

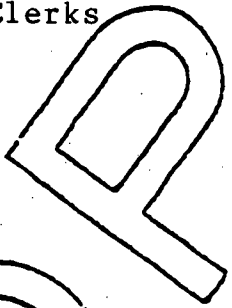
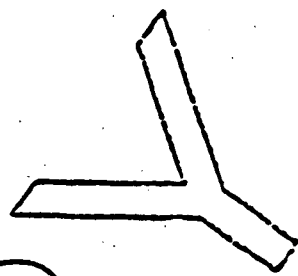


TYRONE C. FAHNER
ATTORNEY GENERAL
STATE OF ILLINOIS
SPRINGFIELD

October 12, 1982

FILE NO. 82-034

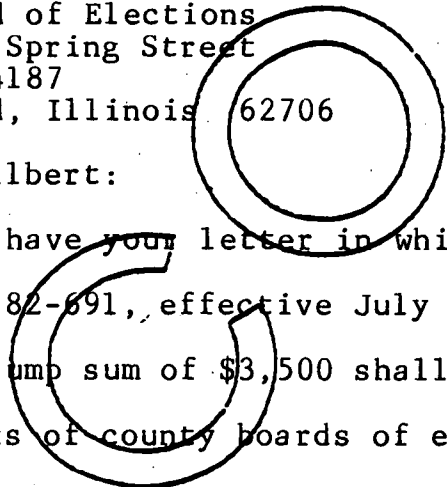
COMPENSATION:
Procedure for Payment of
Annual Lump Sum Payments
to County Clerks and Chief Clerks
of County Board of Election
Commissioners



J. Phil Gilbert
Chairman
State Board of Elections
1020 South Spring Street
P. O. Box 4187
Springfield, Illinois 62706

Dear Mr. Gilbert:

I have your letter in which you inquire concerning
Public Act 82-691, effective July 1, 1982, which provides that
an annual lump sum of \$3,500 shall be paid to county clerks or
chief clerks of county boards of election commissioners for the
additional duties required of such officers by the consoli-
dation of elections law. You ask the following questions:



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1. When is the annual lump sum payment referred to in Public Act 82-691 (Ill. Rev. Stat. 1981, ch. 53, par. 37a) required to be made?

2. To whom should the State Board of Elections distribute the annual lump sum payment since more than one person may serve as county clerk or chief clerk of the county board of election commissioners during the fiscal year?

3. Does the State Board of Elections have any obligation to withhold for income tax or make any other deductions with respect to the annual lump sum payments to be distributed?

In response to your first question, it is my opinion that Public Act 82-691 (Ill. Rev. Stat. 1981, ch. 53, par. 37a) requires that one annual lump sum payment be made at the conclusion of the State fiscal year, except in situations such as that specified in your second question.

Public Act 82-691, effective July 1, 1982, amended section 1 of "AN ACT in relation to the compensation of sheriffs, coroners, etc." (Ill. Rev. Stat. 1981, ch. 53, par. 37a) by adding the following paragraph:

" * * *

In addition to but separate and apart from the compensation provided for above, the county clerk of each county that does not have a county board of election commissioners and the chief clerk of each county board of election commissioners shall receive an award of \$3,500 per annum for the additional duties required of such officer by the consolidation of elections law. The total amount required for such awards each year shall be appropriated by the General Assembly to the State Board of Elections which shall distribute the awards in annual lump sum payments to the several county clerks and chief election clerks.

* * *

"

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The above language requires the State Board of Elections to make annual lump sum payments of \$3,500 to county clerks and chief clerks of county boards of election commissioners in counties of less than 1,000,000 inhabitants for the additional duties required of them by the consolidation of elections law. Because the time of payment is not specified in the statute, it is necessary to apply common law principles to determine when such payment may properly be made.

At common law, the right to emoluments of public position had no legal existence except as arising out of rendition of services for which such emoluments were compensatory. (Township of Springfield v. Pedersen (S.Ct. N.J. 1977), 372 A.2d 286, 288.) In Hull v. City of Cleveland (C.A. Ohio 1946), 70 N.E. 2d 137, an action was brought by a municipal judge to recover deductions made in his salary during a year of financial stringency. In denying the judge's claim, the court said at pages 138-139:

" * * *

This Court will reiterate here that a public office is a public trust to which the compensation attaches but as an incident to the office tending to promote the better performance of duty in the interest of the public, and that no vested right to the office or the emoluments thereof exists in the officer. That legal title to the emoluments or the right thereto accrues only after service rendered.

* * *

"

Similarly, in In re State Treasury (D.C. Pa. 1906), 16 P. Dist.

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437, the court held that legislators were not entitled to compensation until after performance of services. The court stated at pages 438-439:

" * * *

* * * Even if there were the element of a contractual nature - which there is not - it must be observed, under the law of contracts, that a contract for the performance of services to be rendered in futuro is of an executory nature on both sides, and one of the parties to the contract cannot be called upon to perform his part by making payment while the party of the other part has still to perform his side of the contract.

* * * "

Therefore, it is clear, as a matter of law, that the compensation of a public officer is not payable in advance, but only after services for which payment is made have been rendered. Public Act 82-691 (Ill. Rev. Stat. 1981, ch. 53, par. 37a) states specifically that the \$3,500 lump sum payment is for the additional duties required of the officers in question under the consolidation of elections law. Those duties do not terminate with any one election but continue throughout the fiscal year. Therefore, it cannot be concluded that the additional duties for which payment is to be made would be fully performed at any point prior to the end of the State fiscal year, and it is my opinion that the payments in question cannot be made until the conclusion of such fiscal year.

In your second question, you inquire to whom the State

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Board of Elections should distribute the annual lump sum payment if more than one person serves as county clerk or chief clerk of the county board of election commissioners during the fiscal year. Where the duties of a public officer entitled to an annual salary continue through the entire year, the salary accrues and becomes payable only for the space of time during which the duties are performed. (In re Lawrence (1853), 1 Ohio St. 431.) As noted above, the lump sum payments made are to cover duties performed by the officers in question throughout the fiscal year, and therefore, an unjust result would obtain were the entire payment to be made to an officer who only served for a portion of the period for which payment is to be made. It is a well-settled rule of statutory construction that the General Assembly will be presumed not to have intended absurd or unjust consequences in its enactments. Halberstadt v. Harris Trust and Savings Bank (1973), 55 Ill. 2d 121, 128.

Public Act 82-691 (Ill. Rev. Stat. 1981, ch. 53, par. 37a) directs an annual payment of \$3,500 for the additional duties required of a county clerk or chief clerk of a county board of election commissioners as a result of the consolidation of elections law. A fair and just construction of the Act requires that, if more than one person serves as county clerk or chief clerk of the county board of election commissioners during the State fiscal year, the \$3,500 payment be prorated,

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based upon time of service, among the persons holding the office during such year. Because a person leaving office prior to the end of the fiscal year will have completed his duties, he will, under the principles enunciated in my response to your first question, be entitled to receive his pro rata share of the \$3,500 payment at the time he leaves office.

In your third question, you ask whether the State Board of Elections has any obligation to withhold for income tax or make any other deductions with respect to the \$3,500 payments to be distributed. For the reasons hereinafter stated, it is my opinion that the State Board of Elections has an obligation to withhold for State and Federal income tax, contributions to the Illinois Municipal Retirement Fund, and Social Security tax.

As noted above, Public Act 82-691 (Ill. Rev. Stat. 1981, ch. 53, par. 37a) provides that the annual payment of \$3,500 is for the additional duties required of the county clerk and chief clerk of the county board of election commissioners. Thus, it is clearly taxable income subject to withholding of Federal and State income tax at the source of payment.

Subsection 3401(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 3401(a)) defines "wages" as "all remuneration * * * for services by an employee for his employer, * * *".

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Subsection 3402(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 3402(a)) provides in pertinent part:

"Requirement of withholding. - Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages, a tax determined in accordance with tables or computational procedures prescribed by the Secretary.
* * * "

The term "employer", within the meaning of subsection 3402(a), is defined in subsection 3401(d) of the Internal Revenue Code of 1954 (26 U.S.C. § 3401(d)), which provides in pertinent part:

"Employer. - For purposes of this chapter, the term 'employer' means the person for whom an individual performs or performed any service, of whatever nature, as the employee of such person, except that --

(1) if the person for whom the individual performs or performed the services does not have control of the payment of the wages for such services, the term 'employer' (except for purposes of subsection (a)) means the person having control of the payment of such wages, and

* * *

"

Even though county clerks and chief clerks of county boards of election commissioners are not employed directly by the State Board of Elections, the State Board of Elections has control of the payment of certain wages to such officers. Therefore, the State Board of Elections is an employer within the meaning of section 3402(a) and is thus required to withhold Federal income tax. See, In re Freedomland, Inc. (2d Cir. 1973), 480 F.2d 184, 187-189; Educational Fund of the Electrical Industry v. United States (2d Cir. 1970), 426 F.2d

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1053, 1057-1058. Since section 7-701 of the Illinois Income Tax Act (Ill. Rev. Stat. 1981, ch. 120, par. 701), which requires employers to withhold State income tax, adopts the definition of "employer" contained in subsection 3402(a) of the Internal Revenue Code of 1954 (26 U.S.C. § 3402(a)), the State Board of Elections is also an "employer" required to withhold Illinois income tax.

Counties with 1,000,000 inhabitants or less are municipalities within the meaning of the Illinois Municipal Retirement Fund. (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 7-132.) Both a county clerk, who holds an elective county office, and a chief clerk of a county board of election commissioners, who holds an appointive office, are employees of a county and, as such, are required to make contributions to the Illinois Municipal Retirement Fund. (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 7-109; Ill. Rev. Stat. 1981, ch. 108 1/2, par. 7-173(a).)

In addition to making these contributions to the fund, such officers also pay Social Security taxes to the fund. Subsection 7-173(b) of the Illinois Pension Code (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 7-173(b)) provides:

"Each employee shall make contributions to the fund for Federal Social Security taxes, for periods during which he is a covered employee, as required by the Social Security Enabling Act. For participating employees, such contributions shall be in addition to those required under paragraph (a) of this section."

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The Social Security Unit of the State Employees' Retirement System of Illinois is authorized by section 21-119 of the Social Security Enabling Act (Ill. Rev. Stat. 1981, ch. 108 1/2, par. 21-119) and section 418 of the Social Security Act (42 U.S.C. § 418), to enter into an agreement with the Secretary of Health, Education and Welfare (now Health and Human Services) for the purpose of extending the benefits of the Federal Social Security insurance program to employees of the State of Illinois or of any political subdivision thereof or to members of a Retirement System. Based upon information furnished to us by the Social Security Unit of the State Employees' Retirement System of Illinois, it is clear that a county employee, such as a county clerk or chief clerk of the county board of election commissioners, is a covered employee required to contribute to the Illinois Municipal Retirement Fund for Federal Social Security taxes.

It is my opinion that, for counties with 1,000,000 or less inhabitants, the State Board of Elections is required to deduct the employees' contributions of the county clerks and chief clerks of county boards of election commissioners for the Illinois Municipal Retirement Fund and for Federal Social Security taxes. These contributions should be forwarded to the various counties for payment into the Illinois Municipal Retirement Fund. Section 7-173(c) of the Illinois Pension Code

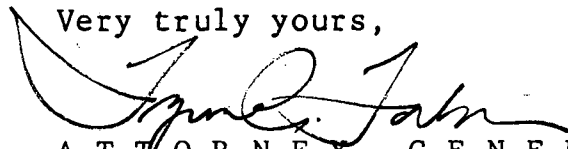
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(Ill. Rev. Stat. 1981, ch. 108 1/2, par. 7-173(c)) provides in pertinent part.

"Contributions shall be deducted from each corresponding payment of earnings paid to each employee and shall be remitted to the board by the participating municipality or participating instrumentality making such payment. * * *"

The above provision requires that contributions be deducted from earnings paid to each employee. Since the State Board of Elections will make the payment, it will be required to deduct the contributions. The contributions should be forwarded to the various counties for accounting purposes and for payment by the counties to the board of trustees of the Illinois Municipal Retirement Fund.

Very truly yours,



A T T O R N E Y G E N E R A L