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May 9, 2008

OFFICIAL OPINION 2008-2

Cheryl A. W. Musgrave, Commissioner
Indiana Department of Local Government Finance
Indiana Government Center North
100 North Senate Avenue N1058(B)
Indianapolis, Indiana 46204

Re: HEA 1001 and Transfer of Assessor Duties

Dear Commissioner Musgrave:

You recently requested a legal analysis of several issues involving the transfer of assessor duties to county assessors under HEA 1001.

Background

Prior to 2008 legislative changes, assessor duties under Indiana Code chapter 6-1.1 were performed by county assessors, elected township assessors, or township trustees. Ind. Code § 36-2-15-5 (2007); § 36-6-5-3 (2007); § 36-6-5-2 (2007). During the 2008 legislative session, assessor duties were modified under House Enrolled Act (HEA) 1001.¹ The 2008 legislative changes are summarized as follows:

- Effective July 1, 2008, township trustee assessor duties are removed. HEA 1001, § 709 (Ind. Code § 36-6-4-3).
- Effective July 1, 2008, the county assessor is required to perform the assessment duties in any township where the number of parcels of real property is less than 15,000. HEA 1001, § 693 (Ind. Code § 36-2-15-5); § 710 (Ind. Code § 36-6-5-1(h)).

¹ Effective April 4, 2008, HEA 1001 became Public Law No. 146-2008.

- Effective January 1, 2009, the county assessor is required to perform assessment duties in any township of at least 15,000 parcels where a majority of the township votes on November 4, 2008, on a referendum to approve the transfer of duties to the county assessor from the township assessor. HEA 1001, § 693 (Ind. Code § 36-2-15-5).
- Elected township assessors may perform assessment duties in a township with at least 15,000 parcels of real property and where the transfer of duties to the county assessor has been disapproved in the referendum to be held on November, 4, 2008. HEA 1001 § 710 (Ind. Code § 36-6-5-1).

Questions Presented and Brief Answers

The Department of Local Government Finance requested a legal analysis of the following issues:

- 1. May an elected township assessor continue to receive pay and benefits after assessor duties have been transferred to the county assessor either by law on July 1, 2008, or referendum on January 1, 2009?**

Answer: Yes. The elected township assessor may continue to receive salary and fringe benefits for the remainder of his or her current term of office. While the legislature had the authority to cut short the elected township assessor's term, it did not. Therefore, the current elected township assessor should continue to perform the statutorily assigned duty of assisting the county assessor in the transfer of records and operations.

- 2. May a county council reduce the compensation of the elected township assessor once the duties have changed?**

Answer: Under sections 36-6-8-10 and 36-2-5-13(a), the compensation of an elected township assessor may not be increased or decreased for the year in which it was fixed.

- 3. May a county or township reduce the compensation of a township trustee who is performing assessor duties once those duties are transferred to the county assessor by law on July 1, 2008?**

Answer: Under sections 36-6-8-10 and 36-2-5-13(a), the compensation of a township trustee who is performing assessor duties may not be increased or decreased by a county council for the year in which it was fixed. Nor may a township board that has supplemented the salary of a trustee assessor under

section 36-6-6-10(d) reduce the salary during the fiscal year for which it was fixed.

- 4. After assessor duties have been transferred to the county assessor either by law or after the referendum, is the elected township assessor still entitled to receive the \$1,000 payment under section 36-6-8-6 after becoming certified?**

Answer: Yes. The elected township assessor is entitled to receive the \$1,000 payment for the duration of his or her term of office, provided that the elected township assessor maintains the certification.

- 5. After assessor duties have been transferred to the county assessor either by law or after the referendum, may the county assessor hire the elected township assessor or trustee assessor as a deputy? Would holding both the position of elected township assessor and deputy be a violation of the prohibition against dual officeholding?**

Answer: The county assessor's deputies are not lucrative officeholders. Therefore, an elected township assessor or trustee assessor may serve as a deputy under the county assessor without violating the prohibition against dual officeholding.

- 6. Is the reference to "employment positions" at HEA 1001, Section 834 a reference to the transfer of the "line item" in the budget or a reference to the transfer of the employee or person?**

Answer: The transfer of "employment positions" is not a reference to the transfer of the elected township assessor as an employee since he/she is still an elected official and not an employee of the county assessor. The reference to "employment positions" under section 834 may also be read more broadly than simply a reference to the transfer of a "line item" in the budget. The transfer of the "employment position" under section 834 will allow the county to create and fund a new position in the county assessor's office to carry out the newly assigned assessing duties.

- 7. May elected officials collect unemployment insurance?**

Answer: No. Employment as an elected official cannot be used to qualify for unemployment insurance benefits under Indiana Code section 22-4-8-2(i)(2).

Analysis

A. Elimination of an Elected Office

The creation and abolition of offices is discussed by Indiana courts:

Offices are neither grants nor contracts, nor obligations which cannot be changed or impaired. They are subject to the legislative will at all times, except so far as the constitution may protect them from interference. 'Offices created by the legislature may be abolished by the legislature. The power that creates can destroy. . . . The term of an office may be shortened, the duties of the office increased, and the compensation lessened by the legislative will.'

Yancy v. Hyde, 28 N.E. 186, 187-88 (Ind. 1891) (citations omitted). The office of elected township assessor is not an office established by the Indiana Constitution and therefore no constitutional question is involved. Ind. Const. Art. 6 § 2, §3.

Non-code provision, HEA 1001 section 832(b), addresses the abolishment of the office of township assessor when assessor duties are assumed by the county assessor either by law on July 1, 2008 or referendum on January 1, 2009. Section 832(b) provides that any township assessor elected before July 1, 2008, may remain in office until the end of the township assessor's elected term. The same holds true for an individual who was selected to fill a vacancy in the office of elected township assessor before July 1, 2008. While serving out the term of his or her office, "the sole duty of the individual is to assist the county assessor in the transfer of records and operations from the township assessor to the county assessor under this act." HEA 1001, § 832(b).

In brief, the legislature has the power to abolish the office of elected township assessor and impose additional duties upon the county assessor. And while the legislature had the power to cut short the elected township assessor's term of office, it did not.² Instead, where assessor duties are transferred to the county assessor, the office of elected township assessor is abolished *after* the expiration of the term for which the current elected township assessor was elected. HEA 1001, § 832(b). The elected township assessor continues to perform the sole duty of assisting the county assessor in the transfer of records and operations. *Id.*

B. Compensation

State law provides that each county council, "*in the manner prescribed by IC 36-2-5*" must fix and appropriate funds to pay the salaries of the elected township assessor or trustee

² Compare *State v. Felger*, 95 N.E.2d 840, 842 (Ind. Ct. App. 1950) (the legislature abolished the office of city treasurer, but only *after the expiration* of the term for each currently elected city treasurer) with *Downey v. State*, 67 N.E. 450, 451 (Ind. 1903) (city council abolished the office of city attorney in the middle of the term and paid attorney for work done through date of abolishment, thereafter the attorney was no longer an officer of the city).

assessor, and the deputies and employees of each. Ind. Code § 36-6-8-10(a) (emphasis added). Chapter 36-2-5 provides that compensation for an elected county officer "may not be changed in the year for which it is fixed." Ind. Code § 36-2-5-13(a). Chapter 36-2-5 applies to elected township assessors and trustee assessors. Ind. Code § 36-6-8-10(a).

The statutory prohibition against diminishing the fixed yearly compensation of an elected official is consistent for all elected county, township and city officials. Ind. Code § 36-2-5-13(a); § 36-4-7-2(c); and § 36-6-6-10(d).³ Typically, such restrictions against changing the compensation of public officers are believed to promote definiteness and certainty as to the salary of an office, keep officers from seeking increased compensation, and deter the appropriating body from influencing an office by threatening or promising salary changes. 63C Am. Jur. 2d Pub. Officers and Employees § 294.

"Compensation" is not defined for purposes of chapter 36-2-5. The term may be broadly held to encompass any form of payment for services and may include fringe benefits such as health insurance or pension payments. *Hilligoss v. LaDow*, 368 N.E.2d 1365, 1369-70 (Ind. Ct. App. 1977). The primary objective in construing a statute is to ascertain and give effect to the legislature's intent. *Johnson Co. Farm Bur. Coop. Ass'n. v. Ind. Dept of State Rev.*, 578 N.E.2d 578, 580 (Ind. Tax. Ct. 1991). As previously noted, it is generally assumed that a statutory restriction against diminishing an officer's fixed compensation is used to promote certainty of the valuable perquisites of an office and to deter any improper influence over an officer. Therefore, it is likely that the legislature intended the term "compensation," in this instance, to include all forms of salary and fringe benefits.

Therefore, under sections 36-6-8-10 and 36-2-5-13(a), the compensation of an elected township assessor or a trustee assessor may not be increased or decreased by a county council for the year in which it is fixed. However, the statutory prohibition against changes in compensation does not apply to deputies or employees of the elected township assessor or trustee assessor. Deputy and employee compensation may be changed at any time pursuant to the procedure allowed under section 36-2-5-13(a).

Additionally, section 36-6-6-10(e) also allows a township board to supplement the salary of a township trustee assessor or an appointed officer to compensate for performing assessing duties, but only through June 30, 2008. Section 36-6-6-10(e) does not grant the board the additional authority to decrease the salary once the supplement is made. If the trustee assessor or appointed officer's salary is supplemented by the township board, section 36-6-6-10(d) prohibits the board from thereafter decreasing the salary during the fiscal year for which it is fixed.

Finally, elected township assessors are entitled to receive \$1,000 per year after becoming a certified level two or three Indiana assessor-appraiser. Ind. Code § 36-6-8-6(a); 36-2-5-3(b). The compensation is in addition to and not part of the elected township assessor's annual salary. *Id.* The township assessor is entitled to receive the additional \$1,000 "for as long as the person

serves in that position and maintains the level two or level three certification." Ind. Code § 36-6-8-6(d).⁴ Therefore, even though the county assessor may have assumed the assessor duties by law or as a result of a referendum, an elected township assessor serving out the remainder of his or her term of office is entitled to the annual payment of \$1,000, provided that the certification is maintained.

C. Dual Officeholding

Article II, Section 9 of the Indiana Constitution prohibits dual officeholding, or the holding of two lucrative offices at the same time. A public service position is considered a lucrative office for purposes of Article II, Section 9 if state law grants any of the state's sovereign power to the officeholder and the officeholder is entitled to any monetary compensation for service. *See Dual Officeholding Guide*, Indiana Attorney General (2008) (available at <http://www.in.gov/attorneygeneral/legal/advisory/pub/DualOfficeHoldingGuide.pdf>).

Lucrative officeholders include elected township assessors, township trustees performing assessor duties, and county assessors. *See Bishop v. State ex rel. Griner*, 48 N.E. 1038, 1041 (Ind. 1898); *Wells v. Peden*, 94 N.E. 321, 322 (Ind. 1911). By law, the deputies of officers of a political subdivision, such as a county or township, are not lucrative officeholders. Ind. Code § 5-6-4-3. Therefore, deputies of county assessors are not lucrative officeholders.

A person may hold both the office of elected township assessor and deputy county assessor position without being in violation of the dual officeholding prohibition. Similarly, a person may hold both the positions of trustee assessor and deputy county assessor.

D. Transfer of "Employment Positions" under HEA 1001, Section 834

Section 834 is a non-code statutory provision that requires the transfer of matters from the elected township assessor or trustee assessor to the county assessor after the assessor duties have been transferred by law or after a referendum. 1001 HEA, § 834. Real and personal property, outstanding obligations, and the funds of the elected township assessor and trustee assessor are transferred under section 834.

Section 834 also provides that "the employment positions" of the elected township assessor and all employees of the elected township assessor are transferred. 1001 HEA § 834(1) and (2). "Employment positions" is not defined.

DLGF believes that "employment positions" is a reference to the transfer of a budget line item. We read the statute more broadly. The new law does not immediately abolish the office of the elected township assessor upon the transfer of assessor duties to the county assessor. The elected township assessor continues to serve out his/her term with the sole duty of assisting the county assessor in the transition. HEA 1001, § 832(b). Therefore, the transfer of "employment

⁴ Because the statute does not define the term "township assessors," we assume that section 36-6-8-6 applies to both elected township assessors and township trustee assessors.

positions" would not mean a transfer of the elected township assessor as an employee since he/she would continue to act as an elected official and not an employee of the county assessor.

Furthermore, given that the elected township assessor's duties are restricted to assisting the county assessor with the transition, the transfer of the "employment position" under section 834 should be read to allow the county to create a new position to assist with the newly assigned assessing duties. Section 36-2-5-11(c)(2) indicates that the county council fixes the number of deputies and employees for each office. The number of employees is limited only by the amount of funding appropriated by the county council. *Id.* The transferred "employment position" would require additional funding appropriated by the county council. An employee selected to fill the position would be filling a new position that is in addition to that of the elected township assessor who is fulfilling his or her term of office by assisting the county assessor.

E. Unemployment Insurance

Services of elected officials are excluded from coverage for purposes of establishing an unemployment insurance award under Indiana law. Ind. Code § 22-4-8-2(i)(2). Employment as an elected official cannot be used to qualify for unemployment insurance benefits.

We appreciate the opportunity to provide this legal analysis.

Sincerely,



Stephen Carter,
Attorney General

Rebecca Walker,
Deputy Attorney General