

OPINION 13

OFFICIAL OPINION NO. 13

April 19, 1967

**COUNTY OFFICERS—County Treasurer—Right to  
Appoint Deputies and Other Clerks.**

Opinion Requested by Hon. Austin E. Barker, State Representative.

I am in receipt of your recent inquiry concerning the employment of deputies and clerks of a county treasurer. Your specific questions were:

- “(1) In a county having a population of more than 10,000 but less than 18,000 does a County Treasurer have the right to appoint a second deputy and Clerk in addition to his first deputy where the County Treasurer has found it necessary in his judgment based on six years experience to have a second deputy and Clerk in order to fulfill his duties as Treasurer?
- “(2) Assuming that a second deputy and clerk are necessary to fulfill the duties of the office of Treasurer does the County Commissioners have a right to refuse to pay said second deputy and Clerk where the budget for the year 1967 provided for the employment of a second deputy and clerk and said budget has been approved by the County Council and the State Board of Tax Commissioners?
- “(3) In the event your answer to question #2 is in the negative, what courses of action are available to a County Treasurer where the County Commissioners arbitrarily refuse payment?”

Your questions involve three considerations which must be separately considered before your questions can be answered, namely: The power of the treasurer to appoint deputies, the source of the compensation to be paid deputies of the treasurer, and the authority of the board of county commissioners in relation to the appointment of deputies to the county treasurer.

The first consideration is readily evaluated. So long as compensation is not involved, a county treasurer has unlimited authority to appoint deputies and other assistants. 1 R.S. 1852, ch. 112, § 4, the same being Burns § 49-3105, provides:

“He [the county treasurer] may appoint one or more deputies, may take from them bond and surety, and may remove them at pleasure. He and his sureties shall be liable for all official acts of such deputies.”

1 R.S. 1852, ch. 28, § 1, as last amended by Acts 1959, ch. 314, § 1, the same being Burns § 49-501, provides in part:

“The secretary of state, the auditor of state, the treasurer of state, the clerk of the Supreme Court, the sheriff of the Supreme Court, and every clerk of the circuit court, county auditor, county treasurer, county recorder, county sheriff, county coroner, county surveyor, prosecuting attorney and township assessor may appoint deputies, when necessary or when required, if provision shall have been made for paying such deputies for their services from the funds of the state or of the county or from fees received for their services. . . .”

The first of the statutes above places no restriction on the treasurer's power to appoint deputies, although the second does at first glance seem to impose a restriction. The second statute was carefully considered in a case where a deputy treasurer attempted to mandate a county auditor to pay her compensation for her services as deputy treasurer. In *Applegate v. State ex rel. Pettijohn*, 205 Ind. 122, 124, 185 N.E. 911 (1933), the Indiana Supreme Court said, in relation to that statute as it then existed:

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“The appellee points to section 11619, Burns 1926, as amended, Acts 1925, page 401, as authorizing an appropriation by the county council for the payment of the salary of a deputy treasurer. In its original form, as passed in 1855, this statute merely provided that the officers therein mentioned might appoint deputies. No reference to compensation was made. By the amendment of 1925 the Act was made to provide that certain officers may appoint deputies when necessary or when required ‘if provision shall have been made for paying such deputies for their services from the funds of the state or of the county.’ The Act does not purport to confer power upon the county council to appropriate county funds for the payment of deputies.

“There are statutes specifically providing for the appropriation of funds and the payment of salaries to deputies of certain county officers in certain of the larger counties, but the appellee does not attempt to bring herself within any of these statutes. . . .

“The law contemplates that the treasurer shall perform the duties of his office, and that his salary and allowances shall compensate him for that service, and that if assistance is required he shall pay the expense thereof out of his own compensation, unless there is express statutory provision for an allowance, and the statutes above referred to clearly show such a legislative interpretation of the law.”

On the basis of the language above I ruled in 1965 O.A.G., p. 241, that a county sheriff, and inferentially all other officers mentioned in the statute, could appoint deputies not to be paid from public funds.

The language in the *Applegate* opinion is also pertinent to the payment of compensation for deputies. Deputies of a county treasurer can be compensated from public funds only if some enactment of the Legislature so provides. In 1933 the General Assembly adopted such a statute. Acts 1933, ch. 21, is entitled:

“AN ACT fixing the compensation of certain public officials, their deputies and assistants in fixing manner

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of payment thereof; authorizing the appointment of deputies and assistants; prescribing certain duties; making a division of deputy's and assistant's compensation unlawful and providing a penalty therefor; providing for the collection of fees and mileage and the disposition of same; repealing all laws in conflict therewith and fixing the time of taking effect."

The second section of that Act, as last amended by Acts 1965, ch. 34, § 1, the same being Burns § 49-1002, provides in part:

"The county auditor, the county treasurer, the clerk of the circuit court, the county sheriff, the county recorder, the county assessor, the county surveyor, and the county superintendent of schools, may appoint such number of full time or part time deputies and other assistants as may, in the judgment of the officer, be necessary for the proper discharge of the duties imposed by statute upon each of such public officers: Provided, however, That the number of deputies and other assistants shall, except as otherwise specifically provided herein, be subject to the approval of the board of county commissioners both as to full time and part time employment. . . . The board of county commissioners shall make recommendation to the county council as to the amount of salary that each of said deputies and other assistants shall receive. The salaries and other compensation of all such deputies and other assistants, to be paid by the county, shall be determined and fixed by the county council within the limits hereafter prescribed. . . .

"In all counties of the state the county auditor, the county treasurer, the clerk of the circuit court, the county sheriff, the county recorder, shall each be entitled to appoint one first or chief deputy without the approval of the board of county commissioners. . . .

"In all counties having a population of not less than ten thousand and one and not more than eighteen thousand according to the last preceding United States census, the salary of each of said deputies or other as-

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sistants shall not be less than two hundred dollars per month: Provided, however, That the salary of the first or chief deputy shall not be less than two hundred dollars per month.”

From the statute above it is apparent that every county treasurer in the State of Indiana has the authority to appoint one deputy, if he thinks a deputy is needed, without anyone's approval as to the existence of that need, and that deputy is to be paid from public funds a salary to be set by the county council but not less than the minimum specified in the statute. The statute also provides that the treasurer may appoint as many other deputies and assistants, to be paid with public funds, as he considers necessary, provided the board of county commissioners approves the additional number. The salaries of such additional deputies and assistants are also to be set by the county council in an amount not less than the minimum specified by the statute. Thus, while the treasurer can appoint an unlimited number of deputies and assistants, only those appointed in conformity with the statute above may receive compensation from public funds.

The board of county commissioners has no control over the number of deputies who are not paid from public funds. The board has no control over the appointment of a first deputy to be paid from public funds, but it can recommend to the county council a salary for that deputy. The board has full and complete control over the number of additional deputies and assistants to be paid from public funds, and recommends the salaries to be paid.

Portions of the above statute as it was originally enacted in 1933 have been interpreted by the Indiana Supreme Court and by the Attorney General. In *Porter v. State ex rel. Hays*, 208 Ind. 410, 196 N.E. 238 (1935), the clerk of the Circuit Court of a county of less than 15,000 population filed an action of mandamus to compel the payment of a salary to a deputy clerk of the court. The Supreme Court held that the language providing that such clerks “may designate and appoint one deputy” when compared with the language used later in the statute in relation to clerks in counties of more than 25,000 population, providing that such clerks “shall without the

approval of the board of county commissioners designate and appoint one deputy," indicated that the Legislature did not intend to authorize the appointment of deputies without approval of the county commissioners in the smaller counties. In 1934 O.A.G., p. 256, the Attorney General reached the same conclusion, and inferentially concluded that an appropriation by the county council to pay deputies not approved in number by the county commissioners would be invalid. See also 1941 O.A.G., p. 318.

That opinion (1934 O.A.G., p. 256) also stressed that the board of commissioners' power of approval was limited to approval of the number of deputies rather than approval of the particular persons to be appointed. The Attorney General pointed out that the bill as originally introduced lacked clarity on this point but that it had been amended before passage to include the specific words "the number of." That the county commissioners should be concerned only with the number of deputies is reasonable not only in view of the wording of the statutes quoted earlier, but also in consideration of the general principle that the power to appoint the deputies who are to carry out the function of an office is incidental to the holding of the office. In *Tucker v. State*, 218 Ind. 614, 652, 35 N.E. 2d 270 (1941), the Supreme Court, in considering the nature of the power of appointment, said :

“. . . It is equally well established by our decisions, and decisions elsewhere, that the General Assembly may exercise the executive power of appointment of officers and employees whose duties are an incident to its legislative functions; and it cannot be seriously doubted that administrative officers in the administrative department of the government or in the judicial department may exercise the executive power of appointing their own deputies and employees whose duties are incidental to the carrying out of the administrative functions of the offices they occupy. Thus the Clerk of the Supreme Court may appoint deputies and assistants who are to assist him in his ministerial functions, and the Auditor, Treasurer, and Secretary of State may exercise like power; and if the Governor had not been broadly vested with the general executive power of the

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state, but had been vested only with special and limited executive authority, that would carry with it the incidental executive appointing power in so far as it involved his subordinates and assistants.”

While the *Tucker* case was involved with and specifically mentioned state officers the principle expressed above applies equally to county officers. See also 1937 O.A.G., p. 324, question 5.

While there is ample authority for the proposition that the board of county commissioners must approve the number of deputies, there is no authority which answers the question of when such power of approval can be exercised. That point, then, becomes a question of statutory interpretation.

The salary act quoted in part above, Acts 1933, ch. 21, § 2, as last amended by Acts 1965, ch. 34, § 1, the same being Burns § 49-1002, also provides :

“The estimates of compensation to be paid deputies and other assistants submitted by the respective officials of each county shall be itemized so as to state the annual rate of salary of each deputy and of each assistant, and in case of part time deputies and assistants such estimates shall state the pro rata part of the year each is to be employed. The appropriations made by the county council shall be itemized in conformity with the aforesaid estimates.”

In determining the legislative intent in enacting a given statute, other statutes that are *in pari materia* with that statute may be considered. *Smith v. General Motors Corp.*, 128 Ind. App. 310, 143 N.E. 2d 441 (1957). Therefore, we shall consider Acts 1899, ch. 154, § 1, which is entitled “AN ACT concerning county business.” Especially important are §§ 16, 17 and 20 of that Act, the same being Burns §§ 26-516, 26-517 and 26-520, respectively, which provide, in part, as follows:

Section 16; Burns § 26-516—

“Before the Thursday following the first Monday in August of each year, every county officer shall prepare

an estimate, itemized with as great particularity as possible, of the amount of money required for his office for the ensuing calendar year. . . .”

Section 17; Burns § 26-517—

“Every estimate required by the preceding section to be prepared by any county officer of money required for his office shall embrace in items separate from each other each of the following matters: . . .

“Second. The estimated amount of deputy hire, if any such is under the law payable out of the county treasury.”

Section 20; Burns § 26-520—

“. . . At the regular annual meeting of the council on the first Tuesday after the first Monday in September, the auditor shall present all of said estimates thereto, and may make such recommendation to the council with reference to the estimate as made to him seem proper. And it shall be his duty, before such meeting of the council, to prepare an ordinance in proper form, to be adopted by the council, fixing the rate of taxation for the taxes to be collected in the ensuing calendar year, and also an ordinance making an appropriation by items for such calendar year for the various purposes for which all of the above estimates are required. The council at said meetings shall act upon such ordinances, and, by adopting the same or amended or substituted ordinance, fix the tax rate within the limit prescribed by law, and make the appropriations.”

It is apparent that the estimates of annual salary referred to in the salary act are the annual estimates of expenditures required by the Act regulating county business. It would, therefore, follow that the county commissioners must approve the number of deputies and assistants prior to the Thursday following the first Monday in August. It would further seem to follow that once the county council has adopted the ordinance which the auditor has drawn in conformity to that approval, the number of deputies and assistants is thereby fixed for the following year.

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This reasoning finds some support in the case of *O'Rourke v. Board of Comm'rs. of Lake County*, 215 Ind. 195, 18 N.E. 2d 380 (1939), in which it was held that even though the salary statute had been amended in 1937 so as to increase the minimum amount of the annual salary of the chief deputy treasurer in Lake County to an amount greater than that appropriated in 1936 by the Lake County Council for that deputy's 1937 salary, the county council had no power to increase the already duly appropriated budget for 1937, except in case of emergency. See also 1937 O.A.G., p. 352 which holds that the passage of a statute increasing minimum salaries does not in itself create an emergency. Although the *O'Rourke* case is not concerned with the appointment of deputies, it does inferentially hold that the fixed number of deputies could not be increased subsequent to the yearly ordinances of the county council, except in case of emergency.

Statutes must also be interpreted in such a manner as to avoid conclusions so irrational or inconvenient that they cannot be supposed to have been within the intention of men of ordinary intelligence and discretion. *Marks v. State*, 220 Ind. 9, 40 N.E. 2d 108 (1942). If the board of county commissioners could alter the approved number of deputies and assistants of the county treasurer at will, then there would be no stability in that office, nor in any other office covered by the salary statute. Reasonable men would never legislate such a possibility. Further, if the commissioners were able to alter the approved number at will they would be able to regulate the appointment of persons to fill the positions by approving the position only after approving the appointee, a result in direct contravention of the salary statute and the principles expressed in *Tucker*.

With this background your questions may be readily answered, as follows :

1. A County Treasurer in a county having a population of more than 10,000 but less than 18,000 has the right to appoint a second deputy and clerk in addition to his first deputy where the County Treasurer has found it necessary in his judgment based on six years' experience to have a second deputy and clerk in order to fulfill his duties as Treasurer. However, he

does not have an absolute right to have such persons paid from county funds. In order to have such persons compensated from the county fund the Treasurer must first convince the board of county commissioners that his judgment in this matter is sound and that the board should approve the appointment of, and recommend the salary for, such personnel.

2. The present necessity for a second deputy and clerk is, in a sense, irrelevant. The only thing that matters is whether the board of county commissioners has, prior to the Thursday following the first Monday in August of 1966, approved the existence of such positions, and whether the county council's appropriation for 1967 includes a salary for such positions. If those conditions exist then the county commissioners do not have a right to deny pay to such deputy and clerk during service in 1967 pursuant to appointment by the treasurer.

3. I am required by statute to advise only state officers and agencies in the conduct of their affairs and therefore am not authorized to plan a course of action for a county treasurer. I may point out, however, that the plaintiffs in both the *Applegate* and *Porter* cases, *supra*, filed actions in mandamus.

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OFFICIAL OPINION NO. 14

May 15, 1967

**ELECTIONS—TOWNSHIP OFFICERS—Justice of the  
Peace—Expiration of Term When Successor  
Does Not Qualify.**

Opinion Requested by Mr. Robert A. O'Neal, Superintendent  
Indiana State Police.

I am in receipt of your recent letter in which you inquire who is the Justice of the Peace in a given township in view of certain specified facts.