



OHIO ETHICS COMMISSION

8 East Long Street, Suite 1200

Columbus, Ohio 43215-2940

Telephone: (614) 466-7090

Fax: (614) 466-8368

Advisory Opinion Number 96-00 1

March 15, 1996

Syllabus by the Commission:

(1) Division (D) of Section 102.03 of the Revised Code prohibits all municipal officers of a statutory city or village, including a mayor, law director, president of council, and council members, from authorizing, or using the authority or influence of their office, formally or informally, to enact an ordinance that will increase compensation to which they are entitled in their next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term;

(2) Division (E) of Section 102.03 of the Revised Code prohibits all municipal officers of a statutory city or village, including a mayor, law director, president of council, and council members, from accepting an increase in compensation to which they are entitled in their next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term;

(3) Because the Ohio Ethics Law and related statutes establish a uniform standard of ethical conduct for all persons who serve as public officials, these statutes apply equally to an incumbent public official, who at the time is also an unchallenged candidate for office.

* * * * *

You ask whether the Ohio Ethics Law and related statutes "prohibit elected officials of a statutory city, such as the Mayor, Law Director, President of Council, and Council Members, from enacting or receiving salary increases in their next term of office, which salary increases were authorized by ordinance enacted following their reelection but prior to the beginning of their new term." You also ask whether the same prohibition is applicable "to officials who were unopposed in the primary or general elections."

In framing your questions, you assert awareness of the Ethics Commission's prior Advisory Opinions discussing prohibitions in the general conflict of interest sections of the Ethics Law upon in-term increases in compensation for city officials. However, you seek clarification of the application of these prohibitions to the issue.

As explained below, the Ethics Law prohibits elected officials in statutory cities and villages from receiving an increase in compensation, enacted by an ordinance, which they know they are entitled to receive by virtue of their reelection but prior to the beginning of their new term.

Uniform Application of the Ethics Law

The Ethics Commission has held that the Ohio Ethics Law and related statutes are general state criminal laws that establish a uniform standard of ethical conduct for all persons who serve as public officials and employees on the state and local levels. Advisory Ops. No. 83-004 and 89-014. These statutes create a series of inter-related prohibitions that have been expanded and enhanced to attempt to protect the general public against the potential exercise of conflicts of interest inherent in all of us who serve as public officials or employees. As the Franklin County Court of Appeals stated in State v. Nipps, 66 Oh. App. 2d 17 (Franklin County 1979), upholding the constitutionality of the so-called "Revolving Door" statute:

Under this ethics law, a public official or employee may enter private employment in an area related to his public employment or service, but must conform his conduct to the restrictive language utilized in the statute. The state has a substantial and compelling interest to restrict unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.

As a result, the Ethics Commission has construed the application of the various provisions of the Ethics Law and related statutes to help insure that the independence of judgment of a public official in the public interest is paramount to the manifest improper influence of substantial things of value personally to the official, his family, or his business associates. However, where the action of the official produces a uniform benefit to all citizens, or is sufficiently subjected to independent public review, and objective and fair consideration, where the law allows, the action of the official can be taken. Advisory Ops. No. 85-006, 88-004 and 92-013.

The issue before us is whether a public official's use of discretionary decision-making authority following their reelection, to secure an increase in their compensation, which they know they are entitled to receive by virtue of their reelection for the new term, interferes with their independence of judgment in the public interest.

Prohibition Imposed Upon Changes in Compensation by R.C. 102.03 (D) and (E)

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. (Emphasis added)

The term "anything of value" is defined for purposes of R.C. 102.03 to include money and every other thing of value. R.C. 1.03 and 102.01 (G). Compensation received by an elected public official for performing his official duties, and increases in his compensation, fall within the definition of "anything of value." Advisory Ops. No. 91-007, 91-008, 92-016, and 93-006.

In summary, the Ethics Commission held in a series of advisory opinions that an in-term increase in compensation for municipal officials who have discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions, would provide a definite and particular financial benefit to these municipal officials such that their objectivity and independence of judgment in deciding whether the increase would be in the best interests of the city could be biased or impaired. Advisory Ops. No. 91-007, 91-008, 92-016, and 93-006.

In Advisory Opinion No. 91-007, the Ethics Commission reviewed the provisions of Ohio Const. art. II, Sect. 20 that prohibits a change in the compensation, during his existing term, for an officer whose term of office and compensation is fixed by the General Assembly. The Commission held that the purpose of this prohibition, and similar provisions found in Ohio Const. art. II, Sect. 31 and Ohio Const. art. III, Sect. 19, is to avoid the potential for a public officer to abuse his authority by improperly influencing the legislative authority that determines his compensation. The Commission stated that municipal officers do not fall within the Ohio Const. art. II Sect. 20 prohibition because of the Constitution's home rule amendments, but referred to R.C. 731.07 and R.C. 731.13, which prohibit the salaries of city or village officers, respectively, from being increased or decreased during their term. However, the Commission recognized that courts have held that the home rule amendment enables both chartered and non-chartered municipalities to vary the prohibitions of R.C. 731.07 and R.C. 731.13. But see Creed v. Hubbard, 78 Ohio App. 3d 461 (Trumbull County 1992) (R.C. 731.07 precludes a noncharter municipality from granting its mayor an in-term pay increase).

After it reviewed these Constitutional and statutory provisions regarding in-term increases in compensation, the Commission addressed the question presented as:

[W]hether 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. (Emphasis added).

In Advisory Opinion No. 91-007, the Ethics Commission held that R.C. 102.03 (D) prohibits a public official from authorizing, or using the authority or influence of his office, formally or informally, to enact an ordinance that will increase the in-term compensation of the public official, and that R.C. 102.03 (E) prohibits a public official from accepting an increase in compensation enacted by an ordinance during his term of office. Id. See also Advisory Ops. No. 91-008, 92-016, and 93-006. The Ethics Commission held that the purpose of requiring a public official to forgo any increase in compensation enacted during his term is to assure that the public officials who have discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions, are not improperly influenced or swayed by the fact that they would be entitled, as a matter of law, to the increase. Advisory Ops. No. 91-007, 91-008, and 93-006.

Public Officials Subject to These Restrictions

In Advisory Opinion No. 91-008, the Commission held that R.C. 102.03 (D) prohibits a city mayor from approving the enactment of an ordinance that grants him an increase in compensation, and from using his authority or influence, formally or informally, to secure an increase in compensation. In Advisory Opinion No. 91-008, the Commission also held that R.C. 102.03 (D) prohibits a city law director from using his authority or influence, formally or informally, to secure an increase in compensation.

In Advisory Opinion No. 91-007, the Commission held that R.C. 102.03 (D) prohibits the president of council from voting to break a tie of council in favor of enacting an ordinance to grant to the president an in-term increase in compensation and from using his authority or influence, formally or informally, to secure an increase in compensation. In Advisory Opinion No. 91-007, the Ethics Commission also held that R.C. 102.03 (D) prohibits members of city council from enacting an ordinance granting an in-term increase in compensation for the current members of council.

Advisory Opinion No. 91-008 holds that R.C. 102.03 (E) prohibits a city mayor and a city law director from accepting, for the duration of their current terms, increases in compensation enacted by council during their current terms. Advisory Opinion No. 91-007 holds that R.C. 102.03 (E) prohibits the president of council and city council members from accepting, for the duration of their current terms, increases in compensation enacted by council during their current terms.

In Advisory Opinion No. 93-006, the Commission held that R.C. 102.03 (D) prohibits a village mayor from voting to break a tie of council in favor of enacting an ordinance to grant to the mayor an in-term increase in compensation and from using his authority or influence, formally or informally, to secure an increase in compensation. In Advisory Opinion No. 93-006, the Commission also held that R.C. 102.03 (D) prohibits a village solicitor from using his authority or influence, formally or informally, to secure an increase in compensation. In Advisory Opinion No. 93-006, the Commission further held that R.C. 102.03 (D) prohibits members of village council from enacting an ordinance granting an in-term increase in compensation for the current members of council.

Advisory Opinion No. 93-006 holds that R.C. 102.03 (E) prohibits a village mayor and members of village council from accepting, for the duration of their current terms, an increase in compensation enacted by village council during their current terms. Advisory Opinion No. 93-006 also holds that R.C. 102.03 (E) prohibits a village solicitor from accepting, during the duration of the term of his agreement with the village, an increase in compensation enacted by council during his current agreement.

Public Officials Not Subject to These Restrictions

Advisory Opinions No. 91-007 and 91-008 held that a city auditor, city director of public safety, the clerk of council, and a city treasurer are not prohibited from accepting an increase in compensation, enacted by city council during their current terms, unless a local provision

authorizes them to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions. Advisory Opinion No. 93-006 held that a village treasurer, clerk, or clerk-treasurer are not prohibited from accepting an increase in compensation, enacted by city council during their current terms, unless a local provision authorizes them to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions.

The advisory opinions summarized above addressed questions presented concerning officers of non-charter cities and villages. The public policy considerations underlying the conclusions of the advisory opinions summarized above may also generally apply to charter municipalities. Advisory Op. No. 93-006. However, it is recognized that the organization of charter municipalities and the method establishing the compensation of their officers vary. Approval by the citizens of a charter city or village of specific charter provisions regarding compensation for elected officials may represent the public's review and acceptance of its officer's ability to self-establish compensation, in the manner a charter provides. The application of this issue to charter municipalities is not before us and need not be addressed.

Post-Election Increases

Your first question differs from the issues that the Ethics Commission addressed in Advisory Opinions No. 91-007 and 91-008, and the primary issue that the Commission addressed in Advisory Opinion No. 93-006. The primary focus in the Commission's previous opinions, on the issue of in-term increases in compensation, was whether the Ethics Law and related statutes prohibit an in-term increase in compensation for incumbent office holders. You ask whether the Ethics Law and related statutes prohibit city officers from enacting or receiving salary increases in their next term of office, if the salary increases were authorized by ordinance enacted following their reelection but prior to the beginning of their new term.

You contend that an increase in compensation enacted following an official's reelection but prior to the beginning of his new term is not a prohibited in-term increase. However, as explained below, the fundamental conflict of interest and the potential for abuse are as strong for the incumbent officers who were reelected for the term to which the increase applies, as for officers who authorize an in-term increase in compensation before their reelection.

A person who has been elected or reelected to public office is legally assured of assuming that office, and receiving the attendant compensation, at the beginning of his term of office. 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); *Mirlisena v. Fellerhoff*, 11 Ohio Misc. 2d 7 (C.P. Hamilton County 1984). The Ethics Commission held in Advisory Opinions No. 91-007, 91-008, 92-016, and 93-006 that the purpose of requiring a public official to forgo any increase in compensation enacted during his term is to assure that public officials who have discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions, are not improperly influenced or swayed by the fact that they would be entitled, as a matter of law, to the increase. This protection is also lost if incumbents who are reelected to office are permitted to authorize an increase in

compensation by enacting an ordinance after their reelection but prior to the beginning of their new term of office. The same consideration may have been weighed in the General Assembly's enactment of R.C. 731.13, when it stated, "[t]he legislative authority [of a statutory village] 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." (It is interesting to note that R.C. 731.13 requires that the compensation be fixed not only before the election, but before the time candidacy must be declared.)

An incumbent office holder who knows, at the time of the passage of the ordinance, that he is entitled, as matter of law, to an increase in compensation for the upcoming term of office to which he has already been reelected and is legally entitled, faces impaired objectivity and independence of judgment with respect to acting upon his own increase in compensation. As a result, an increase in compensation enacted following an official's reelection but prior to the beginning of his new term is of such a character as to manifest a substantial and improper influence upon the reelected official with respect to his duties to establish the compensation of city officers.

Therefore, in response to your first question, R.C. 102.03 (D) prohibits a city mayor, law director, president of council, and council members, from authorizing, or using the authority or influence of their office, formally or informally, to enact an ordinance that will increase their compensation in their next term of office, during the period following their reelection but prior to the beginning of their new term. R.C. 102.03 (E) prohibits a city mayor, law director, president of council, and council members, from accepting an increase in compensation enacted by an ordinance during the period following their reelection but prior to the beginning of their new term. This conclusion is equally applicable to all municipal officers of a city or a village who exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions.

It must be stressed that the provisions of Section 102.03 (D) and (E) do not prohibit all types of increases in compensation and benefits. The Ethics Law and related statutes do not prohibit a city mayor, law director, president of council, and council members, from accepting an increase in compensation at the commencement of a new term if they authorized, or used the authority or influence of their office, prior to their reelection, to enact an ordinance that would increase their compensation in their next term of office for the positions they held. See Advisory Op. No. 93-006. See also Advisory Op. 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 reelection but had not yet announced that he would do so.) Likewise, these provisions do not, at any time, prohibit municipalities from increasing the compensation or benefits of subordinate employees and officials who do not exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their positions.

Application to Unopposed Candidates

You also ask whether the same prohibition is applicable "to officials who were unopposed in the primary or general elections." Your question suggests that the prohibitions described above should not apply due to the assumption that an incumbent candidate who is not challenged by a political opponent is assured of reelection.

As explained above, the Ohio Ethics Law and related statutes establish a uniform standard of conduct for all persons who serve as public officials and employees on the state and local levels. For that reason alone, whether a candidate is practically assured of reelection, or faces an opponent and is uncertain of his future office, makes no difference. Whenever a public official authorizes, or use the authority or influence of his office, formally or informally, to enact an ordinance that will increase his compensation in his next term of office, during the period following his reelection but prior to the beginning of his new term, the amount of compensation that he will receive is unknown to the public at the time of the electorate's opportunity to vote for their representatives.

The knowledge that the amount of compensation to which he will legally be entitled in his next term and which is unknown by the public until after his reelection could impair a public official's objectivity and independence of judgment in establishing an increase in his own compensation. The enactment of an increase in compensation for his next term of office, during the period following his reelection but prior to the beginning of his new term, insures that the amount of an official's compensation is not independently presented to the public. Because the issue of the increase is removed from the timely public assessment and debate, an increase in compensation that is enacted in this manner is a thing of value that is of such a character as to manifest an improper influence upon the official, and thereby prohibited by R.C. 102.03 (D) and (E). Again, despite the fact that R.C. 731.13 is outside the Commission's jurisdiction, it is interesting to note that R.C. 731.13 requires that compensation for the ensuing term of office be established prior to the last day for filing as a candidate for such office. As a result, the amount of compensation is publicized not only to the public but also to potential political opponents.

This opinion does not purport to interpret any provision of Title VII of the Revised Code that prohibits the salary of municipal officers from being increased or decreased during their term of office. See R.C. 731.07 and 731.13. See also Creed v. Hubbard, 78 Ohio App. 3d 461 (Trumbull County 1992) (R.C. 731.07 precludes a noncharter city from granting its mayor an in-term pay increase) and City of Hubbard ex. rel Creed v. Sauline, 74 Ohio St. 3d 402 (1996).

This advisory opinion is based on the facts presented. It 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. 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 all municipal officers of a statutory city or village, including a mayor, law director, president of council, and council members, from authorizing, or using the authority or influence of their office, formally or informally, to enact an ordinance that will increase compensation to which they are entitled in their next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term; (2) Division (E) of

Section 102.03 of the Revised Code prohibits all municipal officers of a statutory city or village, including a mayor, law director, president of council, and council members, from accepting an increase in compensation to which they are entitled in their next term of office, after knowing that they have been reelected to the office, but prior to the beginning of their new term; and (3) Because the Ohio Ethics Law and related statutes establish a uniform standard of ethical conduct for all persons who serve as public officials, these statutes apply equally to an incumbent public official, who at the time is also an unchallenged candidate for office.

A handwritten signature in cursive script that reads "Jack Paul DeSario". The signature is written in black ink and is positioned above a horizontal line.

Jack Paul DeSario, Chair
Ohio Ethics Commission