Note from the Attorney General's Office:

1965 Op. Att'y Gen. No. 65-123 was modified by 1981 Op. Att'y Gen. No. 81-011.

OPINION NO. 65-123

Syllabus:

A non-charter municipality may pass retroactive legislation to increase the salaries of their employees who are not employed for a specific term but who serve at the pleasure of the appointing authority. Opinion No. 898, Opinions of the Attorney General for 1964, page 2-100, paragraph 6, of the syllabus overruled)

To: Chester W. Goble, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, July 12, 1965

Your request for my opinion reads in pertinent part as follows:

> "* * * * * * * * *
>
> "Assuming that Sections 731.07 and 731.13, Revised Code, are not applicable because no specific term of employment is involved, but rather service at the will of the appointing authority (See 1925 O.A.G. at page 644; 1957 O.A.G. No. 176; and 1961 O.A.G. No. 2171), we respectfully ask your opinion to the following question:
>
> "May a non-charter municipality pass retroactive legislation to increase the salaries of their employees who are not employed for a specific term?"

You have asked that I assume the inapplicability of Section 731.07 and 731.13, Revised Code. However, inquiry must be made as to whether Sections 731.07 and 731.13, Revised Code, prohibit a change in salary of an employee who is not employed for a specific term but who serves at the pleasure of the appointing authority during the term of his service. I had occasion to consider the question of a change in salary of certain state employees during their service serving at the pleasure of the Governor of Ohio in Opinion No. 176, Opinions of the Attorney General for 1957, page 22. The first branch of the syllabus of that opinion reads as follows:

> "An officer whose tenure is 'during the pleasure' of the appointing authority does not hold office during an 'existing term' within the meaning of Section 20, Article II, Ohio Constitution and the inhibition therein of a change in salary 'during his existing term' has no application to the encumbent of such office."

In arriving at the conclusion above stated, I reviewed the authorities as they applied to Section 731.13, Revised Code.

I shall not prolong this letter by reiterating the authorities cited in Opinion No. 176, supra, at pages 24-29. Suffice to say that the authorities therein cited still constitute the law regarding a change in salary of appointed officials or employees vis-a-vis Section 731.13, Revised Code. It is clear that the compensation of an employee serving at the pleasure of the appointing authority may be changed by the appointing authority or whatever person or persons are by law authorized to set his compensation.

The ultimate question is, of course, whether the change in compensation of such an employee may be effected by retroactive legislation. This depends upon whether the legislative authority of a municipal corporation may validly enact retroactive legislation.

In Opinion No. 780, Opinions of the Attorney General for 1964, page 16, I had occasion to consider the general question of the validity of retroactive municipal ordinances. In Opinion No. 780, supra, I made the following observations, at page 19:

> "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.
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> "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.* * *"

Although the above statements related to an opinion request involving a charter municipality, I have been unable

to find any provisions in Ohio law which would cause the foregoing comments to be inapplicable to non-charter municipalities in Ohio, as well as to charter municipalities.

The foregoing conclusion requires my re-examination of Opinion No. 898, Opinions of the Attorney General for 1964, page 100. In branch 6 of the syllabus of that opinion, I stated that a municipality operating under a statutory form of government has no power to pass retroactive legislation. The basis of my conclusion there was that, absent express authorization, a municipality operating under a statutory form of government has no power to enact such legislation. Upon re-examination, I must conclude that where retroactive legislation does not constitute a taking of property (e.g. where a salary is retroactively diminished), there is no fundamental legal restraint upon the enactment of retroactive legislation by the legislative body of a municipal corporation. Reluctantly, I find it necessary, in view of the foregoing, to overrule branch 6 of the syllabus of Opinion No. 898, Opinions of the Attorney General for 1964, page 2-100. In doing so, I note that the fixing of salaries is, under the authority of Section 3 of Article XVIII, Ohio Constitution, a matter of local self-government (City of Mansfield v. Endley, 38 Ohio App., 528, aff'd, 124 Ohio St., 652) and that an ordinance which is concerned with local self-government and which is passed by a non-charter city is valid where it is not at variance with state statutes (Leavers v. City of Canton, 1 Ohio St., 2d, 33, 37). Since there are no state statutes prohibiting this sort of municipal legislation, I must conclude that the legislation here in question is valid.

Therefore, it is my opinion and you are advised that a non-charter municipality may pass retroactive legislation to increase the salaries of their employees who are not employed for a specific term but who serve at the pleasure of the appointing authority. (Opinion No. 898, Opinions of the Attorney General for 1964, page 2-100, paragraph 6, of the syllabus overruled)