

COUNTY HIGHWAY ENGINEER:
COUNTY COURT:
SALARY:
SENATE BILL NO. 48:

Under Senate Bill No. 48, 69th General Assembly the maximum salary which a county highway engineer in a third class county may receive during the remaining term of his office is \$3,650.



September 30, 1957

Honorable Eldred Seneker
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. Seneker:

Your recent request for an official opinion reads:

"Section 61.190 of Revised Statutes of Missouri, 1953, relative to Highway engineer's salary has been repealed and a new section #61.190 has been enacted in lieu thereof.

"The new section provides that in counties of the third class the highway engineer shall receive an annual salary, to be fixed by the County Court, of not to exceed \$4200 per year.

"Lawrence County Surveyor, who is a registered engineer, has been appointed by the county court as County Highway Engineer. Some members of the county court want your opinion as to whether the county highway engineer, who is also surveyor, is entitled to receive the annual salary as provided in the new section 61.190 which has recently passed. My contention is that he is, but your opinion is requested."

On September 11, 1957, you wrote to us as follows:

"In regard to my letter of August 29th, and your telephone conversation of September 10th, relative to the surveyor's salary, I will more fully explain the situation in Lawrence County, which is a third class county and ask an additional opinion.

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"Eugene Burnett was first elected surveyor in Lawrence County in the November election of 1952. In January, 1953, he was appointed county highway engineer by the county court for a term of four years. In the November 1956 election, Mr. Burnett was again elected county surveyor and in January, 1957 he was again appointed county highway engineer by the county court for a term of four years. The county court paid Mr. Burnett \$10 per day for 20 days per month for his services as county highway engineer. Under these conditions, is Mr. Burnett entitled to such yearly salary as a court may desire to pay him, not to exceed \$4200? And, if so, has the county court the authority to place Mr. Burnett on the salary plan at this time?"

All references to statutes will be to RSMo 1949, unless otherwise indicated.

Section 61.160 reads:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of sections 61.170 to 61.310 shall apply only to counties of classes two, three and four."

Section 61.200 reads:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by sections 61.170 to 61.310; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor; provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county highway engineer cannot properly perform all the duties of his office,

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he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

Numbered paragraph 2 of Section 61.190, Laws of 1953, p. 385, reads:

"2. In all counties of the third and fourth class the county highway engineer shall receive as compensation an amount fixed by the county court, for each day he shall actually serve as county highway engineer. The amount so fixed shall not exceed ten dollars per day in counties of class three nor eight dollars per day in counties of class four. All such compensation shall be payable monthly out of the county treasury. As amended Laws 1953, p. 385, § 1."

The above section was repealed and re-enacted by Senate Bill No. 48 of the 69th General Assembly, numbered paragraph 2 of which reads:

"2. In all counties of the third and fourth class the county highway engineer shall receive an annual salary, to be fixed by the county court, of not to exceed four thousand two hundred dollars per year in counties of class three, nor to exceed three thousand dollars per year in counties of class four. This compensation shall be payable monthly out of the county treasury."

In your second letter, you inform us that the county highway engineer was appointed for the second time, in January, 1957, for a four year term, and also that his previous appointment had been for a four year term.

You also state that "The County court paid Mr. Burnett \$10 per day for 20 days per month for his services as county highway engineer."

Since the county highway engineer was appointed for a "term" and since his "term" began prior to the effective date of Senate Bill No. 48, which effective date was August 29, 1957, his salary cannot be increased during his "term", since this would be violative of Section 13 of Article VII of the Missouri Constitution, which reads:

"The compensation of state, county and municipal officers shall not be increased during the

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term of office; nor shall the term of any officer be extended."

Since the salary of the county highway engineer cannot be increased during his term of office, we must determine what his "salary" was prior to the effective date of Senate Bill No. 48 so that the "salary" fixed by the county court under the provisions of that Bill will not exceed the "salary" which the county highway engineer received prior to the effective date of the Bill.

We have noted above your statement to us that prior to the effective date of the Bill the county highway engineer had been paid at the rate of \$10 per day, five days a week, for each year of his term. This would amount to a yearly sum of \$2400. The total maximum which the county highway engineer could have earned, had he worked seven days per week for each year of his term, would have been \$3,650. This figure of \$2,400 per year is a definite statement of what he actually received whether the amount be designated as salary or fees. On the other hand, as we stated, \$3,650 per year is the greatest amount which he could have possibly made. It would seem fairly clear that one or the other of these two sums must be taken as the maximum figure beyond which the county court cannot fix the salary of the county highway engineer under Senate Bill No. 48 in order that the constitutional prohibition, noted above, against increasing the salary of a county officer during his term of office not be violated.

In order to receive light upon this situation, we turn to the case of State v. Farmer, 196 S.W. 1106, a case decided by the Missouri Supreme Court en banc in 1917. The office there involved was that of circuit clerk, and from a factual point of view, it was very similar to the facts in the instant case. The situation is clearly set forth by the court at l.c. 1108 as follows:

"[3] II. Coming to the second and decisive constitutional question reserved, we have to ascertain and rule whether the act here under discussion did increase the compensation of relator and of other circuit clerks similarly situated during their terms. It is admitted that Callaway County has a population of between 25,000 and 30,000. Relator qualified as circuit clerk in his current term on the 1st day of January, 1915. When he so qualified, his compensation was fixed upon a fee basis, and he was allowed to retain the fixed sum of \$2,000 from his fees as clerk of the circuit court if he earned so much; the sum so allowed to be retained being then governed by the below statute, to wit:

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'The aggregate amount of fees that any clerk under articles 2 and 3 of this chapter shall be allowed to retain for any one year's services shall not in any case exceed the amount hereinafter set out. * * * In all counties having a population of twenty-five thousand and less than thirty thousand persons, the clerks shall be permitted to retain two thousand dollars for themselves, and be allowed to pay for deputies or assistants not exceeding fifteen hundred dollars.' Laws 1913, p. 702.

"Under the act here attacked relator's compensation was commuted to the sum of \$2,000 per annum in cash, payable by the county monthly in lieu of all fees, which were thereafter payable to the county, pursuant to the below provision, to wit:

'The clerks of the circuit courts of this state shall receive for their services, annually, the following sums: In counties having a population of 7,000 persons and less than 10,000 persons, the sum of eleven hundred dollars; in counties having a population of 10,000 persons and less than 15,000 persons, the sum of twelve hundred and fifty dollars; in counties having a population of 15,000 persons and less than 20,000 persons, the sum of sixteen hundred dollars; in counties having a population of 20,000 persons and less than 25,000 persons, the sum of nineteen hundred and fifty dollars; in counties having a population of 25,000 persons and less than 30,000 persons, the sum of two thousand dollars.' Laws 1915, p. 378.

"While defendants concede that the amount of cash salary relator is entitled to receive under the provisions of the act of 1915 does not exceed, but exactly equals, the amount he was entitled to retain under the act of 1913, out of his fees collected, yet they contend that unless the fees which he actually earned and collected amount each year to a sum equal to the \$2,000 yearly cash salary, the provisions of the act of 1915 are unconstitutional, for that they in fact bring about an increase in his compensation during the currency of a given term."

At l.c. 1109, the court further stated:

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"* * * For the year 1911, the sum of \$1,056.42; for the year 1912, the sum of \$1,507.76; for the year 1913, the sum of \$1,689.04; for the year 1914, the sum of \$1,840.84. * * *."

The conclusion of the court is thus stated at l.c. 1109 et seq:

"[5,6] The act of 1915, putting circuit clerks upon a salary basis, was, it is plain, designedly enacted so that the several salaries fixed thereby and made payable monthly in cash should exactly equal the amounts fixed by statute in 1913, as the amounts which could be retained by each circuit clerk as his annual compensation out of the fees he earned. As we gather the position and contention of defendants, they concede that in all cases and counties wherein the fees actually earned by the several circuit clerks amount in any one year to the sum fixed as their salaries by the act of 1915, the act is constitutional. At least, if defendants do not concede this, the logic of their contention concedes it for them. The result of such a construction is that some circuit clerks in some counties which contain from 25,000 to 30,000 population would get the salary fixed by the act of 1915 some years, and get fees other years, and it would be impossible ever to tell what method of payment should be employed, or how much compensation the circuit clerk was to get till the end of the year. Likewise in some of the counties these officers would be paid salaries and in others still remain upon a fee basis of compensation. Such results could not have been in legislative contemplation; since two cardinal canons of construction upon the attack of unconstitutionality confront us: One of these is that we must be convinced beyond a reasonable doubt that an act is void under the Constitution before we are warranted in so declaring it. (*State v. Baskowitz*, 250 Mo. 82, 156 S.W. 945, Ann. Cas. 1915A, 477), the other is that where one construction of a statute would render the act absurd and unenforceable and the other the converse, we are required to adopt the latter rather than the former (*State ex rel. v. Gordon*, 266 Mo. 411, 181 S.W. 1016).

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"Our attention is directed toward the late case of Folk v. St. Louis, 250 Mo. 116, as furnishing authority for the position defendants take here. We do not think the Folk Case is at all persuasive. In a way that case is the antithesis of this. There an act was passed during a certain current term increasing the salary of the circuit attorney of the city of St. Louis to \$5,000 per year. The acts in force when he took office gave this official \$4,000 payable by the city, and \$350 payable by the state, a total fixed salary falling short of the amount fixed by the act attacked. It was urged that as other services were performed wherein the services performed were worth more than the difference, there was in fact no increase. We held against this contention. So that case furnishes no authority for this.

"We are constrained, therefore, to hold that the act of 1913 (Laws 1915, p. 378) fixed the basic compensation for clerks of the circuit courts, and that the amounts severally set forth in that act as the sums in fees which such clerks could each retain as their several compensations constitute the salaries from which we are to determine whether the act of 1915 increases such compensation. We have seen that the amounts are the same in counties of the class here in question, and conclude that as to the relator there has been no increase, and the act is constitutional. * * *."

From the above, it would seem plain that in the Farmer opinion the Missouri Supreme Court adopted the principle that the highest possible maximum of fees, rather than the amount of fees which the circuit clerk had actually received prior to putting him upon a straight salary of \$2,000 per year, was to be the measuring rod in determining whether he could receive a straight salary of \$2,000 during the remaining part of his office. We believe that the same principle would apply in the instant case of a county highway engineer. We also note that although the Farmer decision was handed down in 1917, it stands undisturbed or modified by subsequent appellate court opinions.

Since, as we noted above, the highest possible maximum which the county highway engineer could have earned prior to the passage of Senate Bill No. 48 was \$3,650 per year, we believe that this is the maximum at which the county court can fix his salary under the provisions of Senate Bill No. 48.

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CONCLUSION

It is the opinion of this department that under Senate Bill No. 48, 69th General Assembly, the maximum salary which a county highway engineer in a third class county may receive during the remainder of his term of his office is \$3,650 per year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Hugh P. Williamson.

Yours very truly,

John M. Dalton
Attorney General

HPW/bi