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COPY

FILE NO. S-777

CONSTITUTION:
Elected Officers of Units of
Local Government -
Changes in Salary

Frank A. Kirk
Director
Department of Local Government Affairs
303 East Monroe Street
Springfield, Illinois 62706

Dear Mr. Kirk:

I have your letter wherein you state in part:

"* * * (1) Must the salary of an elected officer of a unit of local government be fixed at a flat annual rate for the entire term, or may it be established on a graduated basis prior to the term for which that officer is elected? (2) If the statutes provide a graduated salary scale based on population, may the salary of an elected officer of local government be changed during the term for which that officer was elected if the population of the unit of government changes during his term?

* * *

Section 9(b) of article VII of the Illinois Constitution of 1970 reads as follows:

> "(b) An increase or decrease in the salary of an elected officer of any unit of local government shall not take effect during the term for which that officer is elected."

There appeared in the Constitution of 1870 a provision comparable to section 9(b). Section 11 of article IX of the Illinois Constitution of 1870 read in part as follows:

> "* * * The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be decreased or diminished during such term."

Prior to the adoption of the new Constitution, I had occasion to publish two opinions each of which involved a construction of section 11 of article IX. In opinion S-160, dated April 27, 1970, (1970 Ill. Atty. Gen. Op. 86), I replied to an inquiry of the State's Attorney of Peoria County. He had asked whether the salary of the county superintendent of highways must be fixed at a flat annual rate for the new term or whether a graduated salary could be established in advance for the entire new term. At page 88, I held:

> "In the case of a graduated salary, which is established in advance for the entire new term, there would be no change in the law determining

> such income during the term of office. The spirit and purpose of the constitutional prohibition would not be violated. I am, therefore, of the opinion that the salary of the County Superintendent of Highways may be established by a graduated scale in advance for the entire new term. The Illinois Constitution does not require a flat annual rate."

In opinion S-311, dated June 23, 1971 (1971 Ill. Atty. Gen. Op. 61), I, in effect, held that the salary of the supervisor of assessments could be increased or diminished during his term pursuant to a change in population as long as the population scale was fixed prior to the start of the term.

Both opinions relied on Brissenden v. Howlett, 30 Ill. 2d 247. In Brissenden, the Illinois Supreme Court held that the annual compensation of a county superintendent of schools may be diminished during his term of office pursuant to a statute which provided that his compensation is to be based upon the county population, without violating section 11 of article IX. The Court said at page 249:

> "The rationale of the majority of these cases is best expressed in State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N.E. 2d 840, 843, where the court stated: 'The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will

be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, albeit the compensation of the judge is made variable, from and after the last federal census becoming effective during his term.'

The Illinois Supreme Court has expressed a like understanding of the purpose of the constitutional prohibition against a legislative increase in salaries during an elective term. In People ex rel. Holdom v. Sweitzer, 280 Ill. 436, 442, the court stated: 'The constitution expressly prohibits the legislature from increasing the salaries of circuit judges, and, in fact, of all State officers, during the terms for which they are elected. The theory of the framers of the constitution was to make the three branches of government, the legislative, executive and judicial, separate and independent of each other, as far as possible. The power to fix the salaries of State officers is in the legislative branch of the government, the duty to enforce acts of the legislature is in the executive branch, and the power to construe the acts of the legislature is in the judiciary. The acts of the officers of each branch, while such officers are in power, should not be made to depend upon or be influenced by the acts of another branch, nor should there be anything in the conduct of either that would even give rise to a suspicion of such a thing as coercion by reducing salaries or a reciprocal interchange of favors by increasing salaries, hence the reason for the constitutional provision putting it beyond the power of the legislature to increase or diminish the salaries of State officers in office and in power.

> This is fully borne out by the Debates and Proceedings of the Constitutional Convention as reported in volume I, pages 1015, 1018, 1019, 1020, 1058 and 1059, in which the practices which had theretofore obtained in securing, or attempting to secure, increases in salaries by certain State officers were set forth forcibly and at length.'
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> It would follow that the spirit and purpose of the constitutional prohibition would not be violated by an act establishing a fixed scale of pay to be determined during the term of office according to such an extraneous fact as the Federal census. As a practical matter this has long been the practice in this State and many elected public officials have long received an additional rate of pay during their terms by reason of increased population. This practice was approved by an exhaustive opinion of the Attorney General of Illinois in 1941. Attorney General's Opinions, 1941, No. 75, p. 146."
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> The Court further said at page 251:
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> "* * * The constitutional prohibition is directed not against a change in income but against a change in the law determining such income during the term of office. In the present case there has been no such change in the law."

The language of section 9(b) is, of course, not identical to section 11. Specifically, you refer in your letter to the phrase in section 9(b) that reads: ". . . shall not take effect . . . ." You inquire as to whether this new language would effect a change in my earlier opinions, specifically, S-160.

Section 9(b) was not proposed to the 6th Illinois Constitutional Convention by the Committee on Local Government. It was proposed to the Convention by Delegate Ralph Dunn. (IV 6th Ill. Const. Conv., Verb. Trans., p. 3408 (1972).) This proposal, at first, read: "the salary paid an elected officer of any unit of local government shall not be increased or diminished during the term for which the officer is elected."

In justifying his proposal, Delegate Dunn pointed out that the proposed legislature, executive and judicial articles all contained similar provisions. (See, Ill. Const.: art. IV, sec. 11; art. V, sec. 21; art. VI, sec. 14.) Delegate Dunn opined that the Committee on Local Government had overlooked such a provision in presenting its proposed article to the Convention. (IV 6th Ill. Const. Conv., Verb. Trans., p. 3409 (1972).) He further noted that the Constitution of 1870 did contain a similar provision.

The proposal was adopted and sent to the Committee on Style, Drafting and Submission. There, changes in language were made and proposed to the Convention for adoption on second reading. (VII 6th Ill. Const. Conv., Comm. Prop., p. 1957

(1972).) Among the changes made was the adoption of the phrase "shall not take effect". No explanation of these changes was submitted with the Committee Proposals. It is, therefore, assumed that the changes were without substantive intent.

As indicated earlier, the legislature, executive and judicial articles contain sections similar to section 9(b). (Ill. Const.: art. IV, sec. 11; art. V, sec. 21; art. VI, sec. 14.) Sections in both the legislature and executive articles contain the phrase "shall not take effect". The judicial article contains strikingly similar language. It reads: "Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office."

This particular phrase (shall not take effect) appeared in the original proposal made by the Committee on the Legislature to the Convention. (VI 6th Ill. Const. Conv., Comm. Prop., p. 1315 (1972).) The executive article, as originally proposed, did not contain that phrase. It was added on third reading by the Convention pursuant to a proposal by the Committee on Style, Drafting and Submission. (VII 6th Ill. Const. Conv.,

Comm. Prop., p. 2458 (1972); V 6th Ill. Const. Conv., Verb. Trans., p. 4344 (1972).) Again, the Committee offered no explanation for these changes. It is assumed the changes were made for reasons of style and perhaps to promote uniformity. No substantive intent in making these changes can be discerned. Changes in the judicial article were also proposed by the Committee on Style, Drafting and Submission and adopted by the Convention on third reading. VII 6th Ill. Const. Conv., Comm. Prop., p. 2466 (1972); V 6th Ill. Const. Conv., Verb. Trans., p. 4439 (1972).

The most dramatic changes brought by section 9(b) vis-a-vis section 11 of article IX of the Illinois Constitution of 1870 pertained to coverage and manner of selection of officers. Section 9(b) governs only elected officers, while section 11 governed elected and appointed officers. Also, section 9(b) encompasses officers of units of local governments while section 11 encompasses only municipal officers.

Although my opinion, S-160, pertained to an appointed, county officer, and section 9(b) pertains only to elected officers

of a unit of local government, I am of the opinion that the reasoning employed in S-160, and more importantly, the reasoning employed in Brissenden v. Howlett, 30 Ill. 2d 247, is still viable.

Therefore, in answer to your questions, I am of the opinion that the salary of an elected officer of a unit of local government need not be fixed at a flat annual rate for the entire term; the salary may be established on a graduated basis prior to the beginning of the term for which that officer is elected. If the statutes provide a graduated salary scale based on population, the salary of an elected officer of a unit of local government may be changed during his term if the population of the unit of local government changes during such term. This assumes that the statute in question was adopted prior to the beginning of the officer's term. It is also understood that any determination of a population change would be made by reference to an objectively determinable and extraneous event such as the federal census.

Very truly yours,

ATTORNEY GENERAL