carrying out the provisions of this act." That the authority of the State Board of Vocational Education to administer such vocational rehabilitation program in cooperation with the Federal Administrator under the federal statute, has been withdrawn by the Legislature of Indiana, and that said State Board of Vocational Education has been thereby deprived of any power or authority to so carry on such function as far as the adult blind are concerned.

Under the above authorities it is clear that pursuant to the express provisions of Chapter 327 of the Acts of the General Assembly of Indiana of 1945, the State of Indiana has again accepted the benefits of such Federal Act and authorized said Board of Industrial Aid and Vocational Rehabilitation for the Blind to be the sole agency to cooperate with the Federal Security Administrator in providing a "plan" of cooperation for such rehabilitation program for the adult blind, and to direct a disbursement and administer the use of all funds appropriated by the State, or received from the Federal Government or from any other source, for such program.

I am therefore of the opinion it is necessary for the board of industrial education and vocational rehabilitation for the blind to prepare a plan, and submit the same to the Federal Administrator, for the carrying on of such vocational rehabilitation of the adult blind program, which plan is subject to the Federal Administrator's approval. That no other agency in the State of Indiana is now authorized to act for the State of Indiana in such capacity, as far as the vocational rehabilitation of the adult blind is concerned.

OFFICIAL OPINION NO. 39

May 14, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and
Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

Your letter of March 13, 1945, received in which you request an official opinion on the following question:

"Does Chapter 271, Acts of 1945, authorize the common council of a city which owns or operates a sewage disposal plant or other utility or utilities to provide, by an ordinance duly enacted, for the payment to the officials enumerated therein and who are now incumbent in office the amounts as therein provided:

"(a) If the officials are elected?

"(b) If the officials are appointed?"

Section 2 of Article 15 of the Constitution of Indiana, as amended in 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."

Chapter 271, Acts of 1945, contained an emergency clause and was in full force and effect when approved by the Governor on March 7, 1945. Section 1 of said statute 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. The salaries as herein authorized shall be in full for all services performed for the city; Provided however, That in any city which owns and operates a sewage disposal plant or any other utility or utilities, the common council *shall,* by ordinance duly enacted, provide that the mayor, city attorney, city engineer, city controller, and city clerk or city clerk-treasurer of such

city may receive, from the funds of such sewage disposal plant or other utility or utilities, a compensation in addition to the annual salary herein otherwise authorized, which additional compensation shall not exceed the sum total of one thousand two hundred dollars ($1,200) per year. Provided, further that in cities of the fifth class having three utilities not including a sewage disposal plant said additional compensation shall not exceed $1,500.00."

Section 2 of the above statute provides that nothing in said Act shall be construed to reduce any salary or compensation provided by Chapter 84 of the Acts of 1943, same being Section 48-1226, Burns' 1943 Supplement, which provides a minimum and maximum salary for certain city officials in certain classifications of cities of the second class.

For purposes of comparison, I am setting forth below the material parts of Section 1 of Chapter 131 of the Acts of 1943 (Section 48-1233, Burns' 1943 Supplement):

"The common council of each and every city shall, by ordinance duly enacted on or before the first Monday in September, 1933, and thereafter on or before the first day of April of the year in which elections for 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. The salaries as herein authorized shall be in full for all services performed for the city including services for any public utility or utilities owned and operated by such city; except that the common council of any city which owns and operates a public utility or utilities *shall,* by ordinance duly enacted on or before the first Monday in September, 1933, *and thereafter on or before the first day of April in the years in which elections for election of city officers are held,* provide that the mayor, city attorney, city engineer, city controller and clerk-treasurer of such city may receive, from the funds of such utility or utilities, street department, park department *a salary* in addition to the annual salary herein otherwise authorized, which additional

> salary shall not exceed the sum total of six hundred dollars ($600) per year. * * *." (Acts 1933, Chapter 233, Section 1, page 1042; 1941, Chapter 19, Section 1, page 51.) (Emphasis ours.)

From the comparison of Chapter 131 of the Acts of 1943 with Chapter 271 of the Acts of 1945, it will be noted that the 1945 Act in its provisions for additional compensation paid by cities owning and operating the utility or utilities, omitted the term "salary," and in lieu thereof substituted the term "compensation" and that the 1945 Act omitted the clause "and thereafter on or before the first day of April in the years in which elections for election of city officers are held."

It must be presumed that this change and omission was intentional on the part of the Legislature, and a change of legislative intention will be presumed from a material change in the wording of the statute.

> State, *ex rel.* Neal v. Beal (1916), 185 Ind. 192, 197;
>
> Chism, *et al.* v. State of Indiana (1932), 203 Ind. 241, 244.

The 1945 amendment also contained an emergency clause, and became effective March 7, 1945. From the change in language of this Act and from the emergency clause it must be presumed that the Legislature intended the provisions of Chapter 271 with reference to cities owning and operating utilities to become effective at once, unless in conflict with the Constitution or some other statutory limitation.

In the case of City of Lebanon v. Dale (1943), 113 Ind. App. 173, the court construed Section 21 of Chapter 233 of the Acts of 1933, Section 48-1233, Burns' 1933 and held that the said Section 21 was only permissive, and that the additional salary could not be made available without action of the Board of Works and Public Safety making the funds available for action by the council by way of ordinance. The court said:

> "In no event should the word *may* be construed as synonymous with *shall* where it is evident that the Act under construction confers discretionary powers on a

> city or any governmental subdivision thereof. We cannot escape the conclusion that the statute upon which the appellee relies for relief does nothing more than require a city of the fifth class to provide by ordinance a method whereby its mayor may be allowed additional salary to be paid from the funds of its public utilities *if and when* the board of public works and safety, in the exercise of its discretion, sees fit to so provide." (Third emphasis ours.)

However, since Chapter 271 of the Acts of 1945 provides "the common council shall, by ordinance duly enacted, provide," etc., it would seem that the Legislature intended that the managerial duties or additional responsibilities required of the named officers in cities having a utility or utilities justified additional compensation, which should be paid at the discretion of the common council without the necessity of having the approval of the board in charge of the management of the utility or utilities.

Section 2 of Article 15 of the Constitution of Indiana above set forth, in certain instances prohibits an increase of compensation during a term. The prohibitions do not apply to (a) one not an officer, (b) an officer who does not have a fixed term, (c) a compensation that is not a salary, or (d) a salary not fixed by statute. No distinction is made in the section between officers who are elected and officers who are appointed.

The authorities in Indiana are uniform in holding that a public office is one in which the officer is authorized by law to exercise some part of a sovereign power of government.

> Tucker v. State (1941), 218 Ind. 614, 702;
> State *ex rel.* Wickens v. Clark (1935), 208 Ind. 402, 196 N. E. 234.

This is often difficult to determine, and in each instance the rights, powers and duties as provided by law must be examined before an opinion can be given.

As to whether or not an officer has a fixed term depends upon either the constitutional provisions or the statutory provisions involved. If the statute provides no term, or if one is appointed and holds office at the pleasure of the appointing

power, he does not have a term of office within the constitutional prohibition.

State *ex rel.* v. Curtis (1913), 180 Ind. 191, 193;
Roth v. State (1901), 158 Ind. 242, 262 to 266;
Douglass v. Rights (1918), 68 Ind. App. 111, 117, 118;
1945 Ind. O. A. G. 120, No. 26.

The term salary has a well defined meaning under the decisions in Indiana. It is generally based upon an annual basis, attaches to the office, and does not depend upon the officer being personally present or able to discharge the duties of his office. It is to be distinguished from a fee, which is a charge for doing a specific act; a per diem which is a compensation for services for a day or a part of a day; or wages which are based upon work done by the week, or by the month, and only paid for the actual services rendered.

Cowdin, Auditor v. Huff (1857), 10 Ind. 84;
Seiler v. State, *ex rel.* (1902), 160 Ind. 605;
Morton v. City of Aurora (1932), 96 Ind. App. 203, 214;
Leonard v. City of Terre Haute (1911), 48 Ind. App. 104, 114;
City of Terre Haute v. Burns (1918), 69 Ind. App. 7, 15;

See also: 1943 Ind. O. A. G. 66;
1943 Ind. O. A. G. 517, 519;
1943 Ind. O. A. G. 124;
1945 Ind. O. A. G. 149, No. 31.

It is also necessary to determine whether or not the fixing of a salary of a state officer by ordinance of the common council of the city, within the minimum and maximum amounts established by statute, is thereby "fixed by law" within the meaning of Section 2 of Article 15 of the Constitution of Indiana, as amended in 1926. In other words, would the fixing of such salary by such ordinance be "fixed by law" within the meaning of said constitutional provision, or would the same be "fixed pursuant to law."

See: 1943 Ind. O. A. G. 453.

In the case of State, *ex rel.* McKay, *et al.* v. City of New Orleans (1930), 131 So. 843, 171 La. 670, the court was called upon to construe whether or not an increase in the salary of deputy sheriffs came within the provisions of Section 34 of Article 3 of the Constitution of Louisiana of 1921 which provided:

> "Salaries of public officers, whether fixed in this Constitution or otherwise, may be changed by vote of two-thirds of the members of each House of the Legislature."

On page 845 of the Southern Reporter citation the court said:

> "It is manifest that the terms, 'fixed otherwise,' as used in the above section, mean fixed by the Legislature or by statute, and cannot be extended to the salary of a deputy sheriff fixed merely by the sheriff who has appointed him, as is the case in the parishes outside of the parish of Orleans, or to the salary of some petty officer or employee fixed by a mere board or local authority."

It has been held that a city ordinance was not a "law" within the meaning of a clause of the Pennsylvania Constitution which declared that "no law shall extend the term of any public officer, or increase or diminish his salary, or emoluments, after his election or appointment."

> Baldwin v. City of Philadelphia (1881), 99 Pa. St. 164, 170.

A city ordinance regulating barber shop closing hours could not be sustained under a constitutional provision authorizing "laws" for the regulation of hours of labor; the word "laws" in such constitutional provision was held not to embrace municipal ordinance but defined the legislative power of the General Assembly.

> City of Cincinnati v. Correll (1943), 49 N. E. (2d) 412, 413, 141 Ohio St. 535.

A municipal "ordinance" was held not to be a "law" within the meaning of Article 4, Section 2 of the Constitution of Ohio which required the concurrence of at least all but one of the judges of the Supreme Court to declare a "law" unconstitutional.

> Village of Brewster v. Hill (1934), 191 N. E. 366, 367, 128 Ohio St. 354.

It has been decided "an ordinance is not, in the constitutional sense, a public law. It is a mere local rule, or by-law, a police or domestic regulation, devoid in many respects of the characteristics of public or general law."

> State v. Fourcade (1893), 45 La. Ann. 717, 727, 13 So. 187, 191.

An examination into the historical development of the treatment of ordinances is of value. Historically, what we now know as an ordinance was known as a "bylaw" or "byelaw."

In 37 Am. Jur. Municipal Corporations, Section 142, page 755, is found the following statement:

> "In general and professional use, the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'bylaw.' Some authorities have gone to the extent of declaring that the terms are synonymous. The term 'ordinance' is now the usual denomination of local laws, although in England and in some states in this country, the technically more correct term 'by-law' or 'bye-law' is in common and approved use. The main feature of such enactments is their local applicability, as distinguished from the general applicability of the state laws; hence, according to some of the critical analysts, the word 'law,' with the prefix 'by' or 'bye,' should in strictness be preferred to the word 'ordinance.' "

> State, *ex rel.* Maxey v. Swindell (1897), 146 Ind. 527, 532.

In the case of Anderson v. City of Jacksonville (1942), 41 N. E. (2d) 956, 380 Ill. 44, the court was called upon to determine if an increase in the salary of policemen whose

terms were fixed by ordinance, violated Section 11 of Article 9 of the Constitution of Illinois, which provided:

> "The fixed salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term."

On page 957 of the Northeastern citation the court said:

> "* * * it has been definitely held by this court that where the term of an office is not fixed by a constitutional or statutory provision, it is held at the pleasure of the appointing power, and although that power has atempted to fix a definite term for the office, as in this case was done by ordinance, the constitutional provision above referred to does not apply and the salary may be raised, lowered or revoked by the proper authority. Quernheim v. Asselmeier, 296 Ill. 494, 129 N. E. 828. This holding was followed and reaffirmed in the recent case of People v. City of Chicago, 374 Ill. 157, 28 N. E. 2d 93, as it had also been in Morgan v. DuPage County, 371 Ill. 53, 20 N. E. 2d 40."

City ordinances providing for fines and penalties have been held not to be "laws" within the meaning of the Michigan constitutional provision that "all fines assessed and collected in the several counties and townships for any breach of the penal laws," shall be exclusively applied to the support of libraries. (Art. XIII, Sec. 12.)

> People, *ex rel.* Fennell v. Bay City (1877), 36 Mich. 186, 190.

In view of these authorities, a salary fixed by ordinance is not "fixed by law" within the constitutional prohibition. Since under City of Lebanon v. Dale (1942), 113 Ind. App. 173, *supra,* the action of the board in charge of the utility was necessary, the salaries of the city officials were not fixed by statute prior to the effective date of Chapter 271 of the Acts of 1945.

Therefore, it is my opinion that whether an incumbent official be elected or appointed, Chapter 271 of the Acts of 1945 authorizes the common council of a city, within the classification of this Act, which owns and operates a sewage disposal plant or any other utility or utilities, to provide by ordinance additional compensation for the mayor, city attorney, city engineer, city controller, and city clerk or city clerk-treasurer, either by way of per diem or a salary, whether said named persons are in fact public officers or not, and whether they have a fixed term or not. The salary for the remainder of 1945 would be pro rated to the remainder of this year. 1945 Ind. O. A. G., p. 145, No. 30.

OFFICIAL OPINION NO. 40

May 15, 1945.

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and
Supervision of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your letter dated March 31, 1945, asking for an official opinion concerning Section 1A of Chapter 238 of the Acts of 1945, in which you ask the following questions:

> "1. Is Section 1A of Chapter 238, Acts of 1945, a valid enactment?
>
> "2. If your answer to question No. 1, is in the affirmative, do the provisions of said Section 1A of Chapter 238, Acts of 1945, violate the provisions 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?
>
> "3. Would any allowance made under the authority of said Section 1A of Chapter 238, Acts of 1945, be limited to the days of actual attendance at a session of the board of county commissioners?