

OPINION NO. 79-114**Syllabus:**

1. An ordinance passed by a noncharter city increasing the compensation of the mayor, auditor, and director of law, which has not been enacted as emergency legislation, will not become effective until the expiration of both the ten-day period required by R.C. 731.20 (regarding authorization and recording) and the thirty-day period required by R.C. 731.29 (regarding referendum).
2. In a noncharter city, the date of commencement of the terms of office of the municipal officers is set by statute and may not be altered by the officers' delaying the date of taking the oath of office or the giving of bond.

To: James R. McKenna, Jefferson County Pros. Atty., Steubenville, Ohio
By: William J. Brown, Attorney General, December 31, 1979

I have before me your request for my opinion regarding an ordinance which increases the compensation of three municipal officers of the City of Steubenville. Your questions may be restated as follows:

1. R.C. 731.20 states that no ordinance shall go into effect until ten days after the date of first publication. R.C. 731.29 states that no ordinance shall go into effect until thirty days after being filed with the mayor. Which statute governs the effective date of an ordinance passed on December 18, 1979?

2. If your opinion reflects that the effective date is governed by R.C. 731.29 and not R.C. 731.20, would the officials, all incumbents, be permitted to delay the taking of the oath of office and giving of bond until after the expiration of thirty days, and then take the oath and give bond to qualify for office and receive the higher salary called for in the ordinance?

Your question has arisen because R.C. 731.07 prohibits an officer of a noncharter city from receiving an increase in compensation which becomes effective during the officer's existing term. The ordinance in question increases the compensation for the positions of mayor, auditor, and law director of the City of Steubenville. Clearly, these positions are public offices within the purview of R.C. 713.07. The ordinance was passed on December 18, 1979. Because the City of Steubenville has not adopted a charter, the city is governed by the statutory provisions regarding municipal corporations. The statutes governing the terms of office of the mayor, the auditor, and the law director provide that each term commences on the first of January following the election of the officers. R.C. 733.02; R.C. 733.10; R.C. 733.49, respectively. Your first question, therefore, is whether the ordinance increasing the salary of these officers will be effective on January 1, 1980, so that they may receive the larger amount.

You note that there are two statutes which set forth time periods which must elapse before a municipal ordinance becomes effective. R.C. 731.20, which pertains to the authentication and recording of ordinances, states in pertinent part:

Ordinances of a general nature or providing for improvements shall be published as provided by sections 731.21 and 731.22 of the Revised Code before going into operation. No ordinance shall take effect until the expiration of ten days after the first publication of such notice.

Ordinances fixing the salaries of municipal officers are ordinances of a general nature. See 1960 Op. Att'y Gen. No. 1649, p. 583; 1951 Op. Att'y Gen. No. 654, p. 383. Thus, the ordinance in question must be authenticated and published according to the provisions of R.C. 731.20. Therefore, the ordinance cannot become effective until ten days after the date of the first publication. The effective date of the ordinance, as computed under R.C. 731.20, does not affect the officers' entitlement to the increased compensation, however, because under that statute, the ordinance will be in effect before January 1, 1980.

Application of R.C. 731.29 requires a different result. This statute concerns referendum and states in pertinent part:

Any ordinance or other measure passed by the legislative authority of a municipal corporation shall be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.

R.C. 731.30 sets forth exceptions to the thirty-day requirement, including emergency ordinances. None of those exceptions is relevant to the ordinance you have described. R.C. 731.29 thus requires a thirty-day period before the ordinance in question becomes effective.

R.C. 731.29 provides a means by which the electorate may approve or reject the action of the city council. This is a necessary step in the legislative process and may not be omitted. In describing the importance of the referendum my predecessor, in 1918 Op. Att'y Gen. No. 926, p. 68, 71, explained:

Under the provisions of section 4227-2 G.C. [R.C. 731.29] the people of municipalities have been given the right to have referred to them, for their approval or disapproval, ordinances passed by the council.

They virtually become a part of the law making machinery of the city. The mere fact that the council of a municipality adopts an ordinance is not conclusive upon the question as to whether the principles embodied in the ordinance will become the law of the municipality or not. Council no longer has the final say in the matter as to what principles shall be enacted in law by means of ordinances or resolutions. The people have the right to speak. And until they do speak, either by permitting the ordinance to become effective without any action or by approving the same at the polls by a majority vote, the provisions of the ordinance are held in abeyance. (Emphasis added.)

You suggest that the ordinance might be subject to only one of the statutory provisions discussed above. This, however, is not the case. The two statutes were enacted to serve two different purposes. R.C. 731.20 requires notice to the public of newly enacted ordinances, and R.C. 731.29 requires an opportunity for the public to express their approval or rejection of the ordinance. Application of the statutes is not mutually exclusive. Hence, both time periods must be observed.

A situation identical to the one from which your questions arose was confronted by my predecessor in 1918 Op. Att'y Gen. No. 926, p. 68. There the ordinance increasing the compensation to a municipal officer was passed in December and the referendum period did not expire until January 14. As in the present situation, the officer was to take office on January 1. Although the specific question posed was whether the officer could begin his term at the lower salary and then receive the higher salary after the effective date of the ordinance, the analysis is helpful here. After a thorough discussion of the principle of referendum, my predecessor drew the following conclusion:

It is my opinion that the going into effect of the ordinance can not be anticipated for any purpose whatever, and that the provisions of the old ordinance must be relied upon entirely as to the status of the law until the new ordinance goes into force and effect under the principles of the referendum. . . . The ordinance works no change or effect whatever upon the rights of persons until the thirty-day period has expired. No rights can be predicated upon it; no remedies can be secured from it. If it does not go into effect for a period of thirty days as provided in the statute, then the repealing clause of the ordinance does not go into effect until this period has expired. If the repealing clause is not in effect, then the old ordinance in reference to salary remains in full force and effect until the end of said referendum period. The provisions of both ordinances can not be in force and effect, hence the provisions of the new ordinance are not effective as to salary until the end of the referendum period.

Thus, it is clear that, if the term of the office begins before the ordinance becomes effective, the officer may not receive the higher salary provided by the statute but instead must remain at the lower rate until the expiration of that term.

Your second question is whether the date on which the individuals take office may be delayed until the ordinance becomes effective. You suggest that if the officer delayed taking the oath of office and giving bond, his term would not begin until he performed those acts. R.C. 733.68 requires an officer to take the oath of office before entering upon his duties. R.C. 733.69 also requires that bond be given before the officer begins his duties. Performance of these acts does not, however, fix the commencement of a term of office. As was pointed out above, the date on which the terms of office begin has been set by statute. Where a city has chosen not to adopt a charter, it must accept the statutory limitations on its powers. 1972 Op. Att'y Gen. No. 72-059; 1954 Op. Att'y Gen. No. 4322, p. 498. Thus, the statutory term must govern. As was stated in State ex rel. Cunningham v. Coppeller, 7 Ohio Dec. Rep. 537, 539 (C.P. Noble County 1878):

The fact that a bond was given and an oath of office taken would not

fix the commencement of the term. Otherwise it would be left to the option of every officer to regulate his own term. The term of office may be said to commence only from the time that the right to enter upon its duties begins. . . .

The right to enter upon the duties of the offices herein begins on January 1, 1980, and the officers themselves are powerless to change that date.

In City of Parma Heights v. Schroeder, 26 Ohio Op. 2d 119 (C.P. Cuyahoga County 1963), two city council members resigned during their terms of office. They were appointed to fill the vacancies that their resignations had created. The council members attempted to characterize their appointments as new terms so that they could receive a larger salary that had been enacted during their original terms. The court held that the members could not receive the larger salary since their appointments were merely continuations of their previous terms and stated: "Clearly one cannot do indirectly what he cannot lawfully do directly." Id. at 122.

Based upon the foregoing, I conclude that municipal officers may not change the time of commencement or duration of their terms. Thus, regardless of the date on which the officers in question take the oath of office or give bond, the term for which they serve will begin on January 1, 1980, and the officers may not receive increases in compensation that become effective after that date.

Accordingly, it is my opinion, and you are advised, that:

1. An ordinance passed by a noncharter city increasing the compensation of the mayor, auditor, and director of law, which has not been enacted as emergency legislation, will not become effective until the expiration of both the ten-day period required by R.C. 731.20 (regarding authentication and recording) and the thirty-day period required by R.C. 731.29 (regarding referendum).
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