

COUNTY CLERK:  
COUNTY COURT: CLERICAL HIRE:

Increase in amount county clerk can expend for clerical hire or additional compensation to regular deputy or assistant, provided for in Senate Bill 290, 67th General Assembly, may be expended during present term of county clerk.



October 22, 1953

Mr. Haskell Holman  
State Auditor  
State of Missouri  
Jefferson City, Missouri

Dear Mr. Holman:

Your request for an official opinion is at hand, which said request reads as follows:

"Sub-section 6 of Section 51.450 of Senate Bill No. 290, passed by the Sixty-seventh General Assembly, provides in part:

'The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed one thousand dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county; \* \* \*'

"This section repeals Sub-section 6 of Section 51.450 R.S.Mo. 1949, which provides in part:

'The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed five hundred dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county; \* \* \*'

"The question is -- Would the county court, after the effective date of the bill, be authorized to allow the county clerk, during his present term in office, the

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one thousand dollars for clerical hire, provided in Sub-section 6 of Section 51.450 of Senate Bill No. 290, passed by the Sixty-seventh General Assembly?"

Section 13 of Article VII of the Constitution of 1945 of the State of Missouri provides that the compensation of state, county and municipal officers shall not be increased during the term of office. The problem involved in the instant request is whether or not the additional \$500.00 which the county court may allow the county clerk "to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of such county" does, in fact, increase the compensation of the county clerk during his present term of office.

This precise question has never been presented to the courts of Missouri.

Section 51.450 R.S.Mo. 1949, as amended, divides the counties of the third class into population groups, and provides that the clerk of the county court in each such county shall be entitled to employ deputies and assistants, and for such deputies and assistants shall be allowed the sums as in said section provided. It should be noted here that there is no provision for a fixed or definite term in said section for the deputies or assistants.

" The general rule is stated in 37 L.R.A. (N.S.) 389, to-wit:

"The general rule, however, seems to be that this constitutional prohibition against changing the salary of a public officer during his term of office applies only to officers who have a fixed and definite term, and does not apply to appointive officers who hold only at the pleasure of the appointing power."

Corpus Juris Secundum, Vol. 67 at p. 355, states as follows:

"However, where the statute provides a fixed salary for the officer and salary for deputies, all payable out of the public treasury, an increase in the salary of such deputies, or an extra allowance for clerk hire, or a provision for extra deputies, is not within the Constitutional prohibition, since the government has undertaken to pay the officer and the expenses of running the office." \

The Board of Commissioners of Muskogee County v. Hart, 29 Okl. 693, 119 Pac. 132, decided by the Supreme Court of Oklahoma,

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involved increasing the compensation of certain deputies then in office who did not hold for any specified time or defined term. The Constitution of Oklahoma provided that "in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office.\* \* \*" The court held that the deputy clerk here is without any "term" as the same is used in the quoted section of the Constitution, and therefore does not apply to the deputy clerk. In *Sommers v. State*, 5 So. Dak. 321, 50 N.W. 804, Id. 5 S.D. 585, 59 N.W. 963, where the Constitution provided that the legislature shall never grant any extra compensation to any public officer, employee, agent or contractor after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office, the Court held as follows:

"A deputy, appointed by an officer to hold during the pleasure of such principal, does not hold for a "term" within the meaning of Sec. 3, Art. 12, of the Constitution, prohibiting any change in the compensation of any public officer 'during his term of office'".

The case of *Harrold v. Barnum*, Auditor, 8 Cal. App. 21, 96 Pac.104, involved a deputy county surveyor who was appointed to serve by the county surveyor who was elected January 7, 1907, for a term of four years. At the time of the county surveyor's election the statute read that the surveyor's salary was to be \$2,000.00 and the deputy's salary was to be \$960.00 per annum. The Legislature of 1907 amended the deputy's salary, making it \$1,200.00 yearly. The county surveyor revoked the deputy county surveyor's appointment after this legislative change and reappointed him. This suit was to compel payment under the increased salary for the deputy county surveyor. The question was whether the act increasing the salary as hereinbefore set out is within the prohibition of the California Constitution which reads:

"Compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office, nor shall the term of any officer be extended beyond the period for which he is elected or appointed."

The court concluded that the expression "term of office" as used in this provision of the Constitution applies only to officers who have a fixed and definite term and that it does not apply to appointive officers who hold at the pleasure of the appointing power.

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The Supreme Court of California in the case of Bayley v. Garrison, County Auditor, 190 Cal. 690, 214 Pac. 871, dealt with a mandamus action brought by a deputy in the office of the county clerk. The clerk at the start of his term received a fixed salary and was allowed deputies who also had fixed salaries, all being paid out of the county treasury. During the term of office of the clerk, the pay of the existing deputy was increased, and this action is brought to recover the increased pay of this deputy during the clerk's term of office. The court held that whatever benefit the clerk may derive from an increased salary to his deputy is not a direct benefit; rather, if it is a benefit, it arises from securing more valuable or competent help. The court then determined that this "provision for the deputy is neither an increase of the salary of the officer nor of the deputy during his term of office within the meaning of Article 11, Section 9, of the Constitution, prohibiting an increase of salary."

It would thus seem that by virtue of these authorities and under our statutes and constitutional restriction, if the money is "allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant" that the sum could be allowed by the county court after the effective date of the bill and during the county clerk's present term in office. But what of the provision of the section where the additional sum may "be used solely for clerical hire"?

The Constitution of the State of Illinois, dealing with the subject of Counties, in Article X, Section 10, provides that the county board "shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses," and thereafter in said section is stated: "Provided, that the compensation of no officer shall be increased or diminished during his term of office". The Supreme Court of Illinois has construed this section in several cases. In *People v. Foster*, 133 Ill. 496, 23 N.E. 615, that court said: "This court is committed to the construction of the statute that the amount fixed by the county board 'for necessary clerk hire, stationery, fuel, lights,' etc. to a county officer, remains under the control of the board, and may be changed at any time when, in their judgment, the necessity therefor exists."

In another Illinois case, *Coles County v. Messer*, 195 Ill. 540, 63 N.E. 391, the compensation of the sheriff had been fixed by resolution of the county board "including all necessary deputy hire", at the amount of \$2,500.00 per annum, "and that the said sheriff shall be allowed \$1.50 per day for jailer". The sheriff asked the county for extra compensation from the fees of his office, claiming he had paid out more in necessary expenses than this amount. The sheriff brought suit when the county board refused to allow and pay such amount. The Supreme Court of Illinois states, at p. 545 of 195 Ill., P. 393 of 63 N. E.:

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"If the compensation including the expenses, is fixed at one sum, the officer is entitled to retain that amount if it is paid by the fees of his office. If it is fixed in separate sums - one sum for the compensation of the officer, and another sum for expenses - the officer can only retain out of the fees collected a sufficient sum to reimburse him for moneys actually paid out for reasonable and necessary expenses of his office.\* \* \* If the amounts are fixed separately, the compensation, aside from the expenses, cannot be changed during the official term, but the expenses may be changed from time to time by the county board as the necessities of the office may change.\* \* \* The principle of all the decisions is that the compensation, including the expenses of the office, is to be paid, if at all, out of the fees and emoluments of the office, and that there is no liability, and there can be no recovery, for expenses which have not been fixed in advance by the county board. The plain intent and meaning of the Constitution is that the county board shall have power to control and limit the expenses of county officers, and that the officers shall not be at liberty to create a liability against the county except within some limit already fixed by the county board. The allowance for expenses may be changed from time to time, as varying circumstances may require; but there is no liability unless an allowance has been made."

A California case, *Newman v. Lester*, County Auditor, 105 P.785, concerned Orange County, a county of the 15th class, which by statute allowed a salary to the assessor's office as follows: \$3,500.00 per annum to the assessor; and seven field deputy assessors appointed by the assessor of the county and holding office for one specified year, each to receive \$100.00 per month. The law was changed during the term of office of the assessor wherein the office was allowed eight field deputy assessors, and one deputy was to keep an account of all transfers of property in said county during the year, and the change was to take effect immediately. A field deputy assessor filed suit for the increased pay, and the Court of Appeals, 2nd District of California, in this case, allowed the petitioner his salary claimed, stating as follows at 11 Cal. App. P. 581:

"\* \* \* Where the statute provides a fixed salary for the officer and a separate allowance for expenses of his office (*Kirkwood v. Soto*, 87 Cal. 394, 25 Pac. 488), or a fixed salary for the officer and a fixed salary for a certain number of

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deputies or clerks, all payable out of the county treasury, an increase of such separate allowance for expenses or for deputies, whether in the number of deputies or the amount paid to each, is not a violation of the constitutional provision that 'the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office.' (Const., Sec. 9, Art XI.)"

CONCLUSION

It is the opinion of this office that the county court in all counties of the 3rd class may allow the county clerk after the effective date of sub-section 6 of Section 51.450 of Senate Bill No. 290 and during his present term in office the \$1,000.00 per year as in said section provided for the purpose provided for in said subsection.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. J. Robert Tull.

Very truly yours,

JOHN M. DALTON  
Attorney General

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