

630624.1

PUBLIC OFFICES AND OFFICERS: Justices of the peace and circuit court commissioners – salary or fees payable to, change in.

The legislature is authorized by the Revised Constitution to abolish the offices of justice of the peace and circuit court commissioner prior to January 1, 1969, the date as of which such offices are otherwise abolished. During this period the compensation payable to those officers shall be as provided by law. The legislature may change the present fee basis either by providing for the payment of salary in lieu of fees or otherwise at any time regardless of the date of their election or appointment. Further legislation would be required in order to provide for the payment of a salary to township justices of the peace.

No. 4150

June 24, 1963.

Honorable Joseph A. Gillis
State Representative
2312 Guardian Building
Detroit 26, Michigan

Your recent request for an opinion states:

“The Revised Constitution contains the following provisions:

“ARTICLE VI

“Sec. 17. No judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of judicial activity of his office.

“Sec. 26. The offices of circuit court commissioner and justice of the peace are abolished at the expiration of five years from the date this constitution becomes effective or may within this period be abolished by law. Their jurisdiction, compensation and powers within this period shall be as provided by law. Within this five-year period, the legislature shall establish a court or courts of limited jurisdiction with powers and jurisdiction defined by law. The location of such court or courts, and the qualifications, tenure, method of election and salary of the judges of such court or courts, and by what governmental units the judges shall be paid, shall be provided by law, subject to the limitations contained in this article.

“Statutory courts in existence at the time this constitution becomes effective shall retain their powers and jurisdiction, except as provided by law, until they are abolished by law.

“Schedule and Temporary Provisions

“Sec. 4. All officers elected at the same election that this constitution is submitted to the people for adoption shall take office and complete the term to which they were elected under the 1908 constitution and existing laws and continue to serve until their successors are elected and qualified pursuant to this constitution or law.

“Sec. 16. * * * it shall be the supreme law of the state on and after the first day of January of the year following its adoption.

"In view of the apparent conflicts in the Sections, would you please answer the following questions for me:

"When will the fee system be abolished for justices of the peace,

- "a. Those elected at the 1 April 1963 Election?
- b. Those elected or appointed prior to 1 April 1963?
- c. Those elected or appointed subsequent to April 1963?"

By another communication you have presented similar issues with respect to the office of circuit court commissioner. Both requests are answered herein.

The Revised Constitution will, as provided in Article XVII, Section 4, of the Michigan Constitution of 1908, and in Section 16 of the Schedule and Temporary Provisions of the said Revised Constitution become effective on January 1, 1964. Such effective date will be applicable to both sections 17 and 26 of Article VI.

Resort has been had to the record of the proceedings of the 1961 Constitutional Convention as a means of determining the intent of the delegates.¹ Both of these sections were included in their original form within Committee Proposal No. 96, as submitted to the convention by the Committee on Judicial Branch on February 2, 1962.²

Under the rules of the convention all such proposals which were finally adopted were previously considered by the entire convention on first (committee of the whole), second and third reading, and following each such consideration the same were referred to and reviewed by the Committee on Style and Drafting. As rereferred by that committee to the convention and considered by it on third reading, these two sections of Article VI read:³

"Sec. 17. No judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of judicial activity of his office.

"* * *

"Sec. 26. The offices of circuit court commissioner and justice of the peace shall be abolished at the expiration of (5) five years from the date this constitution becomes effective or may within this period be abolished by law. Their jurisdiction and powers within this period shall be as provided by law. Within this (5) five-year period, the legislature shall establish a court or courts of limited jurisdiction with powers and jurisdiction defined by law. The location of such court or courts, and the qualifications, tenure, method of election and salary

¹ *Holland vs. Clerk of Garden City*, 299 Mich. 465, 470. *Kearney vs. Board of State Auditors*, 189 Mich. 666, 671, 673, quoted with approval in *School District of City of Pontiac vs. City of Pontiac*, 262 Mich. 338, 346, and in *City of Jackson vs. Commissioner of Revenue*, 316 Mich. 694, 720.

² Official Record, Constitutional Convention 1961, seventy-first day, February 2, 1962, page 757, referring to ninety-third day, March 6, 1962, page 1478, et seq., at which Committee Proposal and its comments with respect thereto are printed.

³ Official Record, Constitutional Convention 1961, one hundred thirty-third day, May 7, 1962, pp. 3061-3062.

of the judges of such court or courts, and by what governmental units the judges shall be paid, shall be provided by law, subject to the limitations contained in this Article."

It will be noted that section 17 was then in the form in which it was finally adopted. However, two amendments were subsequently adopted to section 26. The insertion of the word "are" in lieu of "shall be" in the first sentence⁴ is of no significance. However, of direct bearing upon the issue here presented is the other amendment by which the word "compensation" was inserted in the second sentence of this section. I quote from that portion of their proceedings.⁵

"SECRETARY CHASE: Mr. W. F. Hanna [and Mr. Higgs] offers the following amendment:

"Amend Article VI, Section 26 (first column, line 39), after 'jurisdiction' by inserting a comma and 'compensation'; so the language will read: 'Their jurisdiction, compensation and powers within this period shall be as provided by law.'

"VICE PRESIDENT HUTCHINSON: Mr. Hanna.

"MR. W. F. HANNA: Mr. President and fellow delegates, I want to raise a problem which, unfortunately, I did not catch on first or second reading and it was not until we were going over this matter carefully in style and drafting last week that I saw what I believe to be a serious problem and a serious inconsistency, and I bring it to the attention of the convention. We have provided that upon the adoption of this constitution or the effective date of this constitution that no judicial officer shall be compensated by fees or anything based upon the volume of his business, but it is said that he must be paid a salary. We now then come to section 26, where we have continued in office these offices of circuit court commissioner and justice of the peace, which are in fact officers that in the main have been compensated by fees of their office and dependent upon the volume of activity.

"Now I want to raise 3 problems with this conflict as I see it:

"First is the practical impossibility, if this constitution goes into effect on January first of a given year. In townships the fiscal year is from April 1 to April 1, and in counties the fiscal year will have commenced before the effective date of the constitution. There will be no money appropriated; there will be no money out of which you can pay circuit court commissioners a salary or a justice of the peace a salary. Therefore, you are asking these people to serve completely without compensation.

"Secondly, under the present state law, each township elects 2 justices of the peace. Certainly, you will have to provide in all due process that the 2 justices will receive the same salary. And in many, many, many

⁴ Official Record, Constitutional Convention 1961, one hundred-thirty-sixth day, May 11, 1962, p. 3238.

⁵ Official Record, Constitutional Convention 1961, one hundred thirty-fourth day, May 8, 1962, pp. 3125-3127.

townships that have 2 justices, one justice maintains an active calendar and open docket and the other has no open calendar, no docket, and is purely an honorary type of office. To set a salary commensurate for these 2 men that is the same immediately penalizes the man who has been doing the work and benefits the man who does not do the work, and so far there is nothing in this constitution that makes a justice of the peace maintain a docket, hold office, or perform any judicial function. Therefore, until this whole matter can be worked out, this man can sit there and draw a salary and not do anything. So that you have a practical fiscal problem in the efforts to do this.

* * *

"The third thing that I would like to raise and which I think is very important: you are giving the legislature 5 years to work out the system of inferior courts. If you make the legislature fight 2 battles; the first immediately upon the adoption of this constitution or just before the adoption of this constitution, to pass a law governing salaries of circuit court commissioners and justices of the peace; and then within 5 years make them reorganize the court system, you are asking them to fight the battle twice. If they fight the battle before this constitution becomes effective, you are going to make a lot of people mad and you are turning over to the legislature the power of deciding this constitution. If you wait 'til afterwards, after the constitution becomes effective, you run into the problem that the justices and circuit court commissioners cannot be compensated.

"I do not believe the legislature in attempting to get a good 5 tier or inferior court system should fight the battle twice. They should fight the battle once. They should set up an intelligent lower court system and provide the salaries or how they are to be paid. I urge that you insert the word 'compensation' so that until the legislature reorganizes the lower tier of the court system, the compensation, jurisdiction and powers will be as provided by law during that period.

* * *

"VICE PRESIDENT HUTCHINSON: Mr. Prettie.

"MR. PRETTIE: Mr. President, I would like to ask Mr. Hanna a question. It has been touched upon somewhat tangentially, but Section 17 appears to abolish the fee system immediately upon the effective date of this constitution. If your amendment were adopted, would it not be necessary, Mr. Hanna, to obviate that inconsistency by some further amendment to section 17?

"MR. W. F. HANNA: Mr. President, Mr. Prettie and fellow delegates, I am relying on the interpretation that we have made in style and drafting that by inserting 'compensation' that it would remain the same as provided by law and would allow fees to be continued during this 5 year period. If the word 'compensation' would be construed to require a salary, then we would have to correct it in style and drafting, but the import of my amendment, 'compensation,' is that they would be allowed to continue receiving a pay based upon fees during the interim.

"MR. PRETTIE: Well, Mr. President and Mr. Hanna, it seems to me that the provisions of section 17, upon adoption of this constitution, would have to be given the same dignity as the word 'compensation' proposed to be added by Mr. Hanna's amendment and that there is very patently an inconsistency there which flies in the face of the near unanimous decision of the committee on judicial branch that the fee system should be abolished if this constitution be adopted. I therefore oppose the proposed amendment.

"VICE PRESIDENT HUTCHINSON: Mr. Dehnke.

"MR. DEHNKE: Mr. President and fellow delegates, if I were as sure as Mr. Everett seems to be that there would be some provision for paying these continuing officers until the legislature gets around to setting up the new courts, I would not be concerned. This is not a matter of perpetuating fees. The trouble is that if this word is not put into the constitution we may find ourselves in the situation where we are not able to provide either fees or any other type of compensation for the justices of the peace.

"The day after this constitution becomes effective, if it is approved, there will be demands made on justices of the peace all around the state, where they do not have municipal courts, for the issuance of warrants, for the holding of examinations, and the doing of all the other things that are within the jurisdiction of the justices of the peace and without this word 'compensation' in there, it would be purely speculation to assume that the boards of supervisors—this money being paid into the county and not to townships—would consider themselves authorized to pay compensation. This is merely a stopgap measure to assure that we will not run into that situation of no provision made for any type of compensation either salary or fees.

"Now as far as the point raised by Delegate Prettie is concerned, if there should be considered to be a technical conflict between section 26 and section 17, I think the answer would be in the rule that where there is a specific proviso pertaining to some specific situation, that takes precedence over a general situation. None of us are advocating the continuance of the fee system. The only thing we are trying to avoid is this possibility, this awkward situation that might develop that while we are waiting for a year or 2—certainly not longer than 5 years—for the legislature to set up the new courts, there may be no legitimate way of paying the justices or other officers or the circuit court commissioners, who would be expected to perform their functions even though there is no assurance of any kind of compensation. I therefore favor the amendment."

The adoption of such amendment by a substantial majority evidenced fairly general acceptance upon the part of the delegates of the interpretation suggested by Delegates Hanna and Dehnke. I therefore construe sections 17 and 26 together as providing that during the period intervening between January 1, 1964 and the date as of which the offices of justice of the peace and the circuit court commissioner are abolished persons holding those offices shall receive such compensation which may be either

fees or salary, as may be provided by law. Section 26 authorizes the legislature to adopt legislation changing the compensation payable to such officers during such period or any part thereof.

The Michigan Constitution of 1908⁶ contained a general prohibition against increasing or decreasing the salary of a public officer after election or appointment. The two previous constitutions did not contain a comparable specific provision. Absent such a provision, there would be no constitutional prohibition against the adoption of legislation decreasing the salary of a public officer following his election. As held by the following cases the office holder, even after election, has no vested property or contractual rights in a public office or the compensation prescribed therefor, which would prevent the abolishment of the office or the reducing prospectively of the amount of such compensation at any time. Thus, the legislature is at liberty to fix salaries in lieu of fees.

An early Michigan case⁷ involved the authority of the common council to reduce the salary of the recorder of the city of Wyandotte during his term. The statute⁸ provided that the recorder was entitled to receive for his compensation "such sums as the common council may allow, not exceeding \$300 per annum." The salary of the officer, in addition to certain fees, was fixed as of the date of his election by resolution of the council at \$250 per annum. He was paid that amount during 1877, the first year of his term. However, for the next year, the council by resolution reduced the salary to \$150, which amount was paid to him. He brought this action to recover the difference, and judgment was entered for him in the trial court. In reversing the same, the Supreme Court, speaking through Justice Cooley, stated:

"It is claimed, however, that when the salary is fixed at the time when the office is accepted, the acceptance is presumed to have the salary in view, and a contract is thereby effected between the officer and the city which neither can change without the consent of the other. This is a position that has frequently been taken and almost as often overruled. Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public. The leading case of *Butler v. Pennsylvania* 10 How. 402, has been universally regarded as having settled that question; and it has been followed by decisions in numerous cases. The salary or other compensation is therefore at the discretion of the legislative authority of the State, or of such other authority as the Legislature has seen fit to entrust it to. This was indirectly recognized in *Chapoton v. Detroit* 38 Mich. 636; a case which is in point here.

"It is said on behalf of the defendant in error that the principle above stated rests on the right of the officer to resign and give up his office at any time; and it is further said this right did not exist in the case of this officer because he could only resign to the common council—the very body that reduced the salary—and the council might

⁶ Article XVI, Section 3.

⁷ *City of Wyandotte vs. Drennan*, 46 Mich. 478, 480-481.

⁸ L.A. 1875, p. 680.

keep him in by refusing to accept his resignation. Whether the council could in this way compel the recorder to continue in the performance of his duties we do not care to consider in this case, because we think the legislative authority over the subject does not depend upon the existence or non-existence of any such power. Offices are created for the public good at the will of the legislative power, with such powers, privileges and emoluments attached as are believed necessary or important to make them accomplish the purposes designed. But except as it may be restrained by the Constitution the Legislature has the same inherent authority to modify or abolish that it has to create; and it will exercise it with the like considerations in view. Whoever accepts a public office must accept it with this principle of constitutional law in view; and if his compensation is reduced below what seems to him reasonable, it may be a hardship, but it is not a legal wrong. The legislative power is ample, and he is supposed to know when he takes the office that it is liable to be exercised."

Chapoton vs. Detroit,⁹ cited in the above opinion, was an action of mandamus to require the payment to relator of his salary as a member of the board of public works at the rate of \$3,000 per annum. Relator was appointed January 30, 1874, and re-appointed for four years from January 30, 1877. On February 11, 1877, his salary was fixed for the ensuing year at \$3,000 as it had been for every year theretofore. On December 22, 1877, it was fixed for the second year at \$2,500. Relator claimed this to be in violation of the city charter,¹⁰ reading in part:

"* * * It [the common council] may also fix and regulate the compensation of all officers elected or appointed under or by virtue of any act relating to said city, except as may be otherwise provided; but the compensation of no officer, fixed by an annual or periodical salary, shall be diminished during the term for which he was elected or appointed; nor shall the salary of any officer be increased during his term of office, unless by a two-thirds vote of said council."

The board of public works was created by an 1873 act¹¹ which provided that "each member of said board shall receive such salary per annum as the Common Council may from time to time establish." The court held that the action of the council in reducing the amount of the annual salary was authorized by such provision of the 1873 act and denied mandamus.

In a later case¹² it was contended that the provisions of Article XII, Section 8, of the 1850 Michigan Constitution authorizing the governor to remove public officers were in violation of the Fourteenth Amendment of the Federal Constitution, which states that no state shall "deprive any person of life, liberty, or property, without due process of law." In rejecting such contention, the opinion stated:

"A public office cannot be called 'property,' within the meaning

⁹ *People ex. rel. Chapoton vs. Common Council of the City of Detroit*, 38 Mich. 636.

¹⁰ L.A. 1871 Vol. III Chapter 5 § 23, pp. 1371-1372.

¹¹ L.A. 1873, Vol. III, p. 175.

¹² *Attorney General ex rel. Governor vs. Jochim*, 99 Mich. 358, 367.

of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the State, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.

* * * "

The opinion also cited with approval *City of Wyandotte vs. Drennan*, supra, and quoted from the opinion therein the excerpt above set forth.

As held by the above cases, the officeholder has no vested property or contractual rights in a public office or the compensation prescribed therefor which would prevent the abolishment of such office or the reducing of the amount of compensation following election. The 1908 Constitution contained a general prohibition against increasing or decreasing of the salary of a public officer after election or appointment.¹³ The comparable provision of the Revised Constitution¹⁴ relating to judicial officers refers specifically to justices of the Supreme Court and circuit and probate judges, but not to either justices of the peace or circuit court commissioners. Furthermore, as above noted, section 26 of Article VI, authorizes the legislature to fix the compensation payable to such officer during this period. The authority of the legislature to fix such compensation is not circumscribed by reference to the compensation fixed either presently or as of the date of election.

You also direct my attention to the provision of the Schedule¹⁵ entitling officers elected at the same election at which the Revised Constitution was voted upon to complete the term to which they were elected. For the purposes of this opinion, I will assume without deciding or expressing any opinion thereon that such provision is applicable to other than state offices. Even so, such provision may not be construed as being applicable to the offices of justice of the peace and circuit court commissioner. That is evidenced by the authority conferred upon the legislature¹⁶ to abolish those offices within this five-year period.

Therefore, in answer to your specific questions, the fee system for the compensation of justices of the peace will be abolished as of the date during the five-year period, commencing January 1, 1964, that any act providing therefor becomes effective. Such act will be effective according to the terms thereof, irrespective of the date of election or appointment of any such justice. In the event no such legislation is adopted the same will terminate with the abolition of the office either at the end of the five-year period, or at such prior time as an act abolishing the offices becomes effective.

Townships have only such authority as is conferred upon them by law either expressly or by necessary implication.¹⁷ Presently townships are not

¹³ 1908 Constitution, Article XVI, Section 3.

¹⁴ Article VI, Section 18.

¹⁵ Schedule and Temporary Provisions, Section 4.

¹⁶ Article VI, Section 26.

¹⁷ *Hanslovsky vs. Township of Leland*, 281 Mich. 652.

authorized to provide for compensating justices of the peace by salary in lieu of fees. Accordingly, legislation would be required in order to authorize or require the payment of a salary.

However, the Revised Judicature Act¹⁸ presently authorizes the board of supervisors of any county to fix the amount and manner of payment of a salary to circuit court commissioners. Another statute¹⁹ requires the fixing of the amount of such salary prior to election and prohibits the increasing or decreasing thereof following election or appointment. Subject to such limitations, the board of supervisors of any county would, in the absence of amendment to or repeal of such statutes, be authorized to provide for the payment of a salary in lieu of fees to circuit court commissioners during this five-year period commencing on January 1, 1964. However, the legislature is vested with the same authority above set forth with respect to the office of justice of the peace, not only to abolish the office of circuit court commissioner, but also to fix the compensation of the commissioners during this period.

FRANK K. KELLEY,
Attorney General.

630709.1

CITIES: — Fourth Class — city council, quorum — authority of a lesser number.

A majority of the aldermen constitutes a quorum. A lesser number may adjourn from time to time or take action to compel the attendance of absent members, but may not fill vacancies or transact other business.

No. 4172

July 9, 1963.

Honorable Walter G. Nakkula
State Representative
5870 Cedar Lake Road, R.F.D. No. 1
Gladwin, Michigan

Your letter under date of June 18, 1963, refers to a fourth class city and requests with respect thereto an opinion upon certain questions which will be answered seriatim.

"1. How many city council members have to be present to constitute a quorum?"

The city council consists of two aldermen from each ward, the mayor and city clerk.¹ The latter two are ex-officio, nonvoting members, except in case of a tie, in which case the mayor is authorized to cast the deciding vote.² The number of aldermen on the council varies, of course, from city to city in accordance with the number of wards therein. You do not state

¹⁸ P.A. 1961 No. 236 § 1067, being M.S.A. 1962 Rev. Vol. § 27A.1067.

¹⁹ C.L. 1948 § 45.421, M.S.A. 1961 Rev. Vol. § 5.1101.

¹ C.L. 1948 § 88.1, M.S.A. 1949 Rev. Vol. § 5.1697.

² C.L. 1948 § 88.4, M.S.A. 1949 Rev. Vol. § 5.1700; C.L. 1948 § 88.2, M.S.A. 1949 Rev. Vol. § 5.1698.