

Office of the Attorney General
State of North Dakota

Opinion No. 81-124

Date Issued: November 19, 1981

Requested by: Ray Larson
Cass County Commissioner

--QUESTION PRESENTED--

Whether a member of the legislative assembly may be appointed as state's attorney of a county.

--ATTORNEY GENERAL'S OPINION--

It is my opinion that a member of the legislative assembly may be appointed as state's attorney of a county if the actual salary to be paid to the member for that office has not been increased by action of the legislative assembly of which the person is or was a member.

--ANALYSIS--

Article IV, Section 17 of the North Dakota State Constitution states:

No member of the legislative assembly shall, during the term for which he was elected, be appointed or elected to any civil office in this state, which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected; nor shall any member receive any civil appointment from the governor, or governor and senate, during the term for which he shall have been elected.

The office of state's attorney has existed since well before the 1981 session of the legislative assembly, hence, the only question to consider is whether the emoluments of the office of state's attorney have been increased. In this context, the relevant emolument is that of salary.

Prior to the 1981 session of the legislative assembly, the salaries for county officers, including the state's attorney were stated in Section 11-10-10(2) of the North Dakota Century Code as follows:

2. * * *

- a. Eleven thousand nine hundred dollars in counties having a population of less than eight thousand.
- b. Twelve thousand two hundred ninety dollars in counties having a population exceeding eight thousand plus additional compensation of one hundred dollars per year for each one thousand additional population or major fraction thereof over eight thousand. However, in counties where the population consists of more than twenty-five percent Indians who have not severed tribal relations, the county commissioners may adjust the salaries provided for herein within the limitations contained in this subdivision.
- c. State's attorneys in counties having a population exceeding thirty-five thousand, or in other counties where the board of county commissioners has determined by resolution that the state's attorney shall be full time and shall not be an attorney or counsel for any party except the state or county, shall receive a salary of twenty thousand to twenty-seven thousand nine hundred dollars, to be determined by resolution of the board of county commissioners.

Section 11-10-10(4), N.D.C.C., allowed the board of county commissioners, by resolution, to 'increase the salary of any full-time county official by an amount not to exceed thirty percent above the salary provided in this section or in section 27-08-08, if, in the judgment of such board, by reason of the duties performed, the official merits the increase.'

In 1981 the legislative assembly amended Section 11-10-10(2), N.D.C.C., by increasing the salaries for county officers, including the state's attorney, as follows:

2. * * *

- a. Thirteen thousand one hundred dollars in counties having a population of less than eight thousand.
- b. Thirteen thousand five hundred twenty dollars in counties having a population exceeding eight thousand plus additional compensation of one hundred dollars per year for each one thousand additional population or major fraction thereof over eight thousand. However, in counties where the population consists of more than twenty-five percent Indians who have not severed tribal relations, the county commissioners may adjust the

salaries provided for herein within the limitations contained in this subdivision.

- c. State's attorneys in counties having a population exceeding thirty-five thousand, or in other counties where the board of county commissioners has determined by resolution that the state's attorney shall be full time and shall not be an attorney or counsel for any party except the state or county, shall receive a salary of twenty-two thousand dollars to twenty-nine thousand seven hundred dollars, to be determined by resolution of the board of county commissioners.

Section 11-10-10(4), N.D.C.C., was also amended to allow the board of county commissioners of any county to, by resolution, 'increase the salary of any full-time official provided in this section or section 27-08-08, if, in the judgment of such board, by reason of duties performed, the official merits the increase.'

The base salary for county officials, including state's attorneys, was raised by the legislative assembly in its 1981 regular session. Additionally, the limitation of a thirty percent maximum increase over the base salary was eliminated leaving any additional increase over the base salary to the discretion of the board of county commissioners.

The legislative assembly has not appropriated any funds to pay the salaries of county officials. The salary a county official receives other than the base salary set by the legislative assembly in 1981 is set at the discretion of the board of county commissioners and paid with county funds.

If, prior to the amendment of Section 11-10-10, N.D.C.C., by the legislative assembly in 1981, the salary of a state's attorney was set at a level higher than the new minimum base salary set by that amendment, and if that same salary was not increased to more than thirty percent of the old pre-1981 maximum base salary after the amendment of Section 11-10-10, N.D.C.C., then the emoluments of the office of state's attorney have not been increased by the legislative assembly. It is a question of fact in each case.

The obvious purpose of Article IV, Section 17 of our constitution is to prevent a member of the legislative assembly from receiving the benefits of an office created or the salary (emoluments) of which has been increased by the action of the legislative assembly of which the person seeking that office was a member.

In *State v. Guy*, 107 N.W.2d 211 (N.D. 1961), the same section of our constitution was discussed. Judge Morris, writing for a unanimous court, held that this section:

. . . is clearly a restriction upon the members of the legislature. In order to determine the extent of that restriction we must consider the object

to be sought by it. If there was an evil to be prevented or restrained, the nature of that evil may be considered . . . 107 N.W.2d 211, 217.

The court held that William L. Guy, who was a member of the legislative assembly prior to his election as governor was not ineligible to be elected governor even though certain benefits of the office of governor in the form of an automobile, certain expenses, and an increase in social security coverage were increased by the legislative assembly of which he was a member. The Court held that these legislative actions 'did not constitute an emolument within the spirit or intent' of this section of our constitution. 107 N.W.2d 211, 218.

It is appropriate for a board of county commissioners, in determining the question of fact set forth above, in the possible appointment of a member of the legislative assembly to the office of state's attorney, to consider the 'spirit and intent' of Article IV, Section 17 of our constitution. The board of county commissioners can legally, without violating the 'spirit and intent' of this section, appoint a member of the legislative assembly to the office of state's attorney, provided that the salary to be paid is within the range existing prior to the action of the legislative assembly in 1981. Since the setting of the salary of the office of state's attorney involves the exercise of some discretion, there is no requirement that any person appointed to the office receive exactly the same salary as the person who previously held the office.

--EFFECT--

This opinion is issued pursuant to Section 54-12-01, N.D.C.C. It governs the actions of public officials until such time as the question presented is decided by the courts.

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