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WHERE CITY COUNCIL PRESCRIBES SALARY OF CLERK OF MUNICIPAL COURT, MAYOR OF CITY CANNOT VETO ORDINANCE REGARDLESS OF HIS VETO POWER—§§1901.31, 731.27, R.C.

SYLLABUS:

Where pursuant to division (C) of Section 1901.31, Revised Code, the council of a city has, by ordinance, prescribed the salary of the clerk of the municipal court, the mayor of the city is without authority to veto the ordinance, regardless of the fact that under Section 731.27, Revised Code, or under the city charter, the mayor is given veto power over ordinances.

Columbus, Ohio, July 27, 1961

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"I request your opinion with respect to the following matter:

"The charter of the City of Lakewood has a provision that is usually found in charters to the following effect:

"That ordinances passed by the City Council must be presented to the mayor and if the mayor signs the same within ten days it becomes law, or if he does not veto it during that period of time, it becomes law.

"The City Council or legislative authority of the City of Lakewood passed an ordinance setting the salary of the Clerk of Courts at $8500.00 per annum; the mayor vetoed said ordinance, as per his authority under the aforementioned charter provision.

"Revised Code 1901.31, section C, provides in part as follows:

"That in Municipal Courts confined to territories of less than 100,000 population, the salary of the Clerk shall be as prescribed by the legislative authority.

"The City of Lakewood does have a population of less than 100,000.

"Specifically I request your opinion as to whether or not under Revised Code 1901.31, section C, the legislative authority

has the right to prescribe the Clerk's salary for a court in a territory having a population of less than 100,000 people without regard to the right of the mayor to veto said ordinance by authority of a provision in the charter giving the mayor the right of veto.

"I enclose herewith a communication from Judge Hazelwood which further sets forth the specific problem."

I also have on hand the text of the charter of the City of Lakewood, a copy of the ordinance involved, and also a copy of the letter of the mayor of Lakewood to the council with his objections to said ordinance.

Section 1901.31, Revised Code, provides in pertinent part:

"The clerk * * * of a municipal court shall be selected, compensated, give bond, and have powers and duties as follows:

"* * * * * * * * *

"(2) If the population of the territory is less than one hundred thousand, the clerk *shall be appointed by the court,* and said clerk shall hold office until his successor is appointed and qualified, * * *.

"* * * * * * * * *

"(C) In territories having a population of less than one hundred thousand, *the clerk of a municipal court shall receive such annual compensation as the legislative authority prescribes;* * * *. Such compensation is payable in semimonthly installments from the same sources and in the same manner as provided in section 1901.11 of the Revised Code.

"The clerk's compensation *shall not exceed that of the clerk of courts of the county in which the municipal court is located.*

"(D) Before entering upon the duties of his office, the clerk of a municipal court shall give bond of not less than six thousand dollars *to be determined by the judges of the court* conditioned upon the faithful performance of his duties as clerk.

"* * * * * * * * *"

(Emphasis added)

Accordingly, the clerk of the municipal court here considered is appointed by the court, serves at the pleasure of such court, and receives such annual compensation as the legislative authority prescribes. The answer to your question thus appears to depend on whether the mayor is a part of the legislative authority within the purview of Section 1901.31, *supra.*

At the outset, it will be noted that the statute in question, Section 1901.31, *supra,* since it deals with courts, takes precedence over the

"home rule" powers of the municipal corporation; and a municipal corporation is without authority to create a court or to pass legislation affecting a court. In this regard the first headnote of the case of *Underwood et al., v. Civil Service Commission,* 61 Ohio App., 129, reads:

> "A conflicting municipal ordinance or municipal charter provision, notwithstanding the 'home rule' provision of Article XVIII of the Constitution, cannot stand as against the act of the Legislature, passed under its special power to pass laws creating courts inferior to the Court of Appeals reserved by Article IV of the Constitution."

Also see *State, ex rel. v. Hoffman,* 68 Ohio App., 171; *Ellis v. Urner,* 125 Ohio St., 246; *State, ex rel. v. Huntspiller,* 112 Ohio St., 468.

Section 1 of Article III of the Charter of the city of Lakewood provides:

> "The legislative powers of the city, except as limited by this charter shall be vested in a council consisting of seven members, one of whom shall be a resident of and elected from each of the four wards in the city and three shall be elected at large. * * *"

Under this definition, the mayor is not a part of the legislative authority unless the charter provision giving him veto power (noted in your letter) should be read to make him a part.

I noted that the charter provision as to the legislative authority is similar to the statutory provision for the legislative authority of a city, which statutory provision applies where the city has not adopted a charter, in that the mayor is not mentioned in either provision. The statute, Section 731.01, Revised Code, reads:

> "The legislative power of each city shall be vested in, and exercised by a legislative authority, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by electors of the city at large. For the first twenty thousand inhabitants in any city, in addition to the original five thousand, there shall be two additional members of such legislative authority, elected by wards, and for every fifteen thousand inhabitants thereafter there shall be one additional member similarly elected. The total number of members of such legislative authority shall not exceed thirty-two. When the total number of members is fifteen or more, one of every five members shall be elected at large, and the remainder from wards."

Also, the statutory veto power of a mayor of a city, Section 731.27, Revised Code, is similar to the charter veto power, said section reading in part:

> "Every ordinance or resolution of a legislative authority of a city shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves such ordinance or resolution, shall sign and return it forthwith to the legislative authority. If he does not approve it, he shall, within ten days after its passage or adoption, return it, with his objections, to the legislative authority, or, if it not in session, to the next regular meeting thereof, which objections shall be entered upon its journal. * * *"

While I have been unable to find any specific definition of "legislative authority" which would indicate whether the mayor should be considered a part of the legislative authority, the case of *Payne v. State, ex rel.,* 32 Ohio App., 189, appears to be of help in the question. That case concerned an amendment to a city charter. The city council had passed an ordinance to place the amendment on the ballot but the mayor vetoed the ordinance. The question was whether the mayor had the power to veto the ordinance. On this point, the court stated, at pages 191 and 192:

> "The sole question presented to this court is whether or not the mayor of the city of Toledo has the power to veto the ordinance in question, and whether his approval was necessary to make it valid. There is no question that the charter of the city of Toledo, which became effective January 1, 1916, requires the ordinances passed by the council to be submitted to the mayor for approval, and gives him the veto power. We think it is obvious, however, that the city charter cannot enlarge the provisions of the Constitution of Ohio with reference to an amendment to such charter, and that the matter is fully covered by that part of Section 9 of Article XVIII of the Constitution of Ohio which reads as follows:
>
> " 'Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof.'
>
> "The contention of the plaintiff in error is that the words, 'legislative authority,' include not only the exercise of legislative power by the municipal council, but the approval or rejection of the ordinance by the mayor. The contention cannot be sustained, and such a construction would be a strained one. By the plain terms of the Constitution the council may submit to the electors of a municipality an amendment to the charter by the vote of two-thirds or more of its members, and when the council takes such action

the electors of the municipality have the right to determine the question, and the approval of the mayor is not required; nor can the mayor take that right away by an exercise of the veto power."

The reference in Section 9 of Article XVIII, Ohio Constitution interpreted in *Payne v. State, supra,* to the "legislative authority" is similar to that of Section 1901.31, *supra,* here concerned. While that case dealt with a constitutional provision, I believe that the reasoning may be applied to the instant question since the statute here concerned does take precedence over the home-rule power of the city. In the *Payne* case, the court held that the city charter could not enlarge the provisions of the Ohio Constitution. In the present case, the city charter cannot enlarge the provisions of the statute. And, clearly, the court held in the *Payne* case that the mayor is not a part of the "legislative authority" where that term is used.

Another case which appears somewhat analogous to the present question is *People ex rel. Churchyard v. Board of Councilmen of City of Buffalo,* 20 N.Y.S., 51 (affirmed 135 N.Y., 660). The headnote of that opinion reads:

"Under Act April 27, 1892, (Laws 1892, c. 379,) amending the charter of the city of Buffalo so as to provide that 'commissioners of police shall receive such annual salary as may be fixed by the common council at a joint session thereof,' and that 'said common council shall immediately * * * determine the amount of such salary.' *the mayor cannot veto a resolution so fixing the same,* notwithstanding that Act March 27, 1891, (the revised charter of said city,) provides (section 18) that 'every ordinance and resolution of the common council,' with immaterial exceptions, 'shall be presented to the mayor before it shall be of force,' and that, if he does not approve it, but returns it with his objections to the board of aldermen, that board and the board of councilmen shall pass it by the votes of two thirds of all the members elected before it shall be of force.' ' (Emphasis added)

In view of the foregoing, therefore, I am constrained to conclude that, as to a city, the words "legislative authority" as used in division (C) of Section 1901.31, Revised Code, refer only to the council as provided for in Section 731.01, Revised Code, or provided for by charter; and that the mayor of the city is without authority to participate in the setting of the salary of the clerk of the municipal court.

Specifically answering your question, it is my opinion and you are advised that where pursuant to division (C) of Section 1901.31, Revised

Code, the council of a city has, by ordinance, prescribed the salary of the clerk of the municipal court, the mayor of the city is without authority to veto the ordinance, regardless of the fact that under Section 731.27, Revised Code, or under the city charter, the mayor is given veto power over ordinances.

Respectfully,
MARK MCELROY
Attorney General