2405.

CITY CHARTER—SALARY OF OFFICER OR EMPLOYE SERVING AT PLEASURE OF APPOINTING POWER MAY BE CHANGED REGARDLESS OF CHARTER PROVISION PROHIBITING CHANGE OF SALARY OF ELECTIVE AND APPOINTIVE OFFICERS.

SYLLABUS:

A provision of a city charter prohibiting the change of the salary of any officer or employe of the city during the term for which he was elected or appointed does not apply to an appointive officer or employe who serves at the pleasure of the appointing power, and therefore the salary of such an officer or employe may be reduced or increased, during the time he is serving under his appointment, by the officer or body having the power to fix his salary.

COLUMBUS, OHIO, March 24, 1934.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

> "The Mayor of the City of Toledo is elected for a term of two years. The directors of the various city departments, under the provisions of the charter of the city, are appointed by the mayor, and serve during the pleasure of the mayor. Section 53 of said charter reads as follows:
>
> 'Sec. 53. COMPENSATION OF OFFICERS AND EMPLOYES. Fees. The Council shall fix, by ordinance, the salary or compensation of all officers and employes of the city. The salary and compensation so fixed shall be uniform for like service in each grade of the service as the same shall be graded and classified by the civil service commission, and all such salaries and rates of compensation shall be reported to the civil service commission forthwith. *The salary of any officer, employe or member of a board or commission shall not be diminished during the term for which he was elected or appointed, except in the case of demotion of an employe.* Laborers shall be paid the highest reasonable wage paid at the time in the city for similar services. All fees pertaining to any office shall be paid into the city treasury.'
>
> In view of that part of the foregoing paragraph which is italicized, will you kindly give us an opinion as to whether the council of the City of Toledo has authority to reduce the salary of a director of a department after he has been duly appointed, qualified and is serving in his office."

In other words, your question is whether a provision of a city charter prohibiting the reduction of the salary of any officer or employe of such city during the term for which he was elected or appointed, applies to an officer who serves at the pleasure of the appointing power.

The word "term" as applied to a term of office ordinarily means a definite fixed term. However, it was held in the case of *Spaller* vs. *Painesville, et al.*, 13 C. C. (N. S.) 577, that under Section 4213, General Code, which contains language

similar to the charter provision in question, a city council has no power to increase or diminish the salary of a police officer during the term for which he was appointed which is during good behavior. This case was affirmed by the Supreme Court in 85 O. S. 483 without opinion, so that it does not appear upon what grounds it was affirmed.

The courts of common pleas in this state which have passed upon this question have refused to follow the Painesville case. In *State, ex rel.* vs. *Bish,* 12 N. P. (N. S.) 369, the Common Pleas Court of Montgomery County held as follows:

> "Policemen and firemen do not hold their positions for a fixed and definite term, and hence are not subject to the provisions of Section 4213, P. & A. Anno. General Code, which forbids the increase or diminishing of salaries of officers, clerks or employes of a municipality during the term for which they were appointed or elected."

The following was held by the Common Pleas Court of Cuyahoga County in the case of *Stage* vs. *Coughlin, et al.,* 12 N. P. (N. S.) 419:

> "Members of the police and fire departments of a municipality are not appointed for a 'term' within the meaning of Section 4213, P. & A. Anno. General Code, and having no fixed or definite term the restriction as to changes in salaries does not apply to them, and council has power to increase or diminish their salaries after appointment."

The two latter cases are well reasoned and are in line with the weight of authority, but whatever the law may be in Ohio with reference to officers or employes serving during good behavior, it is not applicable to officers or employes who serve at the pleasure of the appointing power.

The authorities seem to be unanimous that a provision prohibiting a change of salary of a public officer or employe during the term for which he was elected or appointed does not apply to those who serve at the pleasure of the appointing power for the reason that such persons have no definite term of office.

> "The word 'term' when used in reference to the tenure of office, means ordinarily a fixed and definite term, and does not apply to appointive offices held at the pleasure of the appointing power."—Mechem, Public Offices and Officers, page 250.

In the case of *State, ex rel.* vs. *Massillon,* 2 C. C. (N. S.) 167, the court held that a health officer who serves at the pleasure of the board of health does not come within the purview of a statute prohibiting an increase of salary of an officer during his term. The court said:

> "The word 'term' has significance, as we think, under that section of the statute. It simply means to limit. That is during the period that the office is limited, during that period his salary shall not be increased. But in this case there is no limit fixed by law. It is at the pleasure of the board of health that gives the health officer his position. It is their pleasure. It is not a term, for the reason there is no limit to it. It may be likened unto a tenancy at will, not a term, because it has no limita-

tion. Therefore, it would be difficult to bring such an employe within the terms of Section 1717, Revised Statutes, prohibiting an increase of salary of an officer during his term, whether he be elected or whether he be appointed."

To the same effect are the following authorities:

Alabama vs. *Sanders,* 187 Ala. 79; *Stone* vs. *Strain,* 18 Ala. App. 228; *People* vs. *Strong,* 67 Colo. 599; *Bayley* vs. *Garrison,* 190 Cal. 690; *Harrold* vs. *Barnum,* 8 Cal. App. 21; *Quernheim* vs. *Asselmeier,* 296 Ill. 494; *Jefferson County* vs. *Cole,* 204 Ky. 27; *Shanks* vs. *Howes,* 214 Ky. 613; *Commonwealth* vs. *Iron Company,* 153 Ky. 116; *State, ex rel.* vs. *Johnson,* 123 Mo. 43; *State, ex rel.* vs. *Gordon,* 238 Mo. 168; *Gibbs* vs. *Morgan,* 39 N. J. Eq. 126; *Bowers* vs. *Albuquerque,* 27 N. M. 291; *State, ex rel.* vs. *Sierra County,* 29 N. M. 209; *Muskogee County* vs. *Hart,* 29 Okla. 693; *Summers* vs. *State,* 5 S. Dak. 321; *State, ex rel.* vs. *Oklahoma City,* 38 Okla. 349; *Funderburk* vs. *Oliver,* 140 So. 370; *Cunning* vs. *Humboldt County,* 266 Pac. 522.

Consequently, I am of the opinion that a provision of a city charter prohibiting the change of the salary of any officer or employe of the city during the term for which he was elected or appointed does not apply to an appointive officer or employe who serves at the pleasure of the appointing power, and therefore the salary of such an officer or employe may be reduced or increased, during the time he is serving under his appointment, by the officer or body having the power to fix his salary.

Respectfully,
JOHN W. BRICKER,
Attorney General.

2406.

JUDGMENT—BONDS MAY BE ISSUED BY SUBDIVISION TO PAY FINAL JUDGMENT ONLY WHEN SUCH JUDGMENT BASED ON NON-CONTRACTUAL OBLIGATION.

SYLLABUS:

Bonds may be issued by a subdivision to pay a final judgment only when such judgment is based on a non-contractual obligation.

COLUMBUS, OHIO, March 24, 1934.

HON. WAYNE L. ELKINS, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—I acknowledge receipt of your communication, which reads as follows:

"The Burlington School Board, Lawrence County, in 1929, undertook to pass the proper legislation to borrow $5000.00 to build a new school house. The Iron City Savings Bank of Ironton, Ohio, now in