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OFFICIAL OPINION NO. 8

January 25, 1952.

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

Dear Sir:

I have your request for an official opinion which reads as follows:

"The city council of a third class city fixed the salary and additional compensation of its city clerk by ordinance enacted March 31, 1947 for a period of four years beginning January 1, 1948.

"The salary of the clerk was fixed pursuant to Burns' 48-1227 and in excess of 80% of the maximum as provided by Burns' 48-1238. Additional compensation of \$1200.00 for services to utilities was provided in the ordinance pursuant to Burns' 48-1233 without regard to the 80% minimum.

"The ordinance did not provide an additional annual compensation of \$600.00 for the city clerk serving as clerk of the 'board of public works and safety' as provided by Burns' 48-1216 and the city clerk has not claimed or received such annual additional compensation in whole or in part since January 1, 1948.

"The clerk now believes he is entitled to the annual additional compensation as clerk of the board of public works and safety retroactive to January 1, 1948 and at the rate of \$600.00 annually.

"The mayor of said third class city has requested an official opinion upon the following:

"1. Is the city clerk entitled to claim \$600.00 annually for acting as clerk of the board of public works and safety retroactive to January 1, 1948?

“2. Does the 80% minimum provided by Burns’ 48-1238 apply to this annual additional compensation?”

“3. Is it necessary for the clerk to institute a suit against the city before a request is made for an additional appropriation to pay whatever amount is due him?”

Section 6 of the Chapter 233 of the Acts of 1933, as last amended by Section 1 of Chapter 232 of the Acts of 1945, same being Burns’ 48-1216, provides in part as follows:

“\* \* \* The city clerk shall be clerk of the ‘board of public works and safety,’ and shall receive as an additional compensation therefor, beginning with the first day of January, 1936, an annual compensation of six hundred dollars (\$600), which shall be in addition to the compensation as provided for city clerk in Section 15 (§ 48-1227) of this act. And it is hereby made the duty of the proper officers of every third class city to include said amount in the annual budget of each and every year for the following year, beginning with the budget prepared in 1935, for the year 1936, as not (now) provided by law.”

Section 15 of the same 1933 Act as last amended by Section 1, Chapter 33 of the Acts of 1949, same being Burns’ 48-1227, provides that the salary of the city clerk shall not exceed \$2,800.00. Section 24 of the 1933 Act, same being Burns’ 48-1238, provides that the salaries of any officers are not to be less than 80% of the maximum fixed in the 1933 Act. Thus, the clerk’s salary would be required to be fixed at a sum not less than \$2,240.00. You state that the clerk was also allowed \$1,200.00 for services to utilities of the city without regard to the 80% minimum.

It is to be noted that the portion of Section 48-1216 previously quoted does not provide for affixing \$600.00 additional compensation but affirmatively grants it to the clerk and only makes it the duty of the appropriate officers to provide for such an amount in the annual budget. If the ordinance established any salary in addition to provisions concerning services to utilities, provided same figured between \$2,840.00 and

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\$3,400.00, and stated that it was for salary and for services to the Board of Public Works, such an ordinance would, of course, include the \$600.00. However, there is no necessity for any ordinance directly granting the \$600.00 allowance. Thus, it is manifestly clear that if the salary of the clerk is fixed at some sum between \$2,240.00 and \$2,800.00, that the \$600.00 previously mentioned is not included. It has been held frequently in this state that the salary and allowances of a public officer are incidents of his office and are not waived by failure to collect at the time due. Therefore, it is my opinion, in answer to your first question, that the clerk about whom you inquire is entitled to \$600.00 annually for acting as clerk of the Board of Public Works and Safety retroactive to January 1, 1948, whether included in the ordinance fixing salary or not.

In answer to your second question, it is my opinion that the 80% provision contained in Burns' 48-1238 does not apply to this \$600.00. The wording of this section seems to me precludes such a construction. That section reads as follows:

“Wherever, by any provision of this act, it is provided that the common council of any city shall fix the salary of any officer or employee at an amount not exceeding the amount herein prescribed, such provision shall be construed to mean that the salary so fixed shall in every case be equal to at least eighty (80) per cent of the salary as herein prescribed.”

It will be noted that it applies only when the statute refers to an amount not to exceed a certain sum. Such is not the case in regard to the \$600.00. In the case of other salaries set by the act, the wording is “not to exceed.”

In answer to your third question, the city and its appropriate officers have a clear-cut duty to request the necessary additional appropriation and to pay the sum due when properly appropriated. Their duty is not affected by the existence of litigation. If the proper officers of the city fail or refuse to perform their duties, actions may be commenced to compel them to perform their duties. However, the officers have at all times the right and duty to take steps to see that the \$600.00 allowance is paid.