



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-6

The Honorable Angela Marsee
District Attorney, District 2
P.O. Box 36
Arapaho, Oklahoma 73620

March 13, 2020

Dear District Attorney Marsee:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. **In a county governed by the salary provisions of 19 O.S.2011 & Supp.2019, §§ 180.58–180.68, and whose officers currently receive a salary at or above the minimum authorized by 19 O.S.Supp.2019, § 180.62, may the board of county commissioners institute a pay raise for county officers within the range provided in 19 O.S.2011, § 180.63 that will take effect *during* the officers' term of office without violating OKLA. CONST. art. XXIII, § 10?**
2. **If the pay raise in Question #1 does not violate OKLA. CONST. art. XXIII, § 10, and a board of county commissioners instituted a pay raise effective July 1, 2019 but delayed its implementation pending resolution of Question #1, are the recipients of the pay raise entitled to the increased salary owed since July 1?**

I.
BACKGROUND

A. The County Salary Act.

In Title 19, Sections 180.58 through 180.68 of the Oklahoma Statutes (the “Salary Act”), the Legislature set forth comprehensive procedures governing the salaries of county officers that serve counties in Oklahoma that do not exempt personal property from taxation under Article X, Section 6 of the Oklahoma Constitution.¹ See 19 O.S.2011, §§ 180.58, 180.67. The purpose of the Salary Act is to establish “salaries and wages of county officers . . . by general law applicable throughout

¹ For counties that *have* approved such an exemption, Sections 180.71 through 180.83 of Title 19 govern the salaries of county officers. The two sets of procedures are comparable, but because your question does not reference Sections 180.71 through 180.83, they are not addressed in this opinion.

the state under a uniform schedule fixing such salaries and wages *and future increases and reductions thereof.*” *Id.* § 180.58(B) (emphasis added). Generally speaking, the salary schedule is based upon the scope and value of services the officer² performs and available revenues, as defined by two measures the Legislature has labeled “serviceability” and “service load.” *Id.* § 180.58(C). Serviceability is “the net valuation of all tangible taxable property of the county”, *id.*, measured from “the county assessor’s certificate of such valuations as filed with the excise board of the county for purpose of computation of ad valorem tax levies of each year[.]” *Id.* § 180.59. Service load is simply the county’s population, as determined by the most recent Federal Decennial Census. *Id.* § 180.60.

In its current form, the Salary Act sets a basic annual salary range for all county officers at no less than \$19,000 and no more than \$44,500. 19 O.S.Supp.2019, § 180.62(A).³ It is the duty of the Board of County Commissioners (“Board”) to “set the salaries for all elected county officials within the limits allowed by law.” *Id.* § 180.62(B).⁴ On top of the basic salary, Section 180.63 of the Salary Act provides for salary increases based on serviceability and service load. Under the serviceability factor, the Board *may* increase the salary of the county’s “enforcement officers” according to the following formula:

A. To the basic salary:

1. Add the product of One Hundred Dollars (\$100.00) times each One Million Dollars (\$1,000,000.00) net valuation, or major fraction thereof until a net valuation of Seventy-five Million Dollars (\$75,000,000.00) is reached;
2. Thereafter add the product of One Hundred Dollars (\$100.00) times each additional Five Million Dollars (\$5,000,000.00) net valuation, or major fraction thereof until a net valuation of Five Hundred Million Dollars (\$500,000,000.00) is reached;
3. Thereafter add the product of One Hundred Twenty-five Dollars (\$125.00) times each additional Seven Million Dollars (\$7,000,000.00) net valuation, or major fraction thereof until a net valuation of Two Billion Dollars (\$2,000,000,000.00) is reached;

² The Salary Act groups county officers into two categories: (1) “enforcement officers,” which include the sheriff, treasurer, county clerk, court clerk, assessor, and county commissioners, and (2) all “[o]ther elective county officers.” 19 O.S.2011, § 180.61.

³ The Legislature amended Section 180.62 in 2019 to provide for a single basic salary range applicable to all counties, effective November 1, 2019. *See* 2019 Okla. Sess. Laws ch. 27, § 1. Before then, the basic salary range of county officers differed according to serviceability. *Id.*

⁴ In counties that have adopted the County Budget Act, this duty falls to the members of the county’s Budget Board. *See* 19 O.S.Supp.2019, § 180.62(B). Because you have asked specifically about salary decisions made by a Board of County Commissioners, this opinion refers only to that body.

4. Thereafter as to all additional net valuation add the product of One Hundred Twenty-five Dollars (\$125.00) times each additional Twenty Million Dollars (\$20,000,000.00) net valuation, or major fraction thereof.

Id. § 180.63.⁵ Under the service load factor, the Board *shall* increase the salary of *all* county officers pursuant to the following:

- B. Also, the salary of each county officer *shall be additionally increased* from the basic salary named in Section 180.62 of this title, and the additions thereto heretofore provided in this section, for population or service load according to the following scale:
 1. The product of Twelve Dollars and fifty cents (\$12.50) times each one thousand (1,000) population, or major fraction thereof until a population of seventy-five thousand (75,000) is reached; thereafter
 2. The product of Twelve Dollars and fifty cents (\$12.50) times each additional five thousand (5,000) population, or major fraction thereof until a population of one hundred fifty thousand (150,000) is reached; thereafter add
 3. The product of Twelve Dollars and fifty cents (\$12.50) times each additional ten thousand (10,000) population, or major fraction thereof.

Id. (emphasis added). The timing of salary increases approved by the Board under Section 180.63 is governed by Section 180.68 of the Salary Act:

The date on which changes in the salaries and rates of pay for county officers . . . under this act due to changes in population or valuation in any county shall take effect, shall be as of, *on and after the first day of January* based upon the population as shown by the latest Federal Decennial Census for the State of Oklahoma, and the total net assessed valuations of tangible properties for such year as shown by the official certificate which the county assessor files with the county excise board for the purpose of computing appropriations and levies for such current fiscal year.

Id. § 180.68 (emphasis added).⁶

⁵ Prior to November 1, 2010, salary increases under the serviceability factor were discretionary, as they are today. *See* 19 O.S.Supp.2009, § 180.63. In 2010, this section was amended to make salary increases mandatory. *See* 2010 Okla. Sess. Laws ch. 362, § 1. Then in 2011, the Legislature reversed course and made serviceability increases discretionary again. *See* 2011 Okla. Sess. Laws ch. 9, § 1. The section has remained unchanged since then.

⁶ Before November 1, 2019, the effective date of salary adjustments was July 1 of each fiscal year. *See* 2019 Okla. Sess. Laws ch. 27, § 2.

B. Constitutional Restrictions on Salary Increases for County Officers.

Article XXIII, Section 10 of the Oklahoma Constitution imposes restrictions as to the timing of salary increases (or decreases) for public officials, providing in pertinent part:

Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, *or during his term of office*, unless *by operation of law enacted prior* to such election or appointment[.]

OKLA. CONST. art. XXIII, § 10 (emphasis added).⁷ As it pertains to your question, Article XXIII, Section 10 forbids an increase in the salary of a county officer that takes effect at any point during his or her term, beginning with the date of election, unless that increase occurs by operation of law enacted before the officer was elected. *See Barton v. Derryberry*, 1972 OK 116, ¶ 6, 500 P.2d 281, 282 (“[T]he salary of an officer may be increased after his election or during his term of office where the law which operates to increase the salary was enacted prior to his election.”).

The Oklahoma Supreme Court has explained the “important governmental concerns behind” Article XXIII, Section 10 in the following terms:

1) to establish definiteness and certainty in the salary pertaining to an office; 2) to take from public bodies the power to make gratuitous compensation to officers in addition to that established by law; 3) to establish the complete independence of the three branches of government; 4) to prevent office holders from using influence and position to secure salary increases after being elected; and 5) to insure that pay increases enacted at taxpayers’ expense are for the benefit of the office and not a particular elected official.

Presley v. Bd. of Comm’rs, 1999 OK 45, ¶ 10, 981 P.2d 309, 313 (paraphrasing *State ex rel. Edmondson v. Oklahoma Corp. Comm’n*, 1998 OK 118, 971 P.2d 868). *See also Edwards v. Carter*, 1934 OK 46, ¶ 10, 29 P.2d 610, 611 (describing the “dual purpose” of Article XXIII, Section 10 as (1) “a pledge to the public officers that they would be compensated in a fixed sum during their term of office” and (2) “a protection to the people in preventing the increasing of the salaries of public officers through enthusiastic waves of popular approval of some public official”).

II. DISCUSSION

A. Salary adjustments implemented pursuant to Title 19, Section 180.63 may take effect during county officers’ term of office without violating Article XXIII, Section 10.

Your questions involve a scenario in which elected county officers, paid a salary at or above the floor set forth in Section 180.62 of the Salary Act, receive salary increases pursuant to the terms

⁷ The opening clause of this provision—*i.e.* “Except wherein otherwise provided in this Constitution”—refers to provisions such as Article VII, Section 11(a), which permits judicial salaries to be increased during their terms of office. *See* 2006 OK AG 26, ¶ 1 n.2. There is no such constitutional exception for the salaries of county officials.

of Section 180.63. This increase could be a result of the Board (i) instituting a *discretionary* pay raise based on an increase in the serviceability factor (*i.e.*, higher net valuation of tangible taxable property in the county); *see* 19 O.S.2011, § 180.63(A), or (ii) effecting a *mandatory* pay raise based on the service load factor (*i.e.*, an increase in the county’s population); *see id.* § 180.63(B). *See generally Hess v. Excise Bd.*, 1985 OK 28, 698 P.2d 930 (differentiating discretionary and mandatory salary adjustments under Section 180.63(A) & (B)). You ask whether it would violate Article XXIII, Section 10 of the Oklahoma Constitution for the Board to implement these salary increases to take effect during the relevant officers’ term of office.

As stated above, Article XXIII, Section 10 forbids “the salary or emoluments of any public official [to] be changed . . . during his term of office, unless by operation of law enacted prior to such election or appointment[.]” Thus, so long as a county officer’s mid-term pay increase under Section 180.63(A) or 180.63(B) occurs by operation of law—and that law was enacted before the officer was elected—the pay increase does not violate the Constitution. Accordingly, the answer to your question depends on what it means for an officer’s salary to “be changed . . . by operation of law.”

The phrase “by operation of law” is not defined in the Constitution or in statute, nor does it have a plain and ordinary meaning. Rather, it is a legal term that refers to “the means by which a right or a liability is created for a party regardless of the party’s intent.” BLACK’S LAW DICTIONARY 1201 (9th ed. 2009); *see also U.S. v. Seattle-First Nat’l Bank*, 321 U.S. 583, 587-88 (1944) (determining transfer of securities to be “wholly by operation of law” if the mechanism of transfer “is entirely statutory, effecting an automatic transfer without any voluntary action by the parties”).

Taking the latter provision first, it is clear that a mid-term salary increase implemented by the Board pursuant to Section 180.63(B) would be permitted under Article XXIII, Section 10. As explained above, following the release of the Federal Decennial Census,⁸ “the salary of each county officer *shall be* additionally increased” from the basic salary set forth in Section 180.62, along with any adjustments under Section 180.63(A), based on the statutory formula. 19 O.S.Supp.2019, § 180.63(B) (emphasis added). The Board has no discretion in making this salary adjustment. *See Hess*, 1985 OK 28, ¶ 8, 698 P.2d at 933. Rather, the county’s residents are counted in the census process, the population figure is released, and the formula is applied. No action by the Board is necessary besides submitting a budget to the excise board that contains the mandated salary adjustment. Thus, any such adjustment is a quintessential example of one that comes about by operation of law. *See Bd. of Comm’rs v. Mathews*, 1931 OK 38, ¶¶ 12-15, 296 P. 481, 482-83; *Bd. of Comm’rs v. Williams*, 1913 OK 539, ¶ 6, 135 P. 420, 422-23.

It is less clear from the text of Section 180.63(A) that salary adjustments under that provision come about by operation of law. As the Supreme Court stated in *Hess*, serviceability-based salary adjustments are committed to the Board’s discretion. *Hess*, 1985 OK 28, ¶ 8, 698 P.2d at 933. If a public body must exercise its discretion to bring about a given outcome, it is debatable that the

⁸ Because service load is determined *only* “from the announced population of counties of Oklahoma based on the Federal Decennial Census,” and “[n]o other census however authorized shall have any effect” under the Salary Act, *see* 19 O.S.2011, § 180.60, salary changes based on service load occur only in the year following the federal government’s once-a-decade census. So, for instance, a population-based salary adjustment for county officers will take effect on January 1, 2021 and not again until January 1, 2031. *See* 19 O.S.Supp.2019, § 180.68.

mechanism leading to that outcome “is entirely statutory,” and occurs “without any voluntary action by the parties.” *Seattle-First Nat’l Bank*, 321 U.S. at 588.

Nevertheless, the Oklahoma Supreme Court effectively answered this question in *State ex rel. Macy v. Board of County Commissioners of Oklahoma County*, 1999 OK 53, 986 P.2d 1130. The dispute in *Macy* involved the extent of the Board’s authority to deny the request of a district attorney (“Macy”) for a salary supplement where the Board had delegated its budget-related responsibilities to a county Budget Board under the County Budget Act. *Id.* ¶¶ 2-3, 986 P.2d at 1133-34. In the annual budgeting process, Macy requested a mid-term salary supplement, which the Commissioners voted to deny, but the Budget Board included in the county budget that was ultimately approved by the excise board. *Id.* Similar to Section 180.63(A) of the Salary Act, the statute relied upon by Macy provided that in more populous counties the state-funded “salary of the district attorney and assistant district attorneys *may be supplemented by the county.*” *Id.* ¶ 1 n.3, 986 P.2d at 1133 n.3 (quoting 19 O.S.Supp.1996, § 215.30(C)(1)). After the budget was approved the Commissioners granted only a portion of the supplement, which led to Macy’s lawsuit. *Id.* ¶ 3, 986 P.2d at 1134. One of his claims was that the Commissioners’ refusal to approve payment of the full salary supplement “constitute[d] an unconstitutional attempt to alter the salary of an elected official during his term of office.” *Id.* ¶ 17, 986 P.2d at 1139.

Most of the analysis in *Macy* focused on provisions of the County Budget Act. When the Court turned to Macy’s claim under Article XXIII, Section 10, it explained that Title 19, Section 215.30, which authorized the county-funded salary supplement, predated Macy’s term of office. *Macy*, 1999 OK 53, ¶ 18, 986 P.2d at 1140. And “[b]ecause the statutory scheme allowing [the] county supplement was enacted well before Macy’s term of office had begun, any increase (or decrease) in salary supplement, which is brought about by the county budgetary process, would stand unaffected by the restrictions imposed” by Article XXIII, Section 10. *Id.*

The Court’s reasoning in *Macy* is equally applicable to Section 180.63(A) of the Salary Act. The grant of discretion to the Board to increase the salaries of “enforcement officers” based on the serviceability formula long predates any such officer currently in office. Under the Court’s interpretation of Article XXIII, Section 10, when that authority is later exercised to grant a salary increase, the increase comes about “by operation of law” even if it takes a discretionary act to implement it. Accordingly, a salary increase granted to a county’s “enforcement officers” under Section 180.63(A) of the Salary Act may take effect during the officers’ term of office.⁹

⁹ The Supreme Court’s holding in *Macy* appears to depart from its earlier interpretation of Article XXIII, Section 10 in *Barton*. The statute in question in *Barton* tied the salary of a district attorney to the highest-paid associate district judge in the district. *Barton*, 1972 OK 116, ¶ 2, 500 P.2d at 282 (citing 19 O.S.Supp.1970, § 215.14). Under the Oklahoma Constitution, judicial salaries are set by statute and, as noted above, *may* be increased during the judges’ term. OKLA. CONST. art. VII, § 11(a). The Legislature increased judicial salaries in 1971, during the term of the plaintiff district attorneys, who argued that their salaries should have been increased by operation of the statute tying their salaries to judicial salaries. *Barton*, 1972 OK 116, ¶ 3, 500 P.2d at 282. The Court disagreed, holding that “if there is to be a salary raise for [plaintiffs] they must have the benefit of the statute enacted in 1971, after their election to office, in order to activate a salary increase. This may not be done under [Article XXIII, Section 10.]” *Id.* ¶ 10, 500 P.2d at 283. As was the case in *Macy*, the law enabling the salary increase at issue in *Barton*—Article VII, Section 11(a) of the Constitution, coupled with Title 19, Section 215.14—predated the relevant term of office. And as with *Macy*, the decision-making body in *Barton* acted, based on that law, to increase salaries during the relevant term of office. Nevertheless, because *Macy* is the most recent holding of the Oklahoma Supreme Court on this issue, and its holding bears directly on your question, it is conclusive.

B. If a Board of County Commissioners properly instituted a salary increase for county officers under the Salary Act effective July 1, 2019, but suspended payment pending assurance that it complied with constitutional requirements, the officers are entitled to the increased salary as of July 1.

Your next question involves a Board properly instituting salary increases for county officers pursuant to the Salary Act effective July 1, 2019, but suspending payment of the salary increases pending assurance from this office of their compliance with Article XXIII, Section 10. Because we concluded in response to your first question that the salary increases were permissible, you ask whether the officers are entitled to the incremental increase from the effective date of July 1.

The Salary Act is “the comprehensive salary code for all counties of the state and no [enforcement officers] . . . shall receive any salary or wages except as provided [therein].” 19 O.S.2011, § 180.67. Thus, any properly-instituted salary increase to county officers becomes effective as mandated by the Act. For salary increases implemented prior to November 1, 2019, the effective date was July 1. *See id.* § 180.68. This means the officers are entitled to the increased salary as of that date. While the Board acted sensibly in seeking clarity as to the constitutionality of the salary increases at issue before making the actual payments, now that said increases have been deemed constitutionally valid, payment of the accrued salary increases is due. *Cf.* 1977 OK AG 232 (concluding that because statute “did not prohibit mandated salary increases from being held in abeyance for retroactive payment” pending agreement on other issues, such action was permissible).

It is, therefore, the official Opinion of the Attorney General that:

- 1. Salary adjustments for county officers implemented pursuant to 19 O.S.2011, § 180.63 occur “by operation of law” and therefore may take effect during officers’ term of office without violating OKLA. CONST. art. XXIII, § 10. *See Macy v. Bd. of Cty. Cmm’rs*, 1999 OK 53, 986 P.2d 1130.**
- 2. If a Board of County Commissioners properly instituted a salary increase for county officers under the Salary Act to take effect July 1, 2019, but suspended actual payment of the increase pending assurance that it complied with constitutional requirements, the officers are entitled to the increased salary as of July 1.**

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