

the estimate of cost, a letter to the Auditor of State showing the proper documents to be on file in said office, the notice to bidders, the proof of publication, the tabulation of bids, the contract bond, signed by the New York Casualty Company and properly countersigned by an agent in the State of Ohio, a power of attorney for the signer, a certificate of the Secretary of State showing that W. E. Caldwell Company has qualified as a foreign corporation, the certificate of premium payment of the contractor to the Industrial Commission of Ohio, and the Controlling Board release of \$6,000.00.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all pertinent papers submitted in this connection.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1330.

PRESIDENT OF CITY COUNCIL MAY VOTE FOR SALARY
OF FIREMEN AND POLICEMEN—MANDAMUS WILL NOT
LIE.

SYLLABUS:

1. *The president of a city council has authority under Section 4272, General Code, to cast the deciding vote in the case of a tie upon a measure designated as an ordinance to increase the salaries of the regular policemen and regular firemen of such city.*

2. *Under such circumstances, the president of council may not be compelled by mandamus or otherwise to cast the deciding vote should he desire not to do so.*

COLUMBUS, OHIO, October 20, 1937.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: Your letter of recent date is as follows:

“We are inclosing herewith letter received from the City Solicitor of the City of Sidney, Ohio, and salary ordinance passed by the council of that city.

The Solicitor’s letter presents a certain statement of fact, and asks the following questions:

Question 1. Under the above state of facts and under Section 4272 of the General Code, must the president of the council cast the deciding vote? Or is it the place of the president of the council to cast his vote, if he so desires? Does he have to vote if he doesn't want to?

Question 2. I call your attention to *Webker vs. Hopkins*, 29 O. App. 386, and ask if this piece of legislation enclosed herewith, although entitled 'ordinance', might be classed as a resolution, and in that event, would the president of the council have to cast the deciding vote or can he refrain from voting, or refuse to vote?

Question 3. I am unable to find any citations or cases, or opinions, under Section 4272 of the General Code as to just when and under what conditions the president of the council may, shall or refuse to cast his vote in case of a tie. Do you know of any citations, and if so kindly cite them to me?

Question 4. If you should hold in your opinion under the above statement of facts, the president of council must cast the deciding vote, is there any procedure that could be filed to force him to cast his vote one way or the other under the above statement of facts?

Will you please consider the above and render us your formal opinion, at your convenience?"

The ordinance in question is entitled "An ordinance to increase the salaries of the regular policemen and regular firemen." The letter of the city solicitor states that when such ordinance was given its final reading and placed on passage there were six councilmen present, the vote on the same being three for and three against the passage of the resolution.

Your four questions may be summarized as follows: First, whether or not the president of city council has the power to cast the deciding vote in case of a tie upon a measure designated as "An ordinance to increase the salaries of the regular policemen and regular firemen", and, second, in the event of an affirmative answer to this question, whether or not under such circumstances it is the mandatory duty of the president of council to cast such deciding vote.

Considering these two questions as summarized, it is first necessary to consider the provision of Section 4272, General Code, that the president of city council "shall preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie." The language of such section is, in effect, identical with that of Section 4255, General Code, conferring the same power upon the mayor of a village,

wherein it is said: "He shall be the president of the council, he shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie." The power of the mayor of village council to cast the deciding vote in case of a tie, which, as has just been pointed out, is identical with that of president of city council, was under consideration in the case of *Wuebker vs. Hopkins*, 29 O. App. 386, referred to in the solicitor's letter. The syllabus is as follows:

"1. Where council is required to act by passage of ordinance, majority of council must concur therein, and mayor, in case of tie, cannot cast deciding vote.

2. Under Section 4224, General Code, providing council may act either by ordinance or by resolution, unless statute prescribes one or other method of procedure, adoption of resolution is proper procedure for informal enactment providing for disposition of particular item of business, while passage of ordinance is proper procedure for enactment of regulation of general or permanent nature.

3. Where council was not taking action of general or permanent nature, but was simply making contract for employment of legal counsel, recognized under Section 3809, General Code, as nothing more than contract, only resolution was required, in which case mayor had right to break tie by casting determining vote under Section 4255, regardless whether act of council was called an ordinance.

4. Council has no power by calling resolution an ordinance to divest mayor of authority to break tie by casting determining vote under Section 4255, General Code, that he would have had if measure had been properly denominated."

Under authority of the foregoing case, it must be held that if a city council may act either by ordinance or resolution under the statute in adopting a measure to fix salaries of policemen and firemen, then, regardless of whether or not it may be designated an ordinance, the president of council has statutory power to cast the deciding vote in event of a tie.

It accordingly becomes necessary to consider the provisions of Section 4214, General Code, relating to the powers of a city council. Such section provides in so far as is pertinent as follows:

"Except as otherwise provided in this title, council, by ordinance or resolution, shall determine the number of officers, clerks and employes in each department of the city government,

and shall fix by ordinance or resolution their respective salaries and compensation, and the amount of bond to be given for each officer, clerk or employe in each department of the government, if any be required. * * *.”

There is no question but that in the light of the foregoing section a city council may by statute act either by ordinance or resolution in determining the salaries and compensation of employes in the police department of the city.

It is my opinion, therefore, under authority of the Wuebker case, supra, that the president of a city council has authority under Section 4272, General Code, to cast the deciding vote in the case of a tie upon a measure designated as an ordinance to increase the salaries of the regular policemen and regular firemen of such city.

Coming to the second matter for determination, that of whether or not the president of council under the circumstances set forth by the city solicitor is required to cast the deciding vote or whether he may within his discretion refuse to vote either way on the question, it is observed that Section 4272, supra, does not specifically enjoin upon such president of council the duty to vote in the event of a tie. The statute merely provides that he “shall have no vote therein except in case of a tie.” In other words, in case of a tie, the statute in effect provides that he shall have a vote, but it does not provide that he shall cast the deciding vote.

The syllabus in the case of *Cullen vs. State, ex rel.*, 105 O. S. 545, is as follows:

“A writ of mandamus will not issue to compel the observance of law generally, but will be confined to commanding the performance of specific acts specially enjoined by law to be performed.”

The function of a municipal council in passing ordinances or resolutions is, generally speaking, legislative in character and the president of council occupies a position analogous to that of the Speaker of the House of Representatives or the presiding officer of the Senate. The following text appearing in 18 R. C. L., p. 188, in support of which decisions of the courts of last resort of Alabama, Missouri and New York are cited, is therefore in my opinion entirely in point:

“As regards the performance of duties legislative in their character upon the Speaker of the House, or the presiding officer of the Senate, the courts have no authority to issue

against him a writ of mandamus to compel him to perform such duties.”

It is accordingly my opinion, in view of the foregoing, that in the event of a tie vote upon the question of the passage of an ordinance to increase the salaries of city police and firemen, the president of council may not be compelled by mandamus or otherwise to cast the deciding vote should he desire not to do so.

Respectfully,

HERBERT S. DUFFY,
Attorney General.

1331.

APPROVAL—BONDS OF CITY OF AKRON, SUMMIT COUNTY,
OHIO, \$4,000.00.

COLUMBUS, OHIO, October 20, 1937.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.

GENTLEMEN:

RE: Bonds of City of Akron, Summit County, Ohio,
\$4,000.00.

The above purchase of bonds appears to be part of an issue of bonds of the above city dated February 1, 1925. The transcript relative to this issue was approved by this office in an opinion rendered to your board under date of April 27, 1937, being Opinion No. 531.

It is accordingly my opinion that these bonds constitute a valid and legal obligation of said city.

Respectfully,

HERBERT S. DUFFY,
Attorney General.