

OFFICIAL OPINION NO. 72-38, Elected county officials' salary amendments contained in Chs. 38, 39 and 44 of the Session Laws of 1972 are effective July 1, 1972, and are lawful.

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 72-38

**Elected county officials' salary amendments contained in Chs. 38, 39 and 44 of the Session Laws of 1972 are effective July 1, 1972, and are lawful.**

Dear Mr. Hill:

You have requested my official opinion in regard to a problem facing each county elected official, except county commissioners, in South Dakota.

The factual situation giving rise to the problem is as follows:

During the 1972 regular legislative session, the Legislature enacted three separate Acts affecting the salary of elected county officials. Ch. 38 affected the salaries of the county treasurer, county auditor, clerk of courts and register of deeds of the several organized counties of the state; Ch. 39 affects the salaries of states attorneys, and Ch. 44 the salaries of the several sheriffs of the state.

In the body of each of such legislative acts, there is no provision designating the effective date of either of such acts.

The question you have presented is as follows:

Do these salary enactments become effective July 1, 1972 or, in view of certain constitutional inhibitions, take effect after the the terms of office of county elected officers commence in 1973?

The term of office of all county officers, except the county auditor, commences on the first Monday in January next succeeding election. In the case of the county auditor, his term commences on the first Monday of March next succeeding his election. (SDCL 3-1-2 and 7-7-1).

Some may contend that in view of the constitutional inhibition presented by Sec. 23 of Article III of the South Dakota Constitution, these enactments are "private or special laws," disapproved by the Constitution. It is my opinion that such a challenge is erroneous.

Each of these enactments apply to every county in the state. They are not special or private laws within the meaning of this constitutional provision. (*Clark v. Board of County Commissioners*, (1936) 64 S. D. 417, 267 N.W. 138.)

The constitutional provisions directly involved are those you have mentioned in your inquiry. Section 3 of Article XII, and Sec. 2 of Article XXI of our Constitution.

Section 3 of Article XII, insofar as herein applicable, provides:

... nor shall the compensation of any public officer be increased or decreased during his term of office.

This phrase in our Constitution was initially interpreted by our Supreme Court in *Hauser v. Seeley* (1904) 18 S.D. 308, 100 N.W. 437, when the question of whether or not a county judge's salary could be increased during his term by a legislative act was in issue. The court, speaking through Judge Corson, determined that the term "public officers" as used in such phrase, only referred to state officials, provided for in the Constitution, whose salaries were paid from the state treasury. This being true, a county judge did not qualify as such public officer, and his salary could be increased during his term of office.

This holding was not challenged until *State ex. rel. Lamm v. Spartz* (1934) 62 S. D. 593, 255 N.W. 797, wherein it was contended the Hauser case was incorrect, so that the Legislature could not decrease the salary of a county register of deeds during his term of office. The court in the Lamm case overruled the Hauser precedent, and held that although the Constitution sets the term of office of elected county officials, it did not fix their compensation. The fixing of such salaries being exclusively a legislative matter. However, the court said Hauser was too limited in its definition of "any public officer." This term comprehended all public officers, including elected county officials, so that the Legislature

was prohibited by the Constitution from decreasing a county official's salary during his term of office.

The Lamm case was approved in *Clark v. Board of County Commissioners*, (1936) 64 S. D. 417, 267 N.W. 138. (The actual question presented was whether or not the allowance of travel compensation to a states attorney using his own motor vehicle in his official duties amounted to "compensation" in a constitutional sense. The court held that such travel expense was not compensation, so that it could constitutionally be reduced during a term of office).

Our last case on the problem was *Schamber v. Hutchinson County* (1942) 68 S. D. 622, 5 N.W. 2d 409. The Lamm case was again approved and the court held that a statute raising the salary of a county official during his term of office was unconstitutional.

There can be no question that if Sec. 3 of Article XII of our Constitution is controlling, that in order for such statute to be declared constitutional, we must find its effective date to come after the first of January, 1973, and at the time a new term of county officials commence.

However, before reaching such conclusion, I must consider the effect of Section 2 of Article XXI of our Constitution. This constitutional provision was originally enacted in different language. A proposed amendment to such section appears in Ch. 314, Laws of 1945, which constitutional amendment was approved by a majority of the voters at the general election of 1946. As so amended, this constitutional provision reads as follows:

The Legislature by two-thirds vote of each branch thereof at any regular session may fix the salary of any or all constitutional officers including members of the Legislature. In fixing any such salary the Legislature shall determine the effective date thereof and may in its discretion decrease or increase the salary of any officer during his term.

Because of this amendment, it appears that the pronouncement in *State ex. rel. Lien v. Sathre* (N.D. 1962) 113 N.W. 2d 679, is pertinent. The court quoted from 1 Cooley, "Constitutional Limitations" (8th Edition) page 129, as follows:

Upon adoption of an amendment to a constitution, the amendment becomes a part thereof; as much so as if it had been originally incorporated in the constitution; and it is to be

construed accordingly. If possible, it must be harmonized with all other provisions of the constitution. If this cannot be done the amendment will prevail.

The North Dakota Court paraphrased this principle of law approximately in this language:

The latest expression of the will of the people with respect to matters embraced therein, and such prevails over all preexistent inconsistent constitutional provisions.

In accordance with general rules, the Court pointed out that it must be presumed that people who adopt a constitutional provision intend a reasonable result, and that the court must construe such constitutional provision to give effect to the intention of the people who adopt it.

It appears to me that the 1946 amendment of Sec. 2 of Article XXI, in providing that the Legislature by a two-thirds vote of each branch thereof, may fix the salary of any or all constitutional officers, and also may increase or decrease the salary of any officer during his term, has in effect abrogated or repealed the heretofore quoted Section 3 of Article XII of the Constitution. I have attempted to harmonize these two constitutional provisions. I can appreciate that the term "any public officer" is broader in scope than the term "any and all constitutional officers," but there is no manner in which it can be said that the term "any public officer" does not include "any and all constitutional officers." Likewise, the term "compensation" (the term used in Sec. 3 of Article XII) and "salary" as used in Sec. 2 of Article XXI, are synonymous terms.

Insofar as "constitutional officers" are concerned, there is repugnancy between the cited constitutional provisions. In this situation the 1946 amendment of Sec. 2 Article XXI of our Constitution is controlling, and the provisions of Sec. 3, Article XII prohibiting the increase or decrease of compensation of a constitutional officer is abrogated.

I am convinced that I am correct in this holding in view of the liberal interpretation of who is a "public officer" as interpreted in the *Lamm*, *Clark* and *Schamber* cases previously cited. Our Supreme Court has in the past held that certain provisions of the Constitution have been abrogated by constitutional amendment. See *State ex. rel. Eveland v. Jones*, 43 S.D. 279, 178 N.W. 945; *Dakota Lodge No. 1 v. Yankton County*, 54 S.D. 402, 223 N.W. 330, and *Egan Consolidated School Dist. v. Minnehaha County*, 65 S.D. 32, 270 N.W. 527, 108 ALR 572.

The term "constitutional officer" has been defined by the courts:

Any of these officers whose tenure and term of office are fixed and defined by the Constitution are known as constitutional officers.

*Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637, (See also *Wilson v. Walters* (Calif. App.) 112 P 2d 864; *Franklin v. Westfall*, 273 Ill. 402, 112 N.E. 974) The elected county officials set forth in the three legislative acts under consideration are named within, and the tenure and term of office is set forth in Section 5 of Article IX of the South Dakota Constitution. Each is a constitutional officer. The salary of any or all of such constitutional officers may be increased or decreased during the term of office by legislative act.

Did the three acts in question effectively amend the salaries of the named county officials? Such question must be answered affirmatively if the Legislature enacted such measures in substantial compliance with the requirements of Sec. 2, Article XXI.

There appears three requisites to a proper salary bill. These are:

1. Such must be enacted at a regular session of the Legislature;
2. Such Act must be approved by a two-third vote of the members-elect of each branch of the legislative department of government; and
3. The Legislature must determine the effective date of such salary act.

Requisite 1 has been complied with. The 1972 legislative assembly was a regular session of the South Dakota Legislature.

In accordance with the modified enrolled bill theory of inspection of legislative journals as adopted in *Barnsdall Refining Corp. v. Welsh*, 64 S.D. 647, 269 N.W. 853, and defined since that time by our court, I have inspected the House and Senate Journals relative to the adoption of each of the Acts under consideration. This inspection of the journals has revealed the following vote in each branch of the legislative body.

Chapter 44 originated in House Bill No. 601. The vote for its passage in the House was 52-18, in the Senate 32-2. In each branch the presiding officer announced that more than two-thirds of the members-elect voted in favor of enactment .

Chapter 38 originated in House Bill No. 663. Such was approved in the House 55-12, and in the Senate 35-0. In each branch likewise, the presiding officer announced that more than two-thirds of the members-elect voted in favor of enactment.

Chapter 39 originated in Senate Bill No. 85. It was amended in Committee, and as so amended, was approved 31-2. (The presiding officer announcing the approval by two-thirds of the members-elect.) In the House such bill was amended both in committee and on the floor of the House during debate. As so amended, it was approved 61-10, with the usual announcement of approval by more than two-thirds of the members-elect of such body. Such amended bill was returned to the Senate for concurrence with, or rejection of such amendment. The Senate assented to such amendment by a vote of 33-0. The Journal then states:

So the motion having received an affirmative vote of a majority of the members-elect, Mr. President declared the motion prevailed and House amendment to Senate Bill No .85 concurred in.

It is apparent that more than two-thirds of the members-elect of the Senate concurred in this amendment. It would be absurd to say that the journals must reflect this obvious fact, and that there was no two-thirds vote of the Senate because of the declaration of the chair.

Each of the Acts in question was enacted by two-thirds vote of each branch of the Legislature.

Only one question remains, and this is the most troublesome. This question is as to whether or not the Legislature substantially complied with the constitutional provisions which requires the Legislature to determine the effective date of such salary measures.

There is no question that it would have been preferred had the Legislature itself, within each of these bills, designated a definite effective date of these salary amendments. However, by Statute of long standing, the Legislature has provided a statute covering the effective date of its enactment. This statute is SDCL 2-14-16, which provides:

Subject to the provisions of the Constitution and statutes relating to vetoes and the referendum, an act of the Legislature which does not prescribe when it shall take effect, if passed, at a regular session, takes effect on the first day of July after its passage ...

I must presume the members of the 1972 legislative assembly were acquainted with this general statute. In the early case of *State ex. rel. Richards v. Whisman* (1915) 36 S.D. 260, 154 N.W. 707, LEA 1917B 1, our Court, speaking through Judge McCoy has stated:

Every law which the Legislature has power to enact, where there is no emergency clause embodied therein, goes into effect on the next succeeding 1st day of July, unless vetoed by the Governor, or unless a referendum petition referring the same to a vote is filed as required by law.

(See also *State ex. rel. Richards v. Burkhart* (1921) 44 S.D. 285, 183 N.W. 870.) This rule of law has never been questioned or overruled by our Court.

It is my opinion that this statutory determination is impliedly a part of every statute enacted by our Legislature which does not within its body set an effective date. This statute does not conflict with the provisions of Sec. 22 of Article III of our Constitution which provides that except in cases of emergency, no act shall take effect until ninety days after the adjournment of the session at which it is passed.

In re Opinion of the Judges, 82 S.D. 500, 149 N.W. 2d 326, the court was concerned with the constitutionality of a retroactive payment of twenty dollars a day that the Legislature awarded itself. The act contained an emergency clause, which presumptively required it become effective upon approval of the Governor.

Our court, without discussing either of the constitutional sections I have discussed, did hold such statute to be unconstitutional, insofar as its retroactive features were concerned, as it violated the provision of Sec. 3, Article XII of the Constitution which provides that the Legislature shall never grant "any extra compensation to any public officer ... after the services shall have been rendered." The conclusion of such opinion seems significant. It says:

It is our opinion House Bill No. 645 may constitutionally operate prospectively.

July 1, 1972 was prospective to the date of passage of each of the Acts of the Legislature by the legislative branches and the approval by the Governor. None of such bills was subject to the veto, nor are any of such acts subject to referendum.

Each of the Acts became effective on July 1, 1972. Each was enacted in substantial compliance with the constitutional mandate and is proper and constitutional.

Respectfully submitted,

Gordon Mydland  
Attorney General