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OFFICIAL OPINION NO. 11

June 17, 1966

**ELECTIONS—County Election Board Members—  
No Compensation for Additional Duties.**

Opinion Requested by Hon. Frederick T. Bauer, Majority Leader, House of Representatives.

Your letter of recent date requests my Official Opinion in answer to questions which may be paraphrased as follows:

1. Acts 1965, ch. 261, §§ 16, 17, 18, and 19, impose certain additional duties upon members of County Election Boards in regard to the handling of absent voter ballots. May such Election Board members be paid additional compensation for the new and additional duties and responsibilities so imposed?

2. Acts 1965, ch. 261, § 18, provides that an appointed member of a County Election Board may designate another individual to perform certain duties which are otherwise the responsibility of the member. May the person so designated be paid compensation for performing those duties?

A County Election Board consists of the Clerk of the Circuit Court, as a member *ex officio*, and two additional members, appointed, one each, from the two largest political parties in the county, upon the nomination of the party's county chairman. Acts 1945, ch. 208, § 17, as last amended by Acts 1953, ch. 239, § 7, Burns IND. STAT. ANN., § 29-3102.

An Opinion of the Attorney General has classified the position of Member of the County Election Board as a public office on reasoning found in 1961 O.A.G. No. 30, at p. 177:

“A public office within the meaning of the Indiana Constitution, Art. 2, Sec. 9, *supra*, was defined in the

case of *Shelmadine v. City of Elkhart* (1921), 75 Ind. App. 493, 495, 129 N.E. 878, as follows:

“‘A public office[r] may be defined as a position to which a portion of the sovereignty of the state attaches for the time being, and which is exercised for the benefit of the public. The most important characteristic which may be said to distinguish an office from an employment is, that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power.’

“I find no instance where the status of a member of a county election board has been considered or passed upon by the Supreme or Appellate Court of Indiana or has been heretofore the subject of an Official Opinion by any Attorney General of the state. However, an examination of the provisions of Burns' 29-3104 and 29-3105, *supra*, shows that a member of a county election board, in the exercise of his duties under the authority vested in him as such member, is clearly in a position to exercise a portion of the sovereignty of the state. . . .”

It has also been held that a public officer is limited to the compensation authorized by statute, regardless of any increase in his duties. In *State ex rel. Foust v. Myers*, 119 Ind. App. 1, 83 N.E. 2d 799 (1949), the Indiana Appellate Court held that a Clerk of the Circuit Court (prior to the County Officers' Salary Act, Acts 1957, ch. 319) was not entitled to additional compensation for additional duties imposed by statute, in the absence of any statutory provision for such additional compensation. On page 6 of 119 Ind. App., p. 801 at 83 N.E. 2d the court said:

“It is well settled law in this state that a public officer is entitled to only such compensation for the performance of his official duties as is allowed to him by statute. *Legler v. Paine et al. Board of Comm'rs. of Vanderburgh County* (1897), 147 Ind. 181, 45 N.E. 604; *Board, etc. v. Lewis* (1924), 81 Ind. App. 601, 144

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N.E. 623; *Applegate, County Auditor v. State ex rel. Pettijohn* (1933), 205 Ind. 122, 185 N.E. 911. He takes and holds office *cum onere* and undertakes to perform the duties thereof for such compensation as pertinent statutes provide, even though those duties be increased during his term of office. *Board, etc. v. Buchanan* (1898), 21 Ind. App. 178, 51 N.E. 939.”

It was further held that the allowance of additional compensation by the circuit court (by way of costs in a court proceeding) was void when not authorized by statute.

As pointed out in 1945 O.A.G. No. 57, the statute which presently fixes the compensation of election board members is a 1945 re-enactment (with a few significant changes) of a 1935 statute. Section 24 of the Indiana Election Code, Acts 1945, ch. 208, § 24, Burns IND. STAT. ANN., § 29-3109, establishes a scale of compensation which varies from \$500.00 for each primary, special and general election in counties of over 300,000 population to \$75.00 for each such election in counties of 20,000 or less. This scale was adopted verbatim from Acts 1935, ch. 220, § 1. The other provisions of the two statutes are almost identical, but some words were omitted for the 1945 re-enactment and some added. Omitting the compensation scale, emphasizing the added words, and bracketing the words dropped, the two enactments read as follows:

“[That] The members of the county [board of] election *board* [commissioners] of each county [,] shall receive for their services as such members, [including their services as members of the boards of canvassers,] the following compensation [and none other], to wit:

. . .

“. . . provided that each of such election *board members* [commissioners] shall receive no additional compensation on account of city or town elections in such counties, but the compensation provided for herein shall cover the compensation for the entire services of such election *boards* [commissioners] in their respective counties.” (Emphasis added.)

The same 1945 enactment of the Indiana Election Code also provides that the members of the county election board shall constitute a board of canvassers (Sec. 291, Burns IND. STAT. ANN., § 29-5208) and authorizes the board of county commissioners to fix the compensation of the members for their services as a board of canvassers. (Sec. 293, Burns IND. STAT. ANN., § 29-5210.) In 1945 O.A.G. No. 57, p. 255, that provision was sustained and election board members held entitled to extra compensation when serving as a board of canvassers. The limitation of Sec. 24, *supra*, that its scale of compensation "shall cover the compensation for the entire services of such election boards . . .," was held inapplicable to compensation for services as a board of canvassers. It remains clear, however, that the compensation provided for in Sec. 24 of the Indiana Election Code, Burns § 29-3109, is the only compensation provided or authorized by statute "for the entire services of such election boards." The extensive 1965 amendments to that Code, of which the additional duties are a part, did not include any change in the statutory provisions for compensation.

Therefore, in answer to your first question, the appointed members of county election boards, for their services as election board members, are entitled only to the compensation provided by Sec. 24 of the Indiana Election Code, ch. 208, Acts 1945, Burns IND. STAT. ANN., § 29-3109, and are not entitled to additional compensation for the additional duties imposed by Acts 1965, ch. 261. The amount of their compensation as members of the board of canvassers, however, is not fixed by statute and remains discretionary with the board of county commissioners.

The *ex officio* member, the Clerk of the Circuit Court, is not entitled to any of the compensation provided or authorized by the Election Code. His salary, for all his duties, is fixed and limited by the County Officers' Salary Act, Acts 1957, ch. 319, as amended by Acts 1965, ch. 400, Burns IND. STAT. ANN., §§ 49-1053—1069. See 1958 O.A.G. No. 20, p. 88.

Your second question concerns Acts 1965, ch. 261, § 18, the same being Burns IND. STAT. ANN., § 29-4912, which provides:

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“The election board of the county shall forthwith inclose the unrejected ballots, unopened, together with the first and original application made by such absent voter, in a large or carrier envelope, which shall be securely sealed and indorsed with the name and official title of the clerk of the circuit court and the words: ‘This envelope contains an absent voter’s ballot and must be opened only at the polls on election day while such polls are open,’ and such county election board shall thereafter keep the same securely in office of the clerk of the circuit court until delivered by it as provided by section two hundred and six (206). *The county election board shall during the period absent voter’s ballots are being received, keep such ballots in cabinets, boxes or room, upon which there shall be two [2] locks, one [1] for each of the appointive members of the county election board. Each day during the period that absent voter’s ballots are received, such ballots shall be placed in such cabinets, boxes or room under the direction of the appointive members of the board. If an appointive member can not be present each day, he shall designate someone from his political party to be present with the key to such lock at the time such ballots are placed therein.*” (Emphasis added.)

The emphasized portion was added to the Indiana Election Law by the 1965 amendment thereof.

In the practical application of this statute the advice of the Indiana Supreme Court in *State ex rel. Rogers v. Davis*, 230 Ind. 479, 482, 104 N.E. 2d 382, 383 (1952) ; should be heeded :

“It has been well stated that :

“ ‘The primary object of statutory construction is to ascertain and effectuate the intent of the legislature as shown by the whole act, the law existing before its passage, the changes made and the apparent motive for making them.’ *City of Lebanon v. Dale* (1943), 113 Ind. App. 173, 178, 46 N.E. 2d 269; *Haynes Automobile Co. v. City of Kokomo* (1917), 186 Ind. 9, 12 and cases cited, 114 N.E. 758. . . .”

What, then is the intent of the Legislature shown in statute under consideration? It appears to be twofold: first, to protect absent voters' ballots by keeping them under lock and key; second, to prevent tampering with absent voters' ballots by requiring a specified representative of each of the two major parties to be present whenever the ballot container is to be unlocked.

The statute is intended to establish custody of and responsibility for the keys to absent ballot containers by specifying who shall hold such keys. The statute is not concerned with compensable duties.

To find any authority for compensation we must consider another provision of the Election Code. Acts 1945, ch. 208, § 20, the same being Burns IND. STAT. ANN., § 29-3105, provides, *inter alia*:

“Every county election board is hereby authorized to appoint and at pleasure remove clerks, custodians and such other employees as may be necessary in the execution of its powers, prescribe their duties and fix their rank. Each board may fix the salaries of its appointees.”

The above provision would appear to be broad enough to permit the payment of compensation to the designated key holders. (The provision also implies that there will already be compensated employees who might be designated to perform this minor extra duty.) However, it must be noted that the above statute empowers the County Election Board, not the individual members thereof, to appoint employees and fix their salaries.

Therefore, in answer to your second question, the County Election Board may provide for compensating the individual designated by the appointed members of the Board to perform the duties set out in Acts 1965, ch. 261, § 18, the same being Burns IND. STAT. ANN., § 29-4912.