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November 22, 1991

The Honorable Ken Hechler
Secretary of State
State Capitol, Room 157-K
Charleston, West Virginia 25305

Dear Mr. Hechler:

You have requested an official opinion from this Office on the following issue:

The 1991 Legislature passed H.B. 2688 relating to the salaries of county officials. Because this bill made the salary increases of county officials contingent on the ability of the county to pay and a determination made in 1992, we are presently unable to determine the appropriate filing fee for county officials in the 1992 elections.

Therefore, our question is reasonably simple. Is the filing fee for 1992 for county officials to be determined on the basis of the previous legislation relating to salaries, or is it to be based on the new salaries set by H.B. 2688? West Virginia Code §3-5-8 requires that the filing fees for county officials be "one percent of the annual salary of the office for which the candidate announces."

Chapter 3, Article 5, Section 8, of the West Virginia Code reads, in pertinent part, as follows:

Every person who becomes a candidate for nomination for or election to office in any primary election, shall, at the time of filing the certificate of announcement as required in this article, pay a filing fee as follows:

. . . .

(d) A candidate for sheriff, prosecuting attorney, circuit clerk, county clerk, assessor, member of the county court [county commission] and member of the county board of education shall pay a fee equivalent to one percent of the annual salary of the office for which the candidate announces: Provided, That the fee in no case shall be less than five dollars. . . .

W. Va. Code § 3-5-8 (1990) (Emphasis supplied).

Further, W. Va. Code § 3-5-7 (Supp. 1991) provides that a candidate seeking nomination in the 1992 primary must file a certificate of announcement "not earlier than the second Monday in January next preceding the primary election day [January 13, 1992], and not later than the first Saturday of February next preceding the primary election day [February 1, 1992]." Because the filing fee imposed by W. Va. Code § 3-5-8 must accompany the certificate of announcement described in W. Va. Code § 3-5-7, the filing fee also must be paid no later than February 1, 1992.

House Bill 2688, passed March 9, 1991, and effective July 1, 1991, amended W. Va. Code §§ 7-1-5(a) and 7-7-4 to provide for an increase in the salaries of certain county officials. However, as noted in your request, these increases are expressly conditioned upon approval by the State of the individual county budgets:

(b) Prior to the primary election in the year one thousand nine hundred ninety-two [May 12, 1992], and for the fiscal year beginning on [July 1, 1992], or for any subsequent year if the approval set out herein is not granted for any fiscal year, Upon submission by the county commission to the chief inspector division of the department of tax and revenue of a proposed annual budget which contains . . . such additional amount as is necessary for payment of the increases in the salaries set out herein and related employment taxes over that paid for the immediately preceding fiscal year, and upon approval thereof by the chief inspector, . . . for the purpose of determining the compensation to be paid to the elected county officials of each county office by class are hereby established and shall be used by each county commission in determining the compensation of each of their county officials: . . .

. . . .

If the approval set out hereinabove is granted, the compensation hereinabove provided shall be paid on and after [January 1, 1993], to each elected county official.

W. Va. Code § 7-7-4 (Supp. 1991).

Every year, each county commission must submit its proposed budget to the Chief Inspector Division of the State Department of Tax and Revenue for approval. These budgets are based on a fiscal calendar which begins on July 1 of each year. The county budget proposals and levy estimates for fiscal year 1992-1993 must be considered by the county commission between March 7, 1992 and March 28, 1992. W. Va. Code § 11-8-9. They are then published for comment and submitted to the State Tax Commissioner for approval. W. Va. Code § 11-8-10. By statute, the earliest date that the final budget estimate and proposed levy for 1992-93 could be entered by the county commission, if approved by the Tax Commissioner, is April 21, 1992. See W. Va. Code § 11-8-10a.

In two previous opinions, we have noted that filing fees are creatures of statute, analogous to a tax, and being regulatory in nature must be strictly construed in favor of the candidate. See 38 Op. Att'y Gen. 234 (1940) (where statute provides minimum and maximum salary limitation, use minimum salary to compute filing fee); 50 Op. Att'y Gen. 618 (1964) (no supplemental filing fee required where salary is increased by legislature after candidate files certificate of candidacy).

Accordingly, because the 1992 salary increases are contingent upon Department of Tax and Revenue approval, and that approval can only come after the deadline for filing certificates of candidacy has passed, it is our opinion that the one percent filing fee for the 1992 primary election must be calculated based upon the counties' pre-House Bill 2688 salary scheme.

The salaries for county commissioners previously found in W. Va. Code § 7-1-5a may now be found in W. Va. Code § 7-7-4(a)(1), as amended, and should be used for calculating the filing fees for that office. The salaries for the other county offices, for the purpose of calculating filing fees for the 1992 primary, may now be found in W. Va. Code § 7-7-4 (a)(2), as amended.

SUMMARY

The filing fees imposed by W. Va. Code § 3-5-8 for county officials for the 1992 primary election shall be based upon the salaries payable to such officials prior to the passage of House Bill 2688, and not upon the contingent salary increases provided by the 1991 amendments to W. Va. Code § 7-7-4.

Very truly yours,

MARIO J. PALUMBO
ATTORNEY GENERAL

By



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