

competent evidence in determining the innocence or guilt of the defendant.”

See, also, authorities collated in 78 A.L.R. 2d 905, et. seq.

Therefore, it is mandatory that the person tested shall, upon request, be granted the privilege of having a physician of his own choosing administer the test, in addition to the one administered at the direction of the law enforcement officer.

FRANK J. KELLEY,  
*Attorney General.*

670818.2

**TOWNSHIPS:** Treasurer – compensation of, change in.

Under the 1963 Constitution and the present statutes, the electors at the annual township meeting held following election may take action to place the township treasurer upon a fee basis instead of an annual salary.

When the treasurer is compensated upon the basis of fees payable upon collection of ad valorem taxes, there is no authority to advance him a sum monthly to be deducted from the fees as collected.

Collection fees are not payable upon amounts paid by the state to reimburse the local unit for revenues lost by reason of veterans' and senior citizens' property tax exemption.

No. 4528

August 18, 1967.

Mr. Allen R. Briggs  
Prosecuting Attorney  
Ontonagon County  
Ontonagon, Michigan

Your predecessor requested our opinion advising that at the 1965 annual township meeting in Ontonagon Township, the electors voted to change the basis of compensation of the township treasurer from a stipulated salary to the 1 percent and 3 percent collection fees allowed by the statute in the collection of ad valorem property taxes.<sup>1</sup> Action was then taken to provide for the payment to the treasurer of the sum of \$125 per month, the total of which monthly payments were to be deducted from the amount of the collection fees as the same were received commencing the following December. Any remaining balance of the total amount of the collection fees received over and above the amount required to reimburse the contingent fund for the total amount of such monthly payments was also to be retained by the treasurer. Based thereon, you request my opinion upon three questions which have been rephrased as follows:

1. May the electors at the annual township meeting change the basis of compensation of the township treasurer after he was elected from a salary to statutory fees?

<sup>1</sup> Sec. 44 of Act 206, P.A. 1893, the general property tax act as amended by Act 411, P.A. 1965; M.S.A. Cur. Mat. § 7.87, pp. 61-62.

2. May the township pay the monthly amount of \$125 and subsequently deduct the amount so paid from the statutory collections fees upon ad valorem property taxes thereafter received?

3. Is the township treasurer entitled to payment of the 1 percent and 3 percent collection fees upon amounts paid by the state to reimburse the local unit for revenues lost by reason of veterans' and senior citizens' property tax exemptions?

## I

Township officers, including the treasurer, were elected at the township election held at the same time as the 1964 general November election. They did not take office for the new term, however, until April 10, 1965.<sup>2</sup> The 1965 annual township meeting was held on the Saturday preceding the first Monday in April<sup>3</sup> which followed the date of their election but antedated the commencement of their new term.

The 1908 Constitution contained the following provision:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employee or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."<sup>4</sup>

Article XI, Section 3, of the Michigan Constitution of 1963, provides as follows:

"Neither the legislature nor any political subdivision of this state shall grant or authorize extra compensation to any public officer, agent or contractor after the service has been rendered or the contract entered into."

It is notable that this language differs from that of Article XVI, Section 3, of the Michigan Constitution of 1908, by omitting the prohibition against increase or decrease of salaries of public officers during term. The debates are silent as to the significance of this language, which was adopted unchanged and without specific discussion in the form originally contained in Committee Proposal 62.<sup>5</sup>

The Message to the People as to Article XI, Section 3 of the Michigan Constitution of 1963 is as follows:

"No change from the first sentence of Sec. 3, Article XVI, of the present (1908) Constitution except for the deletion of the word 'employee' after 'agent'. Eliminated from the present section is language relating to the salaries of public officers. This is covered in another section of this document."

The reference in the last sentence appears to be to Article V, Section 23, prohibiting change of compensation during term of certain designated state

<sup>2</sup> Sec. 362 of Act 116, P.A. 1954, the Michigan election law as last amended, but not in pertinent part, by Act 44, P.A. 1966; M.S.A. Cur. Mat. § 6.1362.

<sup>3</sup> Sec. 361 of Act 116, P.A. 1954; M.S.A. 1965 Cum. Supp. § 6.1361.

<sup>4</sup> Section 3 of Article XVI of the Michigan Constitution of 1908.

<sup>5</sup> Official Record, Constitutional Convention of 1961, p. 2493.

elective officers, and to Article VI, Section 18, permitting increase but prohibiting decrease of judicial salaries during term.

The Michigan Constitution of 1963 is otherwise silent as to change of compensation of public officers, agents and employees.

The pertinent statutory provision, as last amended, now reads:

"The officers composing the township boards, board of registration, board of health, board of review and inspectors of election shall be entitled to such salary as shall be fixed by the electors at the annual township meeting, and, in case of the neglect or failure of the electors to fix such salary, the officers shall be entitled to the same salary as his predecessor in office received the year before. . . .

"The salary of township officials who are paid a salary may be determined by resolution adopted by the township board. The electors at any subsequent township meeting may alter the amount of salary fixed by any such resolution. No salaries shall be raised within 60 days prior to an election."<sup>6</sup>

Thus, action to fix the salary of township officers who are paid a salary may be taken in the first instance by either the township board or the electors at a township meeting.<sup>7</sup> If fixed by the board, the salary is subject to being altered by the electors at a subsequent township meeting, except as hereinafter indicated.

In order to arrive at an answer to your first question, it is necessary to consider whether the provisions of the above quoted statute, containing no prohibition against changing compensation of township officials except within 60 days prior to an election, contravenes the provisions of Article XI, Section 3, to the extent that it permits authorizing extra compensation to a public officer "after the service has been rendered or the contract entered into."

On the facts as you state them, the township treasurer affected by the change under discussion had not entered upon his duties at the time that the compensation was changed from salary to fee, because his term had not commenced, although he had been elected.

The Michigan Constitution of 1850 contained no express prohibition against increasing the compensation of public officers. Numerous cases arose thereunder with respect to the legal relationships, as regards remuneration, between public officers or employees and the governmental units served by them. In the leading case of *The People ex rel Eugene E. Douvielle, Judge of Probate v. The Board of Supervisors of Manistee County*, 40 Mich. 585 (1879), a probate judge obtained a writ of mandamus for the amount by which the board of county supervisors reduced his salary during term, under a statute authorizing the board to fix the salary. The court said at p. 590:

<sup>6</sup> Sec. 95, Chapter 16 Rev. Stats. 1846, as last amended, though not in pertinent part, by Act 94, P.A. 1966, effective June 16, 1966; M.S.A. Cur. Mat. § 5.82 pp. 171-172.

<sup>7</sup> O.A.G. 1957-58, Vol. I, No. 2990, p. 199.

“. . . the judges may undoubtedly, if they choose, accept the salaries fixed, and having gone into office on those terms and no other compensation being provided by law, both parties may be deemed to have bound themselves.”

The decree was later modified upon showing that the actual rate at which the salary was originally fixed was that which the judge was paid, the increase having been a voluntary and temporary contribution by the county rather than a part of the salary fixed under the statute.

In *Loyal E. Knappen, Relator v. The Board of Supervisors of Barry County*, 46 Mich. 22 (1881), the statute governing the fixing of salaries of county officers was amended, during incumbency of a prosecutor, to require that salary be fixed prior to beginning of term, and not to be increased or diminished during term. The prosecutor sued for an increase so fixed under the amendment, thus placing before the court the question whether the amendment applied to incumbents. The case arose when, after fixing the salary at an increase, the supervisors later rescinded the increase. The court denied relief, speaking through Mr. Justice Cooley, who said that the amendment applied to incumbents, the legislature having ample authority so to provide in the absence of contrary constitutional requirement. At p. 24:

“The fixing of a salary does not constitute a contract between the county and its officer, and the legislative authority is ample so far as salary is not already earned by the performance of service.”

In *Joseph N. Perry v. Village of Cheboygan*, 55 Mich. 250 (1884), a member of the board of water commissioners of a general act village sued to recover for extra work done by him while in office. The applicable statute provided for village officials to have “such compensation as council shall prescribe.” No compensation was prescribed for water board members. In denying claim, the court said, at p. 254, that he was estopped to claim for extra work:

“. . . the omission to provide compensation . . . was intentional, and it follows that the members accepting such office must be deemed to have done so with knowledge of and with reference to the provisions of the charter relating to the services which they were to perform, and that such services were to be rendered gratuitously.”

In *Attorney General ex rel Zacharais v. Board of Education of City of Detroit*, 154 Mich. 584 (1908), the court held that a legislative act amending the statute to eliminate a limitation upon the salary payable to the Superintendent of Schools of Detroit constituted authorization to the board to increase the salary of the superintendent then in office, the court saying that by making the bill immediately effective, the legislature manifested intent that the incumbent should benefit. Thus, the superintendent was enabled to receive an increase during incumbency by reason of action of the school board so increasing upon authority of the amendment to the governing local act.

From the cases referred to, and others of similar import,<sup>8</sup> I am brought to the conclusion that the acceptance of office commits the township treasurer and the governing body of the township to whatever the statutes provide regarding remuneration, but that the relationship is not contractual in the sense that it would prohibit a change of remuneration occurring between election and commencement of a term as a granting of extra compensation "after the contract entered into" in violation of Article XI, Section 3, of the Michigan Constitution of 1963.

Next, it is necessary to consider whether the statute quoted hereinabove, which empowers the board or the electors to fix the compensation of township officers as therein provided, encompasses the power to provide for compensation by changing from a fixed salary to the total of the 1% and 3% collection fees allowed by statute on the collection of township ad valorem taxes. Similar questions have, from time to time, been considered by the Michigan Supreme Court. In *People ex rel Curtis Munger v. Clerk of Board of Supervisors of Bay County*, 38 Mich. 307 (1878), a writ of mandamus was granted for a warrant to pay a county treasurer compensation including an amount received for office charges on payments under the tax laws, as allowed by the supervisors. The court, holding for relator, said that the board had authority under the governing statute to fix the treasurer's compensation in such amount as it deemed reasonable. In *People v. Reigel*, 120 Mich. 78 (1899), the court had before it an embezzlement conviction of a county treasurer, for having drawn warrants for the amount of fees collected on liquor and other taxes, as permitted by action taken by the board of supervisors under the same statute as was before the court in *Bay*. This statute had since been amended, however, to require that salaries be fixed prior to commencement of term, without increase or decrease during term. The theory of the prosecution was that the treasurer, being bound to know the law, was therefore bound to know that the increase permitting him to keep the collection fees was illegal, and therefore was chargeable with embezzlement. Striking down the conviction, the Court, after finding that the amendment did not overcome the ruling in *Bay*, said, at page 90:

"It is apparent that the amount of the salary was indefinite and uncertain in a sense, because liable to be increased or diminished through variations in the amount of the collection fees. The statute was designed to prevent repeated or untimely action by the board, and not to prohibit

---

<sup>8</sup> Other cases considered included the following: *William Anderson v. L. Dana Hill*, 54 Mich. 4477 (1884); *John J. Speed v. The Common Council of the City of Detroit and Charles W. Moore, Controller*, 100 Mich. 92 (1894); *Ruell v. City of Alpena*, 108 Mich. 290 (1896); *Hartwig v. Mayor and Common Council of Manistee*, 134 Mich. 615 (1903); *Olds v. Commissioner of State Lands Office*, 134 Mich. 442 (1903); *Hudson v. Attorney General*, 150 Mich. 67 (1907); *Chase v. Hart*, 162 Mich. 74 (1910); *Barrus v. Engel*, 186 Mich. 540 (1915); *Kearney v. Board of State Auditors*, 189 Mich. 666 (1915); *Burton v. City of Detroit*, 190 Mich. 195 (1916); *Ware v. City of Battle Creek*, 201 Mich. 468 (1918); *Attorney General v. Board of Education of City of Detroit*, 225 Mich. 237 (1923); *Holland v. Adams*, 269 Mich. 371 (1934); *Haack v. Banish*, 287 Mich. 592 (1939); *Ferris v. Auditor General*, 318 Mich. 528 (1947); *Romano v. Auditor General*, 323 Mich. 533 (1949).

a method of fixing the salary which should make the amount contingent upon the work done.”

In *Vigelius v. Houghton County Clerk*, 317 Mich. 138 (1947), the widow of a county clerk who had been party to an agreement that he could keep 90% of the collection fees was denied recovery under the provisions of Article XVI, Section 3, of the Michigan Constitution of 1908, as constituting extra compensation after election. This ruling does not, however, negate the conclusion of the *Bay* and *Reigel* cases, that compensation in the form of tax collection fees is not in and of itself an improper method of compensation, where so fixed under the applicable statute. The 1963 Constitution does not prohibit increasing compensation of public officials during term, and even if it did, the township treasurer under discussion had not entered upon his office at the time that the electors of the township fixed his compensation in the form of collection fees, in that though elected, his term had not commenced.

I therefore conclude that the fixing of the township treasurer's compensation in the form of collection fees, being cognate with the governing statute, is not violative of law or of any constitutional provision merely by reason of being in a form which inherently translates into a variation in dollars and cents from time to time as collections vary.

One further point remains to be considered. Several Michigan cases have established the doctrine that it is against public policy to decrease the salary of a public official during his term, this being a device whereby an official could be discharged during term by the subterfuge of reducing his salary. See, for example, *Bodell v. City of Battle Creek*, 270 Mich. 445, 448 (1935).<sup>9</sup>

It does not appear from your statement of facts that the effect of the change from fixed salary to collection fee would in fact reduce the emolument of the township treasurer. It would appear, however, that in the event it could be shown that the change did constitute a reduction, it would be invalid under the public policy doctrine set forth in the cases just cited. I therefore note, for your future guidance, that although the present constitution does not prohibit change in compensation during term, there is in the case law a doctrine inimical to reduction during term, on a basis independent of any constitutional provision relating thereto.<sup>10</sup>

As to your first question, therefore, I advise you that under the present constitutional and statutory provisions, it is competent for the township electors to change the remuneration of a township treasurer after election,

<sup>9</sup> And see *Gillespie v. Board of County Auditors of Oakland County*, 267 Mich. 483 (1934); *Everson v. Wayne County Board of Auditors*, 284 Mich. 298 (1938); *Kaminski v. Cowan*, 287 Mich. 62 (1938) (contract to perform for less than compensation fixed by law is contrary to public policy and void); *Lee v. Macomb County*, 288 Mich. 233 (1939); *McQuaid v. Oakland County Board of Supervisors*, 315 Mich. 234 (1946). At p. 67 of the *Kaminski* case is cited *People ex rel Miller v. Board of Auditors of Wayne County*, 41 Mich. 4, and 70 A.L.R. 972, sustaining the following statement of the rule: "The rule seems to be well settled in most jurisdictions that a contract whereby a public officer agrees to perform services required of him by law for a less compensation than that fixed by law is contrary to public policy and void."

<sup>10</sup> See <sup>9</sup> *supra*.

from a fixed salary basis to a tax collection fee basis, provided only that such change does not constitute a reduction in the remuneration contemplated by the official and the electors when he became committed to discharge the duties of the office.

## II

The electors also took action to provide for the payment to the treasurer of the sum of \$125 monthly during the year, such payments to be deducted from the collection fees as the same were received. Thus, the contingent fund of the township was to be reimbursed for the amount of the monthly payments previously made to the treasurer. Such monthly payments made in advance of the receipt of the collection fees would constitute an advance upon his compensation or a loan.

As you point out, such practice would result in complications were the treasurer to vacate his office for any reason prior to the receipt of sufficient collection fees with which to reimburse the contingent fund for the advances made. Furthermore, there is no authority, statutory or otherwise, for the making of such advances.<sup>11</sup> Townships may only exercise those powers which are expressly conferred upon them or those which can be fairly implied.<sup>12</sup> The directive inserted in the present constitution that provisions of law be liberally construed in favor of townships would not obviate the necessity for such a grant of authority.

Action could be taken by the electors to either:

1. Fix or alter the amount of the salary which the treasurer would have received in lieu of statutory fees; or,
2. Place the office on a fee basis so that the treasurer would be entitled but limited to the fees collected.

If the treasurer were paid a salary, he would be entitled to payment of the salary in the amount fixed and the fees as collected would be credited to and deposited in the contingent fund of the township as provided in Section 44 of the general property tax act. However, for the reasons above stated, the treasurer is not entitled to the fees collected with the monthly advance thereon during the preceding year.

## III

The provisions exempting, subject to certain prescribed limitations, the homesteads of veterans and senior citizens from taxation are contained in Sections 7 and 7c respectively of Act 206, P.A. 1893.<sup>13</sup> Each of said sections specifies that the state pay to the city, village, or township treasurer the total amount of tax revenues lost as a result of those exemptions. No provision is made therein for the payment of collection fees.

One of my predecessors ruled that an act providing for the payment from the general fund of a village of a drain tax in lieu of spreading the same

<sup>11</sup> See O.A.G. 1955-56, Vol. 1, No. 2045, p. 210.

<sup>12</sup> Sec. 34, Art. VII, Michigan Constitution of 1963.

<sup>13</sup> M.S.A. 1965 Cum. Supp. § 7.7 and M.S.A. Cur. Mat. § 7.7(4), pp. 58-60

upon the property of the village at large would not authorize the payment of a collection fee thereon, stating:<sup>14</sup>

"Appropriations of public money are strictly construed. The act in question makes no provision for the payment of any collection fee but only for the payment of the amount of the tax. The general administrative construction of laws providing for the payment of taxes out of public monies has been that the administrative agency authorized to pay the tax is not authorized to pay collection fees. We think this construction is correct and that the authorization found in Act No. 146, P.A. 1949, to pay this particular type of tax out of public funds does not carry with it the authorization to pay out of those funds anything beyond the bare tax. You are accordingly advised that the township treasurer may not be paid a collection fee out of the funds of the village on payment of the drain tax in question."

The same principle is here applicable.

It follows in answer to your third question that the treasurer is not entitled to payment of collection fees upon the payments made by the state to reimburse the township for the revenue lost by reason of the veterans' and senior citizens' property tax exemptions.

FRANK J. KELLEY,  
*Attorney General.*

<sup>14</sup>O.A.G. 1955-56, Vol. 1, No. 1971, pp. 63-64. See also O.A.G. 1923-24, p. 98.