

OFFICIAL OPINION NO. 28

May 19, 1947.

Hon. C. E. Ruston, State Examiner,
State Board of Accounts,
Room 304, State House,
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your letter of March 10 requesting an official opinion on the following questions relating to publication of notices by county auditors:

"1. Does Section 1, Chapter 186, Acts 1899 (Burns' 1933, 26-816) require that salaries of officials which are fixed by statute be included in the notice after allowance?

"2. Does the above mentioned section require that salaries of officials which are fixed pursuant to law be included in the notice after allowance?

"3. Does the above mentioned section require that salaries of deputy county officers and employees which are not fixed by law, but which are fixed by a lawful agency be included in the notice after allowance?

"4. Does Chapter 65, Acts of 1931 (Burns' 1933, 26-817-19) require that the salaries of deputy county officers and employees which are not fixed by law, but which are fixed by a lawful agency, be included in the notice prior to allowance and payment?

"5. Is it required that the additional salary of the judge of the circuit or superior court paid by a county be published either before or after payment?

"6. Is it required that the per diem of special judges paid by counties be published either before or after payment?

"7. Is it required that the amount of claim for or allowance of the 25% of the salary of a township trustee paid by a county pursuant to Sec. 14, Chapter 251 of the Acts of 1945 be published either before or after allowance or payment?"

Section 1, Acts 1899, Chapter 186 (Burns' 1933, Section 26-816), provides as follows:

"That the auditor of each county in the State shall be required to publish in a newspaper of a general circulation in his county, within ten days after the adjournment of any term of circuit, superior, criminal or commissioner's court, all allowances made by the regular or special judges thereof, and by the Board of County Commissioners at each term of court at which any allowance is made. All allowances made by the judges of such courts and by the Board of County Commissioners, to whom made, and for what purpose. *Provided*, That the cost of printing thereof shall not exceed five cents for each allowance."

Section 1, Acts 1931, Chapter 65, page 150, (Burns' 1933, Section 26-817), provides as follows:

"That it shall be the duty of every county auditor within this state to publish all claims that have been filed for the consideration of the board of county commissioners and to publish all allowances made by the judge of any of the courts of the county. Such claims filed for the consideration of the board of county commissioners shall be published at least three days prior to each session of the board of county commissioners, and such court allowances shall be published at least three days before the issuance of warrants in payment of such allowances. *Provided*, That in publication of itemized statements filed for consideration of the board of county commissioners by assistant highway superintendents, the county auditor shall cause to be published the name of each party and the total amount due each party named in such itemized statements. The provisions of this act shall not apply to claims for statutory salaries, per diem of jurors and salaries of attaches of the courts. Such claims and allowances shall be published one time in two newspapers as now provided by law."

Section 3 of said Act, (Burns' 1933, Section 26-819), provides as follows:

“This act shall be construed to be supplemental to existing laws, but where the provisions of this act are in conflict with the provisions of existing laws, the provisions herein contained shall prevail:
* * *”

It is noted that the first above quoted Act was not repealed by the latter Act except in so far as the former might conflict with the provisions of the latter.

It would appear that Chapter 186, Acts 1899, requires the auditor to publish all allowances made by the regular and special judges of the courts of the county and by the board of county commissioners. No exceptions are provided in said Act. The obvious purpose in the requirement of said Act was to secure publicity concerning allowances. (*Cheney v. State ex rel. Risk*, 165 Ind. 121). It is therefore my opinion that the auditor is required to publish all allowances made by the regular and special judges of the courts of the county and by the board of county commissioners. The answer to each of your questions 1, 2, and 3 is therefore in the affirmative.

Chapter 65, Acts 1931 requires that the auditor shall publish all claims that have been filed for the consideration of the board of county commissioners and all allowances made by any judge of the courts of the county except “claims for statutory salaries, per diem of jurors and salaries of attaches of the court.” In answering your questions 4, 5, 6, and 7 it becomes necessary to ascertain what was intended to be included within the term “statutory salaries” as used in said Act.

The salaries of deputy county officers and employees are fixed by the county council, a lawful agency, pursuant to authority delegated to it by law. (Ch. 172, Acts 1945; 49-1002, Burns' 1933, Vol. 10). The discretion to determine and fix the amount of such salaries rests in such agency. Such discretion may be exercised unimpaired within maximum and minimum limits prescribed by law. In the final analysis it is the agency, and not the law, which fixes such salaries.

It appears to me that the term “statutory salaries” as used in said Act was intended by the legislature to be analogous in meaning to the meaning usually ascribed to the

term "salaries fixed by law." While, with some degree of reason, such meaning might be enlarged to include salaries "fixed pursuant to law" as well as salaries "fixed by law", such enlargement would take us into the realm of conjecture as to the intention of the legislature. We can be sure that the term was intended to include salaries fixed in a definite amount by the legislature, but we cannot be sure that it was intended to include also salaries fixed by an agency pursuant to a statute delegating to it that authority.

In the case of Benton County Council, etc. v. State *ex rel.* Sparks, etc. (1946), 224 Ind. 114, 65 N. E. (2d) 116, the question arose as to whether the increasing of the salary of a county superintendent of schools during his term of office by a board of township trustees was prohibited by Section 2, Article 15, of the Constitution of Indiana, which reads in part as follows:

"* * * nor shall the * * * salary of any official fixed * * * by law be increased during the term for which such officer was elected or appointed."

After a careful consideration of the questions presented the court concluded as follows: "It is our opinion, therefore, that the term 'fixed by law' in its general and ordinary sense does not include a salary fixed by an administrative board such as that composed of township trustees; and as appellee's salary at the time that he entered upon his term of office and was not the salary fixed for him by the legislature, it was not unlawful for the same to be increased during his term."

It is my opinion therefore that the term "statutory salaries" as used in said Act was intended to include only those salaries fixed in a definite amount by the legislature. The answer to each of your questions 4 and 5 is therefore in the affirmative.

In Cowdin, Auditor v. Huff (1857), 10 Ind. 84, it was stated concerning fees, wages and salaries:

"Fees are compensation for particular acts or services, as the fees of clerks, sheriffs, lawyers, physicians, etc.

“Wages are the compensation paid, or to be paid, for services by the day, week, etc., as of laborers, commissioners, etc.

“Salaries are the *per annum* compensation to men in official and some other situations. * * *”

And in *Seiler v. State ex rel. Board of Commissioners* (1902), 160 Ind. 605, at page 619, it was stated:

“An allowance fixed by law at a definite amount per day, to compensate a person for discharging public duties, certainly can not be regarded as a fee, within the accepted meaning of that term, but falls more properly within the definition of the term wages. * * *”

The per diem of special judges is an allowance fixed by law at a definite amount per day or part thereof served in such capacity. I am therefore of the opinion that such per diem paid by counties is not a salary and it was not intended to be included within the meaning of the term “statutory salaries” as used in said Act, and that the county auditor is required to publish claims therefor and the allowance thereof. The answer to your question number 6 is in the affirmative.

In answer to your question number 7, Chapter 251, Acts 1945, fixes the salaries of township trustees and further provides in Section 14 thereof “That in all townships of the state wherein the township trustee is *ex officio* township assessor twenty-five per cent of the salary of such trustees, as herein provided, shall be paid from the county general fund * * *” Such salary is fixed by statute and it is provided that a fixed portion thereof shall be paid from the county general fund in certain cases. I am of the opinion that such salary is a “statutory salary” within the meaning of Chapter 65, *supra*, and the auditor of the county is not required to publish claims therefor filed for consideration of the board of county commissioners. However, he would, under Chapter 186, Acts 1899, be required to publish the allowance of such claims.