

proposition as to whether the expenses of the members of such commission may or may not be legally paid when the purpose of the trip was other than that stated in your request.

Specifically answering your inquiry, it is my opinion that :

1. The prosecuting attorney is the legal adviser to the members of the soldiers' relief commission for the county in which he holds office and for which such members have been appointed.

2. The board of county commissioners is not by Section 2932 of the General Code granted authority to authorize the issuance of warrants for the payment of the traveling expenses of the members of the county soldiers' relief commission to and from Columbus for the sole purpose of a conference with state officials with respect to the legal interpretation which should be given to a statute, since the performance of such act is not a duty of the members of the soldiers' relief commission.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.

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3134.

SALARY—JUSTICE OF PEACE—CONSTABLE—WHEN CORPORATE LIMITS OF CITY AND TOWNSHIP BECOME IDENTICAL—WHERE CITY COUNCIL BY ORDINANCE FIXED SALARY OF SAID TOWNSHIP OFFICERS, SECTION 3512 G. C.—COUNCIL OF MUNICIPALITY, BY ORDINANCE, MAY AT ANY TIME CHANGE SUCH MODE TO FEE BASIS—CHANGE MAY NOT APPLY TO INCUMBENTS DURING EXISTING TERMS.

SYLLABUS:

*When the corporate limits of a city have become indential with those of a township and under authority of Section 3512, General Code, the council of the city has, by ordinance, fixed the salary of the justice of the peace and the constable of said township, the council of said municipality may at*

*any time change, by ordinance, this mode of compensation to a fee basis, but the change may not be made to apply to incumbents of those offices during their existing terms.*

Columbus, Ohio, December 18, 1940.

Hon. Robert C. Carpenter, Prosecuting Attorney,  
Tiffin, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads in part as follows:

"In 1938, under authority of Section 3249, General Code, a new township known as Tiffin Township in Seneca County was created coterminous with the corporate limits of the City of Tiffin. Subsequently, the Court of Common Pleas of Seneca County, in conformity with Section 1712, General Code, fixed the number of the Justices of Peace at one and set the date of his election. The Council of the City of Tiffin, under Section 3512, General Code, by ordinance fixed the salary of the Justice of the Peace of the new township at \$150.00 per month payable semi-monthly and of the constable at \$100.00 per month payable semi-monthly, and provided for the payment to the city treasury of all fees collected by these officers.

Following these steps, and pursuant to Section 1712, General Code, W. D. T. and R. H. G., were elected respectively Justice of the Peace and Constable of Tiffin Township. These officers duly qualified and performed their duties, receiving the salaries provided by the Council of the City of Tiffin. At the general election in 1939 both were reelected to full terms and both again qualified and entered upon the performance of their duties and are now holding their respective offices."

Based on the foregoing facts, you inquire whether or not the City Council of Tiffin may, by ordinance, change the compensation of the offices of justice of the peace and constable of Tiffin Township and put said legislation into immediate effect thereby making same applicable to the present incumbents for the balance of the terms they are now serving.

Section 3512, General Code, in so far as is pertinent to your inquiry, provides as follows:

"When the corporate limits of a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of

the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. \* \* \* ”

By force of this section, the City Council of Tiffin is empowered to fix the compensation of the justice of the peace and the constable of Tiffin Township, it appearing that the corporate limits of the City of Tiffin are identical with those of Tiffin Township. This power, however, is not absolute. As stated by Wanamaker, J. in the case of *State, ex rel. Clarke vs. Cook*, 103 O. S. 465, at page 470:

“The express power to fix a salary does not grant by implication the power to unfix such salary. \* \* \* The power to change after once having fixed the term and salary, to employ the language of the *Locher case, supra*, must be ‘clear and distinctly granted’.”

Applying this rule to the instant case, we must now determine if the power to change, after having once fixed the compensation, rests with the city council under the facts you present.

Section 3512, *supra*, standing alone places the matter of compensation entirely in the discretion of the members of council. Said section is silent with respect to any limitations and it would, therefore, appear that the council possesses the power to change unless there is some constitutional inhibition.

A justice of the peace and a constable are public officers within the meaning of Article II, Section 20 of the Constitution of the State of Ohio, which provides as follows:

“The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

Consequently, the salaries of those officers may not be changed by the city council during their existing terms of office. Opinion No. 548, 1927 Opinions of the Attorney General, Vol. II, page 905. This is so even though Section 3512, *supra*, does not contain that express limitation. The provisions of Article II, Section 20 of the Constitution of the State of Ohio are as much a part of Section 3512, *supra*, as though they were written therein when enacted by the Legislature. *State, ex rel. Clarke vs. Cook, supra*.

The question now arises whether W. D. T. and R. H. G. are receiving

"salaries" from the City of Tiffin which may not be changed during their present terms.

In Opinion No. 749, Opinions of the Attorney General for the year 1939, Vol. II, page 947, I held that:

"The terms 'compensation' and 'salary,' as used in Article II, section 20 of the Constitution of Ohio, are not synonymous."

At page 950, it was said:

"It will be noted that in the opening clause the term 'compensation' is used, while the prohibitory clause refers to 'salary.' It follows that the two terms are not used synonymously and do not bear the same meaning. 'Compensation' may be said to include money received by a public officer in direct proportion to services rendered, for example, \$10.00 per day, whereas 'salary' denotes a fixed wage, such as \$100 per month, irrespective of the time or labor put forth."

Supporting this text are the following: *Gobrecht v. Cincinnati*, 51 O. S. 68; *Thompson vs. Phillips*, 12 O. S. 617; *State ex rel. Taylor vs. Madison County*, 13 O. D. (N. P.) 97; 32 O. J. 1026, et seq.; Opinion No. 565, Opinions of the Attorney General for the year 1917, Vol. II, page 1614.

This same distinction was made by a former Attorney General in Opinion No. 548, Opinions of the Attorney General for the year 1927, Vol. II, page 905 in holding as follows:

"When the corporate limits of a city or village have become identical with those of a township and the council of the city or village has by ordinance fixed the amount of compensation to be paid to a justice of the peace, elected within the township, as the amount of fees taxed and collected by said justice of the peace in the hearing of state cases, the council of said municipality may subsequently change the amount of compensation to be paid to said justices of the peace by the enactment of an ordinance providing for the payment to the justice of the peace of a definitely fixed salary."

In this opinion the then Attorney General had under consideration the question of whether or not a village council might change the compensation of a justice of the peace under Section 3512, supra, from a fee basis to a fixed salary and provide that said change go into immediate effect so as to include the incumbent justice of the peace for the remainder of his existing term of office. It was held, as disclosed by the syllabus set out above, that such action was permissible and not violative of Article II, Section 20, supra.

by reason of the fact the compensation and not the salary of the justice of the peace was being changed during the term.

In the instant opinion we are concerned with the reverse situation of the one discussed in the 1927 opinion. In your case the present city ordinance provides for a fixed salary to be paid the justice of the peace and the constable, to-wit, \$150.00 and \$100.00 per month respectively. The council now seeks to change this form of compensation to a fee basis.

In line with the authorities above referred to, it would appear that the justice of the peace and the constable of Tiffin Township are receiving a "salary" which may not be changed during their existing terms of office. Any attempt to place said officers on a fee basis at this time, in my opinion, would constitute such a change of salary during the term as would be violative of Article II, Section 20, *supra*.

In arriving at this conclusion, I am not unmindful of Opinion No. 3197, Opinions of the Attorney General for the year 1934, Vol. II, page 1346, the syllabus of which states:

"A village council has power to repeal an ordinance enacted prior to the commencement of the term of office of the justice of the peace in the township having identical boundaries with the village, which ordinance places the said office on a salary basis, after the term of office has commenced, when the justice of the peace refuses to serve, providing such repeal is effective before the justice of the peace is appointed to fill the vacancy caused by the failure of such justice of the peace to qualify."

It will be noted that this opinion permitted a village council to repeal a salary ordinance after commencement of a new term of the office of the justice of the peace. The instant opinion and the 1934 opinion, however, are not conflicting. In the 1934 opinion the repeal of the salary ordinance took place after the commencement of the new term, but became effective prior to the time the justice of the peace under consideration took office pursuant to an appointment occasioned by a vacancy. The "salary," therefore, of that justice of the peace was not changed by the repeal ordinance because at the start of his term the city ordinance in effect provided for compensation on a fixed basis. The salary ordinance was not in force when he began his term of office. In your case, the salary ordinance of the City Council of Tiffin was in full force and effect at the time the terms of W. D. T. and R. H. G. began. To repeal said ordinance and place those officers on a fee basis of compensation at this time would clearly change their salaries during term.

There is no doubt that under a situation controlled by Section 3512, supra, a city council may change the form of compensation of a justice of the peace and constable from a salary to a fee basis. However, such change can not be made to apply to incumbents of those offices during their existing terms. Any such attempted application would contravene the inhibition of Article II, Section 20, supra.

In view of the foregoing and in specific answer to your inquiry I am of the opinion that when the corporate limits of a city have become identical with those of a township and under authority of Section 3512, General Code, the council of the city has, by ordinance, fixed the salary of the justice of the peace and the constable of said township, the council of said municipality may at any time change, by ordinance, this mode of compensation to a fee basis, but the change may not be made to apply to incumbents of those offices during their existing terms.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.