

Note from the Attorney General's Office:

1973 Op. Att'y Gen. No. 73-063 was modified by
1981 Op. Att'y Gen. No. 81-011.

OPINION NO. 73-063

Syllabus:

The legislative authority of a municipality whose charter empowers it to fix the compensation of employees of the municipality, whether elected or appointed, may grant retroactive salary increases to the mayor and to the councilmen. (Opinion No. 65-123, Opinions of the Attorney General for 1965, and Opinion No. 780, Opinions of the Attorney General for 1964, approved and followed.)

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: William J. Brown, Attorney General, June 27, 1973

I have before me your request for my opinion, which asks whether the Council of the City of Westlake, "a charter municipality having no prohibition against passing retroactive legislation for elected or appointed employees", may adopt legislation providing for a retroactive pay increase for the mayor and councilmen. Relevant charter provisions read as follows:

Article I (Powers of the Municipality)

Section 1. Powers: The municipality of Westlake shall have all powers of local self-government and municipal home-rule now or hereafter granted to municipalities by the constitution and laws of Ohio.

Section 2. Manner of Exercise: All such powers shall be exercised in the manner prescribed by this Charter or by ordinance of the Council created hereby. The powers of the Municipality may also be exercised, except as a contrary intent or implication appears in this Charter or in the ordinances of the Council, in such manner as may now or may hereafter be provided by the general laws of Ohio.

Article II: (The Mayor)

Section 4: Term of Office: The Mayor shall be elected for a term of four years, to commence the first day of January after his election, with a minimum salary of twelve thousand dollars (\$12,000) per year commencing January 1, 1966.

Article III: (The Council)

Section 3. Duties of Council:

(a) General Duties. All legislative powers of the Municipality, except as limited by this Charter, shall be vested in the Council, and in furtherance thereof it shall originate, introduce and pass ordinances and adopt resolutions; fix the salaries of all employees of the Municipality whether elected or appointed; require and fix bond * * * and perform such other duties and exercise such other rights, not inconsistent with this Charter, as now or hereafter granted to the legislative authority of any municipality of Ohio.

You state that my opinion is requested because of a Notice of Findings made by the State Examiner, against the mayor and councilman, for funds paid to them pursuant to the retroactive ordinances. The Examiner cited in support of his findings, Opinion No. 65-123, Opinions of the Attorney General for 1965. The Director of Law of the City of Westlake, in opposing the findings, cited Opinion No. 780, Opinions of the Attorney General for 1964, and State ex rel. Loux v. Lakewood, 120 Ohio App. 415, 193 N.E.2d 710 (1963), appeal dismissed 176 Ohio St. 154 (1964). Upon the suggestion of the Auditor of State, you have submitted the question to this office.

The syllabus of Opinion No. 65-123, supra, reads as follows:

A non-charter municipality may pass retroactive legislation to increase the salaries of their employees who are not employed for a specific term but who serve at the pleasure of the appointing authority. (Opinion No. 898, Opinions of the Attorney General for 1964, page 2-100, paragraph 6, of the syllabus overruled)

The reason for the distinction between the two types of employees is that R.C. 731.07 prohibits an increase or decrease in the salary of any officer, clerk, or employee of a city, "during the term for which he was elected or appointed." (See also, R.C. 731.13). My predecessor followed the established construction of this language, holding it applicable only to officers and employees who serve for a fixed term, rather than at the will of the appointing authority.

It must be noted, however, that Opinion No. 65-123, supra, concerned a non-charter municipality. More closely on point for the instant fact situation is Opinion No. 780, supra, which concerned a municipality whose charter empowered its legislative authority to fix the compensation of officers and employees. Such a charter provision supercedes any statutory regulation, such as R.C. 731.07, under the municipal home rule power conferred by

Article XVIII, Sections 3 and 7, Ohio Constitution. As my predecessor wrote, in the third and fourth branches of the Syllabus of Opinion No. 4322, Opinions of the Attorney General for 1954:

3. Statutory provisions fixing the salaries of municipal officers and employes, or prescribing limits within which changes in such salaries may be made, relate to the form or structure of the several statutory plans of municipal government for which the General Assembly has made provision by law as authorized by Section 2, Article XVIII, Ohio Constitution. Immunity from such limiting provisions may be achieved by municipal corporations by the adoption of a charter establishing a form or structure of municipal government at variance with such statutory plans; but such limiting provisions apply to municipal corporations which have elected, by failure to adopt a charter, to operate under a statutory plan of municipal government.

4. Where a city or village charter confers full authority on the municipal council to fix the compensation of the municipal officers and employes such legislative authority may be exercised without regard to the provisions of Sections 731.07 and 731.13, Revised Code; but such statutory provisions are controlling in the case of the council of a city or village which operates under a statutory plan of municipal government.

Opinion No. 780, supra, holds as follows:

A municipal corporation under authority of the "home rule" amendment (Section 7, Article XVIII, Constitution of Ohio) and acting pursuant to its charter, may enact legislation to operate retroactively to increase the compensation of employees of the municipal corporation.

My predecessor had little trouble in holding R.C. 731.07 inapplicable, because of the charter provision which empowered the city council to fix the salary or compensation of each officer, employee and member of any board or commission of the municipality. He stated as follows:

This charter provision is controlling over Section 731.07, Revised Code, because the matter of salaries and compensation is one of local self-government. (See generally State, ex rel. Canada v. Phillips, 168 Ohio St. 191 (1958); City of Mansfield v. Endly, 38 Ohio App. 528 (1931).

My predecessor did advise that the mayor's salary could not be raised, but that was due to a charter prohibition against changing the compensation of elected municipal officials during their terms of office.

The case of State, ex rel. Loux v. Lakewood, supra, held that, when the municipal charter empowers the legislative

authority to fix the salaries of the members of council, it can increase the compensation of such officials during their terms of office. The court states, at 120 Ohio App. 421:

That the increase is a matter of purely local concern, regular in all respects and free from control by the General Assembly. The ultimate control as to the wisdom of such a move is reposed in the local electorate.

It may be noted that both Opinion No. 65-123 and Opinion No. 780, supra, approved retroactive salary increases. In the latter, my predecessor stated as follows:

In Ohio there is no express prohibition against the passage of retroactive ordinances by a municipal corporation. Section 28, Article II, Constitution of Ohio contains a proscription on the passage of retroactive laws by the General Assembly, but there is no like restraint applicable to municipal corporations. It remains to be determined whether there is any other constitutional or legislative interdiction upon ordinances of this nature.

The subsequent discussion was quoted with approval in Opinion No. 65-123, supra, and, as I see no reason to question it, I quote it again:

Despite some apparent impressions formed to the contrary and even some general judicial expressions, in the absence of some express prohibition retroactive or retrospective laws are not invalid for this reason alone. Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L. Ed. 1528; Sherman v. U.S., 241 F.(2) 329; Ferneau et al v. Unckrich, 45 Ohio App. 531, 533. The validity of a retroactive law is determined by whether or not it is subject to some fundamental or constitutional objection apart from its retroactive character. See generally 16 C.J.S. Constitutional Law, Sec. 415.

In Ohio there is no express prohibition against the passage of retroactive ordinances by a municipal corporation. Section 28, Article II, Constitution of Ohio contains a proscription on the passage of retroactive laws by the General Assembly, but there is no like restraint applicable to municipal corporations. It remains to be determined whether there is any other constitutional or legislative interdiction upon ordinances of this nature.

A frequent reason (although often not precisely stated) for holding retroactive legislation invalid is that it interferes with some vested right and, therefore, con-

stitutes a taking of property without substantive due process of law. * * *

The writer of Opinion No. 780, supra, went on to state that there could be no unconstitutional taking of property, because the ordinance took nothing from the affected employees. While the author of Opinion No. 65-123, supra, did not quote this language, I assume he agreed with it, as it is logically necessary to support his conclusion. Opinion No. 65-123, supra, extended the reasoning of Opinion No. 780, supra, and advised that non-charter as well as charter municipalities may grant retroactive salary increases to their employees.

On the basis of the foregoing, I conclude that the City Council of Westlake, under the charter provisions empowering it to "fix the salaries of all employees of the municipality whether elected or appointed", may grant retroactive salary increases to the mayor and to its own members. The charter provision fixing the mayor's minimum salary does not, of course, affect this conclusion.

In specific answer to your question it is my opinion, and you are so advised, that the legislative authority of a municipality whose charter empowers it to fix the compensation of employees of the municipality, whether elected or appointed, may grant retroactive salary increases to the mayor and to the councilmen. (Opinion No. 65-123, Opinions of the Attorney General for 1965, and Opinion No. 780, Opinions of the Attorney General for 1964, approved and followed.)