



OHIO ETHICS COMMISSION
THE ATLAS BUILDING
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February 12, 1993 Informal Opinion 1993-INF-0212-2

Barbara J. Urban
Clerk, Village of McDonald
Municipal Building
McDonald, Ohio 44437

Dear Ms. Urban:

You have asked for an application of the Ethics Commission's ruling in Advisory Opinion No. 91-007, prohibiting city council members from receiving in-term increases in compensation, to the situation in your village.

You have stated that in your village, two incumbent council members ran for re-election in November, 1991 and were re-elected to new terms beginning January, 1992. After the November election, the village council enacted legislation in December granting to council members a pay raise, to become effective in January, 1992. The two council members who had been re-elected voted in favor of the increase. You have asked whether these two council members are prohibited by the Ethics Law from receiving the pay increase enacted after their re-election, but prior to the commencement of their new term.

Divisions (D) and (E) of Section 102.03 of the Revised Code 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 a 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.

In Advisory Opinion No. 91-007, the Ethics Commission held that an increase in compensation would provide a definite and particular financial benefit to city council members such that their objectivity and independence of judgment as council members in deciding whether the increase would be in the best interests of the city, could be biased or impaired. The Commission concluded, therefore, that R.C. 102.03(D) would prohibit the members of city council from enacting an

ordinance granting an in-term increase in compensation for the current members of council for the duration of their present terms, and that R.C. 102.03(E) would prohibit current members of council from receiving an in-term increase in compensation for the duration of their terms. As the Commission stated at pages 6-7 of Advisory Opinion No. 91-007:

Council is charged with the authority to fix the compensation of city officials through the enactment of ordinance. . . . An increase in the compensation paid to council members currently serving and acting on the increase would be of such character as to manifest a substantial and improper influence upon the council members with respect to their performance of this duty.

The Commission went on to note that the issue was raised whether council members who abstain from participating in deliberations and voting upon the pay increase, or who vote against the raise, may receive the increase if the ordinance passes. The Commission stated at pages 7-8:

The issue of an in-term increase for members of city council presents an inherent and fundamental conflict of interest for those council members. There is no question but that a public official's objectivity could be impaired in considering and acting upon an increase in compensation for himself. Once council votes to approve an increase, it would be improper for any member of council serving at the time of the vote to accept the increase for his current term. 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. . . . 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.

A village council member, like a city council member, is a "public official or employee" who is subject to the prohibitions of R.C. 102.03(D) and (E). See R.C. 102.01(B) and (C). Also, a village council, like city council, is charged with the authority to fix the compensation of municipal officers and employees. See R.C. 731.13. See also R.C. 731.08. Therefore, the analysis and conclusions set forth in Advisory Opinion No. 91-007 and summarized above would apply to village council members. Division (D) of Section 102.03 would prohibit the members of village council from enacting an ordinance granting an in-term increase in compensation for the current members of council. Division (E) of Section 102.03 would prohibit a member of village council from accepting, for the duration of his present term, an increase in compensation enacted by village council while he was a member thereof.

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The facts you have presented, however, differ slightly from those addressed in Advisory Opinion No. 91-007. In the previous opinion, the issue concerned an in-term increase for incumbent council members. In this instance, the increase voted upon by council was not to take effect during the current terms of the members serving at the time the ordinance was enacted, but was to become effective for the terms of office beginning after the enactment of the ordinance. However, at the time the ordinance was enacted, two of the council members had been re-elected and were aware that they would be serving for another term.

Advisory Opinion No. 91-007 states: "The issue of an in-term increase for members of city council presents an inherent and fundamental conflict of interest for those council members. There is no question but that a public official's objectivity could be impaired in considering and acting upon an increase in compensation for himself." As summarized in Advisory Opinion No. 91-007, the purpose of a prohibition against in-term increases "is to avoid the potential for a public officer to abuse his official authority by taking action to improperly influence the legislative authority that determines his compensation." See State ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942). Compare Advisory Opinion No. 83-008 (holding that a city council member who is affiliated with the mayor in a legal professional corporation is not prohibited from voting on an ordinance increasing the salary of the office of mayor, effective during the next term following an election, where the election would take place a few months after the vote on the proposed ordinance and the present mayor might seek re-election but had not yet announced that he would do so.)

In this instance, the fundamental conflict of interest and the potential for abuse are as strong for the incumbent council members who were re-elected for the term to which the increase is affixed, as for council members who enact and receive an in-term increase in compensation. An individual who has been elected or re-elected to public office is legally assured of assuming that office, and receiving the attendant compensation, at the beginning of his term of office, absent an election contest. See generally State ex rel. Grisell v. Marlow, 15 Ohio St. 114 (1864); State ex rel. Gaylord v. Herdman, 17 Ohio App. 269 (Summit County 1923); Mirlisena v. Fellerhoff, 11 Ohio Misc. 2d 7 (C.P. Hamilton County 1984). The purpose of requiring a council member to forgo any increase in compensation enacted during his term is to assure that the council members who are making the decision to increase the compensation are unswayed by the fact that they would be entitled to the increase. This protection is lost if incumbents who are re-elected are entitled to an increase in compensation that is enacted after their re-election but prior to the beginning of their new term of office. The same consideration appears to have been weighed by the General

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Assembly when it enacted R.C. 731.13, which states that "[t]he legislative authority shall, in the case of elective officers, fix their compensation for the ensuing term of office at a meeting held not later than five days prior to the last day fixed by law for filing as a candidate for such office," thereby requiring that compensation be set not only before the election, but before the time candidacy must be declared.

In this instance, the objectivity and independence of judgment of an incumbent council member could be impaired with respect to enacting an increase in compensation for the upcoming term of office to which he had already been re-elected. The increase in compensation is of such character as to manifest a substantial and improper influence upon the re-elected council members with respect to the performance of their official duties to set the compensation of village officers. Thus, the re-elected council members are prohibited from accepting the increase in compensation. In this instance, the re-elected council members voted in favor of the increase. However, as discussed above, a council member would be subject to this prohibition regardless of whether he voted or otherwise participated with regard to the increase or voted against the increase.

Although the re-elected council members who were in office at the time the increase in pay was enacted are prohibited from receiving the increase, the newly elected council members who began their term of office in January, 1992 may, of course, receive the increase. However, it must be noted that the analysis and conclusions of this opinion are not limited to village council members, and may apply to other municipal officials. See Advisory Opinions No. 91-007 and 91-008. The Ethics Commission should be contacted if questions should arise concerning the application of this opinion to other municipal officials.

This informal advisory opinion was approved by the Ethics Commission at its meeting on February 12, 1993. The opinion is based on the facts presented, and is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. It does not purport to interpret other laws or rules. I apologize for the delay in responding to your request, and regret any inconvenience this delay has caused. If you have any questions, please feel free to contact this Office again.

Sincerely,



Melissa A. Warheit
Executive Director