

Note from the Attorney General's Office:

1964 Op. Att'y Gen. No. 64-898 was overruled in part by
1965 Op. Att'y Gen. No. 65-123.

OPINION NO. 898

Syllabus:

1. Rules of the legislative authority of a municipal corporation, operating under a statutory form of government, need not, under Section 731.45, Revised Code, be adopted by ordinance or resolution but may be adopted on motion.

2. Rules of procedure of the legislative authority of a municipal corporation, operating under a statutory form of government, in the form of an ordinance or resolution may become effective as a motion even though the formalities of an ordinance or resolution are not met.

3. Rules of procedure of the council of a municipal corpora-

tion, operating under a statutory form of government, do not continue from term to term but must be re-adopted by succeeding councils.

4. Section 731.44, Revised Code, does not require that the council of a municipal corporation formally pass on the election and qualifications of its members.

5. The council of a municipal corporation, operating under a statutory form of government, has the power to reconsider its action taken at a previous meeting at any time before the rights of third parties have vested.

6. The council of a municipal corporation, operating under a statutory form of government, has no power to pass retroactive legislation.

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To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, March 5, 1964

I am in receipt of your request for my opinion which is, in material part, as follows:

"1. Under Section 731.45 of the Revised Code, and in view of the provisions of Section 731.17 of the Revised Code, is the proper procedure for the establishment of rules of council, functioning under a statutory form of government, by ordinance, resolution, by-law or motion?

"A. Subject to the answer to Question No. 1, if a city council establishes its rules by resolution or ordinance, are the statutory requirements for the passage of such ordinance and resolution required to be followed before such rules may become effective?

"B. Subject to the answer to Question No. 1, if a city council can properly establish rules of council by motion but elects to do so by ordinance or resolution, must the statutory requirement for the passage of ordinances and resolutions be followed before such rules become effective?

"C. Do rules of a city council once established continue in effect from year to year or must they be expressly re-adopted by each succeeding council?

"2. Is it required that a newly constituted city council formally pass upon the qualifications of its members before such councilmen can validly act?

"A. If the answer to Question No. 2 is

in the affirmative, and the councilmen are not qualified to perform their functions, would such councilmen be entitled to the prescribed compensation prior to council approval of the qualifications?

"3. Can a city council by motion declare a previous council meeting held during its term to be null and void?

"A. If the answer to Question No. 3 is in the negative, and council amends its rules so as to change the manner in which standing committees are appointed, do new appointments under the amended rules prevail over prior appointments made during the same term of council?

"4. Can a city council adopt rules of council to become effective retroactively during the same term of council?

"5. Subject to the answers to Questions 2 and 3, can city council call a special meeting, under Section 731.46 of the Revised Code, if its organizational meeting is null and void, and/or the qualifications of its members have not been approved by council?"

Section 731.17, Revised Code, provides:

"The action of the legislative authority of a municipal corporation shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by yeas and nays and entered upon the journal, but this shall not apply to the ordering of an election, or direction by the legislative authority to any board or officer to furnish legislative authority with information as to the affairs of any department or office. No bylaw, ordinance, or resolution, of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale, or transfer of property, shall be passed, unless it has been fully and distinctly read on three different days, and with respect to any such bylaw, ordinance, or resolution, there shall be no authority to dispense with this rule, except by a three-fourth(s) vote of all members elected to the legislative authority, taken by yeas and nays, on each bylaw, resolution, or ordinance, and entered on the journal. No ordinance shall be passed without the concurrence of a majority of all members elected to the legislative authority."

Section 731.45, Revised Code, on the other hand provides:

"The legislative authority of a municipal cor-

poration shall determine its own rules and keep a journal of its proceedings. It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two thirds of all the members elected, and until the delinquent member has been notified of the charge against him and has had an opportunity to be heard."

I think it is clear from a comparison of the above two quoted statutes that rules of council of a municipal corporation, unlike legislative action, need not be promulgated or adopted by ordinance or resolution but may be effected on mere motion alone. This conclusion is in harmony with the operation or functioning of legislative bodies generally and, although not expressly decided, appears to be assumed in the decided cases. Thus, headnote number two in Humphrey v. Youngstown (City), 75 O.L.A. 239, (1956) states:

"2. The fact that the council of a municipality departed from its own rules in adopting an amendment to a zoning ordinance does not render such ordinance illegal and void where the action taken was legal in all other respects and no rules of conduct were prescribed by the municipal charter or by a duly enacted ordinance of such body."

The implication is, in the absence of a contrary provision by ordinance or municipal charter, that council of a municipal corporation is free to adopt or rescind, suspend or amend rules by any form of action reflecting the approval of council, so long as its action is journalized.

In Kerlin Brothers Co. v. The City of Toledo, 20 C.C. 603, (1900), the following pertinent statement is contained in the opinion of the court at page 619:

"I call attention to Kepner v. Commonwealth, 40 Penn. St., 130, but will not take time to go into the case farther than to read some short paragraphs, indicating the opinion of the court upon the general subject. Chief Justice Lowrie, in announcing the opinion, undertakes to distinguish between resolutions, ordinances, regulations, by laws, etc., and says, at page 129,130:

"'Certainly there is some distinction between these words in ordinary usage. Regulation is the most general of them, meaning any rule for the ordering of affairs, public or private; and it thus becomes the generic term from which all the others are defined, specified or differentiated. Ordinance is the next most general term, including all forms of regulation by civil authority, even acts of parliament. With us its meaning is usually confined to corporation regulations. Ordinances are all sorts of rules and by-laws of municipal corporations. Ordinary usage shows this, and it may be found illustrated in Willcock on Corporations, 73.

"Resolution is only a less solemn or less usual form of an ordinance. It is an ordinance still, if it is anything, intended to regulate any of the affairs of the corporation. If the word 'ordinances' in the act of assembly does not include such resolutions, the law that requires ordinances to be submitted to the mayor for his approval, is of no force at all, because it allows its substantial purpose to be defeated, by giving to ordinances the form of resolutions.

"What we have said cannot, of course, apply to rules of council properly so called, for these are mere rules of practice of the council itself in its deliberations, passed by virtue of an authority inherent in all associated functionaries, and implied when not expressly granted; and establishing the forms under which they act in the process of passing ordinances. They are not ordinances, but rules for passing ordinances."

Under Arabic numeral one, you have asked three further related questions. The first is whether "if a city council establishes its rules by resolution or ordinance, are the statutory requirements for the passage of such ordinance and resolution required to be followed before such rules may become effective." The answer is yes if they are to be effective as an ordinance or resolution -- an effect which may be required by charter or prior ordinance or resolution.

The same question is asked assuming "council can properly establish rules of council by motion." The answer here is no, and is disposed of on the authority of Kerlin Brothers Co. v. The City of Toledo, supra, the eighth headnote of which states:

"(8). A resolution, although of a general or permanent nature, to come within the purview of sec. 694, R.S., must be a necessary resolution, a resolution required by statute. If the same thing can be accomplished by a mere motion, and the council, without necessity therefor, adopts the form of a resolution -- an unnecessary formality -- it does not follow that the council thereby commits itself to a course which would require of it still farther formalities appropriate to a resolution, but not required in the case of motion."

Under this same numerical heading you question whether "rules of a city council once established continue in effect from year to year or must they be expressly re-adopted by each succeeding council." I can, of course, only consider this question as it pertains to statutory forms of government and will limit my answer accordingly.

While the council of a municipal corporation is a continuing body (Smith v. Columbus, L. & S.R. Co. 8 O.N.P. 1, 10 O.D.N.P.441), the rule is that rules of procedure of a legislative body operating as they do only upon the legislative body, expire at the end of the session. 37 Am. Jr. 669, Municipal Corporations, Section 55. The rationale appears to be that a municipal council has inherent or

statutory power to make its own rules of procedure, which power can not be limited by a preceding council. I find this reasoning persuasive and, accordingly, and in answer to your question, conclude that rules of procedure of a municipal council do not continue in effect from year to year but must be re-adopted by each succeeding council. No particular formality need be taken for re-adoption.

To this conclusion I note an exception, viz., rules which have been enacted as ordinances. It has been held that council rules established by ordinance under a statute authorizing a municipal council to establish rules of procedure can only be repealed or waived by action of the council of equal formality. State, ex rel. Maxey v. Swindell, 146 Ind. 527, 45 N.E.700 (1897).

You have also asked whether a newly constituted city council must formally pass upon the qualifications of its members before such councilmen can validly act.

Section 731.44, Revised Code, provides:

"The legislative authority of a municipal corporation shall be the judge of the election and qualification of its members. A majority of all the members elected shall be a quorum, but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. The legislative authority shall provide rules for the manner of calling special meetings."

It will be noted that, while this statute makes the legislative authority the judge of the election and qualification of its members, there is no requirement that there be a formal approval of the members. In my opinion, the import of this section is that, in the event of challenge to membership on a municipal council or in the event of an election contest, the council itself is in the first instance the arbiter. Actual functioning as a council, however, need not be preceded by formal approval of the election of its members. A conclusion which is indicated, if not by the language of Section 731.44, supra, by the fact that members are elected to identical terms.

The question whether council of a municipal corporation has the power to "declare a previous council meeting held during its term to be null and void" is also raised by your request. This question may not be categorically answered. Council of a municipal corporation has control over its own proceedings and over the rules of procedure by which it operates. It is a general rule, subject to certain qualifications not here pertinent, that a municipal council has the right to reconsider its actions and to adopt a measure which has previously been defeated, or rescind one which has previously been adopted, at any time before the rights of third parties have vested. McConoughey v. Jackson, 101 Cal. 265, 35 P. 863; Peo. ex rel. MacMahon v. Davis, 284 Ill. 439, 120 N.E. 326. Applying this general rule to the apparent specific situation, which promotes your question, I am of the opinion that council has the power to amend its rules so as to change the manner in which standing committees are appointed and to make appointments pursuant to the amended rules.

You have asked, finally, if a city council has the authority to adopt rules of council to become effective retroactively during the same term of council. Again, this is a question which can only be generally answered as to statutory forms of municipal government.

Section 28, Article II, Constitution of Ohio, prohibits the passage of retroactive laws by the General Assembly. While limited by expression to the General Assembly, it has been held that this interdiction applies to by-laws and regulations of private corporations and societies. Randolf v. First Baptist Church, 53 O.O.288.

While I am not willing to extend this constitutional prohibition to municipal corporations formed pursuant to statute, I am nevertheless of the opinion -- absent an express authorization -- that a statutory municipal corporation is without power to enact retroactive legislation. It should be noted that the cases in Ohio define retroactive laws as those which affect substantive rights and distinguish laws which are merely remedial in nature. State, ex rel. Slaughter v. Industrial Commission, 132 Ohio St. 537; Gager v. Prout, 48 Ohio St. 89; State, ex rel. Michaels v. Morse, 165 Ohio St. 599.

In specific answer to your request, therefore, it is my opinion that:

1. Rules of the legislative authority of a municipal corporation, operating under a statutory form of government, need not, under Section 731.45, Revised Code, be adopted by ordinance or resolution but may be adopted on motion.
2. Rules of procedure of the legislative authority of a municipal corporation, operating under a statutory form of government, in the form of an ordinance or resolution may become effective as a motion even though the formalities of an ordinance or resolution are not met.
3. Rules of procedure of the council of a municipal corporation, operating under a statutory form of government, do not continue from term to term but must be re-adopted by succeeding councils.
4. Section 731.44, Revised Code, does not require that the council of a municipal corporation formally pass on the election and qualifications of its members.
5. The council of a municipal corporation, operating under a statutory form of government, has the power to reconsider its action taken at a previous meeting at any time before the rights of third parties have vested.
6. The council of a municipal corporation, operating under a statutory form of government, has no power to pass retroactive legislation.