necessarily incurred during the trip, such amount as was
necessarily and actually expended might be lawfully claimed
by such sheriff.

ACCOUNTS, STATE BOARD OF: Cities of fifth class—
Salaries of officials of the City of Nappanee for the year
1939.

March 10, 1938.

Hon. W. P. Cosgrove,
State Examiner,
Department of Inspection and
Supervision of Public Offices,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of March 3rd wherein you pre-
sent the following facts and questions:

"The City of Nappanee, according to the census re-
port of 1930, had a population of 2,987.
"Under the provisions of Chapter 233, Acts of 1933,
cities with a population of less than three thousand,
as shown by the last preceding United States census,
became civil towns as of January 1, 1934.
"In the case of Nappanee, an action was brought in
the Elkhart Superior Court and the court decreed that
the City of Nappanee was a civil city of the fifth class
and enjoined the holding of an election. I am sub-
mitting herewith a copy of the decree.
"Chapter 97 of the Acts of 1935, reduced the mini-
mum population for cities of the fifth class from 3,000
to 2,000. In Section 2 of this Act, it provides in part,
as follows:
"* * * On and after the first Monday in January,
1939, in all cities having a population of less than
three thousand (3,000), as shown by the last pre-
ceding United States census, the annual salaries of
officials of such city shall be fixed by the common
council as hereinafter provided, at not to exceed the
following amounts: mayor, five hundred dollars
($500); clerk-treasurer, five hundred dollars ($500);
city attorney, four hundred dollars ($400); members of the council, ninety dollars ($90.00) each; county auditor, for services to civil cities, fifty dollars ($50.00); * * *

"The statutes provide for the fixing of annual salaries of all city officers by ordinance of the common council duly enacted on or before the first day of April of the year in which elections for election of city officers are held.

"The question is now presented as to the statute (Section 48-1232 or 48-1202, Burns' Indiana Statutes Annotated 1933) that will govern the common council in fixing the salaries of the city officials for the term beginning January 1, 1939.

"I will be pleased to have your official opinion on this question."

In passing upon the question presented herein, I am, after an examination of the certified copy of the court decree attached to your letter, of the opinion that such decree is in no way binding except upon the parties joined in such suit and then only for the purposes of the action. The action was commenced to determine the legality of holding an election for town officers and therefore the judgment decreeing the City of Nappanee a city of the fifth class is only decisive of the status of the city for that purpose alone. The decree is in no way conclusive or binding in the determination of the question presented by your letter as there is no finding in the decree that the City of Nappanee was a city of three thousand (3,000) population by the last preceding (1930) United States census nor is the finding of the status of the city against any person or corporation other than those joined in the action. By Sec. 1, Ch. 233 of the Acts of 1933 it was provided:

"All civil cities of this state are hereby classified as follows, effective at 12 o’clock noon of the first Monday in January, 1934: * * *

"Cities having a population of three thousand (3,000) or over and less than ten thousand (10,000), according to the last preceding United States census, shall be denominated cities of the fifth class."
Section 2 of the same Act provides as follows:

"All present civil cities with a population of less than three thousand (3,000) as shown by the last preceding United States census shall, on and after twelve o'clock noon of the first Monday in January, 1934, become civil towns, and shall operate thereafter under the provisions of the laws pertaining to the government of civil towns." (Our italics.)

From the foregoing sections it is clear that a population of three thousand (3,000) or over by the last preceding United States census is a condition precedent to any community becoming a city of the fifth class. By the last preceding United States census, that of 1930, the City of Nappanee failed to meet such condition and therefore reverted to a town. The status of the city, any city of over two thousand (2,000) by the last preceding United States census, was returned to the fifth class by Ch. 97, Sec. 1, Acts of 1935. Nappanee now being a city of the fifth class, the question is narrowed to whether the salaries of city officials are governed by Sec. 2, Ch. 97, Acts of 1937, or by Sec. 20, Ch. 233, Acts of 1933.

Sec. 20, Ch. 233, Acts of 1933 which provides for salaries in fifth class cities under the 1933 Act three (3,000) to ten thousand (10,000) classification reads as follows:

"In cities having a population of three thousand (3,000) or more and less than five thousand (5,000) as shown by the last preceding United States census, the annual salaries for the officers herein named shall be fixed by the common council, as hereinafter provided, at not to exceed the following amounts: mayor, six hundred dollars ($600); clerk-treasurer, nine hundred dollars ($900); city attorney, four hundred dollars ($400); members of the common council, ninety dollars ($90.00) each; county auditor, for service to civil city, fifty dollars ($50.00)." (Our italics.)

The provisions of the foregoing section fix and limit the salaries of municipal officials of cities which qualified under the Act as cities of the fifth class, i. e., cities of three thousand (3,000) to five thousand (5,000) by the last preceding United States census. It is obvious that the officials of the City of Nappanee cannot be paid under such schedule as the
city did not have a sufficient population by the last preceding United States census to come within the provisions of the Act. Since the 1933 Act did not contemplate any cities of a less than three thousand (3,000) by United States census there is no salary provision for such towns, though they continue to operate as a city.

The City of Nappanee being unable to qualify under the provisions of the 1933 Act relative to salaries of officers of cities of the fifth class, subsequent statutes must govern what salaries such officers will receive.

Sec. 2, Ch. 97, Acts of 1935 read as follows:

"* * * On and after the first Monday in January, 1939, in all cities having a population of less than three thousand, as shown by the last preceding United States census, the annual salaries of officers of such city shall be fixed by the common council, as hereinafter provided, at not to exceed the following amounts: mayor, five hundred dollars; clerk-treasurer, five hundred dollars; city attorney, four hundred dollars; members of the council, ninety dollars each; county auditor, for services to civil cities, fifty dollars: * * *

These provisions are applicable to all cities of the fifth class who by the last preceding census were between two and three thousand. Nappanee falls within such classification and it is my opinion that such salary schedule will govern in such city for the year of 1939 and thereafter.


Mr. Richard W. Sharpless,
Director, Motor Vehicle Department,
Indianapolis, Indiana.

Dear Mr. Sharpless:

This is in answer to your inquiry of March 10, 1938, which is as follows:

"The commission has information that a large number of truck owners are purchasing coal in Clay County in