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May 24, 2023

Informal Opinion 2023-INF-0524

Thaddeus M. Boggs  
Law Director  
City of Canal Winchester

Dear Mr. Boggs,

On April 6, 2023, the Ohio Ethics Commission received your request for an advisory opinion.

### **Key Facts**

In your letter, you stated:

- You are the Law Director for the City of Canal Winchester. City Council has asked you to submit this request on behalf of the City.
- The City is a charter municipality. The charter includes provision for the biannual adjustment of elected officials' salaries. The salaries must be set no later than July 1 of an odd-numbered year to take effect January 1 of the following year. You provided a copy of the charter.
- The charter provides that adjustments made to the salaries of elected officials apply to all elected officials regardless of whether they are in the beginning or are mid-term. The provision was adopted prior to the commencement of the original term of any of the current elected officials of the City.

### **Questions Presented**

1. Does the charter provision providing for biannual, mid-term adjustments to elected official compensation control over the prohibitions in R.C. 102.03(D) and (E)?
2. If R.C. 102.03 (D) and (E) control over the City's charter, which hypothetically allows elected officials in the City to raise their salary mid-term, would R.C. 102.03(D) and (E) prohibit the elected officials from raising their salary mid-term on the condition that Council also approves raises for City employees to keep up with cost-of-living?
  - a. You provided the following example: Current Council approves an increase in compensation of three percent year-over-year for members of Council and the Mayor. A new mayoral term begins January 1, 2024, as well as the terms for the four Council seats. Under the charter provision, the ordinance calls for an increase of three percent for 2024 and an additional three

percent for 2025. The charter provision also says that the increase for 2025 shall not take effect unless City employees receive a cost-of-living adjustment equal to or greater than three percent for 2025.

- b. If R.C. 102.03(D) and (E) prohibit mid-term adjustments, would it also prohibit the elected officials from (a) approving a cost-of-living adjustment in the annual budget that would trigger a mid-term increase, or (b) having approved an employee cost-of-living adjustment, prohibit the elected officials from accepting the resulting mid-term increase?

### **Brief Answers**

1. No, the Ohio Ethics Law prevails over a conflicting city charter provision or city ordinance because R.C. 102.03(D) and (E) are general laws that apply statewide to the actions of public officials and are backed by criminal sanction.
2. Yes, Council is prohibited from using cost-of-living increases to trigger an increase in compensation during the existing term or accepting an in-term increase in compensation because the cost-of-living increase ordinance is a discretionary action by Council that would result in an in-term increase in compensation.

### **Scope of Opinion**

The Ohio Ethics Commission cannot issue an advisory opinion to address matters that have already occurred. Therefore, this opinion will not apply the Ethics Law and related statutes to the specific facts you have presented regarding the charter provision that took effect in 1997, but instead will provide general information regarding Ethics Commission precedent on in-term increases in compensation.

The Ethics Commission has the authority to interpret and enforce Chapter 102 and Sections 2921.42, 2921.421, 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.<sup>1</sup> The Ohio Constitution addresses the issue of “in-term” increases in compensation<sup>2</sup> and the Attorney General’s Office has issued opinions interpreting these constitutional provisions.<sup>3</sup> Further, the Ethics Commission does not have the statutory authority to issue an advisory opinion interpreting R.C. 731.07.<sup>4</sup> You should consider contacting the Ohio Attorney General’s Office for additional guidance on these matters and other conflict of laws issues.

### **Charter Provision In Conflict with Ethics Law**

In your first question, you asked if a charter provision providing for biannual, mid-term adjustments to elected official compensation would control over the prohibitions in R.C. 102.03(D) and (E). R.C. 102.03(D) and (E) are general, criminal laws<sup>5</sup> set forth by the General Assembly to establish a standard for all citizens who serve as public officials or employees.<sup>6</sup> The Ohio Supreme Court has stated “even in the regulation of such local matters a municipality may not infringe on matters of general and statewide concern.”<sup>7</sup> The Court stated that “even if there is a matter of local concern involved, if the regulation of the subject matter affects the general public of the state as a whole more than it does the local inhabitants the matter passes from what was a matter for local government to a matter of general state interest.”<sup>8</sup> When applied to in-term increases, the Eleventh District stated, “When a city determines that its officers’ compensation should be increased, that is a matter of local concern. However, the time for payment of that increase is a procedural matter and is governed by general laws, namely, R.C. 731.07.”<sup>9</sup>

The Ohio Ethics Laws and related statutes “are part of the criminal code, which operates uniformly throughout the state. While municipalities may regulate matters of local self-government, ethics in government is not a purely local concern; it is a state-wide concern.”<sup>10</sup> As matters of state-wide concern, the Ethics Law prevails over conflicting city charter provisions and city ordinances.<sup>11</sup> In particular, the Commission has stated that R.C. 102.03 prevails over a city ordinance permitting what R.C. 102.03 prohibits.<sup>12</sup>

Additionally, the Canal Winchester City Charter specifically incorporates the Ohio Ethics Law stating, “The laws of Ohio pertaining to conflicts of interest, criminal misbehavior, ethics and financial disclosure by municipal officials and employees, and campaign financing and other election practices of candidates for municipal office shall apply under this Charter.”<sup>13</sup> Therefore, the City charter provision providing for biannual, mid-term adjustments to elected official compensation does not control over the prohibitions in R.C. 102.03(D) and (E).

### **In-Term Increases and Cost-of-Living Increase Ordinance**

City Council members<sup>14</sup> are subject to the restrictions in R.C. 102.03(D) and (E), which state:

- (D) No public official or employee shall use or authorize the use of the authority or influence of 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 the public official or employee with respect to that person’s 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 the public official or employee with respect to that person’s duties.

If a matter before council would provide such a definite and particular benefit for a council member “that his private interest could impair his independence of judgement or unbiased discretion in making his official decisions,” then the council member is prohibited from voting on the ordinance.<sup>15</sup> Since an in-term increase in compensation would provide a definite and particular financial benefit to a council member, R.C. 102.03(D) would prohibit the members of 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.<sup>16</sup>

The restrictions in R.C. 102.03(D) and (E) apply to all city officials who exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their own positions including the mayor, law director,<sup>17</sup> president of council, and council members.<sup>18</sup> These laws exist, in part, to ensure that public official’s decisions and are made in a fiduciary capacity to the public agency that they serve, and not for the official’s personal benefit. However, public officials who do not exercise discretionary authority with respect to ordinances increasing their compensation are not prohibited from accepting an in-term increase in compensation.<sup>19</sup>

Based on the examples you provided in your letter, there are two scenarios to consider:

1. Council passes an ordinance providing an increase in Council members’ compensation anytime a cost-of-living increase is given to all City employees who are not in a bargaining unit. Council then passes an annual ordinance to grant a cost-of-living increase resulting in an increase in Council’s compensation.



2. The City Charter provides a cost-of-living increase to Council members anytime a cost-of-living increase is given to all City employees not in a bargaining unit. Council then passes an annual ordinance to grant a cost-of-living increase resulting in an increase in Council's compensation.

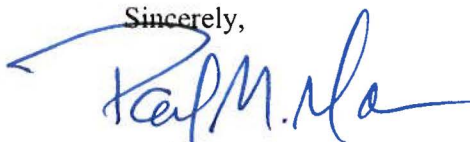
In both scenarios, Council members are using their authority and influence to secure a benefit to themselves in their personal capacity. In example one, Council is establishing the ordinance that is triggered by a second ordinance to increase their pay. These are two separate actions of Council that lead to the same result, an in-term pay increase. While the method of enacting the pay increase appears indirect, the increase requires Council to exercise its authority and discretion to enact both ordinances resulting in an increase.<sup>20</sup> Without Council's actions passing both ordinances, the pay increase could not be triggered. Since both ordinances require discretionary acts by Council, R.C. 102.03(D) would prohibit the Council members from enacting the ordinances resulting in an in-term increase in their compensation.

In example two, the charter provides the framework for the increase, but Council still must act to trigger the increase in pay. Unlike example one, the charter provision eliminates the need for the first ordinance, which was one of Council's discretionary actions. However, Council passing the ordinance to trigger the cost-of-living increase would still be a discretionary action that results in an in-term pay increase. Therefore, while the mechanism is different, the result is the same, and R.C. 102.03(D) would prohibit the Council members from enacting the ordinance resulting in an in-term increase in their compensation.

In both examples, Council members must use their authority and discretion to enact the ordinance or ordinances that result in an in-term increase. R.C. 102.03(D) prohibits Council members from enacting the ordinances and R.C. 102.03(E) prohibits Council members from accepting the in-term increase.<sup>21</sup> However, the Ethics Law does not prohibit city officials from raising Council members' salaries prior to the election, so long as the raises do not take effect until the beginning of a new term.<sup>22</sup>

The Ohio Ethics Commission approved this Informal Advisory Opinion at its meeting on May 24, 2023. 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. Please do not hesitate to contact this Office if you have any further questions.

Sincerely,



Paul M. Nick  
Executive Director

Enclosures: Ohio Ethics Commission Advisory Opinions No. 91-007 and 91-008

The Ohio Ethics Commission Advisory Opinions referenced in this opinion are available on the Commission's Web site: [www.ethics.ohio.gov](http://www.ethics.ohio.gov)

<sup>1</sup> Ohio Ethics Commission Advisory Opinions No. 75-037 and 94-002.

<sup>2</sup> Ohio Constitution, Article II, Section 20; Ohio Constitution Article II, Section 31; Ohio Constitution Article III, Section 19; Ohio Constitution Article IV, Section 6.

<sup>3</sup> See 2000 Op. Att'y Gen. No. 2000-043; 2001 Op. Att'y Gen. No. 2001-039; 2012 Op. Att'y Gen. No. 2012-024.

<sup>4</sup> R.C. 731.07 ("The salary of any officer of a city shall not be increased or diminished during the term for which he was elected or appointed.")

<sup>5</sup> See R.C. 102.99.

<sup>6</sup> Adv. Op. No. 83-004.

<sup>7</sup> *Kettering v. State Employment Relations Bd.*, 26 Ohio St.3d 50, 54, 496 N.E.2d 983 (1986) citing *Cleveland Electric Illuminating Co. v. Painesville*, 15 Ohio St.2d.125, 129, 239 N.E.2d 75, (1968).

<sup>8</sup> *Kettering* at 54, citing *Beachwood v. Board of Elections of Cuyahoga County*, 167 Ohio St. 369, 371, 148 N.E.2d 921 (1958). See also *City of Niles v. Howard*, 12 Ohio St.3d 162, 466 N.E.2d 539 (1984).

<sup>9</sup> *Creed v. City of Hubbard*, 78 Ohio App.3d 461, 464, 605 N.E.2d 415 (11th Dist.1992); see also *City of Warren ex. rel. Bluedorn v. Hicks*, 124 Ohio App.3d 621, 707 N.E.2d 15 (11th Dist.1997).

<sup>10</sup> Adv. Op. No. 83-004, citing *Fitzgerald v. City of Cleveland*, 88 Ohio St. 338, 103 N.E. 412 (1913), *Leis v. Cleveland Railway Company*, 101 Ohio St. 162, 128 N.E. 73 (1927), *Garcia v. Siffren*, 63 Ohio St. 2d 259, 407 N.E.2d 1369 (1980), and *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88, 431 N.E.2d 311 (1981).

<sup>11</sup> *Id.*; see also Adv. Ops. No. 2001-03 and 2001-04 (“A public agency cannot, by rule or policy, impose a lesser standard of behavior on public officials and employees than that imposed by the Ohio Ethics Law.”)

<sup>12</sup> Adv. Op. No. 91-007.

<sup>13</sup> Canal Winchester City Charter 11.02.

<sup>14</sup> Adv. Ops. No. 91-007, 91-008, and 93-006.

<sup>15</sup> Adv. Ops. No. 91-007 and 88-004.

<sup>16</sup> Adv. Op. No. 91-007.

<sup>17</sup> *Id.*

<sup>18</sup> Adv. Op. No. 91-008.

<sup>19</sup> Adv. Ops. No. 91-007 and 91-008.

<sup>20</sup> See Adv. Ops. No. 91-007, 91-008, and 92-010.

<sup>21</sup> Adv. Op. No. 96-001.

<sup>22</sup> *Id.*