

**Auditor, County—Salary, Increased.**

A county auditor not being a constitutional officer is entitled to the increased compensation provided for by Chapter 221, Session Laws of 1919.

February 10th, 1920.

Mr. A. E. McLeish,  
Chairman Board County Commissioners,  
Fort Benton, Montana.

Dear Sir:

I am in receipt of your letter of the 3rd instant, requesting my opinion with reference to the following:

“Is a County Auditor in a fourth class county entitled to the increased pay as per Chapter 221 of the Laws of the Sixteenth Legislative sAssembly, where said auditor was elected at the general election, 1918?”

Section 31 of Article V of the Constitution of this State is 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; Provided, that this shall not be construed to forbid the Legislative Assembly from fixing the salaries or emoluments of those officers first elected or appointed under this Constitution, where such salaries or emoluments are not fixed by this Constitution.”

This section of the Constitution has been twice construed by the Attorney General. In an opinion given to Hon. Harry R. Cunningham, State Auditor, on March 29th, 1907, it was held that such section did not prohibit the legislature from increasing the salaries or compensation of the State Game Warden, Mine Inspector, Coal Mine Inspector, Librarian of the Historical Library, Librarian of the Law Library, or the Secretary of the Bureau of Child and Animal Protection, such offices being created by Acts of the legislature which fixed their terms and compensation. (2 Op. Atty. Gen., 61.) In an opinion given to Governor Edwin M. Norris, on January 23rd, 1911, it was held that such section did not prohibit the legislature from increasing or diminishing the salary or compensation of officers appointed by the Governor when the offices have been created by the Legislative Assembly and not by the Constitution. (4 Op. Atty. Gen., 45). The Attorney General saying in this opinion:

“If the office is created by or provided for in the Constitution itself, I am of the opinion that the salary or emoluments of the officer could not be increased or diminished during his term of office, but if the office is created by the Legislative Assembly the legislature would have the right to abolish the office or to increase or diminish the salary of the officer, or increase or diminish the services required of them.”

There are decisions which hold that a constitutional provision, such as ours, applies to all offices, whether created by the Constitution itself, or by legislative act. (Kearney v. Board of Auditors, 155 N. W. 510; Tichle v. City of Philadelphia, 26 L. R. A. (N. S.) 289.)

However, the far greater number of the decisions hold that such a constitutional provision applies only to offices created by the Constitution itself, and not to offices created by legislative act. (State ex rel. Martin v. Klab, 6 N. W. 557; Douglas County v. Timme, 49 N. W. 266; Bottom v. Moore, 89 S. E. 856; State ex rel. Gordon v. Moores, 84 N. W. 399; Cotton v. Ellis, 52 N. C. 545; Hennepin County v. Jones, 18 Minn. 199; Conner v. City of New York, 2 Stanf. 268; Cooley on Const. Limitations, 388; 29 Cyc. 1427-8-9.)

While our Supreme Court has never passed directly on this question, it has said:

“The office of road supervisor is one of legislative, not constitutional, creation; it may be established and abolished at the pleasure of the Legislative Assembly.”

State ex rel. Bonyes v. Granite County, 23 Mont. 250, 58 Pac. 439.

The Constitution created certain county offices (Secs. 4 and 5, Art. XVI), but the office of county auditor is not among the offices so created, such office having been created by Act of the Legislative Assembly, which prescribed and defined his duties and fixed his salary or compensation (Session Laws 1901, pp. 227-231, inc., not Sections 3100 to 3110, inc., Revised Codes 1907), and the office of county auditor is, therefore, not a constitutional office but a statutory office.

I am, therefore, of the opinion that Section 31 of Article V of the Constitution has no application to the office of county auditor; that the legislature may either increase or diminish the salary or emolument attached to such office at any time; and that a county auditor elected at the general election in 1918, and who entered upon the discharge of the duties of such office on the first Monday in January, 1919, is entitled to the salary and compensation fixed by Chapter 221, Session Laws 1919, beginning with the date of the approval of such Act, March 4, 1919.

Respectfully,

S. C. FORD,

Attorney General.