

OPINION NO. 83-036**Syllabus:**

1. A noncharter city may, by the enactment of an otherwise valid ordinance, grant a pay increase to an elected official of the city to become effective during the official's term of office. (1980 Op. Att'y Gen. No. 80-002 (syllabus, paragraphs two, five, and nine); 1972 Op. Att'y Gen. No. 72-059; 1962 Op. Att'y Gen. No. 3240, p. 671; 1954 Op. Att'y Gen. No. 4322, p. 498; 1925 Op. Att'y Gen. No. 2836, p. 644; 1919 Op. Att'y Gen. No. 647, vol. II, p. 1160; 1918 Op. Att'y Gen. No. 926, vol. I, p. 68; and 1915 Op. Att'y Gen. No. 934, vol. II, p. 2005, overruled to the extent that they are inconsistent with this opinion.)
2. Where a city, in the belief that R.C. 731.07 prohibited the granting of an in-term increase in compensation to a city official, withheld payment of such increased compensation granted to the official by a validly enacted ordinance, the city may now pay the official the compensation to which he has been entitled, but has not yet received.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 22, 1983

I have before me your opinion request concerning in-term salary increases for municipal officers. Your specific questions are as follows:

1. May a non-charter city, by the enactment of an otherwise valid ordinance, grant a pay increase to an elected official of the city to become effective during his term?
2. If the answer to the first question is in the affirmative, if a city withheld payment of increased compensation granted by a validly enacted ordinance in the belief that R.C. 731.07 prohibited the city from making such payment, may the city now pay the official the compensation to which he has been entitled, but has not yet received?

Your first question is whether a noncharter city may, by the enactment of an otherwise valid ordinance, grant an elected official a pay increase to become effective during his term. As you note in your request letter, my predecessor considered related questions in 1979 Op. Att'y Gen. No. 79-114, which states that, "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." Op. No. 79-114 at 2-384. More recently, my predecessor issued 1980 Op. Att'y Gen. No. 80-002, which states in paragraph two of the syllabus: "R.C. 731.07. . . prohibit[s] the in-term commencement of payments to procure medical or life insurance benefits on behalf of municipal officers operating under a statutory plan of government." Op. No. 80-002 reasons that any municipality, regardless of whether it has adopted a charter, may, pursuant to Ohio Const. art. XVIII, §3, exercise all powers of local self-government, including the power to fix the compensation of municipal officers. The opinion, however, notes a difference between the powers of charter and noncharter municipalities as to providing for the form of government, stating at 2-9:

while the power of local self-government may be exercised with or without the adoption of a charter, municipalities may create a form of government which varies from the statutory plan created by the General Assembly pursuant to art. XVIII, §2 only by adoption of a charter. . . . [W]here a municipality has elected, by its failure to adopt a charter, to operate under a statutory form of government, it is subject to the statutory plan of government enacted by the General Assembly.

Thus, Op. No. 80-002 concludes that a city which has not adopted a charter may not vary the statutory form of government. The opinion concludes, further, that, since the General Assembly, acting pursuant to Ohio Const. art. XVIII, §2, has enacted R.C. 731.07, which prohibits the granting of in-term salary increases for municipal officers, a municipality that has not adopted a charter is without authority to pass an ordinance at variance with such statute.

The reasoning of Op. No. 80-002 follows that of many prior opinions. See, e.g., 1972 Op. Att'y Gen. No. 72-059 (payment of hospitalization benefits for official of noncharter municipality pursuant to ordinance adopted after beginning of official's term is prohibited by R.C. 731.07); 1962 Op. Att'y Gen. No. 3240, p. 671 (R.C. 731.07 prohibits noncharter city from increasing salary of member of the civil service commission of a city during his term of office); 1954 Op. Att'y Gen. No. 4322, p. 498 (R.C. 731.07 and R.C. 731.13 limit the authority of the legislative council of a city or village operating under statutory plan of government to fix salaries of municipal officers and employees); 1925 Op. Att'y Gen. No. 2836, p. 644 (suggesting that compensation of deputy city auditor would be subject to prohibition of G.C. 4213 (current version at R.C. 731.07) against in-term change in compensation, except that he serves no term); 1919 Op. Att'y Gen. No. 647, vol. II, p. 1160 (G.C. 4213 (current version at R.C. 731.07) prohibits noncharter city from changing salary of city council clerk during his term of employment); 1918 Op. Att'y Gen. No. 926, vol. I, p. 68 (G.C. 4213 (current version at R.C. 731.07) prevents a city officer from receiving salary increase provided by ordinance which does not become effective until after officer enters upon his duties for term for which he was elected); 1915 Op. Att'y Gen. No. 934, vol. II, p. 2005 (G.C. 4213 (current version at R.C. 731.07) applies to legislative authorities of municipalities in fixing compensation of municipal officers). See also 1964 Op. Att'y Gen. No. 851, p. 2-61 (R.C. 731.13, prohibiting in-term changes in compensation of village officers, limits authority of noncharter village to fix compensation of its officers).

Since the issuance of Op. No. 80-002, however, the Ohio Supreme Court has had occasion to consider the extent of a noncharter municipality's authority to provide by ordinance for the compensation of its employees where such ordinance is at variance with a statute concerning the same subject. In Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980), the court stated that Ohio Const. art. XVIII, §3 is a direct grant of power to all municipalities, whether chartered or nonchartered, to exercise all powers of local self-government. In discussing the power of the General Assembly, under Ohio Const. art. XVIII, §2, to provide for the government of municipalities, the court noted that the General Assembly's power is limited to matters of organization and procedure of government. 61 Ohio St. 2d at 381, 402 N.E.2d at 524. The court then concluded that, since the compensation of municipal employees is a matter of substantive, rather than procedural, local self-government, a noncharter municipality may, pursuant to Ohio Const. art. XVIII, §3, enact an ordinance governing the salary paid to its employees, even though the ordinance may be at variance with a state statute.

A question similar to that discussed in Parma was decided in Village of Bellville v. Beal, No. CA-2062 (Ct. App. Richland County 1982). Bellville concerns a situation in which the village had enacted an ordinance which increased the salaries of the village councilmen during their existing terms. This ordinance was in direct conflict with R.C. 731.13, which states that once the legislative authority of the village has set its officers' salaries, the "compensation so fixed shall not be increased or diminished during the term for which [the officers are] elected or appointed." Based on the decision in Parma, the court in Bellville determined that the compensation of village officers is a matter of substantive local self-government, which the village may govern by ordinance, regardless of conflicting statutory provisions. Thus, because of the provisions of Ohio Const. art. XVIII, §3, although R.C. 731.13 prohibits in-term increases in compensation for¹ village officers, the ordinance authorizing such increases prevails over the statute.

¹ The courts have, however, recognized certain specific exceptions to the Parma doctrine. See, e.g., State ex rel. Evans v. Moore, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1982) (syllabus) (since Ohio's prevailing wage law (R.C. 4115.03

You specifically ask whether a noncharter city may, by passage of an ordinance, grant a municipal officer a pay increase to become effective during his term of office. The situation about which you ask is almost identical to that considered in Bellville. Although Bellville involved the home rule powers of a noncharter village, the principles set forth in that case apply equally to a noncharter city. See Ohio Const. art. XVIII, §3 (conferring powers of local self-government on all municipalities). See also Parma. Therefore, even though R.C. 731.07 prohibits a city from granting in-term increases in compensation to its officers, a city may, pursuant to Ohio Const. art. XVIII, §3 and regardless of whether it has adopted a charter, pass an ordinance which is at variance with R.C. 731.07 and, thereby, grant its officers an in-term increase in compensation. In light of the Parma and Bellville cases, I hereby overrule, to the extent that they are inconsistent with this opinion, 1980 Op. Att'y Gen. No. 80-002 (syllabus, paragraphs two, five, and nine); 1972 Op. Att'y Gen. No. 72-059; 1962 Op. Att'y Gen. No. 3240, p. 671; 1954 Op. Att'y Gen. No. 4322, p. 498; 1925 Op. Att'y Gen. No. 2836, p. 644; 1919 Op. Att'y Gen. No. 647, vol. II, p. 1160; 1918 Op. Att'y Gen. No. 926, vol. I, p. 68; and 1915 Op. Att'y Gen. No. 934, vol. II, p. 2005.

Your second question asks: "if a city withheld payment of increased compensation granted by a validly enacted ordinance in the belief that R.C. 731.07 prohibited the city from making such payment, may the city now pay the official the compensation to which he has been entitled, but has not yet received?" Ohio Const. art. II, §29 states:

No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by pre-existing law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the general assembly.

Thus, retroactive pay increases are, as a general rule, prohibited by the Constitution. The type of pay increase prohibited by Ohio Const. art. II, §29 has, however, been described as, "an increase in salary which is adopted at a particular time and made effective as of an earlier date." 1981 Op. Att'y Gen. No. 81-011 at 2-36. In the situation you describe, the pay raise was, in contrast, adopted at an earlier date and made effective on or after that date. If the city now makes payment of increased amounts pursuant to that enactment, it would not be adopting an increase to go into effect at an earlier date but would, rather, be making payments that were authorized as of that earlier date. Thus, the city would be paying its officers compensation to which they became entitled as of an earlier date, but have not received. It is my judgment that such action would not constitute a retroactive pay increase for purposes of Ohio Const. art. II, §29. I note, however, that even if the action taken by the city in the circumstances you describe were construed as constituting the granting of a retroactive pay increase, Ohio Const. art. II, §29 would not operate to prohibit payment of the increase, since, as my predecessor concluded, Ohio Const. art. II, §29 has no application to cities. See Op. No. 81-011 (syllabus, paragraph one). Since I am not aware of any other provision of state law that would prohibit the city from taking the action you describe, I must conclude that a city which withheld payment of increased compensation granted by a validly enacted ordinance in the belief that R.C. 731.07 prohibited such payment may pay the official the salary to which he has been entitled under that ordinance, but has not yet received.

through 4115.15) "has significant extraterritorial effects, beyond the scope of any municipality's local self-government or police powers, [it] preempts any conflicting local ordinance"; Wray v. City of Urbana, 2 Ohio App. 3d 172, 440 N.E.2d 1382 (Champaign County 1982) (R.C. 4111.03 (part of Ohio's Minimum Fair Wage Standards Act) was enacted in the exercise of the state police power, and, therefore, prevails over a conflicting local ordinance).

It is, therefore, my opinion, and you are advised, that:

1. A noncharter city may, by the enactment of an otherwise valid ordinance, grant a pay increase to an elected official of the city to become effective during the official's term of office. (1980 Op. Att'y Gen. No. 80-002 (syllabus, paragraphs two, five, and nine); 1972 Op. Att'y Gen. No. 72-059; 1962 Op. Att'y Gen. No. 3240, p. 671; 1954 Op. Att'y Gen. No. 4322, p. 498; 1925 Op. Att'y Gen. No. 2836, p. 644; 1919 Op. Att'y Gen. No. 647, vol. II, p. 1160; 1918 Op. Att'y Gen. No. 926, vol. I, p. 68; and 1915 Op. Att'y Gen. No. 934, vol. II, p. 2005, overruled to the extent that they are inconsistent with this opinion.)
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