ACCOUNTS, STATE BOARD OF: City clerk of third class city not allowed extra compensation as clerk of board of works.

July 23, 1936.

Hon. William P. Cosgrove,
State Examiner,
State Board of Accounts,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in response to your letter of July 15, 1936, asking an official opinion in answer to the following question:

"Is the city clerk of a third class city, whose term began January 1, 1935, entitled to receive the additional compensation provided in Chapter 307, Acts of 1935?"

In your letter you say:

"The 1933 cities classification law, as amended by Chapter 307, page 1493, Acts 1935, provides that the city clerk of a third class city shall be clerk of the 'board of public works and safety' and shall receive as an additional compensation therefor, beginning with January, 1936, an annual compensation of $600.00."

You suggest that the question has been raised as to whether or not this provision of the 1935 Act, which grants an increase of salary to the clerk of a city, is in violation of Section 2, Article XV of the Constitution of the State of Indiana.

Said Section 2 is 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."
The last provision in this Section of the Constitution was added by an enactment in 1926, but until the decision of the Supreme Court of Indiana in January, 1935, in the case of In Re: Todd, 208 Ind. 168, it was not generally understood that the proposed amendment had been legally adopted. However, we must assume that the amendment became effective in November of 1926.

The 1933 classification of Civil Cities Act, which is Chapter 233 of the Acts of 1933, provides in Section 6 of the Act that the elective officers of a city of the third class shall consist of a mayor, a city clerk, a city judge, members of the common council and a city treasurer.

The last provision of Section 6 is as follows:

“In cities of the third class the duties of the board of public works and the duties of the board of public safety as now provided by law shall be performed by a board to be known as the ‘Board of public works and safety,’ which board shall be composed of the mayor, the city civil engineer and the city attorney. Such officers shall serve as members of such board without additional compensation therefor. The city clerk shall be clerk of the ‘Board of public works and safety’ without additional compensation therefor.”

Part of Sec. 6, Chap. 233, pp. 1045 and 1046, of the Acts of 1933.

The legislature of 1935 amended this part of Section 6 by substituting a provision as to compensation to the clerk, so that the Section as amended reads as follows:

“In cities of the third class the duties of the board of public works and duties of the board of public safety, as now provided by law, shall be performed by a board to be known as the ‘board of public works and safety,’ which board shall be composed of the mayor, the city civil engineer, and the city attorney. Such officers shall serve as members of such board without additional compensation therefor. The city clerk shall be clerk of the ‘board of public works and safety,’ and shall receive as an additional compensation therefor, beginning with the first day of January, 1936, an annual
compensation of six hundred dollars, which shall be in addition to the compensation as provided for city clerk in Section 15 of this Act. And it is hereby made the duty of the proper officers of every third class city to include said amount in the annual budget of each and every year for the following year, beginning with the budget prepared in 1935, for the year 1936, as now provided by law.”

Section 1, Chapter 307, Acts of 1935, pages 1494 and 1495.

Section 15 referred to above is that provision of the 1933 Act which fixes a specific sum as salary for each official of a city of the third class, including the clerk.

The general rule governing the compensation of public officials is stated by our Appellate Court in Board v. Chapman, 22 Ind. App., page 60 at page 63, and is as follows:

“A public officer is entitled to the salary provided by law, because the law attaches the salary to the office as an incident thereof, and not by force of a contract, and the compensation of the officer, as such, may be regulated, altered, increased, or diminished by the lawmaking power at any time, unless the Constitution provide otherwise.”

Later in the same case at page 64 the court said:

“The authority to fix the compensation of a public officer, unless restrained by the Constitution, may, even during the term of an incumbent, be exercised to change his future compensation. Mechem, Pub. Off., Section 857. In Commonwealth v. Bacon, 6 S. & R. 322, the question being, whether a reduction by municipal ordinance of the salary of the mayor, after his term of office had commenced, was valid, it was said: “These services rendered by public officers do not in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto. * * *”

In the case of Board of Commissioners v. Gresham, 101 Ind. 53, where it was sought to secure certain extra fees for a county sheriff because of what was considered to be additional duties and expenses incurred by him not contemplated
under the Fee and Salary Law, the Supreme Court said: That before an official was entitled to any extra fee or compensation, the particular statute permitting such compensation must be pointed out. The court then observed:

"This principle has been recognized in this State from the beginning, and accordingly it has invariably been held that official duties imposed upon a public officer, to which no compensation is attached, must be performed as all official duties anciently were, gratuitously."

The Board of Commissioners of Carroll Co. v. Gresham, 101 Ind. 53, 56.

It seems to be clear that a city clerk whose term of office began January 1, 1935, entered upon his official duty under a law which provided that he should receive a certain compensation, that is, his salary was fixed by law. Moreover, his duties at that time as set out by the statute required him to serve as clerk of the Board of Public Works and Safety and the statute said that this service was to be without additional compensation.

Thereafter the legislature of 1935 assumed to increase the salary already fixed by law by adding $600 to the salary.

It is my opinion that the Act of 1935 which undertook to increase the salary of the clerk is in violation of Section 2 of Article XV of the Indiana Constitution. Your question is therefore answered in the negative.


Don F. Stiver, Director,
Department of Safety,
State House,
Indianapolis, Indiana.

Dear Sir:

This is in response to your request of July 20, 1936, requesting an opinion as to whether or not an unincorporated town comes within the meaning of the word “town” as used