



**OHIO ETHICS COMMISSION**  
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Advisory Opinion Number 91-008  
December 5, 1991

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code prohibits a city mayor from approving the enactment of an ordinance which grants him an increase in compensation, and from otherwise using his authority or influence, formally or informally, to secure an increase in compensation.

(2) Division (E) of Section 102.03 of the Revised Code prohibits a city mayor from accepting, for the duration of his term, an increase in compensation enacted by city council during his current term of office. A mayor is bound by this prohibition regardless of whether he approves the ordinance, disapproves the ordinance, or does not return the ordinance to council.

(3) A city auditor is not prohibited by Section 102.03 of the Revised Code from accepting an increase in compensation, enacted by city council during his current term of office, unless a local provision authorizes the auditor to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for the position of city auditor.

(4) A city law director is prohibited by Division (E) of Section 102.03 of the Revised Code from accepting, for the duration of his term, an increase in compensation enacted by city council during his current term of office.

(5) A city director of public safety is not prohibited by Section 102.03 of the Revised Code from accepting an increase in compensation enacted by city council during his tenure, unless a local provision authorizes the safety director to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for the position of safety director.

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You have asked whether the Ohio Ethics Law and related statutes would prohibit various elected officials of a statutory city from receiving increases in salary during their terms of office. You ask whether the city mayor, auditor, or law director may accept salary increases provided under an ordinance enacted by city council during the officers' current terms of office. You have also asked whether the Director of Public Safety may accept an increase in compensation provided by ordinance.

In Advisory Opinion No. 91-007, the Commission set forth the constitutional and statutory prohibitions against the acceptance of in-term increases by elected officials, and explained that the courts have found that cities are not bound by these prohibitions under their home rule powers granted by the Ohio Constitution. The opinion notes, however, that the issue still remains whether the Ohio Ethics law and related statutes would prohibit city officers and employees from accepting, or using their position to secure, in-term increases in compensation.

As noted in Advisory Opinion No. 91-007, Divisions (D) and (E) of Section 102.03 of the Revised Code are applicable to the questions you have raised. These provisions read as follows:

(D) No public official or employee shall use or authorize the use of the authority or influence of his office or employment to secure anything of value or the promise or offer of anything of value that is of such character as to manifest a substantial and improper influence upon him with respect to his duties.

(E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon him with respect to his duties.

City officials, whether elected or appointed, and city employees are subject to these prohibitions. See R.C. 102.01(B) and (C); Ohio Ethics Commission Advisory Opinions No. 84-004, 84-013, and 85-011.

The term "anything in value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. See R.C. 1.03 and 102.01(G). Compensation received by a city official for performing his official duties, and increases in that compensation fall within the definition of "anything of value." See Advisory Opinion No. 91-007.

In determining whether the city officials about which you have asked may receive an in-term increase in compensation, it is necessary to determine whether the increase would be of such character as to manifest an improper influence upon them with respect to their duties. In Advisory Opinion No. 91-007, the Commission held that the members and president of city council are prohibited by R.C. 102.03 from accepting an in-term increase in compensation, since council would introduce and enact the ordinance granting the increase, and the members and president would exercise discretionary authority in the passage of the ordinance. The opinion also held, however, that the clerk of council and city treasurer are not prohibited from accepting an in-term increase in compensation since they do not exercise discretionary authority with respect to the enactment of ordinances or the appropriation of city funds, and they do not otherwise establish their own compensation. Therefore, it is necessary in this instance to examine the authority and duties of the city officials in question.

#### CITY MAYOR

You have asked whether the city mayor may accept an increase in his compensation during his current term of office.

A city mayor is elected to office, and serves in the executive branch of city government, R.C. 733.01, 733.02. See also R.C. 733.03 (the mayor is the chief conservator of peace within the city); R.C. 733.21 and 733.22 (the mayor serves on the board of control which approves the award of certain contracts in the departments of public service and public safety). The mayor is empowered to "make such recommendations, in writing, to the legislative authority for the welfare of the city as seem wise to him." R.C. 733.06. However, he also plays a more crucial role in the enactment of city ordinances and resolutions. Section 731.27 of the Revised Code provides as follows:

Every ordinance or resolution of a legislative authority of a city shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves such ordinance or resolution, shall sign and return it forthwith to the legislative authority. If he does not approve it, he shall, within ten days after its passage or adoption, return it, with his objections, to the legislative authority, or, if it is not in session, to the next regular meeting thereof, which objections shall be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless the legislative authority, by adjournment, prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it with his objections, the legislative authority may, after ten days, reconsider it, and if such ordinance, resolution, or item, upon such reconsideration, is approved by a two-thirds vote of all the members elected, it shall then take effect as if signed by the mayor.

R.C. 731.27 requires that every ordinance be presented to the mayor "for approval." The mayor may approve an ordinance by signing it and returning it to council. If he does not return the ordinance to council in a timely manner, the ordinance will take effect as if he had signed it. The mayor may also disapprove an ordinance, or any part thereof, and return it with his objections to council. Council may override the mayor's disapproval, but only by a two-thirds vote of all elected members.

As discussed in Advisory Opinion No. 91-007, R.C. 102.03(D) prohibits a public official from participating in any matter if the matter would provide such a definite and particular benefit for the official "that his private interest could impair his independence of judgement or unbiased discretion in making his official decisions." Advisory Opinion No. 88-004. It is apparent that an increase in the mayor's salary would provide a definite benefit to the mayor's personal financial interests, and that this financial benefit could impair the mayor's objectivity and independence of judgment in determining, as a city official, whether the increase would be in the best interests of the city. See Advisory Opinion No. 91-007. Therefore, R.C. 102.03(D) would prohibit the mayor from participating to approve the enactment of an ordinance granting him an increase in compensation.

Furthermore, Division (E) of Section 102.03 would prohibit the mayor from accepting an in-term increase in compensation. It is obvious that the mayor exercises authority over the enactment of an ordinance, regardless of the course of action he pursues. If he signs the ordinance and returns it to council, then the ordinance takes effect. If he disapproves an

ordinance and returns it to council, the ordinance will fail to take effect unless council overrides the disapproval. However, council must act by a two-thirds majority of all members elected in order to override the mayor's disapproval. If the mayor does not return the ordinance to council, then, again, the ordinance will take effect "in the same manner as if he had signed it." R.C. 731.27. Therefore, it is impossible for the mayor to abstain by failing to act, since such failure operates, in effect, in the same manner as if he had acted to approve the ordinance. An increase in the mayor's compensation could impair the mayor's objectivity in considering an ordinance enacting the increase. It is impossible for the mayor to act or not act in such a fashion that he would not exercise authority over the enactment of the ordinance granting his increase. Therefore, the mayor is prohibited by R.C. 102.03(E) from receiving an increase in compensation during his current term of office.

The issue is raised whether a mayor who vetos an ordinance providing for his in-term increase in compensation may receive the increase if the council overrides his veto and enacts the ordinance. In Advisory Opinion No. 91-007, the Commission addressed a similar issue in determining whether a council member who abstains from participating in the deliberations or vote upon the issue of an in-term increase for council members or who votes against the raise could receive the increase if the ordinance passed, and held as follows:

If the Commission were to hold that members who abstained from considering the increase or voted against it would then be eligible to receive the increase, it would be possible in certain instances for members to use their positions to secure the increase. For example, during the roll call if a majority of council had voted affirmatively to approve the increase, the next council member to vote could then abstain or vote against the increase, regardless of his position on the matter, for the purpose of receiving the increase. See also State ex rel. Shinnich v. Green, 37 Ohio St. 227 (1881) and Gogate v. Ohio State University, 42 Ohio App. 3d (Franklin County 1987) (holding that generally the effect of an abstention is considered to be an acquiescence in the action taken by the majority). But cf. Gitlin v. City of Berea, No. 58062 (Ct. App. Cuyahoga County 1982) ("where a member of a legislative body is disqualified due to interest, the disqualification is treated as a vacancy because the member is not qualified to act . . . when an office is treated as vacant, the number of members is reduced accordingly"). Therefore, it must be concluded that none of the members serving on council at the time the increase is enacted may receive the increase regardless of how they voted or whether they abstained.

Similarly, if the Commission were to hold in this instance that, if the mayor vetos a pay increase for himself, he may receive the pay increase if the council overrides his veto, it would be possible in certain instances for the mayor to use his authority to secure the increase. For example, if the ordinance had been passed unanimously by council, or if the mayor had other reason to believe that the votes existed for the override, he could veto the ordinance, not on the basis that he felt it was in the best interests of the city, but with the purpose of receiving the increase if his disapproval were overridden; he would then be in a position to receive the increase if the veto were, in fact, overridden by council even though the increase was of such character as to manifest an improper influence upon him. Therefore, it must be concluded that the mayor is prohibited from receiving an increase in his compensation during his current term of office,

regardless of whether he approves the ordinance granting the increase, disapproves the ordinance, or does not return the ordinance to council.

### CITY AUDITOR

You have also asked whether the city auditor may receive an increase in compensation during his term of office. The city auditor is elected to office, and serves in the executive branch of government. R.C. 733.01, 733.10. The auditor is charged with keeping the books of the city, and exhibiting statements of moneys received and expended, property owned by the city and the income derived therefrom, and of taxes and assessments. R.C. 733.11. The city auditor also audits the accounts of all officers and departments annually, and prescribes the form of accounts and reports to be rendered to him and the form and method of keeping accounts by all other departments. R.C. 733.12. He has the power to inspect and revise the accounts of other city departments. Id. The city auditor is also responsible for preventing appropriations from being overdrawn, for assuring that expenses are paid from the proper appropriation, and for assuring that sufficient funds are in the treasury before allowing the payment of a voucher. R.C. 733.13. See also R.C. Chapter 5705 (the city auditor serves as the fiscal officer for the city for purposes of the tax levy law, and for example, must certify, before any contract or order is made involving the expenditure of money, that the amount required to meet the obligation has been appropriated for such purpose and is in the treasury or in the process of collection, R.C. 5705.41). When claims are presented, he may require evidence that the amount is due. R.C. 733.13. The city auditor receives statements of the receipts and expenditures of city officers and departments, countersigns receipts given by the treasurer, certifies to the court of common pleas the election of certain municipal officers, and attends and assists at the opening of contract bids and inspects the bids. R.C. 733.14-18.

It is clear from examining the auditor's duties, that he exercises discretionary authority, performs an important role in the fiscal matters of the city, and functions as a check upon the expenditure of city funds. The auditor does not, however, play a role in the introduction or enactment of ordinances, and does not have the authority to make appropriations of moneys for the purpose of funding increases in compensation. See Uner v. State ex rel. Alcorn, 51 Ohio App. 97 (Hamilton County 1935), appeal dismissed, 130 Ohio St. 196 (1935) (city auditor has no power to make an appropriation of any money for any purpose; the power rests with city council). He does not have the authority to fix or increase his own compensation. Therefore, R.C. 102.03(E) would not prohibit a city auditor from receiving an increase in compensation enacted by ordinance during his current term of office. (This opinion does not address or purport to interpret R.C. 731.13, which prohibits the salary of any officer of a city from being increased or decreased during his term of office, or any other local provisions prohibiting in-term increases for city auditors). It must be noted, however, that if a local charter or ordinance authorizes the auditor to exercise discretionary authority over the enactment of ordinances, the appropriation of moneys, or the setting of the auditor's compensation, then the prohibitions of R.C. 102.03 would be implicated.

Division (D) of Section 102.03 would prohibit the auditor from misusing his position or influence, formally or informally, to secure an in-term increase in compensation.

CITY LAW DIRECTOR

You have also asked whether the city law director may receive an in-term increase in compensation. The law director is elected to office, and serves in the executive branch of city government. See R.C. 733.01, 733.49. R.C. 733.51 provides that the law director "shall prepare all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers provided in Title VII of the Revised Code as legal counsel and attorney." The law director also serves as the prosecuting attorney of the mayor's court. R.C. 733.51, R.C. 733.52. R.C. 733.53 provides the law director "when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of the city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute." He is also required to provide opinions to any city officer who "entertains doubts concerning the law in any matter before him in his official capacity." R.C. 733.54.

The city law director acts as legal counsel and advisor to city council. See generally Chinnoch v. Blackie, 53 Ohio App. 2d 237 (Cuyahoga County 1979). The law director may assist council in the preparation of ordinances, approves ordinances as to form, may advise council as to the lawfulness or propriety of ordinances or proposed ordinances, and defends and enforces duly enacted ordinances. Indeed, in this instance, the law director was asked by, and advised, council as to the propriety of in-term increases for city officials, including the law director. Although the law director does not participate directly to enact an ordinance, as council members, the president of council, and the mayor do, it is apparent that the law director plays a significant and authoritative role in the introduction, adoption, interpretation, and enforcement of council's enactments, and that an increase in the law director's salary could impair his objectivity and independence of judgment in performing his responsibilities as law director with respect to an ordinance increasing his compensation. Therefore, R.C. 102.03(E) would prohibit the law director from accepting, for the duration of his term, an increase in compensation enacted by city council during his current term of office.

R.C. 102.03(D) also prohibits a city law director from using the authority or influence of his position to secure an in-term increase in compensation. In this instance, the law director did advise council that the city could grant in-term increases in compensation for various municipal officers, including the law director. This advice was based on: (1) the case, Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375 (1980), which held that non-chartered, as well as chartered municipalities may, pursuant to their home rule power granted under Ohio Const. art. XVII, §3, enact an ordinance governing its employees' compensation, even though the ordinance is at variance with state statute; (2) Ohio Attorney General Opinion No. 83-036, which held that a non-chartered city could by enactment of ordinance, grant an in-term pay increase to an elected city official; and, (3) the policy of the State Auditor holding that the Auditor's Office would no longer issue findings for recovery for in-term pay raises enacted by valid ordinance. The Attorney General's opinion and the Auditor's ruling were, in turn, based upon the holdings in the Parma case and Village of Bellville v. Beal, 7 Ohio App. 3d 291 (Richland County 1982), which held that a village council has the home rule authority to enact an ordinance providing an in-term increase in compensation for council members, despite the prohibition of R.C. 731.13 against such increase. Therefore, the law

director's advice was based on clear precedent existing at that time, and there is nothing in your request for an opinion which otherwise indicates that the law director used his authority for his own benefit. However, as discussed in Advisory Opinion No. 91-007, the Beal case and other existing precedent related only to the extent of a non-chartered municipality's home rule power to enact legislation governing the compensation of its officials and employees which is at variance with state civil statute, and did not discuss the impact of the Ethics Law. As previously held by the Commission, the Ethics Law and related statutes are general and criminal laws which prevail over conflicting local provisions, despite the home rule power of municipalities. See Advisory Opinions No. 83-004 and 91-007. Therefore, the Ethics Law does prohibit those municipal officers specified in this opinion and Advisory Opinion No. 91-007 from receiving in-term increases in compensation. The Commission recognizes that this is a new interpretation of the question whether municipal officers may receive an in-term increase in compensation, and that this interpretation was not available to the law director as precedent when he rendered his advice to council.

#### Director of Public Safety

You have also asked whether the Director of Public Safety may receive an increase in salary.

The director of public safety is appointed by the mayor, and is charged with administering the department of public safety. R.C. 737.01. See also R.C. 733.01 (the director of public safety is in the executive branch of city government); R.C. 733.03. The director is the executive head of the police and fire departments, and the chief administrative authority of the charity, correction, and building departments. R.C. 737.02. The director of public safety also serves on the city board of control, which must approve the award of certain contracts in the departments of public safety and public service. R.C. 733.21, 733.22.

R.C. 733.06 requires the director to attend the meetings of city council when requested by council, and to answer any question put to him by any member of council. However, the director of public safety has no authority with respect to the enactment of legislation or the appropriation of funds. He has no authority to set or increase his own compensation. The director of public safety is appointed by the mayor, rather than elected, and does not serve for a fixed term. See 1962 Ohio Op. Att'y Gen. No. 3143, p. 560. There is no provision in the Ethics Law which prohibits the city from increasing the salary of its employees, including the safety director. Cf. 1962 Ohio Op. Att'y Gen. No. 3143 (syllabus) (since the director of the department of service and safety does not serve for a term for purposes of R.C. 731.07, "the legislative authority of the city may increase or decrease his salary during his tenure in office"). See generally Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31 (1980). The director of public safety is not prohibited by Section 102.03 of the Revised Code from accepting an increase in compensation enacted by city council during his tenure, unless a local provision authorizes the safety director to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for the position of safety director.

Division (D) of Section 102.03 would prohibit the safety director from misusing his position or influence, formally or informally, to secure an increase in compensation.

The Commission wishes to make clear that the issues presented and addressed in this opinion relate to officials of statutory cities. The reasoning underlying the opinion's conclusions and interpretation of the Ethics Law would also generally apply to charter municipalities. However, the power of municipal officials and the method by which the compensation of municipal officers is set vary greatly among charter municipalities, and the Ethics Commission should be contacted if questions should arise concerning application of this opinion to the officials of a particular charter municipality.

This advisory opinion is based on the facts presented, and is rendered only with regard to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code.

Therefore, it is the opinion of the Ohio Ethics Commission, and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code prohibits a city mayor from approving the enactment of an ordinance which grants him an increase in compensation, and from otherwise using his authority or influence, formally or informally, to secure an increase in compensation; (2) Division (E) of Section 102.03 of the Revised Code prohibits a city mayor from accepting, for the duration of his term, an increase in compensation enacted by city council during his current term of office. A mayor is bound by this prohibition regardless of whether he approves the ordinance, disapproves the ordinance, or does not return the ordinance to council; (3) A city auditor is not prohibited by Section 102.03 of the Revised Code from accepting an increase in compensation, enacted by city council during his current term of office, unless a local provision authorizes the auditor to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for the position of city auditor; (4) A city law director is prohibited by Division (E) of Section 102.03 of the Revised Code from accepting, for the duration of his term, an increase in compensation enacted by city council during his current term of office; and (5) A city director of public safety is not prohibited by Section 102.03 of the Revised Code from accepting an increase in compensation enacted by city council during his tenure, unless a local provision authorizes the safety director to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for the position of safety director.



Dr. David L. Warren, Chairman  
OHIO ETHICS COMMISSION