OPINION NO. 851

Syllabus:

1. The legislative authority of a non-charter village is required to comply with Section 731.13, Revised Code, in fixing the compensation of elected officials.

2. The legislative authority of a charter village is not required to comply with Section 731.13, Revised Code, in fixing the compensation of elected officials where the charter provides otherwise or can reasonably be construed to include authority for such a departure from the provisions of general law.

To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, February 6, 1964

I have received your request for my opinion in answer to the following questions:

> "1. Is the legislative authority of a village, operated under the statutory plan of village government, required, under R.C. 731.13, to fix the compensation of a village clerk and members of the village board of public affairs, for an ensuing term of office: at a meeting held not later than five days prior to the last date fixed by law for filing as a candidate for the office in question?
>
> "2. If your answer to question No. 1 is in the affirmative, does the same rule apply to a village operating under a charter, which contains no express provision with reference to the establishment of compensation for elective offices?
>
> "3. If your answer to question No. 1 is in the affirmative, does R.C. 731.13 govern procedures which must be followed by the legislative authority of a charter village; where the charter establishes procedures for fixing the compensation of village officers, which are in conflict with the provisions of this statute?
>
> "* * * * * * * * *"

As amended in 1957, Section 731.13, Revised Code, provides as follows:

> "The legislative authority of a village shall fix the compensation and bonds of all officers, clerks, and employees of the village except as otherwise provided by law. The legislative authority shall, in the case of elective officers, fix their compensation for the ensuing term of office at a meeting held not later than five days prior to the last day fixed by law for filing as a candidate for such office. 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 employee is elected or appointed."

The answers to your questions depend upon the extent to which the so-called "home rule" provisions of Article XVIII of the Ohio Constitution modify the limiting effect of this section on powers of a village legislative authority.

As to powers of local self-government, Article XVIII of the Ohio Constitution provides:

> "Section 1:
>
> "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.
>
> "Section 2:
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> "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.
>
> "Section 3:
>
> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.
>
> "* * * * * * * * *

"Section 7:

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

"* * * * * * * * *"

The effect of these constitutional provisions on the applicability of Section 731.13, supra, was considered by one of my predecessors in Opinion No. 4322, Opinions of the Attorney General for 1954, page 498, and I am generally in accord with the conclusion he expressed in Syllabus No. 3 of that opinion which reads as follows:

"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."

Because we now have the benefit of several more recent Supreme Court decisions on the subject of "home rule" powers which were not available to my predecessor, however, I deem it appropriate to state the particular reasoning upon which I base my concurrence in the above conclusion.

Early interpretation of the provisions of Article XVIII, supra, appeared to say that all the powers of local self-government were vested in municipal corporations by virtue of Section 3 which was self-executing so that the valid exercise of any of such power was not dependent upon the adoption of a charter as authorized by Section 7, State ex rel. Perrysburg v. Ridgway, 108 Ohio St., 245 (1923). Indeed, the current edition of Ohio Jurisprudence makes the following general statement on the subject:

"A municipality in Ohio has powers of local self-government under the Ohio Constitution whether or not it has adopted a charter. The right of a municipality to exercise 'all powers of local self-government,' as provided in Section 3 of Article 18 of the Constitution, is not in any wise dependent upon the adoption of a home rule charter under the provisions of Section 7 of the same article.* * *(T)he con-

stitutional powers of a non-charter city are exactly the same as those of a charter city. The only difference between the two in this respect is that one operates under a charter and the other does not.

"* * * * * * * * *"

(38 Ohio Jurisprudence 2d. 438, Municipal Corporations, Section 77, footnotes omitted).

Since the fixing of village officials' salaries is rather clearly a matter of purely local concern and therefore well within the scope of "home rule" power (see Opinion No. 4322, supra,) it would appear from the above that either a charter or a non-charter village might ignore the provisions of Section 731.13, supra, and fix such salaries as it saw fit. And, it was in part upon just such an analysis that the Fifth District Court of Appeals early held that a non-charter city had power to fix the amount of city councilmen's pay at a rate which conflicted with a provision of the General Code, City of Mansfield v. Endly, 38 Ohio App., 528 (1931) (affirmed on other grounds, 124 Ohio St., 652). That case, however, relied upon the same type of interpretation of Perrysburg v. Ridgway, supra, as is relied upon to support the above quotation from Ohio Jurisprudence. In light of recent Ohio Supreme Court decisions, I am compelled to conclude that such interpretation of the Perrysburg case is erroneous, at least insofar as it appears to indicate that there is no distinction between the powers of charter and non-charter municipalities to act in conflict with the general law of the state.

In State ex rel. Petit v. Wagner, 170 Ohio St., 297 (1960) the court was considering the propriety of the appointment of a police chief in a non-charter city, under authority of an ordinance which conflicted with provisions of the Revised Code on the subject of such appointments. The question of a non-charter municipality's power to act in a manner contrary to that required by the Revised Code was, therefore, squarely presented to the court. In the opinion Judge Peck discusses the Perrysburg decision, but points out that "there the powers of home rule sought to be exercised were not at variance with the general law" and that a majority of the court either reserved decision as to a case where there was such a variance or dissented from the decision entirely. A number of more recent decisions are then discussed and the following rule from Morris v. Roseman, 162 Ohio St., 447 (1954) is cited with approval:

> "'* * *If a municipality adopts a charter it thereby and thereunder has the power to enact and enforce ordinances relating to local affairs, but, if it does not, its organization and operation are regulated by the statutory provisions covering the subject.'" (State ex rel. Petit v. Wagner, supra, at 302).

The Judge continues with an analysis of the interrelation of Sections 2, 3, and 7 of Article XVIII, supra, and concludes as follows:

> "This court has thus clearly recognized

> the distinction between the powers of charter and non-charter municipalities. Clear evidence of the intention that such a distinction should exist is found in the very fact that the two provisions of the Constitution hereinabove cited were adopted as separate sections; if an identical extent of authority had been intended to have been conferred, a single section would have abundantly sufficed. By these two sections, the Constitution confers upon charter cities and villages some greater degree of power not here required to be defined but limits the general area of non-charter municipal authority.* * *(A) non-charter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution to prescribe less restrictive qualifications for civil-service-examination applicants than are prescribed by statute, since such municipal action would be at variance with the general law." (State ex rel. Petit v. Wagner, supra, at 303).

It is true that Petit v. Wagner speaks as to a case of conflict in civil service provisions, but it is also clear that the reasoning upon which the decision is based would apply as well to a conflict in provisions for fixing municipal officials' salaries. I must therefore conclude, as did my predecessor, that a non-charter village is bound to comply with the provisions of Section 731.13, supra, in fixing the salaries of elective officers since contrary action would be at variance with the general law.

If, as I believe, it is now clear that non-charter municipalities are bound by the provisions of general law, it is also quite clear that charter municipalities are not, except in the case of police and sanitary regulations, at least where conflicting provisions are established by charter or ordinance adopted pursuant to charter power, State ex rel. Canada v. Phillips, 168 Ohio St., 191 (1958); State ex rel. Lynch v. Cleveland, 164 Ohio St., 437 (1956). These cases also involved conflicts in civil service provisions but, as in State ex rel. Petit v. Wagner, supra, the reasoning upon which they are based would apply with equal force to a situation in which there were conflicting provisions for the establishment of compensation of village officers.

You have also asked me about the case of a village operating under a charter which contains no specific provision relating to the establishment of compensation for village officials. Because of the wide variety of charter formulation possible, no single, definitive answer to that question can be given. The answer in each case would depend upon the form and content of the particular charter involved and the specific factual circumstances in which the question arose.

This much, however, can be said. If the charter indicates an intent to be bound by general law, except as otherwise provided, and no applicable exception appears, appropriate sections of the Revised Code, e.g., 731.13, supra, will continue to be controlling. See State ex rel. Flask v. Collins, 148 Ohio St.,

45 (1947). Further, it appears that the provisions of general law remain in force in charter municipalities where there is merely an absence of charter provisions on the subject, Cf., State ex rel. Sun Oil Co. v. Euclid, 164 Ohio St., 265 (1955). On the other hand, it is clear that, as noted above, a charter is controlling which itself differs from the provisions of general law. See State ex rel. Bindas v. Andrish, 165 Ohio St., 441 (1956). And, it also appears that the charter provisions need not be perfectly explicit in order to permit municipal action contrary to general law, Cf., State ex rel. Jackson v. Dayton, 30 Ohio Law Abs., 378 (1939). My predecessor, for instance, was of the opinion that full authority to fix compensation, conferred by charter, would be sufficient to warrant action on that subject without regard to the provisions of general law, Opinion No. 4322, supra, Syllabus No. 4.

Generally speaking, I would agree with that opinion, but it should be stressed again that the proper answer in a border line case can only be determined upon an analysis of the particular facts in light of the specific charter involved. A specific charter provision is not required to avoid the applicability of general law requirements; yet there must be some reasonable basis in the provisions of the charter itself for the power to disregard such requirements. Under the circumstances described in your second question, no more definite statement is possible.

In summary, therefore, it is my opinion and you are advised that:

1. The legislative authority of a non-charter village is required to comply with Section 731.13, Revised Code, in fixing the compensation of elected officials.

2. The legislative authority of a charter village is not required to comply with Section 731.13, Revised Code, in fixing the compensation of elected officials where the charter provides otherwise or can reasonably be construed to include authority for such a departure from the provisions of general law.