

1294.

APPROVAL, BONDS OF ALBANY CONSOLIDATED SCHOOL DISTRICT,
ATHENS COUNTY—\$77,000.00.

COLUMBUS, OHIO, December 14, 1929.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

1295.

VILLAGE ORDINANCE—CHANGING OFFICERS' COMPENSATION—MUST
BE ENACTED AND EFFECTIVE BEFORE TERMS BEGIN—WHETHER
SUCH ORDINANCES EMERGENCY MEASURES A QUESTION OF FACT.

SYLLABUS:

1. *Whether or not an ordinance of a village increasing or diminishing the salaries of its officers may be passed as an emergency measure depends on the facts in each case.*
2. *An ordinance of a village changing the salaries of its officers must not only be enacted but must go into effect before the term of any officer begins, else it will not be effective to increase or decrease the salary so far as the particular officer is concerned.*

COLUMBUS, OHIO, December 14, 1929.

HON. G. O. MCGONAGLE, *Prosecuting Attorney, McConnelsville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter requesting my opinion with reference to whether or not provision may at this time be made by ordinance of a village council changing the salary for the mayor and marshal of the village, so that the change will affect the salary of the mayor and marshal who were elected at the recent November election and will take office on January 1, 1930.

Inasmuch as you make no mention of a charter for this particular village, I assume, for the purposes of this opinion, that the village is not operating under a charter but under the general law and that, therefore, the general law applying to the increasing or decreasing of village officers' salaries applies. Your attention is directed to the provisions of Section 4219, General Code, with reference to the power of council in villages to fix and change the compensation of the officers of the village. Said Section 4219, General Code, reads as follows:

“Council shall fix the compensation and bonds of all officers, clerks and employes in the village government, except as otherwise provided by law. All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed. Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year.”

In the absence of constitutional or statutory inhibition, the compensation of officers may be changed even during their term of office, but where constitutional or statutory provisions preclude a change in the compensation of an officer either after his election or appointment or during his term of office, such provisions are mandatory and prevent either direct or indirect changes. This principle is supported by the decisions of many courts. In fact, it does not need the citation of authority. *State vs. Raine*, 49 O. S., 580.

The purpose of provisions of law of this kind is to secure as far as possible the independence of each coordinate branch of government and to that end relieve the law-making branch from the importunities of office holders who might seek increased compensation not for the office but for themselves. It also tends to remove from the law-makers the temptation to control the other branches of the government by promises of reward in the form of increased compensation or threats of punishment by way of reduced salary and it is intended not only to protect the public against the evil of letting a public official use his official powers and influence to augment his own salary but as well the equally unjust action of an unfriendly power to cut down an official's salary because he is unpopular with the body whose duty it is to fix the salary. *James vs. Barry*, 138 Ky. 656; *State vs. Porter*, 57 Mont. 343; *Folk vs. St. Louis*, 250 Mo. 116.

In some states constitutional and statutory provisions frequently prohibit a change in the compensation of an officer not only during the term of office but after the election or appointment, and some provisions with reference to the subject even go so far as to provide that no change may be made in an officer's salary within a fixed period before the election of the officer.

It will be noted from the terms of Section 4219, General Code, quoted above, that the inhibition contained therein upon the changing of the compensation of an officer, clerk or employe in a village government is "during the term for which any officer, clerk or employe may have been elected or appointed."

It clearly appears from the terms of the statute that there is no inhibition upon the changing of the salary of officers before their term of office begins and there is no doubt but that, if an effective change may be made at this time in the salaries of the mayor and marshal of the village to which you refer or if that change be made at any time before they take office, the change will affect the compensation which they will receive. The question is whether or not it is now possible for the council of the village to enact legislation changing the salaries of these officers that will become effective before they take office on January 1, 1930. Section 4227-2, General Code, provides in part as follows:

"Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided."

The exceptions spoken of in Section 4227-2, *supra*, are set forth in Section 4227-3, General Code. It is there provided that whenever the law requires the passage of more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of Section 4227-2, General Code, shall not apply except to the first ordinance or measure. Neither shall those provisions apply to ordinances or other measures providing for appropriations for the current expenses of a municipal corporation or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be specially assessed for the cost thereof, as provided by the statutes. Neither shall they apply to emergency ordinances or measures necessary for the immediate preservation of the public peace, health or safety in a municipal corporation. It is provided that such emergency ordinances shall go into immediate effect.

It is clear from the provisions of Section 4227-2 and Section 4227-3, General Code, noted above, that if any ordinance were passed at this time changing the salaries of the mayor and marshal of a village, it would not go into effect until thirty days after its passage unless it be passed as an emergency measure. Thirty days from this time

would be after the term of office of the mayor and marshal had begun, which term is to begin on January 1, 1930.

I know of no case in Ohio where a question such as this has been considered. A very similar question was before the Supreme Court of California in 1917 in the case of *Cline vs. Lewis*, 175 Cal. 315, 165 Pac. 915. In that case, it appeared that the charter of Los Angeles County provided that the compensation of any elective county or township officer should not be increased or diminished during the term for which he was elected nor within ninety days preceding his election, thus making the amount of compensation such an officer was entitled to during his term of office depend on the law in existence on the 91st day preceding his election.

The compensation of county officers was controlled by a board of county supervisors who were authorized to fix the salaries of county officers which must be done, if at all, by an ordinance duly passed by the board.

The Constitution of California provided that all ordinances were subject to referendum upon the filing of a petition for such referendum within thirty days after their passage and that ordinances did not become effective until after the expiration of the time fixed for the filing of referendum petitions. The board of supervisors of Los Angeles County passed an ordinance changing the salary of the sheriff of the county, which ordinance was passed 94 days before a certain election at which a sheriff was elected, and the question arose whether or not the salary of the sheriff then elected was controlled by the ordinance referred to. The court held that it was not. To the same effect is the case of *Harrison vs. Colgan*, 148 Cal. 69, 82 Pac. 674.

Inasmuch as no ordinance could now be passed in the village which you mention changing the salary of the mayor and marshal of the village so as to get into effect before January 1, 1930, I am of the opinion that an ordinance which would be passed at this time changing the salary of the marshal and mayor of the village would not affect the salary of those officers whose terms begin on January 1, 1930, unless the ordinance be passed as an emergency measure.

It will be noted that emergency measures are those necessary for the immediate preservation of the public peace, health or safety in the city or village and that those measures shall go into immediate effect. While considerable discretion is vested in the members of council to determine what is necessary for the immediate preservation of the public peace, health or safety in the corporation, it would be hard to conceive in what way a change in the salary of incoming officials would be necessary for the immediate preservation of the public peace, health or safety of the municipality and I am of the opinion that to make such a measure an emergency measure would ordinarily be an abuse of discretion on the part of council and the courts would not hold it to be such if the question should arise. However, there may exist circumstances under which an ordinance increasing the salaries of village officers might properly be passed as an emergency measure. Whether or not such circumstances do exist is a question of fact in each case.

I am not unmindful of the fact that in the case of *Wise vs. Barberton*, 20 O. C. C. (N. S.) 390, it was held that an ordinance fixing the compensation of council might be passed as an emergency measure. In that case, however, Barberton had automatically advanced from a village to a city and no provision was made by ordinance for any compensation for city council, so that the fixing of a salary for the councilmen was neither an increase or decrease of salary and the court, because of the fact that no salaries had been provided for city officials, agreed with the view of council that an emergency existed. The court said:

"Surely an emergency existed; no salaries had been provided for the city officials, and the men might all refuse to act and the city government be crippled and paralyzed."

A similar situation to that existing at Barberton at that time does not exist in the village about which you inquire as the proposal here is not to fix a salary which had never been fixed before, but to increase the salaries which had theretofore been fixed.

I am, therefore, of the opinion that an ordinance cannot now be enacted by the council of the village about which you inquire increasing the salaries of its mayor and marshal so as to make the increase available to the incoming officials whose term begins on January 1, 1930, unless the ordinance be passed as an emergency measure. Whether or not such an ordinance may be made an emergency measure is a question of fact upon which I, as Attorney General, cannot pass.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1296.

ELECTION—JUDGE OF ELECTIONS, NOT A CANDIDATE, ELECTED TO OFFICE BY VOTERS WRITING HIS NAME ON BALLOTS—VOTES SHOULD BE COUNTED.

SYLLABUS:

Where votes are cast for a person for office who has not been regularly nominated therefor, and who has not sought or aspired to such office, such votes should be counted for such person, even though he is a judge or clerk at the election at which said votes are cast.

COLUMBUS, OHIO, December 14, 1929.

HON. F. H. BUCKINGHAM, *Prosecuting Attorney, Fremont, Ohio.*

DEAR SIR:—I am in receipt of your request for my opinion which reads as follows:

“General Code Section 5092 provides that no person being a candidate for an office to be filled at an election shall serve as clerk or judge of elections in any precinct at such election, and that any person serving as a judge contrary to this section shall be ineligible to any office to which he may be elected.

At an election held this week there was a man in Scott Township, Sandusky County, Ohio, who served as a judge of elections and who was elected to the office of justice of the peace by having the voters write his name in on the ballot.

He has never filed a declaration of candidacy, nor has he ever declared himself to be a candidate for the office, and this move is made by the electors of the township without any solicitation on his part. The ballots for justice of the peace were also misprinted in that they were marked ‘vote for not more than one candidate’ and they should have been marked ‘vote for not more than two’. It seems that no names appeared upon the ballots and all names were written in by the electors.

These people have been in my office inquiring whether in view of this misprinted ballot the man who is elected and served as judge of elections shall be allowed to qualify.”

Section 5092, General Code, to which you refer, reads as follows:

“No person, being a candidate for an office to be filled at an election, other than for committeeman (committeeman) or delegate or alternate to