

Officers, Increase of Salary Of. Deputies, Increase of Salary Of. Salaries, Increase During Term.

In the absence of a constitutional provision limiting its authority, the legislature can alter at pleasure the term, mode of appointment, or compensation of any office created by it. Section 31, Article V, Constitution, relates only to offices the tenure, mode of appointment or compensation of which is established by the Constitution, and does not apply to other offices of the State created by legislative action.

Deputy officers who hold office during the pleasure of their principal have no fixed or definite term within the meaning of the above constitutional provision, and are not subject to the provisions thereof.

Helena, Montana, March 29, 1907.

Hon. Harry R. Cunningham,
State Auditor,
Helena, Montana.

Dear Sir:—

Your request for an opinion upon the following statement of facts received:

The Tenth Legislative Assembly increased the salaries of the Deputy Game Wardens, of the Deputy Mine Inspector, of the Assistant Librarians, of the Assistant State Examiner, the Assistant State Treasurer; and also increased the salaries of the Game Warden, Mine Inspector, Coal Mine Inspector, Librarian of the Historical Library, Librarian of the Law Library and the Secretary of the Bureau of Child and Animal Protection.

Upon such statement of facts you ask the following question:

"Are these increases of salaries in violation of Art. V. Sec 31 of the State Constitution?"

This Section of the Constitution reads in part as follows:

"Except as otherwise provided in this Constitution, no law shall extend the term of any public officer, or increase or diminish his salary or emolument after his election or appointment."

We shall first discuss the effect of such Constitutional provision upon the assistant and deputy officers whose appointments are made by their superior officer.

Such assistants and deputies are appointed for no specific or definite term, and simply hold their offices at the pleasure of the appointing power.

It is a well established principal of law that deputies who merely hold during the pleasure of their principal do not hold for a "term" within the meaning of the constitutional provision quoted above.

The Supreme Court of Missouri in *State vs. Johnson*, 27 S. W. 399,

in construing a constitutional provision which reads as follows: "The compensation or fees of no State, county or municipal officer shall be increased during his term of office", said:

"It will be observed that this Section of the Constitution only embraces within its provisions officers who are elected or appointed for some specific or definite term, and that it has no application whatever to the case in hand, where the Relator's term of office is not fixed by any law or ordinance, and when he simply holds at the pleasure of the appointing power."

To the same effect see also

Somers vs. State, 59 N. W. (S. D.) 962.

Gibbs vs. Morgan, 30 N. J. Eq. (12 Stew.) 126.

Speed vs. Crawford, 3 Metc. (Ky.) 207

Meecham on Public Offices, Sec. 385.

As to the Game Warden, Mine Inspector, Coal Mine Inspector, Librarians of the Historical and Law Libraries and the Secretary of the Bureau of Child and Animal Protection, their offices are created by acts of the Legislature, which fixes the terms for which they are appointed, and also their compensation. It will be noticed that none of these offices are created by the Constitution but are all of Legislative creation.

It is a well established principle of law that offices created by the legislature may be abolished by the same authority, even during the term of a person holding the office so created.

State vs. Granite County Commissioners, 23 Mont. 250.

If the Legislature, under the constitutional provision quoted above, can totally deprive an officer of his salary or emoluments from an office created by it, by abolishing such office during his term, on principle, such legislature would have equal authority to increase or diminish his salary or emolument during his term of office.

Furthermore, it is well settled by decisions in nearly every State in the Union that it is only where the Constitution creates an office, or defines the tenure, the mode of appointment or the compensation, that the Legislature is precluded from altering either or from abolishing the office itself. On the other hand, the general rule laid down as follows:

"Where an office is created by a statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation, may be altered at pleasure, and the latter may be even taken away, without abolishing the office. Such extreme legislation is not to be deemed probable in any case, but we are now discussing the legislative power, not its expediency or propriety. Having the power the legislature will exercise it for the public good, and it is the sole judge of the exigency which demands its interference."

Conner v. The City of New York, Second Stanf. (N. Y.) p. 368.

Cooley on Const. Lim. 7th Ed. 388, Note 2.

In construing a constitutional provision similar to said Sec. 31 of Art. V. above quoted, it has been held that such provision relates only to those officers whose offices were created by the constitution, and was not a limitation upon the authority of the legislature to increase or diminish the salary of offices created by legislative enactment.

Art. III. Sec. 16 of the Constitution of Nebraska reads in part as follows:

"Nor shall the compensation of any public officer be increased or diminished during his term of office."

The Supreme Court of Nebraska in the case of County of Douglas vs. Timme, 49 N. W. 266, said:

"That provision, in our view, applies alone to those officers whose offices were created by the constitution. As to all such officers, the salary or compensation fixed by law when the officer is elected, and enters upon the duties of his office, can neither be increased in any form nor diminished during his term. The question was recently before the supreme court of Wisconsin, in the State vs. Kalb, 50 Wis. 178, 6 N. W. Rep. 557; and it was held under a similar provision of the constitution of that State, that it applied to officers created by the constitution. This, we think is a correct statement of the law. In the absence of any constitutional prohibition or affirmative provision fixing the term of office of any officer or his compensation, and such change of term or compensation will apply as well to the officers of any office as to those to be thereafter elected."

You are therefore advised that the increase of salary of the officers, and the deputies and assistants, mentioned above, is not in violation of the Constitution of the State, and that you are authorized to pay the increase in such salaries.

Yours very truly,

ALBERT J. GALEN,

Attorney General.