



OHIO ETHICS COMMISSION

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February 2, 1996

Informal Opinion 1996-INF-0202-1

Margaret Anne Cannon
City of Beachwood

Dear Ms. Cannon:

On September 7, 1995, the Ethics Commission received a request for an advisory opinion from Louis H. Orkin, who was serving, at that time, as the Law Director of the City of Beachwood (City). The Commission was asked whether the Ohio Ethics Law and related statutes prohibit the mayor from receiving an increase in compensation. You provided supplemental information regarding this question in correspondence received on January 26, 1996. This advisory opinion addresses the question in light of all of the facts presented.

As explained below, under the facts and circumstances that have been described, city council did not create a prohibited increase in compensation for the mayor pursuant to and R.C. 102.03 (D) and (E), and those sections do not prohibit the mayor from receiving the compensation established by city council.

Facts

The request for an advisory opinion states that the former mayor was elected to serve a four-year term beginning January 1, 1992 and ending December 31, 1997. The former mayor did not complete this term. He resigned from office on May 15, 1995. City Charter requires the president of council to assume the additional duty of acting mayor whenever the office of mayor becomes vacant. Article IV, Section 3, Division 1, Charter of the City of Beachwood. If, upon a mayor's resignation, more than twenty-four (24) months remain of the former mayor's term, then the City Charter requires the president of council to serve as acting mayor until a new mayor is chosen in a special election that is held within seventy-five (75) days of the former mayor's resignation. Article IV, Section 3, Division 2 (A)(1), Charter of the City of Beachwood.

The City Charter empowers city council to establish by ordinance the salary and compensation of the Mayor. Charter of the City of Beachwood, Article VIII, Section 3, Division 1 (A). The City Charter further provides that an ordinance providing for the compensation of the Mayor shall be read three times and not be passed as an emergency or urgent legislation. Charter of the City of Beachwood, Article VIII, Section 3, Division 1 (B).

Merle S. Gorden was the president of council when the former mayor resigned and thus, became acting mayor. Shortly after the former mayor resigned, city council discussed the need for a "full-time" mayor and the related issue whether the mayor's compensation should be increased if the office of mayor was changed to "full-time." The advisory opinion request states that Mr. Gorden, who was serving as president of council and acting mayor, did not participate in

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discussions pertaining to the proposed changes in the mayor's duties and compensation. City council believed that an increase in the mayor's compensation would be warranted if the office of mayor were changed to "full-time" since the change would limit the mayor's ability to engage in private outside employment or business activities. The request further states that, while city council was discussing issues pertaining to the mayor's office, Mr. Gorden, announced his candidacy for the office of mayor.

City council determined that the office of mayor should be changed to a "full-time" position and the law director prepared Ordinance 1995-70 that provides for increased wages and benefits for the mayor. The first reading of Ordinance 1995-70 was on June 19, 1995, the second reading was on June 26, 1995. The city council passed Ordinance 1995-70 on July 10, 1995 after the third reading.

Mr. Gorden was elected mayor in a special election that was held on July 18, 1995. On August 9, 1995, the results of the special election were certified, Mr. Gorden took the oath of office, and became the City's new mayor.

Prohibition imposed by R.C. 102.03 (D) and (E)

Your attention is directed to Divisions (D) and (E) of Section 102.03 of the Revised Code, which 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.

R.C. 102.03 (D) and (E) prohibit a public official or employee from receiving an improper benefit or using his public position for his personal financial gain or benefit. A mayor and president of council are subject to R.C. 102.03 (D) and (E). Ohio Ethics Commission Advisory Ops. No. 91-007, 91-008, and 93-006.

Precedent - In-Term Increases In Compensation

The Ethics Commission has held that R.C. 102.03 (D) prohibits a municipal official with discretionary authority with respect to the enactment of legislation, the appropriation of municipal funds, or the establishment of compensation for his public position, from participating in the enactment of a municipal ordinance that would grant him an in-term pay increase. Advisory Ops.

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No. 91-007, 91-008, and 93-006. Also, R.C. 102.03 (D) prohibits all public officials and employees, regardless of their duties and authority, from misusing the authority and influence of their public positions in any way to secure an in-term increase in their compensation. Id.

The Ethics Commission has held that R.C. 102.03 (E) prohibits a municipal official with the discretionary authority to introduce or participate in the enactment of legislation, the appropriation of municipal funds, or the establishment of compensation for his public position from accepting an in-term increase in his compensation. Advisory Ops. No. 91-007, 91-008, and 93-006. Also, R.C. 102.03 (E) prohibits a municipal official with any of these discretionary powers from accepting an in-term increase in compensation regardless of whether he participated in the enactment of the ordinance or otherwise used his authority to secure the increase. Id.

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 impaired. The Commission states in Advisory Opinion No. 91-007, that the reason for prohibiting a public official from receiving an in-term increase in compensation, "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."

Accordingly, the Ethics Commission has held that R.C. 102.03 (D) and (E) prohibits city and village council members, city presidents of council, city and village mayors, city law directors, and village solicitors from participating in the enactment of, and accepting, in-term increases of their own pay. Advisory Ops. No. 91-007, 91-008, and 93-006. Also, the Commission has held that R.C. 102.03 (D) and (E) prohibit an individual who has been re-elected to public office from accepting an increase in his compensation that is enacted after his re-election but prior to the beginning of his new term of office. Advisory Op. No. 93-006. See also R.C. 731.13.

However, the Ethics Law and related statutes do not prohibit an elected municipal official from receiving an increase in compensation at the commencement of a new term if he participated in discussions or voted for the increase during his previous term prior to his re-election. An official 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. Grinsell v. Marlow, 15 Ohio St. 114 (1864); State ex rel. Gaylord v. Herdman, 17 Ohio App. 269 (Summit County 1923). The purpose of requiring an elected public official to forgo any increase in compensation enacted during his term is to assure that the elected official making the decision to increase his compensation is unswayed by the fact that he 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. In other words, the assurance of increased compensation, under R.C. 102.03 (D) and (E), is a thing of value that may be of such a character as to improperly influence or impair the proper independence of judgment of the official in the public interest.

The same consideration appears to have been weighed by the General Assembly when it enacted R.C. 731.13. R.C. 731.13 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 city council set compensation not only before the election, but before the deadline for filing as a candidate.

Application Of Precedent To The Instant Situation

The facts in the instant situation, however, differ significantly from the circumstances in the Ethics Commission's previous advisory opinions that address in-term pay increases. The general issue in all of the previous advisory opinions is whether an individual serving as an incumbent is prohibited from receiving an in-term increase in compensation. In this instance, City council adopted Ordinance 1995-70 before the date of the special election. Also, Ordinance No. 1995-70 did not affect the compensation of the individual holding the office of mayor at the time the Ordinance was enacted because the office of mayor was vacant. Mr. Gorden, as the president of council was serving, pursuant to City Charter, as the acting mayor while the office of mayor was vacant. It is interesting to note that the City Charter does not confer all of the mayoral powers upon a president of council who is serving as acting mayor. See Article IV, Section 3, Charter of the City of Beachwood. Further, the opinion request states that Mr. Gorden did not participate in the consideration or enactment of the Ordinance that authorized the increase. Pursuant to City Charter, only through a special election could the vacancy in the office of mayor be filled. Ordinance No. 1995-70 did not affect the compensation of Mr. Gorden as an incumbent holder of the mayor's office, rather, it increased the compensation that would be received by the successful mayoral candidate in the July 18, 1995 special election.

Conclusion

Based upon these facts and circumstances, Ordinance No. 1995-70 did not create a prohibited increase in compensation pursuant to R.C. 102.03 (D) and (E) and these provisions of the Ethics Law do not prohibit Mr. Gorden from receiving the compensation specified by Ordinance No. 1995-70.

Other Provisions

The Ethics Commission has the authority to interpret and enforce Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code. The Commission has no authority regarding Revised Code provisions outside its jurisdiction or provisions contained in the Ohio Constitution. Advisory Op. No. 91-007. However, it must be noted that the Ohio Constitution addresses the issue of "in-term" increases in compensation. Ohio Const. art. II, § 20; Ohio Const. art. II, § 31; Ohio Const. art. III, § 19; Ohio Const. art. IV, § 6. Also, R.C. 731.07, which prohibits the salary of a city officer from being increased or decreased during his term of office, and R.C. 731.13, which prohibits the legislative authority of a village from increasing or decreasing an elected officer's

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compensation during his term. The City of Beachwood also operates under a Charter. The appeals courts in Ohio do not agree whether home rule provisions permit the legislative authorities of municipalities to vary the prohibitions of R.C. 731.07 and 731.13. Compare Village of Bellville v. Beal, 7 Ohio App. 3d 291 (Richland County 1982) with Creed v. Hubbard, 78 Ohio App. 3d 461 (Trumbull County 1992). As a result, the application of these or other provisions of the Revised Code or Ohio Constitution must be left to your office to determine.

This advisory opinion was approved by the Ethics Commission at its meeting on February 2, 1996. It is based on the facts presented and is limited to questions arising under Chapter 102. and Sections 2921.42, 2921.421, and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions, please feel free to contact this Office again.

Very truly yours,



John Rawski
Staff Attorney