

Zoercher v. Indiana Associated Telephone Corp.
(1937), 211 Ind. 447, 456, 7 N. E. (2d) 282.

It is at once apparent the provision of the statute relative to salary and *per diem* of the secretary is somewhat ambiguous. If strictly construed, it requires payment of both. Where, by a long course of administrative interpretation and practice, said secretary has been paid both salary and *per diem*, a salary for office work and *per diems* for outside work, during which time the statute has been amended two or three different times by the legislature without clarifying said provision, lends credence to the proposition that the legislature was satisfied with the administrative construction and operation of the statute. I am of the opinion that, if construed by a court, it would reach the same conclusion.

In answer to your question, I am therefore of the opinion the secretary of the Board of Dental Examiners is entitled to the *per diem* for meetings and outside services rendered the Board under the above statute in addition to the salary for office work allowed him as secretary of said board.

OFFICIAL OPINION NO. 24

March 11, 1952.

Honorable Henry F. Schricker,
Governor of the State of Indiana,
State House,
Indianapolis, Indiana

Dear Governor Schricker:

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

“In my capacity as Chairman of the State Election Board I have received another request for an opinion to interpret the language of the intention of Chapter 343 of the Acts of 1951, which proposes to amend Section 11 of Article 7 of our State Constitution. Apparently, a similar problem will arise in a number of

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judicial circuits in Indiana where the conditions are parallel.

“Chapter 343 is intended to amend our State Constitution and extend our term of office of prosecuting attorneys from two years to four years, and declares that the first election of said office for a four year term shall be in the General Election of the year 1954.

“The Act in amendment includes the following proviso, to-wit:

“‘Provided that any such officer whose term is abridged by virtue of this section shall continue to serve until January 1, 1959.’

“This proposed amendment will be submitted to the voters for adoption in referendum at the General Election of 1952. If the voters give their approval to this amendment then the following question will need to be answered by your interpretation:

“There are certain prosecuting attorneys in Indiana who do not assume their office until the second January 1st following their election, and because of this fact I am requesting your official opinion as to when prosecutors elected in the General Election of 1952, but not taking office until January 1, 1954, will submit to re-election or when their term of office expires.”

The proposed amendment to the Indiana Constitution reads as follows:

“That Section 11 of Article 7 of the Constitution of the State of Indiana be amended to read as follows: ‘Sec. 11. There shall be elected in each judicial circuit by the voters thereof a prosecuting attorney, who shall hold his office for four years, and whose term of office shall begin on the first day of January next succeeding his election. The election of prosecuting attorneys under this section shall be held at the time of holding the general election in the year 1954 and each four years thereafter: Provided, that any such officer whose term is abridged by virtue of this section shall continue to serve until January 1, 1959.’”

If the proposed amendment receives a majority of the electors' votes in favor of adoption of the above constitutional amendment in the 1952 general election, then such amendment will be declared to be in effect at the closing of the polls on such day of the general election. *Kirkpatrick v. King et al.*, 228 Ind. 236, 91 N. E. (2d) 785. The phrase "a majority of said electors" as used in Section 1, Article 16 of the Indiana Constitution has been construed to mean "a majority of electors voting on adoption of constitutional amendment, and not a majority of all electors voting at the election at which the proposed amendment is voted on or a majority of the electors entitled to vote at such election." *In re Todd*, 208 Ind. 168, 193 N. E. 865.

Should the proposed amendment become effective after the 1952 general election, it is noted that the first election of Prosecuting Attorneys for a four-year term would be held at the general election in 1954 unless such Prosecuting Attorney came under the proviso clause.

The case of *Kirkpatrick v. King et al.*, 228 Ind. 236, 91 N. E. (2d) 785, presented a similar situation as would be present if the proposed amendment is approved. In that case the situation was as follows: The 1945 General Assembly passed a joint resolution to amend Section 2, Article 6 of the Indiana Constitution. The 1947 General Assembly agreed to the Constitutional amendment and the voters at the 1948 general election by a majority, approved such amendment. The amendment which became Section 11, Article 6, reads as follows:

"Notwithstanding any other provision thereof, the sheriff of each county shall be elected in the general election held in the year 1950 and each four years thereafter. The term of office of each such sheriff shall be four years beginning upon the first day of January next following his election and no person shall be eligible to such office more than eight years in any period of twelve years: Provided, however, that any elected sheriff who shall hold said office on December 31, 1950, and who shall have been elected to said office for a period of less than two consecutive years immediately preceding, shall continue in said office for the four year term commencing January 1, 1951."

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In the General Election of 1948 there were ninety-two county sheriffs elected to office. Seventy-seven of these sheriffs took office on January 1, 1949, one took office on November 15, 1948, and fourteen took office January 1, 1950. In connection with the different times that the terms of sheriffs commenced the court said: "We must presume that the General Assembly, and the voters who ratified the amendment, were aware of this situation, and it was their expressed intention not only to change the term of the office of sheriff from two years to four years, but also to establish a definite uniform cycle for the beginning and ending of all such terms throughout the State." *Kirkpatrick v. King et al.*, 228 Ind. 236, at page 243, 91 N. E. (2d) 785. The appellant was one of the seventy-seven sheriffs elected in the 1948 General Election that took office January 1, 1949. He contended that he came under the provisions of the proviso clause in that he held the office of sheriff on December 31, 1950, and that his period of office (January 1, 1949-December 31, 1950) was for less than two years and by virtue of this fact was entitled to remain in office for the four-year term commencing January 1, 1951. The court at page 245 said:

"It is clear that those sheriffs who were elected in the general election of 1948 but would not begin their terms until January 1, 1950, on December 31, 1950, would have been elected for a period of less than two consecutive years, and so by virtue of the proviso clause of the amendment would continue to hold office until January 1, 1955, thus making their term five years. It was the evident intent of the amendment not to shorten an elective term to one year, but certainly it does not follow that it was the intention of the General Assembly who submitted the amendment, and the voters who ratified it, that the seventy-seven sheriffs of the state who were elected at the general election in 1948 for a two year term, and on December 31, 1950 will have served said full two year term, should by virtue of such election have their term extended for an additional four years. If that were true, there would be no necessity of having the constitutional provision for an election of sheriffs in the year 1950, except for those

who were appointed to fill out unexpired terms, and the one sheriff of Jefferson County." (Our emphasis.)

In connection with the time as to when the prosecuting attorneys take their offices after their election, the situation now is somewhat similar to the various times that county sheriffs took their offices prior to the amendment pertaining to sheriffs. The official Roster of State and Local Officials, State of Indiana for 1951, discloses that there are eighty-three judicial circuits in the State of Indiana. The prosecuting attorneys of ten of the eighty-three judicial circuits, although elected at the General Election, do not begin their two-year term of office until twelve months after the January 1st following their election. The remaining seventy-three prosecuting attorneys, however, take their office on January 1 of the year following their election at the General Election. Thus at the General Election in November, 1952, there will be ten prosecuting attorneys who will not begin their term of office until January 1, 1954, and as they are entitled to a two-year term of office, such term would not end until December 31, 1955. If there was an election of prosecuting attorneys in these ten judicial circuits in the General Election of 1954 and the elected person were to take office on January 1, 1955, then the persons elected in the 1952 General Election would have their term shortened to one year. This circumstance is exactly the situation that the proviso clause of the proposed prosecuting attorneys amendment meant to prevent.

In view of the above, it is therefore my opinion that if the proposed amendment to Article 7, Section 11 of the Indiana Constitution is approved by a majority of the electors in the General Election of 1952, then the prosecuting attorneys of the ten judicial circuits elected in the General Election of November, 1952, who do not begin their term of office until January 1, 1954, will continue to hold such office until January 1, 1959.