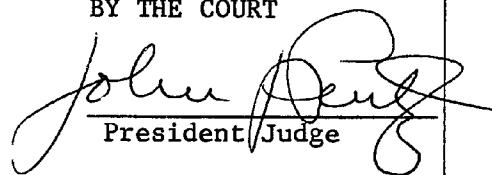
The law, therefore, as stated by the Superior Court of the Commonwealth of Pennsylvania, gives to Mr. Kitko the right to the increased salary from the date of his appointment, since his status under the constitutional provision of Article III, Section 13, is fixed as at the time of his appointment, or election, if he had been elected, just as it fixed the salary payable to Mr. Ammerman, whose status was fixed at the Municipal Election of November 1957, and who obviously did not take office after January 1, 1960.

It is quite obvious, therefore, that the limitation of the salary would apply only to the individual in the office, or holding the office, and is not applicable to the office itself.

O R D E R

NOW, February 6, 1962, Rule made Absolute, and the County Commissioners and County Controller directed to pay to Eugene G. Kitko, the salary at the rate of \$7000.00 per annum, beginning as of March 16, 1961, as provided by the Act of September 8, 1959, P.L. 838 (16 P.S. 11102).

BY THE COURT

  
John Bentz  
President Judge

IN THE COURT OF COMMON  
PLEAS OF CLEARFIELD  
COUNTY, PENNSYLVANIA.  
No. 449 November Term 1961

EUGENE G. KITKO

VS

CLEARFIELD COUNTY

OPINION and ORDER



JOHN J. PENTZ  
PRESIDENT JUDGE  
CLEARFIELD, PENNSYLVANIA