

1952 O. A. G.

OFFICIAL OPINION NO. 1

January 3, 1952.

Hon. Sam J. Bushemi,
State Representative,
3500 Connecticut Street,
Gary, Indiana.

Dear Mr. Bushemi:

Your letter of November 27, 1951, has been received requesting an official opinion on the following question:

“Will you kindly give me your opinion as to the salary to be paid to incumbent county commissioners as of January 1, 1951, and presently retaining said office, in counties having a population between 200,000 and 300,000 under the 1940 census, and which population increased to over 300,000 but not over 400,000 by the 1950 census, under chapter 236 of the Acts of 1949.

“I wish to further call your attention to Burns' Statute 49-1101, being the Acts of 1920, Special Session, Chapter 28, Page 197, which would be applicable in this situation.”

This opinion is supplemental to Official Opinion No. 94 of this office, dated October 19, 1951, wherein it was held that by virtue of the increase in population of Lake County, Indiana, to a number in excess of 300,000 population, according to the last United States Census, incumbent officials' salaries referred to in said statutes cease to apply to such Lake County officials as the title of said Act only provided for a population bracket of between 200,000 and 300,000 population.

Section 49-1101, Burns' 1951 Replacement, same being Sec. 1, Chapter 28, Acts 1920 (Spec. Sess.), referred to in your letter, provides as follows:

“The salaries, compensation or per diem of public officials or other persons receiving compensation out

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of the treasury of any county, township, city, town, or other political subdivision of the state shall in no case be decreased or diminished by reason of any increase or decrease in the population of any such county, township, city, town or other political subdivision, as announced by the census bureau of the United States government, or by reason of the provisions of any law now in force prescribing and fixing any such salary, compensation or per diem on the basis of population. But, unless otherwise provided by law enacted at this, the second special session of the seventy-first general assembly, or hereafter enacted, such salaries, compensation or per diem shall remain as heretofore fixed by law and as they would have been if no census had been taken: Provided, That nothing in this act (§§ 49-1101, 49-1102) shall be construed to prevent the increase of such salary, compensation or per diem by reason of the provisions of any law now in force prescribing and fixing any such salary, compensation or per diem on the basis of population."

The effect of the above statute would seem to continue in effect the salary of incumbents in office whose salaries would be decreased by virtue of the removal of officials of Lake County from the purview of Chapter 236 of the Acts of 1949.

While some concern exists as to the constitutionality of such a statute preventing decrease in salary, it has been on the statute books for some 31 years without, so far as I can ascertain, ever having been questioned or tested by judicial process.

It has been held that in construing legislation, every reasonable presumption must be indulged in favor of its constitutionality. *Heckler v. Conter et al.* (1933), 206 Ind. 376, 187 N. E. 878.

It has further been held that when the legislature declares in the Act itself that the salaries of county officials in the several counties of the state are graded according to population and necessary services required, we must assume that it had before it all of the necessary information to enable it to fix such salaries upon a just and equitable basis, with the view of giving each official therein named a reasonable com-

pensation for the services performed. *Harmon v. Board of Commissioners of Madison County* (1899), 153 Ind. 68, 72, 54 N. E. 105.

The above principle was effectively applied in the statute then before the court for construction, which fixed the salary of the Clerk of the Circuit Court and other officers therein named according to the named county. In that case, the court at great extent reviewed the purpose of the amendment to the Constitution of 1881 for the fixing of salaries according to population and services required. Said case on page 76 of the opinion makes the further pertinent observation:

“* * * It is only where there is a gross departure and manifest abandonment and defiance of constitutional rules of procedure that the judicial department of the State can set aside and declare void the acts and proceedings of a coordinate branch of the State government.”

It is clear from a reading of Official Opinion No. 94, *supra*, that the legislature, in enacting said amendment of said statute of 1949, clearly intended to include Lake County within its provisions but by virtue of an error in printing or drafting of said law, its title was not broad enough to cover the 200,000 to 400,000 population classification contained in the body of the Act.

The intent of the constitutional provision as to classification clearly does not intend to impute a motive that a county which has increased in population more than 60,000 should have its officers' salaries reduced and that such officers be paid less than counties having a lesser population.

By giving effect to the provisions of Section 49-1101, Burns' *supra*, the evident intent of the purpose of the constitutional provision, as well as that of the legislative intent, would be given full credence.

In view of the foregoing and in full consideration of the number of years said statute remained unchallenged as the law of Indiana, I feel required to hold said statute (§ 49-1101, Burns') constitutional until otherwise judicially determined, and that *incumbents* in office of the county officials of Lake County, Indiana, whose salaries would be jeopardized by the

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change in census above indicated, would have their salaries continued in full force and effect, in the amount stated in Chapter 236 of the Acts of 1949, by virtue of the provisions of Section 49-1101, Burns' 1951 Replacement.

OFFICIAL OPINION NO. 2

January 7, 1952.

Honorable Otto K. Jensen,
State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis 4, Indiana.

Dear Mr. Jensen:

Your letter of December 18, 1951, has been received and reads as follows:

"The 1950 census declares the population of St. Joseph County to be in excess of 200,000 inhabitants.

"A difference of opinion exists as to the amount of salary that the prosecuting attorney is entitled to receive. St. Joseph County in itself comprises the 60th Judicial Circuit.

"We respectfully request your opinion upon the following:

"1. Which statute controls as to the amount of salary:

"(a) Burns', Sec. 49-1022, or

"(b) Burns' 1951 Supp., Sec. 49-2673?

"2. If your answer to question 1(a) is in the affirmative, is the salary retroactive to April 1, 1950 or July 28, 1951?"

Section 49-1022, Burns' 1951 Replacement, above referred to, is section 1, chapter 212, Acts 1943, as amended by section 1, chapter 236, Acts 1949, and reads as follows: