necessary for him to carry out the duties enjoined upon him from such office. On the question of general implied powers see State ex rel. v. Home Brewing Company (1914), 182 Ind. 75, 92.

2. The answer given to your question number one answers your question number two. However, in addition it is pointed out that Section 35-122 Burns' 1945 Supplement, same being Section 5, Chapter 217, Acts 1935, regarding appointment of county health officers provides:

"The county commissioners of any county, or the common council of any city shall have the power and authority to provide for a full-time county or city health officer, and for the expenses of his office, and for that purpose the county council or common council, as the case may be, shall annually make the necessary appropriation in the same manner as appropriations are made for other county or city offices. * * *" (Our emphasis.)

The foregoing statute in my opinion would authorize the appropriation and payment of a reasonable salary for a stenographer or other clerical assistants for the county health officer.

OFFICIAL OPINION NO. 61

June 21, 1946.

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

Dear Sir:

Your letter of June 4, 1946, received requesting an official opinion on the following questions:

"1. Since Chapter 203 of the Acts of 1945 provides that in cities having a population of over two hundred fifty thousand as shown by the last preceding United States census, the annual salaries for the officers herein named shall be fixed by the common council at
the following amounts: Mayor, twelve thousand dollars; City Clerk, four thousand dollars; ex officio City Treasurer, sixteen hundred dollars; County Auditor for services to civil city, six hundred dollars; members of the Common Council, twelve hundred dollars; and for the president thereof and the chairman of the finance committee thereof, six hundred dollars in addition thereto, will these salaries as fixed specifically by the legislature in Chapter 203 of the Acts of 1945 be effective as to the above named officials for the extra year of service (1947) beyond the four year term for which they were originally elected?

"2. May the amounts as fixed in said Chapter 203 as the annual salaries for the officials named therein be provided in the annual 1947 city budget, which is now being prepared, and can such amounts be legally paid to such officials as provided by said Chapter 203 for their services during the year of 1947?"

Your letter states General Ordinance No. 16, 1942, was passed by the Common Council of the City of Indianapolis and approved by the Mayor in March, 1942, fixing the salaries of said city officers. The officials named in said General Ordinance were elected in November, 1942, and assumed office January 1, 1943, for a period of four (4) years from said date.

Under Chapter 229 of the Acts of 1945 the Legislature extended the time for the holding of city elections, from November, 1946, to November, 1947, which results in the above named officials holding over an additional year until their successors are elected and qualified. Such Skip Election Law has been held constitutional.

Spencer v. Knight (1912), 177 Ind. 564, 572, 573.

The Skip Election Law would not apply to the election of the County Auditor who performs services ex officio for the city. He is a constitutional officer and required to be elected at the general elections.

Article 6, Section 2, Constitution of Indiana;
Robinson v. Moser (1931), 203 Ind. 66, 71.
Article 15, Section 2 of the Constitution of Indiana as amended November 2, 1926, provides as follows:

"When the duration of any office is not provided for by this Constitution, it may be declared by law; and if not so declared, such office shall be held during the pleasure of the authority making the appointment. But the general assembly shall not create any office, the tenure of which shall be longer than four (4) years, nor shall the term of office or salary of any officer fixed by this constitution or by law be increased during the term for which such officer was elected or appointed."

(Our emphasis.)

Article 15, Section 3 of the Constitution of Indiana reads as follows:

"Whenever it is provided in this Constitution, or in any law which may be hereafter passed, that any officer, other than a member of the General Assembly, shall hold his office for any given term, the same shall be construed to mean, that such officer shall hold his office for such term, and until his successor shall have been elected and qualified."

Section 48-1223 Burns' 1945 Supplement, same being Section 11, Chapter 233, Acts 1933 as amended by Section 1, Chapter 203, Acts 1945, provides as follows:

"In cities having a population of over two hundred fifty thousand (250,000) as shown by the last preceding United States census, the annual salaries for the officers herein named shall be fixed by the common council at the following amounts: Mayor, twelve thousand dollars ($12,000); city clerk, four thousand dollars ($4,000); ex officio city treasurer, sixteen hundred dollars ($1,600); county auditor for services to civil city, six hundred dollars ($600); members of the common council, twelve hundred dollars ($1,200); and for the president thereof and the chairman of the finance committee thereof, six hundred dollars ($600) in addition thereto. Such compensation for services to the city of the ex officio city treasurer and county auditor
shall be paid in accordance with the provisions of the act concerning salaries of county officials, the same being chapter 234 (§§ 49-1017—49-1020) of the Acts of 1941, as amended by chapter 212 of the Acts of 1943. The salaries of all other officers, employees, deputies, assistants and department and institutional heads of such cities not named in this section but otherwise provided for by law shall be fixed in the manner provided in section 10 (§ 48-1222) of this act.” (Our emphasis.)

Section 48-1233 Burns’ 1945 Supplement, being Section 21, Chapter 233, Acts 1933 as finally amended by Section 1, Chapter 271, Acts 1945, provides in part as follows:

“The common council of each and every city shall, by ordinance duly enacted on or before the first day of April of the year in which elections for the election of city officers are held, fix the annual salaries of all officers provided for in this act, and such salaries when so fixed shall not be changed by the common council during their respective terms of office. * * *” (Our emphasis).

It is to be noted Chapter 233 of the Acts of 1933, as amended, is the statute controlling salaries of officers of cities. No change pertinent to the question under consideration was made by the 1945 amendment to Section 48-1233 Burns’ 1945 Supplement, supra. However, an important change was made by the 1945 amendment to Section 48-1223 Burns’ 1945 Supplement, supra. Prior to the 1945 amendment the Common Council of the city was required to fix the salaries of the city officers therein named “at not to exceed the following amounts.” Thereafter the maximum salaries were stated. Under the 1945 amendment of this section of the statute the Common Council is required to fix such salaries “at the following amounts,” there being no minimum or maximum authorized. Definite amounts are stated which are the only salaries that can be fixed by the Common Council.

Three questions therefore are presented for determination before your questions can be answered: (1) Would such city officers be holding office during their “respective terms of office” within the meaning of Section 48-1233 Burns’ 1945
Supplement, *supra*, for that period of time they would hold over after their regular term under the provisions of the Skip Election Law of 1945, and (2) Were the salaries of such elected city officials "fixed by law" within the meaning of Section 2, Article 15 of the Constitution of Indiana as amended November 2, 1926, so as to prevent such increase, and (3) Is such new salary "fixed" by the "Common Council" within the meaning of Section 48-1233 Burns' 1945 Supplement. If these questions are answered in the negative I am of the opinion such increases are authorized for such officers for the year 1947.

It has been held that while the provision of Article 15, Section 2 imposes an absolute restraint against the creation by the Legislature of a term of office of longer duration than four (4) years, and that it prohibits a legislative tenure, or right to hold by legislative authority, for a longer period than four (4) years by virtue of one election or appointment, it does not mean that the provision of Section 3 of the same Article under which offices of legislative creation may be held after the expiration of the term fixed, and until a successor is elected and qualified, is rendered inoperative. This provision adds an additional contingent and defeasible term to the original fixed term, and the right to hold over comes from it and not from the Act regulating the time of holding the election for the office except as it opens the way for the operation of the constitutional provision.

Spencer v. Knight (1912), 177 Ind. 564, 575;
The State *ex rel.* Carson v. Harrison (1887),
113 Ind. 434 at 446 to 448.

The expression "term of office" has been construed as follows:

"An officer, after his term of office has expired, while holding until his successor is elected and qualified, is not usually designated as holding a 'term' of the office, but as holding over."

The State *ex rel.* Reese v. Bogard (1891), 128 Ind. 480, 483.

"The term of office refers to the office itself, and not to the incumbent, and is 'not enlarged or varied
by changing the date when a person shall be elected to fill such office.’”

Russell v. State ex rel. (1909), 171 Ind. 623, 628.

From the foregoing authorities I am of the opinion such increase in salaries for the year 1947, being the hold over year for such city officials as authorized by Section 48-1223 Burns’ 1945 Supplement, would not conflict with the provision of Section 48-1233 Burns’ 1945 Supplement, for the reason said hold over year would not properly constitute part of the “term of office” of said officials within the meaning of said section of the statute.

As to whether or not such increase authorized by the provision of Section 48-1223 Burns’ 1945 Supplement, violates Article 15, Section 2 of the Constitution of Indiana, supra, it is pointed out under the previous law governing the salary of such city officials, same being Section 48-1223, Burns’ 1933, the salaries of said officials were fixed by the Common Council at a salary not to exceed a certain amount. When such salaries were then fixed in 1942 by the Common Council it is clear the salaries of said city officials were fixed “pursuant to law” rather than “by law” within the meaning of the constitutional prohibition. See 1945 Indiana O.A.G., p. 179, Official Opinion No. 39, where the authorities on this question are fully discussed.

It is equally clear that when the Legislature under the 1945 statute required the Common Council of the city to fix the salaries of said city officials at a definite amount determined by the Legislature, such increase would not be made by the Common Council but by the Legislature itself. This new increase is a fixing of certain salaries “by law” rather than “pursuant to law” when such salaries were initially fixed by the Common Council in 1942.

Under the Constitution, the person prohibited from having his salary increased during his term must be a public officer within the meaning of the term as used in the Constitution, and he must have a fixed term. In this opinion no holding is made as to which of the persons involved in your request may be public officers, or who has a fixed term, since this is unnecessary in view of the conclusions reached.
1. In answer to your first question I am therefore of the opinion the salary increases for city officials authorized by Section 1, Chapter 203, Acts 1945, same being Section 48-1223 Burns' 1945 Supplement are effective as to the officials named therein for the extra year of service of 1947 occasioned by the 1945 Skip Election Law. A similar result was reached in an Official Opinion of this office found in 1943 Indiana O.A.G., page 698. The Common Council would therefore be required to so fix such salaries at the amounts prescribed in said statute for such year.

2. Your second question is fully answered by the answer given to your question number one, supra.

OFFICIAL OPINION NO. 62

June 21, 1946.

Hon. Frank Millis, Director,
Gross Income Tax Division,
141 S. Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your request for my official opinion as follows:

“We herewith submit an inquiry and request your official opinion concerning the proper application of Chapter 282, Acts of 1943, Page 793 (Section 10 of the Gross Income Tax Act).

“This inquiry is specifically directed to the limitations of this Division in adjudicating delinquency, assessing penalties and requiring returns in matters concerning gross income tax liabilities of military personnel under the above named Act.

“Chapter 282 provides that

"* * * compensation received for military or naval service from and after December 31, 1941, while in active service in the present war * * * shall be exempt from gross income tax."