Note from the Attorney General's Office:

1964 Op. Att'y Gen. No. 64-780 was modified by
1981 Op. Att'y Gen. No. 81-011.

OPINION NO. 780

Syllabus:

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.

To: Roger W. Tracy, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, January 13, 1964

I am in receipt of your request for my opinion which pro-

vides in substantial part as follows:

"During the course of a recent examination of a Charter city, by the Bureau of Inspection and Supervision of Public Offices, our examiner learned that the salaries of the Mayor's secretary and the Director of Finance had been paid at rates which exceeded those provided in the latest enactment of the village council on that subject. It was further determined from municipal records that the elected Mayor of the city had been paid a 'travel allowance' at a flat rate of $70.00 per month, during a period covering a number of months prior to the time of our examination.

"The Mayor was never required, either by the council or by the municipal fiscal officer, to account for expenses actually incurred while travelling in the interest of the city; but was paid the prescribed 'travel allowance', each month, in addition to the salary established for the office of Mayor. The latest legislation, with reference to a 'travel allowance' for the Mayor, provided for payment of that item at the rate of $50.00 per month, effective in January 1959.

"When the examiner inquired as to the authority for paying these items over a period of several months, it was determined that no authorizing legislation existed. Promptly thereafter, on July 2, 1963, the city council enacted two ordinances, which are designated 'Ordinance No. 63-36 also Ordinance No. 61-19B' and 'Ordinance No. 63-37 also Ordinance No. 61-19A'. A certified copy of each of these ordinances is enclosed for your reference, together with a copy of Ordinance No. 61-19, related legislation which had been passed on February 21, 1961.

"Reference to the enclosed ordinances, passed in 1963, will reveal that the ordinance designated No. 63-36 purports to amend an ordinance (No. 59-5) which was adopted on January 6, 1959, so as to make the amended legislation effective from and after the month of February 1961. The ordinance No. 63-37 purports to amend ordinance 60-21A adopted January 20, 1960, so as to make the amended form effective from and after February 16, 1961. Each of these amendatory ordinances was passed as an emergency measure and directs that minutes of the regular council meeting of February 21, 1961, shall be corrected 'nunc pro tunc' to show the adoption of ordinances No. 61-19A and 61-19B 'as authorized by this ordinance'.

"Our examiner has raised a general question as to the legality of payments made, during the interim between February 1961 and the effective

date of the 1963 legislation, in amounts which exceeded those authorized by the ordinances then in existence."

This factual situation initially raises the question of the validity of an ordinance of a charter municipal corporation which is retroactive in operation. The question must be considered first from the standpoint of the power under this particular charter to enact ordinances of this nature, and second as to the constitutional or statutory validity of legislation of this nature.

Section 4.01, of this municipal charter, provides:

"The municipality of Bedford Heights hereby reserves to itself all powers, general or special, governmental or proprietary, which may now or hereafter lawfully be possessed or exercised by any municipal corporation of Ohio. Any enumeration herein of specific powers shall not be held to be exclusive."

Section 4.02 of this charter, provides:

"The powers of this municipality may be exercised in the manner prescribed in this Charter; or, if not prescribed herein, in such manner as the Council may prescribe. The powers of this municpality may also be exercised, except as a contrary intent appears in this Charter or in the enactments of the Council, in such manner as may now or hereafter be provided by the General Laws of Ohio."

Section 6.06 of the charter, provides in material part:

"The Council shall, by ordinance, make provision for the following:

* * * * * * * * *

"4. The form and method of enacting ordinances and resolutions, but no ordinance or resolution except general appropriation ordinances shall contain more than one subject which shall be clearly stated in the title; * * *"

I find no other charter provisions which I feel bear on the question of this municipality's power to enact retroactive legislation. Significantly, I find nothing which precludes the council from passing retroactive legislation, not otherwise invalid. The matter being one which relates essentially to municipal government, I am persuaded this particular municipal corporation has the power to enact the ordinances in question. I find a parallel in the case of The State, ex rel. McClure v.

Hagerman, 155 Ohio St. 320, which held as disclosed by the first branch of the syllabus:

> "1. The legislative body of an Ohio municipality has the power and authority under the Home Rule Amendment to the Constitution of Ohio, adopted in 1912, unless it has adopted a charter containing a specific prohibition against such expenditure, to determine whether payment of the cost of membership in an association of municipal finance officers out of municipal funds is for a public purpose, and its decision will not be overruled by this court unless it clearly appears that there was an abuse of discretion or that as a matter of law such expenditure is not for a public purpose."

The question remains whether these ordinances violate any constitutional or legislative provisions.

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, constitutes a taking of property without substantive due process of law. This is not the case here, however, for the ordinances directly affect only the mayor, the mayor's secretary, and the director of finance of the municipality; and not adversely. There appears to be no other constitutional basis for even questioning the ordinances under consideration.

From the foregoing, I must conclude that the ordinances in question are not unconstitutional nor in violation of any statutory prohibition because of their retroactive operation.

There is also in your request the question whether the ordinances operate to increase salaries or compensation during term in violation of any legislative restraint.

Section 13.05, of the charter of this municipal corporation,

provides:

> "The Council shall fix the salary or compensation of each officer, employee and member of any board or commission of the municipality. Any such person may be required by the Council, from time to time, to furnish a bond or bonds for the faithful performance of his duties in such amount as it may determine and with such surety as it may approve, and may provide that the premium for any such bond be paid by the municipality.
>
> "Prior to the first day of November in 1959 and in each second year thereafter, the Council shall fix the compensation of the officers to be elected for the terms beginning on the next succeeding first day of January and the compensation of such officers shall not thereafter be changed for such term or part thereof; except that for each absence of the Councilmen from a regular meeting of Council, unless authorized by the affirmative vote of at least four other members thereof, there shall be deducted a sum equal to two percent (2%) of the annual salary of such Councilman.
>
> "Persons filling vacancies for the unexpired terms of elective officers shall receive the compensation theretofore fixed for such elective office.
>
> "The compensation of other officers and employees may be fixed and changed at any time in the discretion of the Council.
>
> "All fees pertaining to any office shall be paid into the municipal treasury with the exception of Notary Public fees,fees collected by a registrar or deputy registrar, fees of the Mayor for solemnizing marriages and authenticating documents other than those of the Municipality."

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)).

It will be immediately seen from a reading of this charter provision that the prohibition against changing the compensation of municipal officers is applicable solely to elected officers and that it is specifically provided that the compensation of other officers and employees may be changed at any time in the discretion of the council. Neither the mayor's secretary nor the director of finance is an elective position and, accordingly, Section 13.05 of the charter is not a deterrent to an increase in compensation for these positions, if indeed the ordinances in question present any problem in this regard.

To the extent that the "travel allowance " to the mayor represents "compensation" the question is raised whether its increase by this ordinance, passed during his term of office, violates this charter provision. "Compensation" is defined in Webster's Third New International Dictionary as "payment for value received or service rendered." It is frequently used interchangeably with the word "salary." While there is not entire agreement, it is generally held that the term "compensation" does not include traveling or other incidental expenses. State ex rel. Todd v. Yelle, 7 Wash. (2) 443, 110 P. (2) 162; Kirkwood v. Soto, 87 Cal. 394, 25 P. 488; Swartz v. Kingsbury County, 64 S.D. 422, 267 N.W. 140. In the Swartz case it was held that a county officer's travel allowance was not compensation within the meaning of a constitutional prohibition against diminishing an officer's compensation during term even though his travel allowance was larger than that of other county officers.

Under the facts outlined in your request, there is obviously some doubt as to whether there is any but a tenuous relationship between the mayor's allowance and actual travel expenses. To the extent that such an allowance is not founded on actual expenses or a reasonable estimate of expenses, I must conclude that it is "compensation" within the meaning of Section 13.05 of the city municipal charter. Opinion No. 737, Opinions of the Attorney General for 1963. As I stated in Opinion No. 737, in considering an almost identical problem, the question of the relationship between an allowance for expenses and expenses incurred is one of fact which has to be determined in a separate proceeding.

If it is determined that a part or all of the "travel allowance" is unrelated to actual expenses incurred, I am of the opinion that the ordinance raising this allowance is in violation of Section 13.05, of the municipal charter, apart from the question of whether an ordinance passed during the term of an officer may be considered as having gone into effect before his term because of its retroactive operation. I am brought to this conclusion by the fact that the ordinance --giving it retroactive operation--became effective in February 1961, which is presumedly during the term of this mayor. In this regard Section 7.02 of the municipal charter provides:

> "The Mayor shall be elected at the regular municipal election in the year 1959, and each second year thereafter for a term of two (2) years commencing on the first day of January next following such election."

This ordinance then (if it increases the compensation of the mayor) is in violation of that provision of Section 13.05 of the charter which declares "the compensation of such officers (elected) shall not thereafter be changed for such term or any part thereof."

I am of the opinion that a claim for travel allowance unsupported by an accounting for expenses incurred is not for this reason a violation of Section 2911.02, Revised Code.

In answer to your request, it is my opinion and you are advised that 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.