

Under the present law<sup>7</sup> the judges of the recorder's court of the city of Detroit are elected at a spring election held in the city of Detroit. This procedure is not in harmony with the requirement of Article II, Section 5 of the 1963 Constitution that all elections for national, state, county and township offices be held on the first Tuesday after the first Monday in November of each even-numbered year, or on such date as members of the U. S. Congress are regularly elected.

Therefore, in answer to the question submitted by you, it will be necessary for the legislature to enact new legislation providing for the future election of judges of the recorder's court for the city of Detroit at elections held as specified in Article II, Section 5 of the 1963 Constitution.

FRANK J. KELLEY,  
*Attorney General.*

**CONSTITUTIONAL LAW: Civil Service.**

**CIVIL SERVICE: Exempt positions.**

In accordance with Sec. 5, Article XI of the Constitution of 1963 each of the principal departments, which are the result of the reorganization provided for in Sec. 2, Article V of the Constitution of 1963, are entitled to two exempt positions when requested by the department head, one of which must be policy-making. The Civil Service Commission may exempt three additional positions of a policy-making nature within each of the principal departments.

No. 4272

February 28, 1964.

Mr. John C. Mackie  
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You have written me asking how many positions exempt from civil service are allowed each principal department under Sec. 5, Article XI of the Constitution of 1963.

The part of Sec. 5 pertinent to your inquiry is paragraph one, which states:

"The classified state civil service shall consist of all positions in the state service except those filled by popular election, heads of principal departments, members of boards and commissions, the principal executive officer of boards and commissions heading principal departments, employees of courts of record, employees of the legislature, employees of the state institutions of higher education, all persons in

analyzing the dual nature of the court whereby those judges assigned to ordinance violations and criminal actions triable by city justices of peace are in a sense functioning as officials of a city court.

<sup>7</sup> C.L. 1948 § 726.4, M.S.A. 1962 Rev. § 27.3554; C.L. 1948 § 725.8, M.S.A. 1962 Rev. § 27.3948.

the armed forces of the state, eight exempt positions in the office of the governor, and within each principal department, when requested by the department head, two other exempt positions, one of which shall be policy-making. The civil service commission may exempt three additional positions of a policy-making nature within each principal department."

The language of Sec. 5, Article XI of the Michigan Constitution of 1963 when considered in the light of its development in the Constitutional Convention is clear and free from ambiguity. No construction is required to learn its meaning. *People v. Board of State Canvassers*, 323 Mich. 523; *Stoliker v. Board of State Canvassers*, 359 Mich. 65. The people have mandated that upon request of the department head two exempt positions are allowed each principal department. In addition, the Civil Service Commission may exempt three positions of a policy-making nature within each principal department.

This was also the clear intent of the drafters of the Michigan Constitution of 1963. The constitutional language in question appearing in Sec. 5 of Article XI was part of Committee Proposal 22 and when introduced read as follows:

"The state civil service shall consist of all positions in the state service except those filled by popular election, heads of departments, members of boards and commissions AND THE CHIEF EXECUTIVE OFFICER THEREOF, employees of courts of record, of the legislature, of the higher STATE educational institutions [recognized by the state constitution], all persons in the [military and naval forces] ARMED FORCES of the state, 8 EXEMPT POSITIONS IN THE OFFICE OF GOVERNOR, [and not to exceed 2 other exempt positions for each elected administrative officer, and each department, board and commission,] AND WITHIN EACH DEPARTMENT, WHEN REQUESTED BY THE DEPARTMENT HEAD, 2 OTHER EXEMPT POSITIONS, ONE OF WHICH SHALL BE POLICY MAKING. THREE ADDITIONAL POSITIONS OF A POLICY MAKING NATURE MAY BE EXEMPTED WITHIN EACH DEPARTMENT AS DETERMINED TO BE NECESSARY BY THE CIVIL SERVICE COMMISSION."<sup>1</sup>

On behalf of the committee on executive branch, John B. Martin, chairman of that committee, submitted the following reasons, among others, in support of Committee Proposal 22:

"The committee is not aware of any dissent from the principle that the governor's office should be staffed with policy personnel of the governor's choice. In the past, the governor's staff (with the exception of the 2 exempt positions allowed under the present constitution) has been given provisional civil service appointments. After such appointments are made all parties concerned have winked at the constitution by not requiring such provisional employees to obtain perma-

<sup>1</sup> Official Record, Constitutional Convention 1961, Vol. 1, 60th Day, January 18, 1962, p. 637.

ment civil service status through examinations as would seem to be required by the present constitution. The committee is not overly critical of the practice but we do feel that such situations should not be continued. Therefore, the committee recommends the suggested new language to make the constitution accord with practice.

"Eight exemptions are adequate in the committee's best judgment. The figure corresponds with the general practice of the governor's office in the last few years. Language such as 'all positions in the office of governor' was rejected because such an open end arrangement invites abuse in the form of a mushrooming expansion of functions in the governor's office.

\* \* \*

"The whole exemption section as proposed is based upon the presumption that administrative agencies and departments will be mandatorily reduced from the present 120 to a figure in the vicinity of 20. The initial question centers around the 2 exempt positions. Should there be 2 exempt positions which cannot be classified? Keeping such positions unclassified would provide personnel sensitive to policy changes. Weighted against this obviously desirable result are the following:

"1. It is conceivable some departments would not need this many nontenure personnel.

"2. It is difficult in some technical areas such as mental health to get a nonpolitical deputy unless tenure can be offered. This applies particularly to personnel that would be brought in from outside the state of Michigan.

"In allowing any department head to have 2 exempt positions on a request instead of required basis we are attempting to escape the evils involved in a mandatory number of exemptions and yet provide flexibility in order to facilitate response to policy changes.

"The requirement here that one of the exempt positions be policy making is a further attempt to insure that the exemption is used for an important position. No restriction is placed on the other exemption in order to allow the department head to select a confidential secretary if one is desired.

"It was felt that there should be some flexibility in the number of policy making exemptions in order to take into account variances in size and types of the departments. Discretion in this matter could be given to the governor, legislature, department heads, or the civil service commission. None of the above have indicated any great interest in being given this chore. The committee felt that the civil service commission was the best equipped and the most desirable agency to handle this responsibility.

"The figure of 3 is a consensus view of the committee. Some members of the committee feel the number is too lenient; and some favor a limited expansion. It should be realized that consolidation of departments with a vertical integration of function requires fewer policy personnel as opposed to the horizontal organization presently experi-

enced in Michigan. Commissioner Mackie, head of the department most often mentioned in connection with increased exemptions, testified before our committee that 5 or 6 exempt personnel would be adequate for his department."<sup>2</sup>

Delegate Durst on behalf of the committee on executive branch offered the first amendment as follows:

"The state civil service shall consist of all positions in the state service except those filled by popular election, heads of departments, members of boards and commissions, the chief executive officer of boards and commissions heading principal departments, employees of courts of record, \* \* \*."<sup>3</sup>

Speaking on the committee amendment, Mr. Durst stated:

"Mr. Chairman, the first change which has been made here is to add to the group of people who are exempt from being covered by civil service the chief executive officer of boards and commissioners heading principal departments.

"We should first of all realize that the committee is making a presumption here. We face the same problem the committee on finance and taxation had, that it is impossible to submit everything to the floor at one time. But we do have under consideration in our committee a proposal which would require executive reorganization, mandatorily require the reduction of the present 120 agencies of the state to a figure somewhere in the vicinity of 20, we will say. If this committee or the convention does not adopt that proposal and require executive reorganization, then it will be necessary to reconsider these proposals in light of what we do later, but this civil service amendment is drafted with the idea in mind that the executive reorganization will ultimately be put into the new constitution.

"So what we have in mind here is where we have a board of commission which heads a principal department—if there are 20 departments or 30 departments, some of these may be made up of boards or commissions—that the chief executive officer would be a political appointee. He would not be able to be classified under civil service, and would be exempt as are the heads of departments. Now, we have limited it by the amendment to the boards or commissions heading principal departments. It was called to our attention that it is possible under this reorganization that you might have all types of little minor commissions under principal departments. It was not the intention of the committee to open up this whole field to exempting the officer from civil service, but it is our desire—and we recommend to you—that the chief executive officer of these boards and commissions be exempt."<sup>4</sup>

The amendment was adopted.<sup>5</sup>

<sup>2</sup> Ibid., p. 638.

<sup>3</sup> Ibid., p. 642.

<sup>4</sup> Ibid., p. 644.

<sup>5</sup> Ibid., p. 645.

Delegate Durst continued explaining the committee position on the remainder of paragraph one. The part of his explanation which is in point on your inquiry follows:

"We have exempted 8 positions in the office of the governor. Now, no one seriously questioned, of those we came into contact with, the idea that the governor should have staff in his office which were of his own choice. In the past the constitution required, really, that these people be civil service personnel except for the 2 exempt positions. What they have done, apparently, since the adoption of civil service is make provisional appointments as the governor might suggest, and then they just never got around to giving the qualifying examinations and giving the employee permanent civil service status. While we are not here to be critical of what has been done—it apparently was done with the concurrence of all parties—we do feel it is desirable to make constitution accord with practice, and therefore we are putting a provision in specifically exempting positions in the governor's office.

"Now, we picked the figure of 8 because this seems to accord with the practice of the last few years in the governor's office. This seems to be the number of personnel which he needs of this policy type. Now, he can have, of course, civil service personnel, if he wants typists and other personnel of that sort, above and beyond the exemption.

"We did consider a provision which would read that all positions in the governor's office should be exempt, and this was rejected on the ground that it opens the field up, because it is possible to put all kinds of functions in the governor's office. This has happened—not to evade civil service—in New York under their reorganization. When they have a new agency, they put it in the governor's office, and the executive office of the governor became a very large establishment. And this could happen here, either inadvertently or specifically to escape the provisions of civil service. This is why the language is so specific. Now, the exemptions that you have there, as I say, must be considered in light of impending provisions requiring executive reorganization.

"The first question we had is, should there be 2 exempt positions which cannot be classified? As I am sure most of you are aware, at the present time civil service has classified several employees who were in previously exempt positions, just as they have classified some chief executive officers of agencies. There have been requests from departments to classify more and more of these people, so that you have some departments operating today that have no employees exempt from civil service. Now, certainly, if you keep these positions exempt, you have the advantage of always having positions which are sensitive to policy changes, whether in the same administration or a change of administration. The weight against this is the argument that some agencies just do not need unclassified personnel. This was the argument made to us by Mr. Lock in regard to his department of revenue. Just briefly, he claimed that the department of revenue is purely an administrative agency. He went on to say that they had no policy making functions in his department. He said some proposals have been made to enlarge the number of unclassified positions in various departments.

"Insofar as the department of revenue is concerned, I wish to voice my objections to these proposals. If you would take 5, 7 or 10 employees of the department of revenue occupying the key positions and authorize their appointments to be made on partisan considerations, it would completely wreck the morale of the department as it now exists.

"He further said:

"It should likewise be pointed out that there is no place for political determinations in the revenue department administering state taxes. There should never be a situation where a change in the administration of state government would result in the substitution of a hard policy or a soft policy in tax determinations or vice versa.

"Now, this is one consideration. The other was that there are some departments whose deputies and top administrators are really technical personnel such as in the department of mental health where often the top deputy will be a very qualified psychiatrist. These people are difficult to obtain on a political basis in a nontenure job. So there is some argument on the other side that it should not always be mandatory that you have these 2 exempt positions at the top.

"So what we have tried to do here is to give it flexibility, trying to preserve the idea of being able to change with policy changes but still be able to give job security to the top administrators if necessary, so that the way this system works is that all the personnel in the department, other than the department head, may be classified under civil service but the top administrator may, if he so desires, bring in 2 exempt positions whenever he should find it necessary. Now, we have required mandatorily that one of these positions be policy making. This, of course, is an attempt to keep this exempt position for important positions. We have left the other one open because we feel it is desirable that the administrator have the right, if he so desires, to have a confidential secretary. We realize this could be subject to some abuse, but is seemed under all the circumstances to be desirable.

"Now, the last provisions there of the exemption section is an attempt to give some flexibility. There was a great deal of testimony that to require, rigidly, 2 exemptions for each department does not meet the needs of the various departments of the state; that there are many departments which have a need for more exempt personnel, and some less.

"So what we have done is allow for the appointment of 3 additional policy making positions on exempt basis and left the determination of when this should be established to the civil service commission. We could have given this power to the governor; we could give it to the legislature; we could give it to the department heads. Frankly, the present governor said he wasn't interested in having it, and by the same token the present civil service commission said they were not interested in having this power. But in the total decision of the committee, it seemed preferable that this power be given to this commission which is normally charged with the responsibilities in this area.

"Now, how we arrived at the figure of 3. There has been some criticism here of people just arriving at a consensus view such as on the exemption section that the committee on legislative powers brought forth. There is no book you can turn to and say, 'What shall this figure be?' We did have testimony from Commissioner Mackie that 5 or 6 exempt positions were all that he felt were necessary in his department. He has perhaps the department which is not necessarily the largest but the one that is mentioned most often as needing more exempt personnel. So this provision would give him 5, and it was felt to be sufficient under all circumstances."<sup>6</sup>

Part of the subsequent discussion follows:

"MR. IVERSON: Now, my third and last question, Mr. Chairman, is on the last amendment, which apparently adds 3 additional exempt positions to each department which I assume exempts them from civil service, the department head and 5 additional ones. Is this proposed in light of the fact that this convention is perhaps going to adopt a proposal which cuts the number of departments to, say, 20 or thereabouts, and if it does not cut it to 20, do you still proposed to exempt 5 or 6 employees of 120 or 130 departments?"

"CHAIRMAN DeVRIES: Mr. Martin.

"MR. MARTIN: Mr. Chairman, Mr. Iverson has stated the proposition correctly. It is based on the idea of a consolidation which has been approved in our committee and which will be submitted to the constitutional convention. We couldn't decide all the questions at once. If it develops that that proposal is not adopted, then the committee will subsequently offer an amendment to delete the 3 additional positions and leave it as it is now.

"CHAIRMAN DeVRIES: Mr. King.

"MR. KING: Mr. Chairman and fellow delegates, as a member of the committee on executive branch and as a member of the subcommittee which worked on this particular problem, the subcommittee concerning civil service, I would like to respond to the remarks by Senator Hutchinson by pointing out that it is my understanding as a member of this subcommittee that the first sentence on page 314 expresses the position of the committee, and that is, 'This language will permanently prevent such classification and reserve these positions for political appointment without tenure.' Now, with regard to Mr. Lock specifically, it is not my understanding that he has civil service status. He was selected by civil service, I believe at the request of the legislature, but he does not have civil service status. I want to make it very clear that I don't want the legislature or anyone else to interfere with these 2 exempt positions along with the head of the department or the executive director of the board or commission. That is my position, and if Mr. Martin is in disagreement with that, I would like the record to so show.

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<sup>6</sup> Ibid., pp. 645-646.

"MR. HUTCHINSON: Mr. Chairman, I wanted to raise another question in regard to this. As I put 2 provisions together, one where we have 8 exemptions in the governor's office and another provision where it says that there may be 3 additional exemptions at the will of civil service, I take it then that in practical language that will mean that there will be 11 exempt positions in the governor's office. Am I interpreting it right? And I would say that is perfectly agreeable with me, but I think that really what we have here is a total of 11 instead of a total of 8.

"CHAIRMAN DeVRIES: Mr. Martin.

"MR. MARTIN: Mr. Chairman, it is not intended so. It is intended to provide only 8 positions in the governor's office. Of course, the governor himself is exempt, but these are not intended to be added together. If it is not clear, we may have to make that clear.

"MR. HUTCHINSON: Well, all right. Mr. Chairman, it just seems obvious to me that they would consider the office of the governor as a department, and it says that 3 additional positions of a policy making nature may be exempted within each department as determined to be necessary by the civil service commission. The governor will appoint the civil service commission. I doubt very much that there would be any question about it. If the governor wanted those 3 additional, he would get them. As I say, I think it is all right so far as I am concerned. I am just raising the point on the record to get the chairman's interpretation of it. He says that he thinks it means only 8. All right.

"CHAIRMAN DeVRIES: Mr. Higgs.

"MR. HIGGS: Mr. Chairman, I have a question for any member of the committee. I am not certain it can be answered at this time in view of the fact that they are contemplating another section reducing the overall number of boards, commissions and agencies, but my question has to do with line 12, 'when requested by the department head,' and I am wondering whether that request is made by the chief executive officer or the board and commission heading the department, or by the head of the department provided for under line 6.

"CHAIRMAN DeVRIES: Mr. Martin.

"MR. MARTIN: Mr. Chairman, the intention of the committee is that this should be the head of the department whether it is a single head or whether it is the board or commission which heads the department.

"MR. HIGGS: That would not apply, then, to the chief executive officer, is that correct?

"MR. MARTIN: No, it would not.

"MR. HIGGS: Thank you.

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"MR. STERRETT: Mr. Chairman and delegates, with regard to Mr. Hutchinson's comment of the possibility of 11 exempt positions in the governor's office, I would like to go further than Chairman Martin's statement and point out that in the verbiage of the proposal,



we specifically state 'the office of governor'; there is the word 'and' which separates 'the office of governor' and the other departments where we say 'within each department.' If we wanted to specifically point out each department in this — and this is for the intent and for the records — we would name other departments. However, because there are 8 exempt positions and more than other departments, we have specifically pointed out the governor's office.

"CHAIRMAN DeVRIES: Mr. Hatch.

"MR. HATCH: Mr. Chairman, also in response to Delegate Hutchinson's question as to the possibility of there being 11 exempt positions in the office of the governor, in connection with the proposal which the committee on the executive branch has considered concerning reducing the number of boards, agencies and commissions to 20, there is excepted from the 20 limitation the offices of the governor and the lieutenant governor, so they would not be considered a department. I think this is further indication that the governor's office would be limited to 8."<sup>7</sup>

Although some changes were made in the committee on style and drafting, the final wording of paragraph one, Sec. 5 of Article XI, was not substantially changed from that under discussion in the foregoing excerpts.

Under Article V, Sec. 2 of the Michigan Constitution of 1963, the people have expressly excepted the office of governor from the grouping of executive and administrative offices, agencies and instrumentalities to be allocated by law among and within not more than 20 principal departments. It must follow, therefore, under Sec. 5 of Article XI of the Michigan Constitution of 1963 that the office of governor is entitled to 8 exempt positions and no more.

It is my opinion that under Sec. 5 of Article XI of the Constitution of 1963, each of the principal departments, which are the result of the reorganization provided for in Sec. 2, Article V of the Constitution of 1963, are entitled to two exempt positions when requested by the department head, one of which must be policy-making. The Civil Service Commission may exempt three additional positions of a policy-making nature within each of the principal departments.

FRANK J. KELLEY,  
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<sup>7</sup> *Ibid.*, pp. 648 to 650.