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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:

“In counties having a population of not less than two hundred thousand (200,000) nor more than four hundred thousand (400,000), according to the last preceding United States census, which such counties shall constitute a separate judicial circuit as now defined by law, the following named sum shall be the salaries of the respective officials named herein: The prosecuting attorney of such judicial circuit shall receive an annual salary of ten thousand dollars (\$10,000); the county auditor shall receive an annual salary of ten thousand dollars (\$10,000); the clerk of the circuit court shall receive an annual salary of ten thousand dollars (\$10,000); the county recorder shall receive an annual salary of seven thousand five hundred dollars (\$7,500); the county sheriff shall receive an annual salary of ten thousand dollars (\$10,000); the county treasurer shall receive an annual salary of ten thousand dollars (\$10,000); and each county commissioner shall receive an annual salary of six thousand dollars (\$6,000), payable from the county treasury in twelve (12) equal instalments on the last day of each month.”

The foregoing section of the statute was the subject of Official Opinion No. 94 of this office dated October 19, 1951, wherein it was held that the 1949 amendment only included a population bracket of 200,000 to 300,000 in its title, while the body of the act was amended to include the population bracket of 200,000 to 400,000, and that therefore the act only applied to counties having a population of between 200,000 to 300,000 which now constitute a separate judicial circuit. Your letter states that St. Joseph County, according to the last United States census, is between 200,000 and 300,000, and therefore said opinion does not affect our question.

It is to be observed that the foregoing statute is drawn in full compliance with article 4, section 22, clause 14, of the Constitution of Indiana, which provides:

“The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: * * *

“(14). In relation to fees or salaries: except that the laws may be so made as to grade the compensation

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of officers in proportion to the population and the necessary services required; (As amended March 14, 1881.)
* * *.”

The next section of the Constitution of Indiana (article 4, section 23) provides:

“In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.”

Section 49-2673, Burns' 1951 Supplement, is section 1, chapter 206, Acts 1951, and amends section 73, chapter 253, Acts 1945, the latter being the section referring to St. Joseph County of the general statute of 1945 fixing salaries of prosecuting attorneys in each of the counties by naming the counties. Said section 49-2673, Burns' 1951 Supplement, provides as follows:

“In the county of St. Joseph the annual salary of the prosecuting attorney shall be seventy-five hundred dollars (\$7500), and the maximum aggregate amount that may be paid for salaries of deputy prosecuting attorneys shall be nineteen thousand dollars (\$19,000). The maximum annual amount which may be paid by the prosecuting attorney for investigators shall not exceed five thousand dollars (\$5,000). The maximum annual amount which may be paid by the prosecuting attorney for clerical assistance shall be three thousand dollars (\$3,000). In the event that the board of county commissioners does not furnish the prosecuting attorney with office space he shall be allowed an annual amount for office space not to exceed eighteen hundred dollars (\$1800).”

From the foregoing, it must be noted that the last statute referred to makes no attempt to specifically fix the salary of prosecuting attorneys according to stated population classifications. It is also to be observed that said 1951 amendment increased the maximum amount that might be paid for deputy prosecuting attorneys in said county from \$7,500 to \$19,000

and it is therefore clear that the legislature recognized that there had been a substantial increase in the amount of services and legal work to be handled by the office of prosecuting attorney of St. Joseph County. A further reference to the old section of this statute prior to amendment, shows that the prosecutor's salary was fixed at \$6,000 per year, while the new amendment fixes his salary at \$7,500 per year.

It would seem the reason the Supreme Court of Indiana has upheld legislation such as contained in the above general prosecutor's statute, consisting of naming counties, instead of fixing them within brackets according to population classification, is due to the judicial assumption that the legislature has taken into consideration the population of the county and the amount of services to be performed by the particular officer in that county. This theory is fully explained in the case of *Harmon v. Board of Commissioners of Madison County* (1899), 153 Ind. 68, 54 N. E. 105, where the court on page 72 of the opinion said:

“(8) When the legislature declares in the act itself that the salaries of the county officers in the several counties of the State are graded according to population and the necessary services required, we must assume that it had before it all the necessary information to enable it to fix such salaries upon a just and equitable basis, with a view of giving to each officer therein named a reasonable compensation for the services performed. (Citing cases.)

“The evils and abuses under the former systems of compensating county officers became so glaring and intolerable that, in 1881, the people of the State amended the Constitution for the purpose of enabling the legislature to correct those evils and prevent those abuses by a new system of payment for official services. * * *”

It is to be noted chapter 253 of the Acts of 1945 (sections 49-2601—49-2696, Burns' 1951 Revision) does not declare in the Act that the legislature has taken into consideration the population of the counties specifically named or the amount of

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services to be performed by the prosecuting attorneys, within the rule announced by the court in the last quoted case.

While the above principle of statutory construction may be permissible in ordinary cases, it is seriously questioned that the portion of section 49-2673, Burns' 1951 Supplement, aforesaid, as far as it applies to the salary of the prosecuting attorney of St. Joseph County, is constitutional. This is due to the fact that since the year 1943 there has been a general statute on the statute books, drawn in full compliance with the above constitutional requirement, stating that the salary of prosecuting attorneys, and other named officers, in counties having a population of between 200,000 and 300,000 and constituting one judicial circuit, shall be \$10,000 per year. This statute since its enactment has been used for the payment of official salaries of those officers in counties coming within its classification. It may be used in the future to fix the salaries of those officers in counties hereafter coming within its classifications. To select one office out of one county for a reduced salary, on its face seems to be discriminatory and contrary to the purposes of said constitutional amendment, especially where in the very statute fixing the prosecutor's salary at \$7,500 per year, it recognized the necessity of an increase for deputy prosecutors' hire in an amount of \$11,500, in which event the amount of services to be performed could not logically be said to be reduced.

In construing the intent of the above constitutional amendment of 1881 on legislation fixing salaries of public officers, the Supreme Court of Indiana in the case of *Crowe v. Board of Commissioners of St. Joseph County* (1936), 210 Ind. 404, at pages 411 and 412, 3 N. E. (2d) 76, in part said:

“* * * It would seem of little importance whether a fee and salary law is called general or local or special, since, regardless of what may have been the legislative power to enact general laws prior to 1881, the amendment of that year must be construed as not only permitting the laws to be so made as to grade the compensation of officers in proportion to the population and necessary services required, but also as prohibiting grading upon any other basis, and therefore as also prohibiting the fixing of different salaries for the same

office in different counties, except the difference be in proportion to the difference in population and necessary services. Thus, where a salary for a given office is fixed for one county, consideration must be given the salary paid for the same office in all of the other counties. If salaries are fixed high in small counties where small services are required, and low in large counties where large services are required, the purpose of the Constitution is defeated, and, consequently, such laws cannot stand. * * *"

From your letter and the material submitted therewith, it appears that the official announcement of the 1950 census was made July 28, 1951, which was several months after the passage of the 1951 statute so fixing the prosecutor's salary at \$7,500 per year. At that time the legislature could not have officially known that the population of St. Joseph County was in excess of 200,000, and it might be reasonably assumed it had no intention, by the passage of said act, of curtailing the scope of operation of the previous general statute as far as the salary of the office of prosecuting attorney of St. Joseph County was concerned. If the legislature did pass said 1951 statute fully knowing, on the basis of unofficial census tabulations, that St. Joseph County had exceeded 200,000 population, and under such circumstances had pinpointed said St. Joseph County's prosecutor's office for a salary less than that generally paid in like counties, where no reduction in services seemed plausible, it would violate the intent and purpose of the constitutional amendment.

Another feature of this problem must be considered. This office has by numerous prior official opinions held that a census, although announced at a later date, is retroactive as to salaries as of the date the census was begun, namely, April 1, 1950. 1950 Indiana O. A. G. Official Opinion No. 38 and 1951 Indiana O. A. G. Official Opinions Nos. 6, 12 and 24. However, all of these opinions, and especially 1951 Indiana O. A. G. Official Opinion No. 6, *supra*, announced the principle that until the official census has been officially announced, the various municipal subdivisions of the state retain their identity given them by the 1940 United States census.

It is therefore clear that, until July 28, 1951, St. Joseph County officially was a county of less than 200,000. On that

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date it came into the classification of counties between 200,000 and 300,000 population. Under the authorities referred to in the above official opinions of this office on July 28, 1951, said county became so recognized as having a new classification, but the effects of such recognition were retroactive for salary purposes to April 1, 1950. Under this set of facts, to conclude that the 1951 amendment to the prosecutors' statute would supersede a statute later coming into actual operation and being the general statute of 1943 fixing the salaries of prosecutors in counties of 200,000 to 300,000 population, and at the same time would recognize the effectiveness of the latter statute from April 1, 1950, to the time of the passage of the 1951 law regarding the St. Joseph County prosecutor, would certainly be inconsistent from a legal or logical standpoint.

While this office has adopted the construction that these salaries are effective as of the date of the beginning of the taking of such census, there is considerable authority to the contrary, as shown by 14 C. J. S. "Census," section 6, page 103, where authorities are reviewed holding that there is no effect to a United States census for any purpose until its official announcement. By this statement it is not intended to indicate any change of opinion from that previously asserted by this office on the effect on salaries of an announcement of a United States census, but it is merely pointed out to show such judicial construction of statutes based on a census were never intended to reach a result such as would be reached by giving precedence to the 1951 prosecutors' salary statute over the statute fixing the prosecutors' salary according to population classification, which as a matter of fact came into operation some time after the passage of the 1951 law.

In arriving at the conclusion herein made, it is also noted that section 49-1022, Burns' 1951 Supplement, is recognized as fixing the salaries of many other county officers therein specified for St. Joseph County due to the new county classification.

In conclusion, in answer to your questions numbered 1 and 2, I am of the opinion that section 49-1022, Burns' 1951 Replacement, fixing the salary of the prosecuting attorney of St. Joseph County at \$10,000 per year, controls and is effective since April 1, 1950; that this construction in no way interferes with the legality or continued operation of that part

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of section 49-2673, Burns' 1951 Supplement, relating to matters other than the salary of the prosecuting attorney of said county.

OFFICIAL OPINION NO. 3

January 10, 1952.

Mr. Robert B. Hougham,
Indiana State Teachers' Retirement Fund,
336 State House,
Indianapolis, Indiana.

Dear Mr. Hougham:

Your letter has been received requesting an official opinion and reads as follows:

"Beginning with Acts 1945, Chapter 328, amendments to the Indiana State Teachers' Retirement Fund Law have contained the language, 'no interest shall be charged for time not credited to the teacher,' with reference to amounts withdrawn from the fund, or amounts due for 'deferred payment or adjusted accounts.'

"Under date of March 31, 1950, you rendered an opinion to this board, to the effect that if a member had transferred from a prior law, to one of the later amendments containing this waiver-of-interest clause, he was not chargeable with interest on arrearages for time not credited to the teacher; and that interest charges on his arrearages are governed by terms of the law under which he holds membership.

"We request your official opinion as to whether the construction of law given in your opinion of March 31, 1950, may be applied also to another class of debts owed by teachers to the fund, namely, deficits for non-payment of assessments or parts of assessments, for prior years. These arise from four principal sources: