

## OFFICIAL OPINION NO. 31

April 13, 1945.

Hon. Otto K. Jensen,  
State Examiner,  
State House,  
Indianapolis, Ind.

Dear Sir:

I have before me your letter of March 28, 1945, asking for an official opinion upon a number of questions concerning Chapter 295, Acts of 1945 (House Bill 329). In the interest of clarity, I will consider each question separately.

## I.

“(1) Do the provisions of said Chapter 295 violate the provision of Article 15, Section 2 of the constitution of Indiana that the salary of any officer fixed by the constitution or by law shall not be increased during the term for which such officer was elected or appointed?”

I refer you to my official opinion of February 17, 1943 (Opinions of Attorney General, 1943, p. 66), wherein I distinguished between fees and salaries for the purposes of Section 2 of Article 15 of the Indiana Constitution and stated my opinion to be “that the assignment of new duties to an officer during his term, for which he is compensated by a stipulated fee, is not an increase of his salary in the constitutional sense.” See also Opinions of Attorney General, 1943, p. 124.

The Act here in question recites in its preamble many specific burdens that have caused the salaries provided by law to become inadequate and that influenced the General Assembly to grant this increase in compensation. If the General Assembly had granted this increase in the form of a larger salary the Act would have been interdicted by the constitutional provision. Having adopted the procedure of granting fees for additional services which are payable only when the

additional services are being performed, the General Assembly avoided the constitutional prohibition.

In my opinion Chapter 295 of the Acts of 1945 does not violate the provisions of Article 15, Section 2, of the Constitution of Indiana, prohibiting an increase in the salary of an officer during the term for which he was elected or appointed.

## II.

“(2) Is the per diem allowance provided by said Chapter 295 for the auditor, assessor, clerk of the Circuit Court, recorder and treasurer limited to the days when such officials attend at their office, in person or by deputy, for the performance of the official duties of their office?”

In *Cowdin v. Huff* (1857), 10 Ind. 83, 84, the court distinguishes between fees and salaries as follows:

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

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

In *Benedict v. U. S.*, 176 U. S. 357, the court, in distinguishing between a salary and the compensation a federal judge received for holding a term in another district, held:

“It was something entirely distinct from the salary paid to him as Judge \* \* \*, but was in fact \* \* \* extra pay for extra work performed—for particular as distinguished from continuous services.”

Not being a salary which is payable solely by virtue of the office and not in consideration of the quantum of services rendered, but, on the contrary, being a compensation which is conditioned directly upon the rendition of services, it must follow that the per diem established by this law for the officers named in your question is payable only when such officers are engaged in their duties as such officers.

It is my opinion, therefore, that these officers are entitled to receive the per diem established by this law only upon those days when they are engaged in the discharge of the official duties of their office.

### III.

“(3) Should the per diem allowance provided by said Chapter 295 for the sheriff and for the chief deputy sheriff be calculated upon a basis different from that of the other enumerated officials?”

By Sections 2 and 3 of the Act in question the sheriff and chief deputy sheriff are granted an additional mileage amounting to 85c per day which is in addition to any other mileage and in addition to their per diems of \$1.75 and 55c, respectively, which are provided by this Act.

The duties of a sheriff are continuous. He must keep the jail, hold the custody of and feed prisoners and keep the peace upon Sundays and holidays, as well as secular days. Therefore, these officers are legally engaged in the duties for which these additional per diems and mileage are payable at all times and are entitled thereto upon each day of the year, Sundays and legal holidays included.

### IV.

“(4) Is the per diem allowance provided by said Chapter 295 for the judges of the circuit or superior courts limited to the days in term time when the courts are actually in session?”

Judges may in vacation appoint certain boards and approve the applications of Notaries Public, hear juvenile matters, accept pleas of guilty and sentence defendants in criminal cases, hear insanity charges, appoint receivers and make orders in such matters, grant restraining orders, make interlocutory orders in divorce cases, approve certain sales of real estate, grant orders in the settlement of estates and act in many probate matters. In my opinion he would be entitled

to receive the per diem allowed by this law upon any day he performed his duties as judge, whether such duties consisted of presiding over the court in term time or in legally exercising a power or performing a duty as judge at any time permitted by law, whether in term or out of term.

## V.

“(5) Are the provisions of said Chapter 295 for an allowance per day to the chief deputy sheriff and to the sheriff, in addition to any allowance now provided by law for mileage, limited to the days when such officials are performing duties which require travel?”

In my opinion the sheriff and his chief deputy are each entitled to the mileage per diem for each day they attend upon their official duties as outlined in my answer to question 3, *supra*. The mileage per diem is not conditional upon travel or the amount of travel by these officers. It is in the nature of the annual fee established by Burns' Indiana Statutes (Supp.), Sec. 49-1008. It may more properly be classified as a commutation of mileage than a strict mileage charge and reimburses these officers for having their means of travel readily available as well as for actually using them.

## VI.

“(6) Is the per diem allowance provided by said Chapter 295 for each member of the board of county commissioners limited to the days when such board is actually in session?”

While Section 3 does not expressly limit the per diem of the members of the Board of County Commissioners to those days when they are engaged in their official duties, such limitation must be implied in the law in order to constitute such payment a fee instead of being a salary increase falling within the constitutional inhibition. A statute is to be interpreted as being constitutional, if such construction is possible.

Inasmuch as this provision is silent as to the days for which this payment is payable, and the evident intent throughout the remainder of this Act is to establish a system of per diem, I believe it is clear that the General Assembly intended to allow this per diem as a per diem payable upon the performance of official duties.

If the statute imposes any duties which may be performed by the commissioner individually, outside of board meetings, then he would be entitled to compensation for the day upon which he performed any such duties outside the meetings. In the absence of any statute empowering the board member to act as an individual commissioner he would be entitled to the compensation only during meetings of the board.

#### VII.

“(7) Is the chief deputy sheriff entitled to be paid the per diem allowance as provided by Section 2 of said Chapter 295 in addition to any allowance now provided by law for mileage if no such mileage is now paid other than that paid to the sheriff for the service of writs and processes?”

Section 2 of the Act in question provides for the payment of a daily mileage to the chief deputy sheriff “in addition to any allowance now provided by law for mileage, if any.” This would seem clearly to contemplate the payment of the daily mileage of 85c whether or not any other mileage was payable.

#### VIII.

“(8) Do the provisions of said Chapter 295 limit the per diem allowance to members of the county council to not to exceed three days in any one month?”

This section is short and reads as follows:

“Sec. 4. Each member of the county council of each of such counties shall be paid the sum of ten dollars per diem for each and every day engaged in the official duties of their offices for a period not exceeding three *successive* days in any one month.” (Our emphasis.)

The word "successive" which I have emphasized in this quotation appears to be incapable of rational application. Strict application of this requirement would not result in the grading of the compensation as to the number of days required to discharge their duties but rather as to whether the days so required were consecutive or not. A councilman performing far more onerous duties might receive less compensation merely because the nature of the duties required or forbade meetings upon consecutive days.

"It is presumed that the Legislature does not intend an absurdity, and such a result will be avoided if the terms of the act admit of it by a reasonable construction; and 'absurdity' meaning anything which is so irrational, unnatural, or inconvenient that it cannot be supposed to have been within the intention of men of ordinary intelligence and discretion."

Marks v. State (1942), 220 Ind. 9, 18.

The county council is a governing body of very limited duties. It is limited to a maximum of two regular meetings in any one year and special meetings may be had only upon formal call and publication of notice. (Burns' Indiana Statutes, Sec. 26-507.) It can adjourn only from day to day. (Burns' Indiana Statutes, Sec. 26-508.) It is the very evident purpose of the legislature to discourage all but the most necessary meetings of this council. It is my opinion that to accomplish this purpose the Legislature intended to limit the total number of days in which the council is in session in any month and that this phrase refers to the quantum of service for which compensation will be paid and not merely to the arbitrary and fortuitous circumstance as to whether the nature of the work required one or more long sessions or a number of short but not consecutive meetings.

"When the purpose of the legislative body sought to be accomplished is clear, such construction shall be given the statute as shall carry out such purpose, even though such construction is contrary to the strict letter thereof."

Milk Control Bd. v. Phend (1937), 104 Ind. App. 196, 207.

It is, therefore, my opinion that the provisions of Chapter 295 limit the additional per diem allowance of members of the county council to a maximum of three days in any one month.

### IX.

“(9) Are judges of criminal, probate or juvenile courts entitled to receive any of the benefits provided by said Chapter 295?”

In terms this Act applies to each county of less than 75,000 in which is located a defense installation and in each county contiguous or near to such a county, the latter classification not containing any express population limitation. However, Chapter 238, Section 1A, establishes a per diem for county commissioners in counties of more than 75,000 which is in direct conflict with Section 3 of Chapter 295 if Chapter 295 is to be construed as applying to counties of more than 75,000 in any case.

“\* \* \* There is no inference that one act was intended to destroy another if they are on the same subject-matter and enacted at the same meeting of the Legislature, but, on the contrary, they should be construed, if possible, to give full effect to each. The purpose of all rules of statutory construction is to ascertain the legislative intent. \* \* \*”

State ex rel. v. International Harvester Co. (1940),  
216 Ind. 463, 467.

These acts can only be given a harmonious construction if Chapter 295 is limited in all cases to counties of less than 75,000 population and this, in my opinion, is the evident intent of the law. There is no probate, criminal or juvenile judge in any county of less than 75,000 and their omission adds additional force to this construction of the legislative intent.

It is, therefore, my opinion that this Act is not applicable to judges of the probate, juvenile and criminal courts and they are not entitled to the additional compensation provided by it.