

Note from the Attorney General's Office:

1954 Op. Att'y Gen. No. 54-4322 was overruled by 1983
Op. Att'y Gen. No. 83-036.

4322

1. MUNICIPAL CORPORATIONS — POWERS OF LOCAL SELF-GOVERNMENT—WITHIN CONSTITUTIONAL LIMITATIONS—CONFERRED ALIKE ON ALL MUNICIPAL CORPORATIONS — CHARTER — ARTICLE XVIII, SECTIONS 3, 7, CONSTITUTION OF OHIO.
2. ADOPTION OF CHARTER—MEANS TO PROVIDE FOR DELEGATION OR DISTRIBUTION OF POWERS, LOCAL SELF-GOVERNMENT — SUCH DISTRIBUTION MAY BE AT VARIANCE WITH POWERS ENJOYED BY OFFICERS AND BRANCHES MAY BE AT VARIANCE WITH POWERS IN CASE OF MUNICIPALITY WHICH ELECTED BY FAILURE TO ADOPT CHARTER, TO OPERATE UNDER STATUTORY FORM OF MUNICIPAL GOVERNMENT.
3. STATUTORY PROVISIONS FIXING SALARIES OF MUNICIPAL OFFICERS AND EMPLOYES—PRESCRIBING LIMITS WITHIN WHICH CHANGES IN SALARIES MAY BE MADE—RELATE TO FORM OR STRUCTURE OF SEVERAL STATUTORY PLANS OF MUNICIPAL GOVERNMENT—IMMUNITY FROM LIMITING PROVISIONS—MAY BE ACHIEVED BY ADOPTION OF CHARTER TO ESTABLISH FORM OR STRUCTURE OF MUNICIPAL GOVERNMENT AT VARIANCE WITH STATUTORY PLANS—PROVISIONS APPLY TO MUNICIPAL CORPORATIONS WHICH HAVE ELECTED BY FAILURE TO ADOPT A CHARTER TO OPERATE UNDER STATUTORY PLAN—ARTICLE XVIII, SECTION 2, CONSTITUTION OF OHIO.
4. WHERE CITY OR VILLAGE CHARTER CONFERS FULL AUTHORITY ON MUNICIPAL COUNCIL TO FIX COMPENSATION OF MUNICIPAL OFFICERS AND EMPLOYES, LEGISLATIVE AUTHORITY MAY BE EXERCISED WITHOUT REGARD TO PROVISIONS OF SECTIONS 731.07, 731.13 RC—PROVISIONS ARE CONTROLLING IN CASE OF COUNCIL OF CITY OR VILLAGE WHICH OPERATES UNDER STATUTORY PLAN OF MUNICIPAL GOVERNMENT.

SYLLABUS:

1. The powers of local self-government within constitutional limitations are conferred alike, under the provisions of Section 3, Article XVIII, Ohio Constitution,

on all municipal corporations whether or not such corporations have adopted a charter as provided in Section 7, Article XVIII, Ohio Constitution.

2. The adoption of a charter is a means whereby a municipal corporation may provide for a delegation or distribution of the powers of local self-government, so conferred on the municipal corporation itself, among the several officers and branches, including the municipal legislative authority, of the governmental structure thereby established; and such distribution to such officers and branches may be at variance with the powers enjoyed by such officers and branches in the case of a municipal corporation which has elected, by its failure to adopt a charter, to operate under a statutory form of municipal government.

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.

4. Where a city or village charter confers full authority on the municipal council to fix the compensation of the municipal officers and employes such legislative authority may be exercised without regard to the provisions of Sections 731.07 and 731.13, Revised Code; but such statutory provisions are controlling in the case of the council of a city or village which operates under a statutory plan of municipal government.

Columbus, Ohio, September 17, 1954

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion states the following questions:

“(1) Under the home rule powers of a City, is it legally possible for a charter city (which charter makes provision that the city council shall fix the compensation of its employees), to increase the compensation of an employee elected or appointed for a definite term, during the term for which elected or appointed, in contravention of Section 731.07, Revised Code?

“(2) Under the home rule powers of a village operating under a charter, (which charter provides that the village council shall fix the compensation of its employees) is it legally possible for the Village Council to increase the compensation of its officials, who are elected or appointed for a definite term, during the term for which elected or appointed, or to fix the salaries of councilmen in amounts in excess of \$5.00 per meeting, in contravention of Section 731.13, Revised Code?

“(3) Under the Home Rule powers granted by the Constitution, is it legally possible for a *non-charter* city or village to increase the salaries of an official, elected or appointed, for a definite term, during the term for which he is elected or appointed, by ordinance of council, in contravention of the provisions of Sections 731.07 and 731.13 of the Revised Code.

“(4) In a non-charter village, is it legally possible for the Village Council to fix the compensation of its councilmen in amounts at variance with the provisions of Section 731.13 of the Revised Code?

“(5) Is it legally possible for a non-charter village council, by ordinance, to fix the compensation of an elective officer for the ensuing term at any date later than five days before the filing date, in contravention of the provisions of Section 731.13 of the Revised Code?”

Your inquiry requires a consideration of certain of the fundamental constitutional powers of local self-government which are enjoyed by municipal corporations in Ohio, and an inquiry as to the points of difference between charter municipalities and those which operate under one or the other of the several statutory forms of government. The several constitutional provisions pertinent to this inquiry are Sections 1, 2, 3 and 7, Article XVIII, Ohio Constitution, which reads as follows:

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:

“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.”

It has long since been well established, in the matter of the “powers of local self-government,” that (1) municipalities derive such powers from the constitution, and (2) such powers are enjoyed equally by municipalities whether or not they have adopted a charter as provided in Section 7, supra. Thus in *Perrysburg v. Ridgway*, 108 Ohio St., 245, the syllabus reads in part:

“1. Since the constitution of 1912 became operative, all municipalities derive all their ‘powers of local self-government’ from the Constitution direct, by virtue of Section 3, Article XVIII, thereof. * * *

“4. The exercise of ‘all powers of local self-government,’ as provided in Article XVIII, Section 3, is not in any wise dependent upon or conditioned by Section 7, Article XVIII, which provides that ‘a municipality *may* adopt a charter,’ etc.”

“5. The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution (State, ex rel. *City of Toledo v. Lynch*, Auditor, 88 Ohio St., 71, 102 N.E. 670, 48 L.R.A. (N.S.), 720, Ann. Cas. 1914D, 949, disapproved upon the proposition that a charter is a prerequisite to the exercise of home-rule powers under Section 3, Article XVIII.)”

As pointed out by Judge Shauck in *Toledo v. Lynch*, 88 Ohio St., 71, upon the adoption of Article XVIII in 1912, “all inconsistent laws fell simply because they were inconsistent; in other words, all repugnant laws were repealed by implication.” Accordingly, the question here first presented is whether Section 731.07, Revised Code, is “inconsistent” with the constitutional authorization of the home rule powers found in Article XVIII.

It may be observed at this point that the expression “home rule powers” may well be regarded as a somewhat more comprehensive term than the term “powers of local self-government” to which reference is made in Section 3, Article XVIII, for as we have noted in the *Ridgway* case, supra, although all municipalities enjoy the latter, those which have adopted a charter as provided in Section 7 of this Article may,

in addition, choose the "mode," i.e. the form of government by which such powers will be exercised.

The significance of this fact, so far as your first question is concerned, is that whether the matter of fixing the compensation of municipal employees be deemed either (1) a matter of local self-government or (2) a feature of the form, organization, or mode, of the municipal government, a charter provision authorizing council to fix such compensation would prevail over a statutory provision fixing such compensation, or, as in the case at hand, a statutory provision limiting the power of the municipal legislative authority to fix such compensation; and a charter permitting a change in such compensation during term would, of course, prevail over the limitations of Section 731.07, Revised Code, provided such charter provision were not deemed inconsistent with other provisions of the constitution.

In Article II, Section 20, Ohio Constitution, we find the following provision:

"The General Assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

This appears to be a limitation imposed on the General Assembly *in cases where that body may lawfully legislate with regard to the salaries of officers*. Accordingly, if it should be determined that another legislative body should be authorized, either under the "powers of local self-government," or under a special charter provision, to legislate with regard to the salaries of municipal officers, this constitutional limitation would not apply.

In Article XVIII, Section 13, Ohio Constitution, we find the following:

"Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

Although the question of salaries of officers and employees as constituting "debts" within the meaning of this provision does not appear

to have been authoritatively decided by the courts, I am inclined to the view that expenditures for such purposes cannot be so regarded. In considering the term "debt" as used in Article VIII of the Constitution, the Supreme Court in *Ross v. Donahey*, 93 Ohio St., 414, held that it had no reference to "current expense," Judge Wanamaker remarking in this connection, pp. 419, 420:

"In construing the word 'debt' as used in the various sections of the constitution referred to in the case at bar, to-wit, Sections 1, 2 and 3, Article VIII, we hold that it has no reference whatsoever to the necessary and every-day current expenses of the sovereign government itself."

By analogy the same view would apply to the provision above noted in Article XVIII, Section 13. Moreover, an examination of the Constitutional Debates of 1912 discloses numerous references, during the discussion on this section, to bond issues, contract obligations, and the like, but no reference either to current expenses or to salaries and wages.

Finally, it was squarely held in *Mansfield v. Endly*, 38 Ohio App. 528, that the salary of a municipal official was not a debt within the meaning of this constitutional limitation. Although much of the force of this decision was lost, as I shall later point out, in view of the limited grounds of its affirmance in 124 Ohio St., 652, and in later statements of the Supreme Court, I am nevertheless in full accord with the *Endly* decision on this point. I am impelled to conclude, therefore, that neither of the limitations noted in Article II, Section 20, and in Article XVIII, Section 13, is applicable in the instant case.

Nowhere in the judicial decisions on the subject do I find any expression of the notion that control of the salaries of municipal officers is such a matter of state-wide concern, such as is the case in the matter of health, education, and the judiciary, that municipal corporations may not by appropriate charter provision exercise control in this field. Accordingly, whether the matter be deemed one falling within the powers of local self-government or one relating to the *form, or mode*, of municipal government, it follows that a municipal charter provision inconsistent with the provisions of Section 731.07, or Section 731.13, Revised Code, would prevail over such statutes.

Coming now to your questions relating to the application of these statutory limitations to non-charter municipalities, it is clear that if such

limitations are to be found not to apply, it can only be on the ground that control of salaries of officers and employees falls within the "powers of local self-government" which are conferred under the provisions of Section 3 of Article XVIII. The law on this point does not appear to be too clearly established, for the import of what is sometimes referred to as the leading judicial decision on this question seems to have been the subject of some serious misapprehension. I refer in this connection to *Mansfield v. Endly*, 38 Ohio App. 528, the headnotes in the reported decision being in part as follows:

* * * "2. Statute classifying cities according to population and making councilmen's salaries dependent thereon *held* void as violating Constitution classifying municipalities as cities or villages (Section 4209, General Code; Article XVIII, Sections 1 to 3, Constitution). * * *

"5. Ordinance fixing councilmen's salaries *held* within constitutional powers of 'local self-government' and not unconstitutional as contravening legislature's power to control municipal indebtedness (Article XIII, Section 6, and Article XVIII, Sections 2, 3 and 13, Constitution.)

"6. Municipal official's salary is not 'debt' within legislature's constitutional powers to control municipalities as regards tax limitation, maximum indebtedness, and expenditure of public funds (Article XIII, Section 6, and Article XVIII, Sections 3 and 13, Constitution.)

"7. Councilmen's salaries, being within municipality's constitutional powers of local self-government, *held* 'provided for in Constitution,' within constitutional provision giving legislature power to fix compensation in all other cases (Article II, Section 20, and Article XVIII, Section 3, Constitution.)

Here it is to be observed that since the court held, as indicated in the second paragraph of the headnotes, that Section 4209, General Code, the supposedly conflicting statute, was unconstitutional under a provision not related to home rule powers, there was consequently no actual conflict between the ordinance and any valid statute, and it was thus unnecessary to consider any home rule questions at all. This was clearly the view of the Supreme Court, its affirmance of the judgment of the Court of Appeals in the case being reported in 124 Ohio St., 652, as follows:

"It is ordered and adjudged by this court that the judgment of the said Court of Appeals be, and the same hereby is, affirmed upon the authority of *City of Elyria v. Vandemark*, 100 Ohio St., 365."

The syllabus in the Elyria case reads in part:

* * * "2. The constitution of the state having classified municipalities on a basis of population, the legislature is without authority to make further classification thereof for the purpose of legislation affecting municipal government.

"3. The provisions of Section 4250, General Code, as amended 106 Ohio Laws, 483, purporting to authorize the council in cities having a population of less than twenty thousand to merge the office of director of public service, are in conflict with the provisions of Section 1, Article XVIII of the Constitution of Ohio."

Not only did the Supreme Court fail to approve the reasoning of the Court of Appeals in the Endly decision on the matter of the scope of the powers of local self-government but in later decisions the court has rather clearly indicated adherence to a contrary view. Thus in *Holcomb v. Coxey*, 126 Ohio St., 496, the first paragraph of the syllabus is as follows:

"The provisions of Section 4213, General Code, preclude a change in the salary of any municipal officer, clerk or employe during the term for which he was elected or appointed."

In *South Euclid v. Bilkey*, 126 Ohio St., 505, the court again had for consideration the effect of a statute relative to the compensation of a municipal officer. The first paragraph of the syllabus in such case reads:

"Under the provisions of Section 4219, General Code, changes in the compensation of a village officer may be made subsequent to his election, if the ordinance making such change be regularly enacted and in effect prior to the date of the beginning of his term of office."

In neither of these cases was the court concerned with a municipal corporation which had adopted a charter. It is true, of course, that in neither case was there any discussion in the opinion of the possible effect of the home rule powers of the municipality concerned, and in neither case was there a finding of a conflict between the statute and ordinance under scrutiny. Nevertheless, I deem it a matter of some significance that the plain statements relative to the controlling effect of the statute were carried into the syllabus of these cases, especially since the court had refrained from approval of a contrary view in its affirmance of the Endly case.

This question of the power of non-charter municipalities over the salaries of municipal officers was the subject of consideration in Opinion No. 2827, Opinions of the Attorney General for 1934, p. 872, the syllabus in which reads:

“Villages have no authority to compensate their council at a rate in excess of the amount set forth in Section 4219, General Code.”

The writer of the 1934 opinion noted the limited effect of the Supreme Court's treatment of the Endly case and concluded that the decision of the court of appeals on the home rule question could not be deemed declarative of the law. With this I agree but not for the reason advanced in the 1934 opinion, such reason being that expenditures for salaries of municipal officers were a “debt” and so were subject to legislative control under the provisions of Article XVIII, Section 13. In reaching such conclusion the writer relied heavily on *Phillips v. Hume*, 122 Ohio St., 11, in which it was held that “purchases and contracts for supplies * * * become debts,” and by analogy concluded that the term “debts” was broad enough to include the liability for officers' salaries. For reasons already indicated herein, I am unable to agree that such is the case.

It is my notion, however, that the power of municipal legislative authority to legislate on the subject of salaries paid to municipal officers is so related to the legislative office that a statutory limitation thereon may be said to be a part of the *form* of government of the municipality concerned.

Here it is proper again to point out the distinction between the “powers of local self-government,” enjoyed by all municipal corporations, and the power to select the form or mode of government through which such powers may be exercised. Such “powers of local self-government” are conferred, not on any one or more of the officers or branches of the municipal government, but on the municipal corporation as such. Thus while all such corporations have the same basic home-rule powers, regardless of whether they have adopted a charter, it does not follow that the *officers* of such corporations have the same power. *Perrysburg v. Ridgway*, *supra*.

In the absence of a charter we must look to the statute for the power of the several municipal officers, for where the municipality concerned has chosen not to adopt a charter, and has thus elected to operate under

a statutory plan of municipal government, it must accept such limitations on the powers of its officers, including its legislative authority, as is provided in such statutory plan.

In this connection it is a matter of some significance that the limitations set out in Sections 731.07 and 731.13, *supra*, are found in the municipal code in a chapter entitled "Organization," a circumstance indicative of the notion that the limitations therein stated constitute a part of the statutory *form* of municipal government.

As pointed out by the court in the Ridgway case, *supra*, a charter is a vehicle by which the people of a municipality may choose and establish a *form* of government different from that authorized by statute; and I conclude, therefore, that by charter provision a municipality could avoid the effect of the statutes here in question. A non-charter municipality, being limited to one of the statutory plans as to the *form* of government, must accept as a part thereof the limitations of the statutes here in question. Accordingly, while I am in agreement with the conclusion stated in the 1934 opinion in its application to non-charter municipalities, I cannot agree that it would apply where a conflicting charter provision is involved.

Accordingly, in specific answer to your questions, and in the light of the authorities here considered, it is my opinion that:

1. The powers of local self-government within constitutional limitations are conferred alike, under the provisions of Section 3, Article XVIII, Ohio Constitution, on all municipal corporations whether or not such corporations have adopted a charter as provided in Section 7, Article XVIII, Ohio Constitution.

2. The adoption of a charter is a means whereby a municipal corporation may provide for a delegation or distribution of the powers of local self-government, so conferred on the municipal corporation itself, among the several officers and branches, including the municipal legislative authority, of the governmental structure thereby established; and such distribution to such officers and branches may be at variance with the powers enjoyed by such officers and branches in the case of a municipal corporation which has elected, by its failure to adopt a charter, to operate under a statutory form of municipal government.

3. Statutory provisions fixing the salaries of municipal officers and employees, 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.

4. Where a city or village charter confers full authority on the municipal council to fix the compensation of the municipal officers and employees, such legislative authority may be exercised without regard to the provisions of Sections 731.07 and 731.13, Revised Code; but such statutory provisions are controlling in the case of the council of a city or village which operates under a statutory plan of municipal government.

Respectfully,

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