

**OPINION NO. 83-068**

**Syllabus:**

1. Moneys gratuitously given a mayor of a nonchartered city for the solemnization of a marriage are received under color of office and are, therefore, public moneys within the terms of R.C. 117.10,

December 1983

and records of financial transactions involving such moneys must be maintained in accordance with R.C. 117.051 and R.C. 117.08.

2. Moneys gratuitously given a mayor of a nonchartered city for the solemnization of a marriage must be paid into the treasury of the municipal corporation in accordance with R.C. 117.10, but may be claimed by the mayor as the lawful owner of such moneys, unless otherwise provided by an ordinance of such city.
3. Where the statutory scheme setting forth the compensation of a mayor permits such mayor to claim moneys gratuitously given him for the solemnization of a marriage, the variable amount of such moneys does not constitute an in-term increase or decrease in salary within the meaning of R.C. 731.07.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 1, 1983**

I have before me your letter in which you ask whether a mayor of a non-chartered city may keep any moneys gratuitously given him for performing marriage services.

Initially, it must be noted that the duties and authority of mayors of non-chartered cities are set forth generally under R.C. Chapter 731 and R.C. Chapter 733. R.C. 731.07 provides for salaries and fees pertaining to city offices as follows:

The salary of any officer of a city shall not be increased or diminished during the term for which he was elected or appointed. This section does not prohibit the payment of any increased costs of continuing to provide the identical benefits provided to an officer at the commencement of his term of office.

Unless otherwise provided, all fees pertaining to any office shall be paid into the city treasury. (Emphasis added.)

Thus, the dispositive issue is whether moneys gratuitously given one who performs a marriage constitute "fees."

The disposition of moneys gratuitously given for the solemnization of marriages was recently considered, with respect to municipal court judges, in City of Kettering v. Berger, 4 Ohio App. 3d 254, 448 N.E.2d 458 (Montgomery County 1982). The court therein thoroughly examined the nature of such moneys and determined that it was "constrained to agree. . .that the word 'fee' given its ordinary meaning conveys a fixed charge as opposed to 'monies given voluntarily or gratuitously in reward for services'." Berger, 4 Ohio App. 3d at 259, 448 N.E.2d at 464. Rather, the court concluded that money gratuitously given for solemnization of a marriage is a "perquisite," as that term is used in Ohio Const. art. IV, §6(B), and stated as follows:

All of the definitions of the term "perquisite" contemplate a profit to be secured by the officer out of the office he occupies, in addition to his fixed compensation. A "perquisite" is something gained from a place of employment over and above the ordinary salary or fixed wages for services rendered, especially a fee allowed by law to an officer for a specific service. Hence, the reimbursement

of a member of the legislature for his actual expenses does not fall within the definition of the word "perquisite." State, ex rel. Harbage v. Ferguson (1941) 68 Ohio App. 189 [22 O.O. 139].

It is clear, as the trial court noted, appellant would not have received any money from the marriage couples but for his role as a judicial officer in solemnizing a marriage.

Berger, 4 Ohio App. 3d at 259, 448 N.E.2d at 463-64.

The moneys to which your letter refers are given gratuitously. It is my understanding that there is no fixed charge payable to a mayor for performance of this service. Further, the authority to perform marriages is granted to mayors (as well as municipal court judges and others) under R.C. 3101.08, which provides, in pertinent part, that "the mayor of a municipal corporation in any county in which such municipal corporation wholly or partly lies may join together as husband and wife any persons not prohibited by law." The right to solemnize marriages thus appertains to the office of the mayor; the holder of the office may perform that service by virtue of his status as such municipal officer. Clearly, but for his role as mayor, an individual would not receive money for solemnization of a marriage. The moneys so received must, therefore, be considered perquisites, rather than fees. Thus, R.C. 731.07 cannot be considered to provide for the disposition of moneys gratuitously given for performance of a marriage.

The disposition of moneys which may be received by the mayor of a city is further considered under R.C. 733.40, which provides, in pertinent part:

All fines, forfeitures, and costs in ordinance cases and all fees collected by the mayor, or which in any manner come into his hands, or which are due such mayor or a marshal, chief of police, or other officer of the municipal corporation, any other fees and expenses which have been advanced out of the treasury of the municipal corporation, and all money received by such mayor for the use of such municipal corporation, shall be paid by him into such treasury on the first Monday of each month. At the first regular meeting of the legislative authority each month, the mayor shall submit a full statement of all money received, from whom and for what purposes received, and when paid into the treasury.

As previously stated, the moneys given gratuitously for solemnization of a marriage cannot be considered "fees." Clearly, such moneys are not fines, forfeitures, or costs within the terms of this statute. Thus, R.C. 733.40 may be deemed applicable only if such moneys are received by the mayor for the use of the city. While the intent of the donor is a factual question which I cannot determine, given the circumstances surrounding most such transactions, it is probable that the money is intended as an expression of appreciation which is personal to one solemnizing a marriage, whether that individual be a mayor, judge, or religious representative. Accordingly, R.C. 733.40 cannot be considered to provide for the disposition of these moneys.

I have also examined the provisions of R.C. 102.03(D) and R.C. 102.04(C) concerning the ethics of public officials. R.C. 102.03(D) prohibits use of an official

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<sup>1</sup> The Ohio Ethics Commission has the authority to issue advisory opinions as to whether a set of circumstances would violate the provisions of R.C. Chapter 102, R.C. 102.08, and to investigate and hold hearings upon complaints of possible violations of R.C. Chapter 102, R.C. 102.06. R.C. 102.03 and R.C. 102.04 are criminal statutes. R.C. 102.06; R.C. 102.99. By analyzing the ethics provisions within the context of this discussion, I do not mean to express an opinion as to the applicability of R.C. 102.03 or R.C. 102.04 with regard to any particular set of facts.

position to secure something of value "which thing is of such character as to manifest a substantial and improper influence" upon an official with respect to his duties. It does not appear that a gratuity for solemnization of a marriage would be of such a nature as to exert undue influence upon a mayor with respect to the performance of his duties. R.C. 102.04(C) specifically prohibits, *inter alia*, receipt by an elected municipal officer of compensation from a source other than the municipality for services which he renders "in any case, proceeding, application, or other matter which is before any agency, department, board, bureau, commission, or other instrumentality, excluding the courts," of the municipality of which he is an officer, except as permitted by R.C. 102.04(D). The situations referred to in R.C. 102.04(C) involve instances where outside compensation could improperly influence the exercise of discretion by a public officer. The performance of a marriage service is distinguishable, since a mayor exercises little, if any, discretion in the solemnization of a marriage. Further, as stated earlier, it does not appear that the gratuity is of such nature as to exert improper influence in this regard. Moreover, the performance of a marriage is not a matter which is pending before any agency, department, board, bureau, commission, or other instrumentality of the municipality, as contemplated by R.C. 102.04(C). I, therefore, conclude that the ethics provisions of R.C. 102.03(D) and R.C. 102.04(C) are not applicable to situations in which a mayor is gratuitously given moneys for performance of a marriage.

In summary, neither R.C. 731.07, nor R.C. 733.40, provides for the disposition of moneys gratuitously given the mayor of a city for solemnization of a marriage. Further, there appears to be no statutory provision which would prevent the mayor of a city from personally accepting such moneys.<sup>2</sup>

Your second and third questions ask whether moneys which are gratuitously given a mayor for solemnization of a marriage, and which such mayor may accept personally, rather than as the representative of the city, are public funds for which accounting records should be maintained. R.C. 117.10 defines "public money," and provides, in pertinent part:

"Public money" as used in this section and division (D) of section 117.091 of the Revised Code includes all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance, order, or otherwise, and all public officials are liable therefor. All money received under color of office and not otherwise paid out according to law is due to the public office with which the officer is connected and shall be paid into the treasury thereof to the credit of a trust fund, and there retained until claimed by the lawful owner. If not claimed within a period of five years, such money shall revert to the general fund of the public office where collected.

As stated earlier, the moneys at issue would not be received by a mayor but for the office which enables him to perform marriages. Clearly, the moneys are received under color of office. As such, the funds are "public money" which, if not otherwise paid out according to law, must be paid into the treasury of the

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<sup>2</sup> Your office has indicated that you are not concerned with cities organized pursuant to R.C. Chapter 705. Accordingly, this opinion does not consider such cities. I note, however, that R.C. 705.25 specifically addresses the disposition of moneys received by an officer of a city which is organized pursuant to R.C. Chapter 705, and requires that "[a]ll fees and perquisites appertaining to any municipal office or officer shall be paid into the treasury of the municipal corporation, and shall be credited to the general fund." The statute further prohibits officers of such cities from receiving, other than as a representative of the city, "any fee, present, gift, or emolument, or share therein, for official services." R.C. 705.25.

municipal corporation<sup>3</sup> to the credit of a trust fund,<sup>4</sup> and retained until claimed by the rightful owner. In the case of cities, other than those organized pursuant to R.C. Chapter 705, the rightful owner is the mayor to whom such moneys were given; consequently, such mayor may claim the funds. R.C. 117.08 requires public officers and city employees to keep accounts in the forms prescribed pursuant to R.C. 117.05 or 117.051. Thus, in response to your second and third questions, moneys gratuitously given a mayor for solemnization of a marriage are received under color of office, and are, therefore, public moneys within the terms of R.C. 117.10. As a result, records of financial transactions must be maintained in accordance with R.C. 117.051 and R.C. 117.08.

Your final question is whether moneys gratuitously given a mayor for performance of a marriage must be applied toward his salary pursuant to R.C. 731.07. It is my understanding that this question arises from the statutory language which prohibits an increase or decrease in compensation during the term for which a mayor is elected or appointed. As has been previously stated, the statutory provisions permit mayors of cities, other than those organized pursuant to R.C. Chapter 705, to personally accept such money. The court in Schultz v. Garrett, 6 Ohio St. 3d 132, 451 N.E.2d 794, 795 (1983), examined the issue of in-term increases in compensation, and stated, as follows:

Where a statute setting forth the formula for the compensation of an officer is effective before the commencement of such officer's term, any salary increase which results from a change in one of the factors used by the statute to calculate the compensation is payable to the officer. Such increase is not in conflict with Section 20, Article II of the Constitution when paid to the officer while in term. (State, ex rel. Edgecomb v. Rosen, 29 Ohio St. 2d 114 [58 O.O.2d 312], overruled.)

See also State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 39 N.E.2d 840, 841 (1942) (syllabus, paragraph 3). Accordingly, if the statutory scheme permits a mayor to claim moneys gratuitously given for the performance of a marriage, the variable nature of the amount of such moneys is irrelevant, and does not violate the provisions of R.C. 731.07.

The foregoing discussion is premised upon the general laws of this state. Your question implicitly acknowledges that the duties and authority of a mayor of a chartered city may differ from those set forth under the general laws, in accordance with the concept of Home Rule. See Ohio Const. art. XVIII, §§2, 3, 7. However, the Supreme Court of Ohio has held that "[a] non-chartered municipality may enact an ordinance which is at variance with state law in matters of substantive local self-government." Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375, 378, 402 N.E.2d 519, 522 (1980). The court therein noted that "the ability to determine salaries paid to city employees is a fundamental power of local self-government." 61 Ohio St. 2d at 383, 402 N.E.2d at 525. Thus, a chartered city, in accordance with its charter or by ordinance, or a non-chartered city, pursuant to an ordinance, may vary from the provisions set forth by statute with respect to the disposition of moneys

<sup>3</sup> Pursuant to R.C. 117.01(A), a municipal corporation is a "public office." Accordingly, moneys received by a mayor are to be paid into the treasury of the city with which the mayor is connected.

<sup>4</sup> Moneys given to mayors of cities organized pursuant to R.C. Chapter 705 are also received under color of office, and, thus, are public moneys within the meaning of R.C. 117.10. However, R.C. 705.25 provides that moneys which constitute perquisites received by a mayor shall be paid to the treasury of the city to the credit of the general fund.

<sup>5</sup> Again, as discussed in note 2, supra, I am not addressing cities organized under R.C. Chapter 705.

gratuitously given a mayor for solemnization of a marriage. A city could require that the mayor deliver moneys received as perquisites for the solemnization of marriages to the municipal treasury.

Based upon the foregoing, it is my opinion, and you are advised:

1. Moneys gratuitously given a mayor of a nonchartered city for the solemnization of a marriage are received under color of office and are, therefore, public moneys within the terms of R.C. 117.10, and records of financial transactions involving such moneys must be maintained in accordance with R.C. 117.051 and R.C. 117.08.
2. Moneys gratuitously given a mayor of a nonchartered city for the solemnization of a marriage must be paid into the treasury of the municipal corporation in accordance with R.C. 117.10, but may be claimed by the mayor as the lawful owner of such moneys, unless otherwise provided by an ordinance of such city.
3. Where the statutory scheme setting forth the compensation of a mayor permits such mayor to claim moneys gratuitously given him for the solemnization of a marriage, the variable amount of such moneys does not constitute an in-term increase or decrease in salary within the meaning of R.C. 731.07.