

COUNTIES: Sheriff of county whose classification changes from  
SHERIFF: third to second class during his term shall not continue  
to act as assistant probation officer nor receive compensation therefor after such change in classification.



February 16, 1955

Honorable Stephen R. Pratt  
Prosecuting Attorney  
Clay County  
Liberty, Missouri

Dear Sir:

Reference is made to the request for an official opinion of this office submitted by your assistant reading as follows:

"We request your opinion on the following question:

"Clay County, effective January 1st, 1955, changed in classification from a 3rd class county to a county of the 2nd class: The Clay County Sheriff began his term of office January 1, 1953, and, therefore, was half through his term at the time of reclassification of the County.

"By virtue of R.S. 1949, Section 211.455, Paragraph 2, the Sheriff of a 3rd class county was designated as assistant probation officer; Section 57.405 provided that he would be compensated in the amount of \$1,200.00 per year for performing the duties of such assistant probation officer. In a 2nd class county such office of assistant probation officer is not provided for.

"Our question, therefore, is whether the Clay County Sheriff will continue to be assistant probation officer as provided in the law pertaining to 3rd class counties and shall continue to be compensated as such, as provided by statute, until the end of his term even though the classification of the county changes from 3rd to 2nd class during his term, particularly in view of

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Section 48.060, R. S. 1949."

In the consideration of your opinion request, certain basic principles relative to public office and public officers must be kept in mind. With the exception of offices created under constitutional provisions, only the legislature has the power to create a public office as an instrumentality of government. See *State ex rel. Rosenthal vs. Smiley*, 263 S.W. 825, wherein the following appears:

"It is well settled that only the Legislature has the power to create a public office (other than a constitutional office) as an instrumentality of government, and this power it cannot delegate. *State v. Butler*, 105 Me. 91, 73 Atl. 560, 24 L.R.A. (N.S.) 744, 18 Ann. Cas. note 489. \* \* \*"

It must be further observed that even though a public officer is appointed or elected for a particular office for a definite term, such office may thereafter be abolished prior to the expiration of such term, and if such is done the officer has no legal complaint and he thereafter ceases to hold the office. *State ex rel. Tolerton vs. Gordon*, 130 S.W. 403, 236 Mo. 142, and *Sanders vs. Kansas City*, 162 S.W. 663, 175 Mo. App. 367.

One further principle we also consider germane to the subject matter of your inquiry. That is the rule that a public officer is not entitled to compensation by virtue of any contract, express or implied. No vested right to such compensation having any of the characteristics of a property right rests in such public officer. We direct your attention to *Givens vs. Daviess County*, 17 S.W. 998, 107 Mo. 603:

"A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. *Gammon v. LaFayette Co.*, 76 Mo. 675; *Koontz v. Franklin Co.*, 76 Pa. St. 154; *Fitzsimmons v. Brooklyn*, 102 N.Y. 536; *Walker v. Cook*, 129 Mass. 579; *Knappen v. Supervisors*, 46 Mich. 22; *City Council v. Sweeney*, 44 Ga. 465. In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged

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without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v. Gear, 27 N.J.L. 278; United States v. Fisher, 109 U.S. 143."

The foregoing discloses the complete control exercised by the legislature with respect to public offices created by such body subject to constitutional limitations.

Examining the provisions relating to counties changing from one classification to another, we observe the following statute relating to the public officers thereof. Section 48.050, RSMo 1949, reads as follows:

"Any elected county official whose office may be abolished or consolidated with another office as a result of the change of the county from one class to another shall continue to hold the office to which he was elected for the term for which he was elected. Any office which may be established as a result of the change of the county from one class to another shall be filled in accordance with the provisions of the law relating to the filling of vacancies for such office."

Giving due recognition to the effect upon the office of sheriff of Clay County by virtue of the transition of such county from one of the third to one of the second class, it will be observed that the office of such official is ~~not~~ <sup>not</sup> "abolished or consolidated with another office." Consequently, the quoted statute is inapplicable with respect to such official.

We note in your letter of inquiry a reference to Section 48.060, RSMo 1949. This statute reads as follows:

"The provisions of this chapter, enacted to conform the law of this state to the provisions of section 8 of article VI of the constitution of 1945, are hereby declared to be dependent upon the constitutional authority uniformly to graduate the compensation of county officers within the classes as designated herein pursuant to the provisions of section 11 of article VI of the constitution of 1945. The failure of the general assembly to possess such

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power shall have the effect of making inoperative the provisions of this chapter."

We have examined the decisions of the appellate courts of this state, and we do not find that the power of the General Assembly in regard to the matters referred to in the quoted statute has ever been questioned. Inasmuch as a great many statutes adopting graduated compensation of county officers within the several classes of counties have been passed and in effect since 1945, we necessarily must accord to such legislative enactments the presumption of constitutional validity to which they are thereby entitled.

What has been said heretofore is not to be construed as the expression of an opinion that the sheriff of your county will be limited to the salary paid him as an official of a third class county for the remainder of his term, inasmuch as it is our belief that subsequent to the effective date of the transition he will be entitled to the compensation and other emoluments incident to being a sheriff of a county of the second class. Even though such change in compensation may result in an increase in compensation to such official, it will not have the effect of violating the provisions of Section 13, Article VII, of the Constitution, which reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

To this effect see State ex rel. Mo s v. Hamilton, 260 S.W. 466, 303 Mo. 302, and State ex rel. Harvey v. Linville, 300 S.W. 1066, 318 Mo. 698. In both of these cases county officials were held to be entitled to increased remuneration based upon changes in county populations subsequent to their elections.

#### CONCLUSION

In the premises, we are of the opinion that a sheriff of a county of the third class who, by virtue of such office, acted as assistant probation officer for such county, will not be required to act as such assistant probation officer or be entitled to receive compensation therefor subsequent to the transition of such county to one of the second class.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Yours very truly,

WFB, Jr.:da

JOHN M. DALTON  
Attorney General