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Case Notes

LOCAL GOVERNMENT LAW—Platte County's Cost of Living Adjustment: Is It an Unconstitutional In-Term Adjustment of an Elected Officer's Salary? *Board of County Commissioners of the County of Platte v. Yeadon*, 971 P.2d 129 (Wyo. 1998).

INTRODUCTION

In April of 1994, the Board of Platte County Commissioners set the salaries through 1998¹ for elected County officials.² At that time the Board of Platte County Commissioners adopted a resolution allowing the Board to grant cost of living adjustment (COLA) raises to County Officials, if budgetarily feasible, that could not exceed eight percent of elected officials' annual salaries.³ The Platte County Board anticipated the need for increased salaries, but was unable to budget pay raises four years in advance⁴ because the revenue for salary increases was not available.⁵

In 1996 the Platte County Board voted to grant a five percent⁶ COLA raise to all elected officials, except the County Sheriff.⁷ In response, Donna

1. See WYO. STAT. ANN. § 18-3-107(a) (LEXIS 1999): "The Board of County Commissioners of each county shall meet no later than June 1, 1978, and on or before the same date each four (4) years thereafter, for the purpose of setting salaries." Note: the delegation of setting salaries to County Boards has never been challenged. However, the Wyoming Supreme Court has allowed municipalities to establish salaries *May v. City of Laramie*, 131 P.2d. 300, 309 (Wyo. 1942).

2. Board of County Commissioners of the County of Platte v. Yeadon, 971 P.2d 129, 130 (Wyo. 1998).

3. See generally Brief of Appellant at 6, Board of County Commissioners of the County of Platte v. Yeadon, 971 P.2d 129 (Wyo. 1998) [hereinafter Brief of Appellant]. In adopting the resolution the board relied on Attorney General opinion 78-12, and was also advised by the Department of Audit. But see Board of County Commissioners of the County of Platte, 971 P.2d 129 (Wyo. 1998) (holding that the COLA raises at issue were distinguishable from the type of raises advocated in attorney general opinion 78-12). See also Brief of Appellant, *supra* note 3, at 5. In 1990, the Board of Platte County Commissioners passed a similar resolution allowing for the possibility, if budgetarily feasible, of up to a five percent increase in salaries. The resolution was never implemented nor was it contested. *Id.* The resolution stated "BE IT FURTHERMORE RESOLVED: That a provision is hereby included for a cost of living allowance not to exceed eight percent (8%) annually, if found to be budgetarily feasible at any time during the term of each official, for whom salary is determined, and providing that no salary shall exceed the limits set by statute for the respective office." *Yeadon*, 971 P.2d at 130.

4. See Brief of Appellant, *supra* note 3 at 5. Platte County Commissioner Chuck Frederick testified that it was virtually impossible to fairly budget the salaries of county officials, three and four years in advance, without having a provision for a flexible cost of living increase. But see Brief of Appellee at 37, *Yeadon*, 971 P.2d 129 (Wyo. 1998) [hereinafter Brief of Appellee]. Yeadon asserted that the raises were only 1/500 of the general budget of Platte County, and that the Board could have easily paid the increased salaries at the beginning of the officials' term.

5. See Brief of Appellant, *supra* note 3, at 4. Continuing litigation over the assessed valuation of the Laramie river station, which constitutes over sixty percent of the assessed property of Platte County, for which substantial amounts of taxes had been paid in protest, made the funds necessary for paying increased salaries unavailable for distribution. See also, *Yeadon*, 971 P.2d at 130.

6. See generally DIVISION OF ECONOMIC ANALYSIS DEPARTMENT OF ADMINISTRATION AND

Yeadon, a Platte County citizen, filed a petition for a writ of mandamus against the Board claiming that the COLA raises were in violation of Wyoming's constitutional prohibition⁸ against in-term salary adjustments.⁹ The District Court of Platte County found for Ms. Yeadon, holding that the Board's COLA raises were unconstitutional, and granted the Plaintiff's motion for summary judgment on the COLA raises.¹⁰ The Platte County Board appealed the trial court's decision to the Wyoming Supreme Court.¹¹ On *de novo* review the court held that the Platte County COLA raises violated Article 3, Section 32 of the Wyoming Constitution, and upheld the district court's summary judgment against the Board.¹²

This note asserts that because of the manner in which the Platte County COLA raises were created and distributed, the court in *Yeadon* was correct in declaring the COLA raises unconstitutional under the letter and spirit of Article 3, Section 32 of the Wyoming Constitution. The note will also briefly discuss the constitutional history of in-term salary increases in Wyoming, as well as the *Yeadon* court's reasoning. This note suggests that, although the COLA plan utilized by Platte County was unconstitutional, other avenues may be available for county governments in Wyoming to allocate salaries that remain in line with changes in the cost of living. Wyoming counties may be able to allocate equitable salaries and remain within constitutional limits by adopting a stepped salary approach where increases in salaries are determined prior to election. Another option may be to adopt a modification of a Montana statute which requires cost of living

INFORMATION STATE OF WYOMING, EQUALITY STATE ALMANAC, 6 (1998). In the second quarter of 1996 the Wyoming Cost of Living Index Annual Inflation Rates for all items was 4.7%. In the fourth quarter of 1996 the index was 4.8%. See also U.S. BUREAU OF LABOR STATISTICS DATA, CONSUMER PRICE INDEX—ALL URBAN CONSUMERS, West Region, 1982-84=100(September 24, 1999) <http://146.142.4.24/cgi-bin/surveymost> (the change in the CPI index from 1995-1996 was a 4.1 increase, and the percentage change was 2.6%).

7. See Brief of Appellant, *supra* note 3, at 5. At no time after granting the cost of living increase did any of the County officers' salaries exceed the range set in WYO. STAT. ANN. § 18-3-107 (Michie 1996). See generally Brief of Appellee, *supra* note 4, at 3. The cost of living increases granted in 1996 amounted to the following: The Justice of the Peace was given an additional \$127.50 per-month, as was the County Clerk, Treasurer, Assessor, and Clerk of the Court. The County Attorney was given an additional \$202.50 per month, and all three of the Platte County Commissioners' received an additional \$15.00 a month. *Id.* See also *Yeadon*, 971 P.2d at 130. The Board did not give the Sheriff a COLA raise because he was not POST (Police Officer Standards and Training) certified and had been enjoined from acting as a peace officer. *Id.*

8. See WYO. CONST. art. III, §32. See *infra* note 14 and accompanying text. For a similar federal provision see generally U.S. CONST. Amend. XXVII. ratified in 1992, which states: "No law varying the compensation for services of Senators and representatives shall take effect unless an election of Representatives has intervened."

9. *Yeadon*, 971 P.2d at 130.

10. *Id.*

11. *Id.* at 130. On appeal, Ms. Yeadon also sought to recover attorney fees from the Board, yet was denied such fees by the Wyoming Supreme court. *Id.* The court held that the trial court had properly denied attorney fees because a timely motion for fees was not made, thereby creating companion case No. 97-167. *Id.*

12. *Yeadon*, 971 P.2d at 132.

adjustments based on independent factors such as the consumer price index and not the whim of county commissioners.

BACKGROUND

Prior to *Yeadon*, the Wyoming Supreme Court had never addressed the specific issue of COLA raises allocated during the term of a public official. However, the Wyoming Supreme Court had decided a number of cases dealing with in-term salary adjustments resulting from a change in county classification, gifts to the family of fallen police officers, and increases for county court judges.¹³

Wyoming Constitution Article 3, Section 32, Article 14, Section 1, and Article 14, Section 3 deal with the issue of in-term salary adjustments. Article 3, Section 32 of the Wyoming Constitution provides:

Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment; but this shall not be construed to forbid the legislature from fixing salaries or emoluments of those officers first elected or appointed under this constitution, if such salaries or emoluments are not fixed by its provisions.¹⁴

Article 14, Section 1 provides:

All state, city, county, town and school officers, (excepting justices of the peace and constables in precincts having less than fifteen hundred population, and excepting court commissioners, boards of arbitration and notaries public) shall be paid fixed and definite salaries. The legislature shall, from time to time, fix the amount of such salaries as are not already fixed by this constitution, which shall in

13. See *County Court Judges Association v. Sidi*, 752 P.2d 96 (Wyo. 1988); *Barber v. Board of County Commissioners of Uinta County*, 277 P.2d 977 (Wyo. 1954); *Blackburn v. Board of County Commissioners of Park County*, 266 P.2d 784 (Wyo. 1951); *Ballangee v. Board of County Commissioners of Fremont County*, 212 P.2d 71 (Wyo. 1949); *State ex. rel. McPherrin v. Carter*, 215 P. 477 (Wyo. 1923); *Nickerson v. Winslow*, 138 P. 184 (Wyo. 1914); *Board of County Commissioners of Crook County v. Mulholland*, 136 P. 112 (Wyo. 1913); *Guthrie v. Board of Commissioners of Converse County*, 50 P. 229 (Wyo. 1897); *Davis v. Board of Commissioners of Sweetwater County*, 35 P. 467 (Wyo. 1894); *Henderson v. Burdick*, 33 P. 125 (Wyo. 1893); and *Board of Commissioners of Converse County v. Burns*, 29 P. 894 (Wyo. 1892). For duties of county commissioners *See generally* WYO. STAT. ANN. § 18-3-504 (LEXIS 1999). Stating that the powers and duties generally delegated to county commissioners include: the power to make orders concerning property; exercise and settle all accounts of receipts and expenses of the county; provide for the construction and maintenance of county buildings; apportion and levy taxes; represent the county and care for county property when no provision is provided by law; layout, alter or discontinue any road running through the county; grant licenses for keeping ferries and toll bridges; perform other duties prescribed by law; provide for snow removal; and provide for the burial of deceased indigents.

14. WYO. CONST. art. III, § 32.

all cases be in proportion to the value of services rendered and the duty performed.¹⁵

Article 14, Section 3 states: "The legislature shall by law designate county offices and shall, from time to time, fix the salaries of county officers, which shall in all cases be in proportion to the value of services rendered and duties performed."¹⁶

The Wyoming Supreme Court first interpreted Article 3, Section 32 only three years after the Wyoming Constitution was ratified in 1889.¹⁷ In *Board of County Commissioners v. Burns*, the Wyoming Supreme Court was faced with the question of whether a change in the assessed valuation of Converse County, moving it from a County of the third class to one of the second class during the first term of the County Treasurer, would allow the Treasurer to receive an increase in salary associated with being the Treasurer of a second class county.¹⁸ The Wyoming Supreme Court held that a change in the County's assessed valuation during the County Treasurer's term of office, after his election, could not increase his salary.¹⁹ Any attempt to increase the Treasurer's salary during his term of office would be unconstitutional under Article 3, Section 32.²⁰ Specifically, the court stated that: "Considering the broad constitutional inhibition, [salaries] cannot be increased or diminished during any part of his official term, nor after his election or appointment."²¹

The Wyoming Supreme Court in *Burns* also stated that the purpose of Article 3, Section 32 of the Wyoming Constitution:

[W]as to protect the individual officer against legislative oppression, and to guard the legislature from the gainful schemes of officials. *State v. Kelsey* 44 N.J. Law, 31. Party rancor, personal spleen, enmity, or grudge, might work to harass and cripple the official by reducing his compensation during his term of service; while, on the other hand, partisan feeling, blood or business rela-

15. WYO. CONST. art. XIV, § 1.

16. WYO. CONST. art. XIV, § 3. See WYO. STAT. ANN. § 18-3-107(a) (LEXIS 1999). The clause "from time to time" in section 3 has been codified as four years, and has also allowed county boards, instead of the legislature to fix salaries. WYO. STAT. ANN. § 18-3-107(a) (LEXIS 1999).

17. *Board of Commissioners of Converse County v. Burns*, 29 P. 894 (Wyo. 1892).

18. *Burns*, 29 P. at 895. Originally, Article 14 Section 3 of the Wyoming Constitution established three classes of counties based upon assessed valuation, and provided maximum salaries for county officials in each class of county. This procedure of categorizing counties and setting salaries based upon assessed valuation, continued even after the 1944 constitutional amendment to Article 14 Section 3. In 1977, however categorization of counties by assessed valuation ceased and salaries were set by decisions of county commissioners under WYO. STAT. ANN. § 18-3-107 (Michie 1977). Wyo. Laws 1973, Ch. 60; Wyo. Laws 1977, Ch. 15.

19. *Id.*

20. *Id.* at 900.

21. *Id.* at 901.

tions, might sway the members of the legislature, and cause the bestowal of an unmerited increase, without this restriction.²²

This strict interpretation of Article 3, Section 32 was subsequently upheld in a number of Wyoming Supreme Court cases.²³ In *State ex. rel. Henderson v. Burdick*, the Wyoming Supreme Court stated that the purpose and intent of Article 3, Section 32 was to:

[S]ecure official independence, and to prevent the legislature from being assailed by the demands of importunate officials, to the detriment of public business. The stability and permanence of the salaries of public officials were guarantied by the constitution, after once fixed, secure during the official term from legislative control.²⁴

Three years later, the Wyoming Supreme Court held that the County Clerk of Converse County could not receive the increase in salary associated with Converse County moving from a county of the third class to one of the second class, because it would violate Article 3, Section 32 and disrupt the precedent established in *Burns*.²⁵ In *Nickerson v. Winslow*, the Wyoming Supreme Court held that a statute setting the assessed valuation of Fremont County, in place during the November 1912 Fremont County elections, was determinative for establishing the salaries of county officials.²⁶ Also, the statute altering the assessed valuation, which was implemented after the county elections, did not apply to the county attorney because the impact would have unconstitutionally altered his salary after his election.²⁷

In *Blackburn v. Board of County Commissioners*, the Wyoming Supreme Court held that a statute increasing the salary of certain county officials did not apply to the sheriff because he was holding the office of sheriff at the time the statute was enacted.²⁸ In so holding, the court noted that "the plain language of the prohibition refers to any public officer, . . . [and] it positively forbids increasing or diminishing the compensation of all officers, state and county whose salaries are fixed by the legislature."²⁹ Soon after *Blackburn*, the Wyoming Supreme Court decided in *Barber v. Board of County Commissioners of Uinta County* that a statute which would allow

22. *Id.* at 899.

23. See *Barber v. Board of County Commissioners of Uinta County*, 277 P.2d 977, 980 (Wyo. 1954); *Blackburn v. Board of County Commissioners of Park County*, 226 P.2d 784, 788 (Wyo. 1951); *Nickerson v. Winslow*, 138 P. 184, 185 (Wyo. 1914); *Board Commissioners of Crook County v. Mulholland*, 136 P. 112, 113 (Wyo. 1913); *Guthrie v. Board of County Commissioners of Converse County*, 50 P. 229, 230 (Wyo. 1897); and *State ex. rel. Henderson v. Burdick*, 33 P. 125, 130 (Wyo. 1893).

24. *Henderson*, 33 P. at 127.

25. *Guthrie*, 50 P. at 230.

26. *Nickerson*, 138 P. at 184.

27. *Id.*

28. *Blackburn v. Board of County Commissioners*, 266 P.2d 784 (Wyo. 1951).

29. *Id.* at 790-92.

for the alteration of county officers' salaries, when upon a determination by the courts that the assessed valuation of the county at the time of the official's election was in actuality different from what it was thought to be at the time, was unconstitutional under Article 3, Section 32.³⁰ The court held:

[T]here can be no change in the compensation of county officials after their election or appointment, and that if the assessed value of the county is increased or decreased thereafter, so as to place the county in a different class, yet the compensation cannot be changed by reason of that fact.³¹

Not all of the Wyoming Supreme Court decisions dealing with in-term salary adjustments have been as strict as the above cases in prohibiting in-term salary increases.³² Only two years after the Wyoming Supreme Court's decision in *Burns*,³³ the Court in *Davis v. Board of County Commissioners* allowed a justice of the peace to receive a salary instead of fees³⁴ when the County Board determined, after the Justice's election, that the precinct's population was more than one thousand five hundred at the time of the election, even though it was thought to be less than one thousand five hundred.³⁵ *Davis* differs from *Barber* in that the Wyoming Supreme Court allowed a salary alteration after the election, based on facts obtained following the election, which affected the qualifying standards at the time of the election.³⁶ In *State ex. rel. McPherran v. Carter*, the Wyoming Supreme Court allowed the legislature to make an appropriation to compensate the widow of a deputy sheriff for his death in the line of duty.³⁷ The court upheld this appropriation because the law does not "extend so far as to require the officer to risk or give his life or incur permanent disablement."³⁸

In *Ballangee v. Board of County Commissioners*, the Wyoming Supreme Court held that Article 3, Section 32 applied only to the officer, and not the office.³⁹ The court stated that an appointee who filled the position of County Treasurer, due to an incumbent's resignation, could receive a salary

30. *Id.*

31. *Id.* at 980.

32. County Court Judges Association v. Sidi, 752 P.2d 960, 962 (Wyo. 1988); Ballangee v. Board of County Commissioners of Fremont County, 212 P.2d 71, 72 (Wyo. 1949); State ex. rel. McPherran v. Carter, 215 P. 477, 479 (Wyo. 1923); and Davis v. Board of Commissioners of Sweetwater County, 35 P.467, 469 (Wyo. 1894).

33. Board of County Commissioners of Converse County v. Burns, 29 P. 894 (Wyo. 1892).

34. See generally WYO. CONST. art XIV, § 1, (preventing justices of the peace in precincts of less than one thousand five hundred people from receiving fixed salaries). See also WYO. CONST. art. XIV, § 3, (declaring that the legislature will provide a law by which justices of the peace may demand fees).

35. Davis v. Board of Commissioners of Sweetwater County, 35 P. 467 (Wyo. 1894).

36. *Id.* at 469.

37. McPherran, 215 P. at 474.

38. *Id.* at 479.

39. Ballangee v. Board of County Commissioners of Fremont County, 212 P.2d 71, 73 (Wyo. 1949).

increase created by a statute enacted after the incumbent was elected.⁴⁰ Prior to *Yeadon*, the Wyoming Supreme Court's most recent decision dealing with in-term salary adjustments was *County Court Judges Association v. Sidi*.⁴¹ In *Sidi*, the Wyoming Supreme Court declared that the prohibitions against in-term salary adjustments contained in Article 3, Section 32 applied only to elective public offices.⁴² The court noted that a county court judgeship was not an elective office, and county court judges were not public officers affected by Article 3, Section 32. Therefore, they were able to receive salary increases after appointment.⁴³

PRINCIPAL CASE

Although the Wyoming Supreme Court has decided a number of cases dealing with in-term salary adjustments resulting from a change in the assessed valuation of a county, it had never heard a case involving COLA raises implemented during a public official's term of office.⁴⁴ The Wyoming Supreme Court could have allowed the COLA raises, on the basis that raises were a responsible method of compensating under-paid county officials,⁴⁵ and that such raises did not conflict with the constitution. Or the court, in line with *Burns* and its progeny, could declare that a COLA raise was an unconstitutional alteration of government officials salaries during their terms of office.⁴⁶

The Wyoming Supreme Court chose the latter course and held that Platte County's COLA raise violated Article 3, Section 32 of the Wyoming Constitution.⁴⁷ The *Yeadon* Court held that the words of Article 3, Section 32:

[M]ean exactly what they say, they are clear and direct, there is no ambiguity about the provision, and when it says the salary of a public officer shall not be increased or diminished after his election, it

40. *Id.* It should be noted that *Ballangee* does not allow an officer who has resigned to be appointed back to the same position at an increased wage. *Id.*

41. 752 P.2d 960 (Wyo. 1988).

42. *Id.*

43. *Id.* at 964-66.

44. The result of creating an in-term salary adjustment during an official's term of office is the same for increases based on COLA raises and for raises due to changes in assessed valuation. However, the key difference between the two is intent. COLA raises are generally intended to give an official a level of compensation that ensures adequate buying power, whereas, changes in salary due to alteration in assessed valuation are intended to compensate county officials for the assumption that work load and duties will increase with the rising valuation of the county.

45. See generally Appellant's Brief at 6-10, Board of County Commissioners of the County Platte v. *Yeadon*, 971 P.2d 129 (Wyo. 1996) (No. 97-166). The Platte Board argued that the COLA was needed to maintain fiscal responsibility while ensuring the allocation of adequate salaries. *Id.*

46. Board of Commissioners of Converse County v. *Burns*, 29 P. 894 (Wyo. 1892).

47. Board of County Commissioners of the County of Platte v. *Yeadon*, 971 P.2d 129, 131 (Wyo. 1998).

means that the salary or compensation for the term he was elected shall not be changed.”⁴⁸

Additionally, the court held that once county officials are elected their salaries should be fixed, the county must know what it will pay, officials must know what they will receive, and salaries “shall not be left to surmise or conjecture.”⁴⁹

After determining that the Board’s COLA raises were unconstitutional, the Wyoming Supreme Court focused on the discretion retained by the Board to grant such raises.⁵⁰ Analyzing the constitutionality of the Board’s COLA raises, the court reasoned that because the Board retained such a high degree of discretion, officials’ salaries had not been fixed and were thus subject to alteration after election.⁵¹ The court stated that “to allow the Board to pay the COLA raises would allow it to perform an unconstitutional act.”⁵² The court viewed the Board’s discretion as troubling and contrary to the underlying purpose of Article 3, Section 32 of the Constitution, which fueled the court’s concerns of political rancor, unmerited increases, inefficiency, and unfairness.⁵³ Although the court in *Yeadon* found no evidence that the evils warned of in *Burns* affected the Board’s 1996 raise, the court stated that the “discretion retained by the Board makes such evil a possibility.”⁵⁴

ANALYSIS

Because of the Board’s inherent discretion to decide when, to whom, and in what amount to award COLAs, the Wyoming Supreme Court was correct in determining that the Platte County COLA raises violated Article 3, Section 32 of the Wyoming Constitution. In reaching this decision the Wyoming Supreme Court did not directly or indirectly address any avenues available to local governments that would allow them to allocate salaries

48. *Yeadon*, 971 P.2d at 131 (quoting *Nickerson v. Winslow*, 138 P. 184, 186 (Wyo. 1914). The court also relied on *Barber v. Board of County Commissioners of Uinta County*, 277 P.2d 977 (Wyo. 1954), to determine that COLA raises violated Article 3, section 32 of the Wyoming Constitution. For the standards of Constitutional interpretation see generally *Yeadon*, 971 P.2d at 130 (quoting *Management Council of Wyoming Legislature v. Geringer*, 953 P.2d 839, 843 (Wyo. 1998)). When interpreting the Wyoming Constitution the Wyoming Supreme Court must: “Look first to the plain and unambiguous language to discern intent [and] if the constitutional language is clear and unambiguous, we must accept and apply the plain meaning of the language.” *Id.* at 130.

49. *Yeadon*, 971 P.2d at 131 (quoting *Barber*, 277 P.2d at 979).

50. The discretion retained by the board was when to give increase, how much increases would be and to who would such increases be given. *Yeadon*, 971 P.2d at 131.

51. *Id.*

52. *Id.*

53. The court concluded that the Board had discretion to determine whether to grant the raises, when to grant raises, to whom to grant raises, when the raises would be granted, and in what amount the raise would be granted. *Yeadon*, 971 P.2d at 131. All of which, as stated by the court in *County Commissioners v. Burns and Henderson v. Burdick*, Article 3, Section 32 sought to eradicate.

54. *Id.*

equitably in response to changes in the cost of living. Therefore, this note will address why the decision reached by the court was correct, and further what alternatives may be available to local governments to allocate salaries in an equitable and constitutional manner.

Correct Result

In light of the broad discretion retained by the Platte County Board and the potential for resulting political evils, the court was correct in holding the Platte County COLA unconstitutional. Article 3, Section 32 of the Wyoming Constitution states that: "Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment."⁵⁵ The purpose of this constitutional provision was to protect government officials from "party rancor, personal spleen, enmity, or grudge [which] might work to harass or cripple the official by reducing his compensation during his term of service."⁵⁶ It was also intended to protect from unmerited increases due to blood feeling or business relations.⁵⁷

Looking at the intended purpose of Article 3, Section 32 it is apparent that the Platte County COLA was unconstitutional. The COLA allowed for cost of living increases of up to eight percent per year, if budgetarily feasible.⁵⁸ With such a provision the county board had the ability to grant relatively large increases, yet such increases were not tied to any justifiable need for raises. They were merely tied to whether the county had funds available. In essence, the provision stated that if the county had the money it would pay officials very well, yet if it did not have the money it would not pay officials as well. This method of allocating salaries is not tied to an official's need for a salary that is adequate in relation to changes in purchasing power. It is only tied to the county's ability to pay, and thus demonstrates an overabundance of discretion.

Another unconstitutional aspect of the Platte County COLA was the Board's discretion in determining who received raises. When the board granted raises in 1996, it denied a raise to the sheriff because he was not POST certified.⁵⁹ The deliberate denial of a raise to the sheriff exudes the very discretion that the constitution sought to prevent. A government official was denied an increase in salary that was given to everyone else, and the only apparent reason for this was that the County did not feel the need or desire to pay a sheriff who was not POST certified.

55. WYO. CONST. art. III, § 32.

56. *Burns*, 29 P. at 898.

57. *Id.*

58. *Board of County Commissioners of the County of Platte v. Yeadon*, 971 P.2d 129, 130 (Wyo. 1998).

59. *Id.* at 129. POST refers to Peace Officers Standards and Training academy.

The Board's discretion as to when, what amount, and to whom the raises would be given had the effect of increasing officials' salaries during their terms of office, thus violating the letter and the spirit of Article 3, Section 32. As stated by the court in *Yeadon*, there is no evidence that the feared political evils affected the Board's raises, yet the "discretion retained by the board makes such an evil a possibility."⁶⁰

The Court's decision in *Yeadon* was correct in declaring the Platte County COLAs unconstitutional. However, the Court gave little guidance as to what county governments may do to tie salaries to changes in the cost of living.⁶¹ The question remains—what may a county government do if it wants to ensure that salaries of government officials are maintained in line with the changes in cost of living? Short of amending the Wyoming Constitution to allow COLA raises, a number of constitutional methods may be available to county governments.⁶²

Before addressing various alternatives it should be noted that there may be valid reasons for local governments to use and implement COLA type raises.⁶³ The use of COLA raises, if properly implemented by local gov-

60. *Id.* at 131.

61. There may have been a number of reasons for the Wyoming Supreme Court's lack of guidance in showing local governments what options are available, one key reason may have been it was not an issue in the case. However, the Court did not do any favors for local governments by deciding the case on constitutional rather than statutory grounds. Wyoming Statute section 18-3-107(a) states that:

The board of county commissioners of each county shall meet no later than June 1, 1978, and on or before the same date each four (4) years thereafter, for the purpose of setting salaries, *which shall not be changed during the term of each official for whom salary is determined.*

WYO. STAT. ANN. § 18-3-107(a) (LEXIS 1999) (emphasis added). *See also* WYO. STAT. ANN. §18-3-107(d) (LEXIS 1999), which contains the same basic provision for county commissioners, stating that their salaries cannot be increased. However, theoretically they may be decreased. Therefore, the Court being inclined to invalidate the COLAs, may have done so on statutory grounds by relying on the last clause of section 18-3-107(a). If a statutory route were taken, the court may have left other more viable avenues available to local governments to allocate equitable salaries.

62. Although the Court's decision in *Yeadon* focused on a COLA implemented by a county board, it may be assumed that if such a plan were attempted by a municipal government, it would also be in violation of the constitutional prohibitions in Article 3, Section 32. Therefore, the proposed alternatives that may be utilized by county governments to allocate salaries in line with the increases in the cost of living may also work for municipalities.

63. It should be noted that the purpose of this note is not to argue for or against the inherent value of cost of living adjustments. If the state or a local government deems that COLA raises are necessary, that is enough to show their value for this note. The purpose of the note is to illustrate, for the benefit of local governments and practitioners in Wyoming, what type of COLA raises the Wyoming Constitution clearly prohibits, and what types may be feasible. Ensuring the integrity and independence of government officials from those who allocate and determine their salaries is a concept that should not be taken lightly. This concept is the basic premise behind Article 3, Section 32 of the Wyoming Constitution and the court's decision in *Yeadon*. The purposes behind this constitutional provision was stated in *Board of County Commissioners v. Burns*, 29 P. 894, 898 (Wyo. 1892), that Article 3, Section 32 of the Wyoming Constitution was to protect individual officers from legislative oppression, and to guard the legislature from the gainful schemes of officials, as well as to prevent officials from altering their behavior because of hope or fear of an alteration in salary. *See also* State ex. rel. Henderson v. Burdick, 33 P. 125, 127 (Wyo. 1893) holding that the purpose of Article 3, Section 32 was to secure the independence of officials and prevent the legislature from being assailed with demands from officials for increased salaries.

ernments, demonstrates the ability of local governments to address changes in the market. Although not as visibly important now as perhaps in the past, cost of living adjustments may need to be given each year to prevent the large and possibly unfair discrepancies between increases in the cost of living, as measured by the Consumer Price Index,⁶⁴ that may result from waiting four years to allocate salaries.⁶⁵ If local governments are to retain and attract quality individuals to serve in public office, they need to keep salaries in line with the rising cost of living.⁶⁶

If county governments are forced to set and allocate salaries under Wyoming Statute section 18-3-107 they should be allowed to do so in a manner, within constitutional limits, that may be deemed necessary to

64. (CPI). See generally BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEXES, "How to Use the Consumer Price Index for Escalation" (1998) <<http://stats.bls.gov/cpi1998.htm>> (The Consumer Price Index (CPI) measures the average change in the prices paid for a fixed market basket of goods and services. These baskets are items purchased for consumption by the two groups covered by the index: All Urban Consumers (CPI-U) and Urban Wage Earners and Clerical Workers (CPI-W).) *Id.* In 1980 the CPI was 82.4. By 1984 it was 103.9. The percentage change in the CPI from 1980-84 was 26%. From 1984-1988 the percentage change in the CPI was 19.9%. From 1988-92 the percentage change in the CPI was 13.9%. From 1992-1996 the percentage change in CPI was 10%. The percentage change from 1996-present is 7.5%. BUREAU OF LABOR STATISTICS DATA (September, 24, 1999) <<http://146.142.4.24/cgi-bin/surveymost>> The percentage of change in the CPI was formulated using the CPI-U (for all Urban Consumers) for the Western region with a base period of 1982-84=100. *Id.*

65. See WYO. STAT. ANN. § 18-3-107(a) (LEXIS 1999) (requiring salaries be set every four years).

66. Although many individuals may be willing to serve local government for "less pay" than those in the private sector because of various ideological reasons, if salaries for local government officials' do not remain somewhat competitive, and at least keep up with the cost of living then local governments may find it difficult to attract and retain qualified individuals to serve as public officials. For all the positive arguments behind the use of COLA raises there are an equal number of arguments against their use. It may be argued that if COLA raises are relevant to the salaries of government officials, that cost of living adjustments may also be relevant to the level of taxes imposed upon the citizenry. As such, governments would be ill advised to allow COLA raises for salary increases because they may then have to alter various taxing schemes to correlate with the level of increase in the cost of living. The issue of addressing one aspect of the county function based on the increased cost of living, and not another may be of great political importance to county governments. Yet, if a county decides to implement, within constitutional limits, a COLA type raise for salaries of elected officials, and neglects to alter its taxing scheme in relation to an increase in the cost of living, there appears to be nothing in the Wyoming Constitution that prohibits counties from taking such action. The political risks of addressing salaries based on an increase in the cost of living, yet neglecting to do so for various tax purposes is a political issue that should be addressed by any local government planning to use COLA type raise. It may also be argued that COLA type raises are not needed in a time, such as the present, when rates of inflation are low. Two responses may satisfy this concern. First, if inflation is low, then the resulting cost of living increase in salaries will be correspondingly low and no real harm will result. Second, times may change, the relatively stable times of today may, by some unforeseen event drastically increase the cost of living, and if a COLA type system is in place it could deal with this increase. A final argument questioning the prudence of COLA raises is, what occurs if the cost of living decreases? For purposes of this note it is assumed that if salaries can be increased, in a constitutional COLA formula, then the converse is also true, if the cost of living decreases, so may salaries. Having said this, it should be noted that any decrease in salaries based on a decrease in cost of living would not be allowed to go below the statutory amount set in Wyoming Statute §18-3-107. Also, the decrease in cost of living, like an increase, would be based on an independent factor, such as the Consumer Price Index. The change would be relative to the overall change in consumer prices in the region and as such, an official with a decreased salary would hold the same buying power as if the cost of living had increased or stayed the same. However, it seems there is no constitutional requirement which would force counties to use COLA raise concepts to decrease salaries. It appears that counties could avoid this political pitfall by allowing COLA data solely for salary increases.

achieve and maintain the various fiscal goals of the particular county. Also, if the State were to reassert its authority under Article 14, Section 3 of the Wyoming Constitution to allocate salaries for local governments it should be able to do so, within constitutional limits, that will allow the state to fairly and adequately allocate salaries of local elected officials.

Stepped Increases

One method for allowing in-term salary adjustments may be to use pre-set stepped salary increments. Prior to the election of county officials, county boards could set a rate or amount, within the limits of Wyoming Statute section 18-3-107(a)(d), that would increase officials' salaries each year in office.⁶⁷ For example, in the first year, salaries could be set at eighteen thousand dollars. The next year they would increase to twenty thousand dollars, the year after to twenty-three thousand dollars, and so on for the full four year cycle.⁶⁸ According to Wyoming Attorney General Opinion No. 78-12,⁶⁹ such a system would not violate Article 3, Section 32 and "boards of county commissioners are entitled to set salaries for elected officials . . . using incremental increases rather than setting one specific amount. . . ."⁷⁰ This stepped salary method may be a constitutionally permissible and helpful tool for county boards to allocate salaries responsibly and fairly.

Another option for implementing a stepped salary approach may be to have the Wyoming Legislature implement and run the stepped salary program for all of the counties within the state. Although this may appear to encroach on the powers of the county governments, the ability of county governments to allocate salaries is merely statutory, not constitutional.⁷¹ Such a proposal may aid counties in their ability to fairly allocate salaries.

Regardless of which government entity implements such a system, it is likely to create controversy. However, in looking at the Attorney General's Opinion, and the safeguards used in implementing such a process, it appears likely that a stepped salary approach may be constitutional. By setting the percentage increase in salaries before an official is elected, the salary is thereby unaltered after an official takes office because all scheduled changes are made before the election.⁷² If the increase in salary is set before

67. 78-12 Op. Wyo. Att'y Gen. 143 (1978).

68. *Id.* at 144.

69. See generally *Demos v. Board of County Commissioners of Natrona County*, 571 P.2d 980 (Wyo. 1977) (holding that the Court will give weight to an attorney general opinion. But see *In Re Sanders Appeal*, 341 P.2d 85 (Wyo. 1959) (holding that respect for an attorney general opinion is based upon the presumption that the lack of legislative change after the attorney general opinion indicates acquiescence on the part of the legislature). Thus, an argument may be made in favor of the use and implementation of Attorney General opinion 78-12, because since its publication in 1978 the legislature has done nothing for or against it.

70. 78-12 Op. Wyo. Att'y Gen. 143, 145 (1978).

71. See WYO. STAT. ANN. § 18-3-107 (LEXIS 1999), which allows county boards to set salaries.

72. WYO. CONST. art. III, § 32. states that "no law shall extend the term of any public officer or

the official takes office, it may be argued that the official's salary was not altered during his or her term of office because the actual amount of the salary increase, and knowledge of such increase, were made before the official took office. Also, as stated in the Attorney General Opinion, a stepped increase would not violate Article 3, Section 32.⁷³ By setting the percentage of changes in salary before an official takes office, the stepped system avoids the problem of discretion associated with those increases used by the Platte County Board, in that officials know what they will be paid before taking office and such a scheme is unlikely to alter officials behavior in hope or fear of an alteration in salary.

Montana's Independent Gauge Approach

To assist counties where future funding is unavailable or unknown, the Wyoming Legislature could create and adopt a resolution similar to Montana Statute section 7-4-2504(1).⁷⁴ The 1889 Montana Constitution contained a provision⁷⁵ that is identical to Wyoming Constitution Article 3, Section 32 which prohibits the increase or decrease of salary during a public official's term of office.⁷⁶ The Montana Supreme Court interpreted Article 5, Section 31 of the Montana Constitution in a manner similar to the Wyoming Supreme Court's interpretation of Article 3, Section 32.⁷⁷

However, in 1972 the Montana Constitution was amended to remove the restrictions of Article 5, Section 31, and the legislature then adopted a statute allowing for COLA increases.⁷⁸ In *Brown*, the Montana Supreme Court referred to the Article 5, Section 31 prohibition on in-term salary adjustments and stated that: "Montana has since abandoned such an arbitrary approach. The legislature and the electorate have removed certain restric-

increase or diminish his salary or emolument after his election or appointment." *Nickerson v. Winslow*, 138 P. 184 (Wyo. 1914), held that a statute setting assessed valuation that was in place at the time of the 1912 election was determinative for setting salaries and the statute that was set after the election, prior to the official taking office, was unconstitutional.

73. 78-12 Op. Wyo. Att'y. Gen 143 (1978).

74. MONT. CODE ANN. § 7-4-2504(1)(1999). Although this statute requires a yearly fixing of salaries, the method it sets forth to determine cost of living increases could be used by Wyoming counties with the current four year increments set by Wyoming Statute §18-3-107(a).

75. MONT. CONST. art. 5, § 3.

76. WYO. CONST. art. 3, § 32, states that "Except as otherwise provided in this constitution, no law shall extend the term of any public officer or increase or diminish his salary or emolument after his election or appointment. . . ."

77. See *State ex. rel. Jackson v. Porter*, 188 P. 375, 376 (Mont. 1920) (holding that the purpose of Article 5, Section 31 was to prevent the temptation of public officers that may result in offensive conduct that lures officials with the reward or fear of punishment). See also *Adami v. County of Lewis and Clark*, 138 P.2d 969, 970 (Mont. 1943) (denying across the board raises as applied to officers elected or appointed); *Sabbat v. Montana*, 484 P.2d 278, 280 (Mont. 1971) (holding that officials elected before the 1969 formal salary law could not receive increases in salary because such raises for officials in their position would violate Article 5, Section 31).

78. See *Brown v. Board of County Commissioners of Gallatin County*, 529 P.2d 358, 359 (Mont. 1974). See also MONT. CODE ANN. § 7-4-2504(1) (1999).

tions to allow salaries of officers to be responsive to changes in the amount of work required in their office."⁷⁹

If the Montana approach is utilized as a framework to create a COLA type raise that complies with Article 3, Section 32 of the Wyoming Constitution, it must be remembered that the Montana Constitution no longer contains any constitutional provision prohibiting in-term salary increases.⁸⁰ However, the difference between the two constitutions does not mean that borrowing from the Montana statute would automatically violate the Wyoming Constitution. Restrictions contained in the Montana approach would prevent the problems associated with giving salary increases to elected government officials and may be permissible.

The relevant portion of the Montana statute states that:

The county governing body shall by resolution on or before August 1, of each year adjust and uniformly fix the salaries of the county treasurer, county clerk, county assessor, county school superintendent, county sheriff, county clerk of the court, county auditor and county surveyor. The salaries fixed may be no less than 80% of the annual base salary provided for in 7-4-2503(1) plus a cost of living increment based on a percentage of up to 100% of the previous calendar year's consumer price index for all urban consumers, U.S. Department of Labor, Bureau of Labor Statistics, or other index that the bureau of business and economic research and the University of Montana at Missoula may in the future recognize as the successor index.⁸¹

If a statute were adopted by the Wyoming Legislature to aid local governments in allocating equitable salaries, it should, in pertinent part, contain the following: In order to maintain the purchasing power for all county officials, the county board may provide "a cost of living increment based on a percentage of up to one hundred percent of the previous calendar year's consumer price index for all urban consumers, U.S. Department of Labor, Bureau of Labor Statistics"⁸² for all county officials equally, which shall not allow salaries to exceed the statutory amount set in Wyoming Statute section 18-3-107(a). The Consumer Price Index (CPI) series that should be utilized for Wyoming is the CPI-U, for the west region, with an index base period of 1982-84=100, and should use the change in CPI from the annual average of the current year to annual average of the prior year to determine

79. *Brown*, 529 P.2d at 360.

80. *Id.*

81. MONT. CODE ANN. § 7-4-2504(1) (1999). See also MONT. CODE ANN. § 7-4-2503(3)(c) (1999), which provides for the same cost of living increment for county attorneys.

82. MONT. CODE ANN. § 7-4-2504 (1) (1999).

the percentage change in the CPI.⁸³ Tying raises to an independent index and granting them equally to all county officials removes discretion over who will receive a raise and in what amount. Removal of such discretion reduces the chance of political officials altering their behavior in hopes of or in fear of having their salaries unduly altered. Fears may also be alleviated by the fact that modified salaries may not go above or below the statutory range set in Wyoming Statute section 18-3-107. Using the independent Consumer Price Index formula of the Montana approach will prevent the greatly feared political evils of unmerited increases and decreases in salary.⁸⁴

Another possible method of increasing salaries based on an independently established cost of living index would be to use the same method as described above, yet replace the action by the state legislature with action by county boards under their authority to set salaries.⁸⁵ Regardless of which group initiates this type of salary increase, if it is based on an independent cost of living index and it is granted to all officials equally, it will serve to remove much of the feared discretion which led the court in *Yeadon* to strike down the COLA plan used by Platte County.

Federal Plan

Another possible method for allowing county governments to increase salaries in line with an increase in the cost of living would be to borrow an idea from the federal government⁸⁶ that uses annual adjustments in pay schedules.⁸⁷ The federal system employs a complex plan that bases the salary increase on the difference (equal to one half of one percentage point,

83. The CPI-U is the CPI for all Urban Consumers and represents nearly eighty-seven percent of the total U.S. population. It is based on the expenditures of all families living in urban areas, whereas the CPI-W for Urban Earners and Clerical Workers only represents about thirty-two percent of the U.S. population. BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEXES, "How to Use the Consumer Price Index for Escalation" (1998) <<http://stats.bls.gov/cpi1998d.htm>>.

84. The Wyoming Supreme Court denotes the evils associated with violating Article 3 Section 32 of the Wyoming Constitution. See generally *Board of Commissioners v. Burns*, 29 P. 894 (Wyo. 1892); *Henderson v. Burdick*, 33 P. 125 (Wyo. 1894); and *Board of County Commissioners v. Yeadon*, 971 P.2d 129 (Wyo. 1998).

85. WYO. STAT. ANN § 18-3-107(a) (LEXIS 1999) gives county boards the authority to set salaries every four years.

86. It should be noted that the federal constitution does not place the same salary restrictions on inter-term salary adjustments that the Wyoming Constitution does. Federal restrictions mainly apply to Congress and are dealt with in the U.S. CONST. amend. XXVII Amendment. However, the federal plan still may serve as a useful reference.

87. See 5 U.S.C. §5303 (1999), which in pertinent part reads: "Effective as of the first day of the first applicable pay period beginning on or after January 1 of each calendar year, the rates of basic pay for each statutory pay system shall be increased by the percentage (rounded to the nearest one-tenth of one percent) equal to one half of one percentage point less than the percentage by which the ECI for the base quarter of the year before the preceding calendar year exceeds the ECI for the base quarter of the second year before the preceding calendar year at all." See also 5 U.S.C. §5302 (1999), which defines ECI as the Employment Cost Index (wages, and salaries, private industry workers) published quarterly by the Bureau of Labor Statistics.

rounded to the nearest one-tenth percent⁸⁸) between the Employment Cost Index from the previous year and the year prior to that.⁸⁹

To avoid the discretion feared in *Yeadon*, the Wyoming legislature should implement a statute whereby county boards would be able to each year, after the base salary was set via the procedures in Wyoming Statute section 18-3-107(a)(1), adjust the pay schedules of all county officials based on the difference of the Employment Cost Index, or some other independent index, from the past year and the year prior to that. This system could be implemented by having the county boards set salaries every four years under Wyoming Statute section 18-3-107. Under the new legislation the county board would be able to subtract the index reading of two years prior from the immediate previous year to get the amount by which the county could increase wages. Basing salary increases on an independent index and a mathematical formula, when granted to all officials equally, removes the discretion feared in *Yeadon*.⁹⁰

In reviewing each of these alternatives a number of issues must be addressed to show the non corrupting nature of these alternatives. First, none of the alternatives presented will allow salaries to go above or below the salary range set in Wyoming Statute section 18-3-107. Second, raises in general are tied to an independent index which will remove discretion in determining the amount. Last, democratically elected officials will have to implement these proposals. So even if these alternatives are constitutional, it is ultimately up to the people through their elected officials to determine whether or not to try to implement these or any other COLA type raises. Although these various types of salary proposals have not been addressed by the Wyoming Supreme Court, the fears and constitutional provisions addressed in *Yeadon* are not as prominent or even present in these proposals. Thus, if implemented in good faith, local governments may be able to use these types of alternatives in an effort to allocate salaries responsibly and equitably.

88. 5 U.S.C. §5303 (1999).

89. *Id.*

90. In support of the notion that the various proposed alternatives may be constitutional, a number of Wyoming Supreme Court cases, as stated earlier in the note which allowed in-term salary increases in one form or another, may be used. See *Davis v. Board of County Commissioners*, 35 P. 467 (Wyo. 1894). Allowing a post election determination of facts existing at the time of election to change the justice of the peace's method of receiving pay after the justice had taken office. In reaching this decision the court was heavily influenced by the manner in which the county board conducted the post election inquiry, stating that "it is clear the board acted honestly, with authority derived from the statute, and with sufficient knowledge to determine this matter." *Id.* at 469. See also *Ballangee v. Board of County Commissioners*, 212 P.2d 71 (Wyo. 1949) (holding that Article 3, Section 32 applied to the office and not the officer, allowing an appointee of a vacated position to receive a salary increase which the incumbent could not have). See also *County Court Judges Association v. Sidi*, 752 P.2d 96 (Wyo. 1988) (holding that Article 3, Section 32 only applied to elected public officers, and that county court judges were not elected public officers, and therefore not subject to the prohibitions in Article 3, Section 32). The court also noted that Article 3, Section 32 did not apply to the directors of various executive agencies. *Id.*

CONCLUSION

Based on precedent, the court's decision in *Yeadon* is correct. However, in the aftermath of *Yeadon* local governments may be left wondering what options, if any, are available to allow them to allocate salaries that maintain the purchasing power of all county officials. Problems and fears associated with having in-term salary increases are real. Political corruption, manipulation, and fear placed upon individual office holders are issues that need to be addressed. Yet, several alternatives may be used that would avoid these problems. Preset stepped salary increases set the amount of an increase before an official takes office and because the salary increase is determined before the election, before an official takes office, it does not seem to conflict with Article 3, Section 32's prohibition of or against in-term salary adjustments. As for the Montana and federal approaches, salaries would be increased based on an independent index that would eliminate any control over such raises that an official may have. Thus, the fear of reprisals or hope of improper benefits will be removed.

Although the Wyoming Supreme Court has not determined the validity of the proposals listed in this note, they still may serve as useful, and perhaps a constitutionally permissible method of allocating equitable salaries. Having said this, it must be noted that it is quite possible that each one of the proposals in one way or another may be viewed as impacting salaries after an official's election. It may appear that the only way to be absolutely sure that a cost of living salary increase will be constitutional is to amend the Wyoming Constitution. However, amending the constitution is a long, arduous, and delicate process that should not be undertaken until various proposals have been attempted by county boards and rejected by the Wyoming Supreme Court.

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