

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?

"4. What, if any, per diem allowance are the members of the boards of county commissioners entitled to receive in counties falling within the population range of seventy-five thousand to ninety thousand?

"5. What, if any, per diem allowance are the members of the boards of county commissioners entitled to receive in counties falling within the population range of two hundred thousand to three hundred thousand?"

1-2. Since the first two questions are related, I shall consider them together. The constitutional and statutory provisions involved provide:

"* * * 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."

Art. 15, Sec. 2, Constitution of Indiana, as amended November 2, 1926.

"Sec. 1A. Since the 1933 fee and salary bill established salaries of members of the Board of County Commissioners at a depression level; since subsequent to that time there have been many additional duties imposed upon county commissioners by reason of defense plants, army camps, air bases and other war projects located in the State of Indiana which have greatly increased the work and responsibility of county commissioners in addition to a normal increase of work and responsibility caused by increase in population and since other duties have been imposed by law upon county commissioners by legislative Acts since 1933, each member of the Board of County Commissioners in any county in which is located a defense plant, army camp, or an air base or proving ground, or a shipyard or which is contiguous or within thirty (30) miles of the nearest boundary of any such county in which is located any establishment as afore-

mentioned shall be paid, by reason thereof, a per diem as follows: In counties having a population according to the last preceding United States Census of from seventy-five thousand (75,000) to ninety thousand and one (99,001), \$1.00 for each additional day any person shall serve as a member of the Board of County commissioners and in counties of a population according to the last preceding United States Census of ninety-nine thousand and one (99,001) to two hundred thousand (200,000) three dollars (\$3.00) per day for each day any person shall serve as a member of the Board of County Commissioners, and in counties having a population of more than three hundred thousand (300,000) according to the last preceding United States Census shall receive three dollars (\$3.00) per day for each day any person shall serve as a member of the Board of County Commissioners. The compensation provided in this section shall be in addition to any other compensation now provided by law. Whereas, an emergency exists for the immediate taking effect of this Sec. 1A, the same shall be in full force and effect from and after its passage."

Sec. 1A, Chapt. 238, Acts 1945. (Approved March 7, 1945.)

A per diem is not a fee, salary or wages. It is a compensation for a service given the government unit for a day or a part of a day, and so does not offend the constitutional prohibition against a raise in salary.

1943 Ind. O. A. G. p. 66;

1943 Ind. O. A. G. p. 517, 519;

1943 Ind. O. A. G. p. 124;

1945 Ind. O. A. G. p. 149 (April 13, 1945) No. 31;

1945 Ind. O. A. G. p. 179 (May 14, 1945), No. 39.

See also:

Cowdin v. Huff (1857), 10 Ind. 83;

Seiler v. State (1903), 160 Ind. 605, 618;

Benedict v. U. S. (1899), 176 U. S. 357.

Therefore, it is my opinion that said Section 1A of Chapter 238 of the Acts of 1945 is a valid enactment, and that no salary increase is provided in violation of Section 2 of Article 15 of the Constitution of Indiana.

3. In answering your third question it is to be noted that Section 1A provides an additional compensation for the county commissioners for each additional day they “* * * shall serve as a *member* of the *Board* of County Commissioners.” (Our emphasis.) The express words of said section would seem clearly to indicate that the additional compensation would be payable to the commissioners only while the board was acting as an entity, which would be only while the board was in session. It is also significant that said Section 1A did not provide for additional compensation for each additional day the commissioners were engaged in the performance of their general duties enjoined by law, but only allowed such compensation while they were serving as members of the board.

In *Waymire, et al. v. Powell, et al.* (1885), 105 Ind. 328, the court construed a statute which provided for a *per diem* for each day's attendance as a member of the county board or board of equalization to mean that county commissioners were only entitled to such *per diem* while actually attending a session of the county boards mentioned. The court said at page 331:

“The order recites that the allowance was for ‘*per diem* as a commissioner of the board,’ etc., but it also shows that it was not for, ‘attendance as a member of the county board or board of equalization,’ and it was therefore made without any authority of law.”

Also, in *Seiler v. State, ex rel.* (1902), 160 Ind. 605, the court construed a statute which provided for the payment to members of the Board of Review of Three Dollars (\$3.00) for each and every day while they were acting as members of said board to mean that the members of the board could only receive the *per diem* while actually attending the sessions of the board. The court said at page 621:

“* * * The statute, under its terms, does not pretend or profess to award to the members of the board of review the *per diem* therein provided for any

particular act or items of service performed, but it is to compensate them for all acts and duties performed or discharged each day as an entirety, while acting as a member of said board."

The general rule governing the conduct of public boards requires the members act in meeting assembled and after opportunity to attend, and an agreement of action taken separately is not binding.

Terre Haute Gas Corporation v. Johnson (1943),
221 Ind. 499, 45 N. E. (2d) 484.

There is a comprehensive collection of authorities in 1 A. L. R., page 276, *et seq.*, and I have been unable to find any authority that holds a statutory provision similar to Section 1A should be construed to give a per diem to an officer merely because he is an officer on a particular day for which a per diem is claimed. Therefore, in answer to your third question, it is my opinion that each County Commissioner can only claim a per diem for a day in which the board acted as an entity and was in session pursuant to some legal duty enjoined by statute.

4. Answering your fourth question I call your attention to that part of Section 1A of Chapter 238, Acts of 1945, providing as follows:

"* * * In counties having a population according to the last preceding United States Census of from seventy-five thousand (75,000) to ninety thousand and one (99,001), \$1.00 for each additional day any person shall serve as a member of the Board of County Commissioners and in counties of a population according to the last preceding United States Census of ninety-nine thousand and one (99,001) to two hundred thousand (200,000) three dollars (\$3.00) per day
* * *"

It is apparent, as noted in your letter, that there is a conflict in the first population class above quoted between the words "ninety thousand and one" and the figure immediately following of "(99,001)." There is thus some uncertainty as to

whether that population range was intended to end with counties having a population of 90,001 or 99,001.

It is to be observed, however, that immediately following the population range in question, the next population range begins with counties having a population range of 99,001. It is settled by decisions of this state that where the legislative intent in the first instance is clear, an Act will not be voided for uncertainty or inconsistency because of an obvious typographical error or omission.

Kos v. State, *ex rel.* Metzler (1940), 218 Ind.
115, 120, 121;
State, *ex rel.* v. Markey, Judge (1936), 212 Ind.
59, 64, 66.

It has been decided that where a word has been omitted, and the context affords the means of correction, the proper word will be deemed substituted or supplied. This is but making the strict letter of the statute yield to the obvious intent.

Gustavel v. State (1899), 153 Ind. 613, 617;
State, *ex rel.* v. Markey, Judge (1936), 212
Ind. 59, *supra*.

In my opinion, it was the intention of the legislature in said Section 1A to fix the first population range from 75,000 to 99,001, and that the word "nine" was omitted from the phrase "ninety thousand and one" by inadvertence. My answer to your fourth question is therefore that in counties falling within the population range of 75,000 to 90,000, and in which is located a defense plant, army camp, or an air base or proving ground, or a shipyard, etc., as provided by Section 1A, the members of the Board of County Commissioners are entitled to a per diem allowance of \$1.00 for each additional day they shall serve as a member of said board.

5. In answer to your fifth question, it is to be noted that Section 1A, Chapter 238, Acts 1945, does not provide for any per diem allowance for members of the boards of county commissioners in counties falling within the population range of 200,000 to 300,000. It is settled that the legislature has broad powers to make reasonable and proper classifications based upon population for purposes of fixing fees and salaries, and the discretion of the legislature in the relation

to the passage of such laws, unless grossly abused, cannot be inquired into by the courts.

Groves v. Board of Commissioners (1935), 209 Ind. 371, 376, 377.

The General Assembly for the year 1943, passed an Act, Chapter 212, Acts of 1943, providing for an increase in the salaries of county commissioners in counties falling within a population range of 200,000 to 300,000. This would be an adequate, valid reason for the legislature for omitting such a population range in Section 1A of Chapter 238, Acts of 1945.

Accordingly, since Section 1A, Chapter 238, Acts of 1945, does not provide a per diem allowance for county commissioners in counties falling within a population range of 200,000 to 300,000, they are not entitled to receive any under said Act.

OFFICIAL OPINION NO. 41

May 16, 1945.

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

Dear Sir:

Your letter of April 2nd requests an official opinion on the following questions:

"1. Are both Chapter 251, Acts of 1945, and Chapter 311, Acts of 1945, in full force and effect in so far as they concern expense allowances to township trustees and the employment and payment of clerical assistance by townships?

"2. If your answer to question No. 1 is in the negative, which act controls?

"3. Should any payment made for the trustees expense allowance or for clerical assistance under the authority of either said Chapter 251 or said Chapter