



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2020-10

The Honorable David W. Prater
District Attorney, District 7
320 Robert S. Kerr Ave, Suite 505
Oklahoma City, Oklahoma 73102

June 26, 2020

Dear District Attorney Prater:

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

Pursuant to 19 O.S.Supp.2019, § 215.30, the salaries of district attorneys are set at 98% of the salary of district judges. The body charged with fixing judicial salaries is the Board on Judicial Compensation, unless its decisions are “rejected or amended by law passed by a majority vote of each house of the Legislature.” 20 O.S.2011, § 3.2. In its 2019 report, the Board recommended a 9.23% salary increase for all state judges, but the report was amended by the Legislature to provide a 4.5% salary increase for certain listed judges, including district judges. See H.B. 2673, 57th Okla. Legislature, 2nd Reg. Session (2020).

Does the judicial salary increase enacted pursuant to House Bill 2673 also increase the salaries of current district attorneys “by operation of law enacted prior to [their] election or appointment” such that the mid-term increase would be permitted by OKLA. CONST. art. XXIII, § 10?

I.
BACKGROUND

A. District Attorney and Judicial Salaries.

Since 2003, the salaries of Oklahoma’s district attorneys have been tied to those of the State’s district judges pursuant to Title 19, Section 215.30 of the Oklahoma Statutes. That statute provides

“each district attorney shall receive a salary equal to ninety-eight percent (98%) of the salary of a district judge.” 19 O.S.Supp.2019, § 215.30(A).¹

The salaries of the State’s district judges are set in statute, but since 2005 that statute has given way to a process by which initial salary determinations are made by the Board on Judicial Compensation (the “Board”). *See* 20 O.S.2011, § 92.1A.² The Board meets in odd-numbered years to consider and potentially make changes to judicial compensation, which must be made by late November of said year. *Id.* § 3.3(A). Members of the judiciary “shall receive compensation as shall be fixed by the Board . . . unless such compensation is rejected or amended by law passed by a majority vote of each house of the Legislature.” *Id.* § 3.2(A). “Any change in judicial compensation, unless rejected or amended [by the Legislature], shall become effective on July 1 of the following calendar year.” *Id.* § 3.3(B).

B. Constitutional Restrictions on Salary Increases for District Attorneys.

Article XXIII, Section 10 of the Oklahoma Constitution imposes restrictions as to the timing of changes in salary 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, § 10.³ Thus, under this provision “the 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.” *Barton v. Derryberry*, 1972 OK 116, ¶ 6, 500 P.2d 281, 282; *see also* 2020 OK AG 6, ¶ 7 (discussing the meaning of “by operation of law”).

The Oklahoma Supreme Court has explained the “important governmental concerns’ underlying 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

¹ In addition, counties with a population of 400,000 or more may use county funds to supplement the district attorney’s salary in an amount up to 25% of the statutory state-funded salary. 19 O.S.Supp.2019, § 215.30(C).

² The Board is composed of seven members from non-legal fields appointed by the Governor, the Speaker of the House of Representatives, the President Pro Tempore of the Senate, and the Chief Justice of the Supreme Court. 20 O.S.2011, § 3.2(B).

³ 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 Barton v. Derryberry*, 1972 OK 116, ¶ 5, 500 P.2d 281, 282. There is no such constitutional exception for the salaries of district attorneys. *Id.*

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

Your question arises from the most recent salary increase for the State's district judges. In its 2019 Final Report, the Board on Judicial Compensation “acknowledged that additional compensation was needed to attract and retain the brightest legal minds for all judicial positions.” OKLA. BD. ON JUDICIAL COMP., FINAL REPORT 1 (2019). The Board then “recommend[ed] that the Oklahoma Legislature increase the Judicial Budget to include a 9.23% increase in compensation for all district court and appellate court judges and justices.” *Id.* at 2.

In the 2020 legislative session, the Legislature—through House Bill 2673—rejected the Board's 2019 Final Report and enacted an “amended salary schedule” in its place. See H.B. 2673, 57th Okla. Legislature, 2nd Reg. Session (2020). The amended salary schedule “provides a salary increase of four and five-tenths percent (4.5%) above the salary levels existing during fiscal year 2020” for certain listed judicial positions, including district judges, effective July 1, 2020. *Id.* § 2.

As explained above, by virtue of Title 19, Section 215.30, the salaries of the State's district attorneys are tied to the salaries of the State's district judges. Thus, an increase in salary for district judges automatically results in a salary increase for district attorneys. The question is whether Article XXIII, Section 10 of the Oklahoma Constitution prohibits incumbent district attorneys from receiving that salary increase during their current term.

In *Barton v. Derryberry*, 1972 OK 116, 500 P.2d 281, the Oklahoma Supreme Court addressed a nearly identical question. The statute in effect at that time set a district attorney's salary at “an amount equal to the highest paid associate district judge of his district.” *Id.* ¶ 2, 500 P.2d at 282 (quoting 19 O.S.Supp.1970, § 215.14). In 1971, the Legislature increased the salaries of associate district judges in certain districts. *Id.* ¶ 3, 500 P.2d at 282. The increase occurred during the term of the plaintiff district attorneys, who argued their salaries should have increased by operation of the pre-existing statute that tied their salaries to judicial salaries. *Id.* The Court disagreed, explaining that “if there is to be a salary raise for [plaintiffs] they must have the benefit of the statute [increasing judicial salaries that was] 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. Essentially, because the plaintiffs needed the operation of *both* statutes to effect a salary increase, and one of the statutes was enacted during their term of office, increasing their salary mid-term would violate the Constitution.

If we were to rely on *Barton* alone, we would have to conclude Article XXIII, Section 10 prohibits incumbent district attorneys from receiving a mid-term salary increase resulting from House Bill 2673. More recently, however, the Supreme Court has taken a more permissive view. In *State ex rel. Macy v. Board of County Commissioners of Oklahoma County*, 1999 OK 53, 986 P.2d 113, the Court addressed a claim by a district attorney (“Macy”) that the denial by the board of county commissioners of a discretionary salary supplement pursuant to Title 19, Section 215.30(C), which had already been approved by the county budget board and excise board, violated Article XXIII, Section 10. Macy argued that the county commissioners’ refusal to approve payment of the 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.

Addressing this claim, the Court explained that Title 19, Section 215.30(C), which authorizes populous counties to supplement the salaries of their district attorneys, 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.* *Macy* therefore stands for the proposition that, if a law creates a mechanism for increasing the salary of a public official, and the law predates the public official’s election or appointment, then a mid-term salary change enacted pursuant to that law is *not* prohibited by Article XXIII, Section 10. And this is the case even if the statutory mechanism involves the exercise of a public body’s discretion to grant the salary increase, rather than relying on an automatic triggering event. *See* 2020 OK AG 6, ¶ 12.

As we noted in Attorney General Opinion 2020-6, the Court’s interpretation of Article XXIII, Section 10 in *Macy* is less than intuitive. *See* 2020 OK AG 6, ¶ 9. Moreover, the Court did not address the effect of its holding on prior cases that read the provision more strictly. *See id.* ¶ 12, n.9. This leaves us in the awkward position of determining whether our conclusion here should be governed by the strict interpretation in *Barton*—a case with facts more analogous to the question posed here—or the more lenient, and more recent, standard espoused in *Macy*.

In 2006, this office addressed questions similar to those presented here and, in so doing, had to grapple with this tension. *See* 2006 OK AG 26. The first question also involved Title 19, Section 215.30, the statute setting district attorney salaries at 98% of district judge salaries, along with the Legislature’s mid-term increase in the statutory salary for district judges.⁴ Relying on *Barton*, the Attorney General concluded that Article XXIII, Section 10 prohibited incumbent district attorneys from also receiving a mid-term salary increase.⁵ *See id.* ¶¶ 7-11. The Attorney General distinguished *Macy*, reasoning that “*Macy* was not addressing a salary change brought about by *a legislative enactment*, as is the case here, but rather a change brought about by *a county budgetary*

⁴ This represented the final legislative increase to district judge salaries before implementation of the Board on Judicial Compensation. *See* 2004 Okla. Sess. Laws ch 499, § 8. The same enactment created the Board, *see id.* §§ 2–4, which made its first change to judicial salaries in November 2005. *See* 2006 OK AG 26, ¶ 15.

⁵ The opinion also cited Attorney General Opinion 1997-69, which relied on *Barton* to conclude that Article XXIII, Section 10 prohibited a mid-term raise for the Commissioner of Labor, who by statute received the salary of a special judge, when the Legislature granted special judges a salary increase during the Commissioner’s term of office. *See* 2006 OK AG 26, ¶ 11.

process authorized by a statute enacted prior to the term of office of the incumbent district attorney.” *Id.* ¶ 12 (emphasis added).

In the same opinion, the Attorney General was asked whether a district attorney would be entitled to a mid-term salary increase if the Board on Judicial Compensation increases district judge salaries during the district attorney’s term, and the Legislature neither rejects nor amends the Board’s action. 2006 OK AG 26, ¶ 15. The Attorney General’s answer turned on whether the Board’s action “constitutes [an] ‘enactment of a law’ such that the new salaries would apply to those officers appointed or elected after the salary is established by the Board.” *Id.* ¶ 20. This led the Attorney General to adopt the following reasoning:

In the situation where the new salary becomes effective in the *absence* of action by the Legislature, no new law has been “enacted” to make the salary effective, other than the law establishing the Board and authorizing it to establish salaries that become effective July 1 of the following year unless rejected or amended by the Legislature.

Id. ¶ 22 (emphasis in original). The Attorney General then concluded that where the Board changes judicial salaries and the Legislature does not alter the Board’s action, the salary increase for district attorneys comes about by operation of two statutes—Title 19, Section 215.30 and Title 20, Sections 3.2 through 3.4. *Id.* ¶¶ 24-25. If a district attorney was elected or appointed *after* those statutes became effective, and the Board increases the salary of district judges *during* the district attorney’s term without legislative action, the district attorney would be entitled to the increased salary under Article XXIII, Section 10. *Id.*

While not specifically asked, the opinion also addressed the circumstances relevant here; what if the Legislature *does* alter the Board’s action? Apparently relying on the reasoning from *Barton*, the Attorney General wrote “[i]f the Legislature acted to amend the salary increase, then only those district attorneys appointed *after* the legislative enactment would have the benefit of the new salary established by the Legislature.” 2006 OK AG 26, ¶ 20, *see also id.* ¶ 24. Essentially, the opinion reasoned that by amending the Board’s change in judicial salary, the Legislature created a new “law” during the term of the district attorney such that Article XXIII, Section 10 would prohibit the district attorney from receiving the mid-term salary increase. *See* 20 O.S.2011, § 3.2(A) (stating that the Board fixes rate of judicial compensation, “unless such compensation is rejected or amended *by law passed by*” the Legislature (emphasis added)).

We do not view this conclusion as consistent with *Macy* or the text of and purposes underlying Article XXIII, Section 10. Put simply, the opinion focused on the identity of the decision-maker in order to determine whether a mid-term salary change is permissible. The Board’s salary determinations that are left undisturbed by the Legislature would result in district attorneys getting similar mid-term raises, while the Legislature intervening to change the Board’s determination—in either direction and by any amount—would result in district attorneys not getting a mid-term raise.

This is an untenable reading of Article XXIII, Section 10. The provision says nothing about the identity of the person or entity making the salary change. It simply prohibits the mid-term salary

change for any public official, “unless by operation of law enacted prior to [the official’s] election or appointment[.]” In *Macy*—the Supreme Court’s most recent holding on this issue—the Court interpreted the phrase “by operation of law” to include a law that grants authority to a particular body to make salary adjustments. “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.” 2020 OK AG 6, ¶ 12. Whether that action is taken by the Board with the approval of the Legislature, or by the Legislature amending the Board’s determination, should not affect the outcome.⁶ Accordingly, that aspect of Attorney General Opinion 2006-26 is hereby overruled.

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

The salary increase for district judges enacted pursuant to House Bill 2673 came about by operation of the laws set forth at 20 O.S.2011, §§ 3.2–3.4. See *State ex rel. Macy v. Bd. of Comm’rs of Oklahoma Cty.*, 1999 OK 53, 986 P.2d 113; 2020 OK AG 6. The associated salary increase for district attorneys results automatically from the operation of 19 O.S.Supp.2019, § 215.30. Because the relevant provisions of 20 O.S.2011, §§ 3.2–3.4 and 19 O.S.Supp.2019, § 215.30 predate the election or appointment of any current district attorney, the State’s district attorneys are entitled to 98% of the salary of district judges as provided by House Bill 2673. See OKLA. CONST. art. XXIII, § 10



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⁶ Nor would drawing such a distinction serve the purposes for which Article XXIII, Section 10 was enacted. See *Fent v. Fallin*, 2014 OK 105, ¶ 17, 345 P.3d 1113, 1117 (“A constitutional provision must be construed considering its purpose and given a practical interpretation so that the manifest purpose of the framers and the people who adopted it may be carried out.”). As explained above, those purposes are:

- (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, 1999 OK 45, ¶ 10, 981 P.2d at 313. These purposes are no better served if it is the Board—with Legislative approval—or the Legislature’s amendment to the Board’s salary determination that results in the increased salary of district judges and therefore district attorneys.