

COUNTY TREASURER: VACANCY: Person filling vacancy in office of County Treasurer is not entitled to receive increase in compensation during the term of office.

January 16, 1942

Hon. W. A. Holloway
Chief Clerk
State Auditor of Missouri
Jefferson City, Missouri



Dear Mr. Holloway :

This is in reply to your letter of recent date wherein you request an opinion from this department based upon the following statement of facts:

"Recently the office of County Treasury of Ralls County was vacated and in the early part of this month an appointment was made by the Governor for the unexpired term.

"Last October the County Treasurer's new salary bill became effective but could not be applied in this county because of the salary basis established by the new law. This was due, of course, to the Constitutional barrier of an increase in salary to an officer during his term.

"The question has now been raised concerning the salary basis of the newly appointed Treasurer for the remainder of this term, and we would appreciate your opinion on this question."

The office of county treasurer is not an office created by the Constitution of the State, there being only two county offices that may be termed constitutional offices, these being the offices of sheriff and coroner. However, by Section 14, Article 9 of the Constitution, the General Assembly is authorized to provide for the election of such other county officers as the public convenience may require. In accordance with this authorization, the General Assembly, by Section 13790, Article 8

Chapter 100, provided for the election of a county treasurer in counties having a population of less than 40,000 inhabitants. This section is as follows:

"On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office: Provided, that nothing in this section shall apply to counties under township organization."

Ralls County, by the 1940 Census, has less than 40,000 inhabitants, and the election of the County Treasurer would be governed by this section of the statutes.

A vacancy occurring in the office of County Treasurer would be filled under Section 11509, Article 2, Chapter 76, R. S. Mo. 1939, which is as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office, originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff, or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such

office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

It will be noted that the county treasurer is elected for a term of four years, and until his successor is elected and qualified. In the event of a vacancy, some person would be appointed to perform the duties until a successor could be elected for the unexpired portion of the term. It obviously was the intention of the lawmakers that the period for which the officer was elected should be one term, without regard to the number of persons who might have tenure of the office, and that tenure of the office by more than one person would not have the effect of creating a new term.

Section 8, Article 14, is the Section of the Constitution which applies to your question. This section is as follows:

"The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In the case of Givens v. Daviess County, 107 Mo. 603, it was held this section was applicable to a county treasurer.

The question of whether or not a person appointed or elected to fill a vacancy in an office is entitled to

receive an increase in compensation, authorized before his election or appointment to fill the vacancy, but which the officer whose term he is finishing could not have received, because of the above constitutional provision, is one which the Missouri appellate courts have not passed on. In other states having somewhat similar constitutional provisions, this question has been before the courts and the decisions are not in harmony.

In the California case of *Larew v. Newman*, 23 Pac. 227, when a similar question was presented to the Supreme Court of California, the court ruled against allowing the person filling the vacancy to receive the increase in compensation. The following quotation is from this case:

" * * * * Afterwards, and before he had resigned, the general county government act (approved March 14, 1883) went into effect, by which the salary of said office was fixed at \$650 per annum. This act enacted that its provisions for salaries 'shall not affect the present incumbents;' and also that a vacancy in an office should be filled by appointment by the supervisors, 'the appointee to hold office for the unexpired term.' Section 9, art. 11, of the state constitution, provides that 'the compensation of any county * * * officer shall not be increased after his election, or during his term of office.' Section 1004 of the Political Code provides that 'any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills.' We think that under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed. The judgment is affirmed."

The case of *Storke v. Goux*, 62 Pac. 68, also a California case, in which it was sought to have the case of *Larew v. Newman*, supra, overruled, followed and cited with approval the *Larew* case. The case is also cited with approval in the case of *Wilson v. Shaw*, 188 N. W. 743, decided by the Supreme Court of Iowa in 1922, and in the case of *State ex rel. Hovey v. Clausen*, 251 Pac. 772, decided by the Supreme Court of Washington in 1922. In both of these cases the person filling the vacancy was denied the increased compensation. The Kentucky case of *Bosworth v. Ellison*, 147 S. W. 400, 148 Ky. 703, is also a case which is similar, and in which the case of *Larew v. Newman*, supra, is cited.

The most recent case we find citing and following the *Larew* case, supra, is the case of *Clark v. Frohmler*, 88 Pac. (2d) 542, decided by the Supreme Court of Arizona in March of 1939. In none of these cases was the constitutional provision identical with ours.

The leading case allowing the person filling the vacancy to receive an increase in compensation which could not have been received by the person whose term was being filled, is the case of *State v. Frear*, 120 N. W. 216, 138 Wis. 536, 16 Ann. Cas. 1019. This case recognizes the rule announced in the case of *Larew v. Newman*, supra, as the general rule, but allowed the person filling the vacancy the increased compensation. The ruling was largely based on administrative interpretation acquiesced for over fifty years. This case is followed in the Oklahoma case of *Carter v. State*, 186 Pac. 464, 74 Okla. 31. The Montana case of *State ex rel. Jackson v. Porter*, 188 Pac. 375, allowed a person filling a vacancy in the office of district judge increased compensation which the person whose term was being filled could not have received. This case was decided upon the ground that constitutional provisions prohibiting increase or decrease of compensation during a term of office, were placed in constitutions to prevent improper influence by the legislative branch of the government upon the executive and judicial branches of the government. The authority cited is 1 Kent's Commentaries, p. 393; The Federalist No. 79; 1 Scott's Federalist and Other Constitutional Papers, p. 431. After allowing the person filling the vacancy to receive the additional compensation, the court mentioned all of the above mentioned cases and a few others without comment and the decision was not based on any of them.

In the early Tennessee case of *Gaines v. Horrihan*, 4 Lea Tenn. 608, a similar result was achieved. The constitutional provision there construed used the word "time" instead of "term", and the decision is based on the use of this word "time."

The cases mentioned will serve to illustrate the lack of harmony in the decisions on similar questions. The cases allowing the person filling the vacancy to receive the increased compensation, while uniform in the result achieved, namely, permitting some person to have an increase in compensation, are not uniform in their reasoning or the authority upon which the decisions are based. The cases refusing the increase in compensation are more nearly uniform in the reasoning and all follow the case of *Larew v. Newman*, supra. As pointed out heretofore, the case of *State v. Frear*, 120 N. W. 216, 138 Wis. 536, recognizes it to be the general rule that the person filling the vacancy is not entitled to receive the increase in compensation, and indicates the general rule might have been followed, had it not been for the administrative interpretation in that state.

The provision of the California constitution construed in the case of *Larew v. Newman*, supra, provided that the compensation of any county officer shall not be increased after his election, or during his term of office, and the statute relating to vacancies provided the person filling the vacancy should possess all the rights and powers, and be subject to all the liabilities, duties and obligations, of the officer whose vacancy he fills. The Missouri Constitution, Sec. 8, Art. 14, supra, provides that the compensation of no state, county, or municipal officer shall be increased during his term of office.

In the case of *State ex rel. Emmons v. Farmer*, 271 Mo. 306, in ruling upon the meaning of Sec. 8, Art. 14, of the Constitution, the Supreme Court used the following language: (l. c. 314)

" * * * The constitutional provision forbidding an increase or decrease of compensation during a term of office has reference to the period fixed as a term by statute only, and in no wise refers to the individual who may incidentally happen to be the incumbent for more than one term."

Under the provisions of Section 11509, supra, a person filling a vacancy performs the duties of the office for the unexpired portion of the term of the person succeeded, and does not have a separate term. The person originally elected to the office could not have received an increase in compensation during his term.

CONCLUSION

The conclusion is reached that a person filling a vacancy for an unexpired portion of the term of a county treasurer is not entitled to receive an increase in compensation which the person elected for the full term could not have received.

Respectfully submitted,

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APPROVED:

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