



OHIO ETHICS COMMISSION

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Advisory Opinion Number 91-007
December 5, 1991

Syllabus by the Commission:

- (1) Division (D) of Section 102.03 of the Revised Code prohibits the members of city council from enacting an ordinance granting an in-term increase in compensation for the current members of council.
- (2) Division (E) of Section 102.03 of the Revised Code prohibits a member of city council from accepting, for the duration of his present term, an increase in compensation enacted by council while he was a member thereof. A city council member is bound by this prohibition regardless of whether he votes for or against the increase, or whether he abstains from participating in the issue.
- (3) Division (D) of Section 102.03 of the Revised Code prohibits the president of city 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 otherwise using his authority or influence, formally or informally, to secure an increase in compensation.
- (4) Division (E) of Section 102.03 of the Revised Code prohibits the president of city council from accepting, for the duration of his current term, an increase in compensation enacted by city council while he was president thereof. The president is bound by this prohibition regardless of whether he voted in favor of the increase in order to break a tie on council.
- (5) The clerk of council and the city treasurer are not prohibited by Section 102.03 or Section 2921.42 of the Revised Code from accepting an increase in compensation enacted by city council during their current term of office, unless a local provision authorizes the clerk or treasurer to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their respective positions.

* * * * *

You have asked whether the Ohio Ethics Law and related statutes prohibit various elected officials of a statutory city from receiving increases in compensation during their terms of office. Your question is whether an ordinance may be enacted whereby the city would "pick up" the pension contributions of the members of council, the president of council, the clerk of council, and the city treasurer during their current terms of office.

By way of history, Ohio Const. art. II, § 20 provides as follows:

The general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.

See also Ohio Const. art. II, § 31 (no change in the compensation of members and officers of the General Assembly shall take effect during their term of office); art. III, §19 (the compensation of executive officers of the state shall be neither increased nor decreased during the period for which they were elected); art. IV, § 6 (the compensation of judges of courts of record shall not be decreased during their term of office). The purpose of these prohibitions 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); 1980 Ohio Op. Att'y Gen. No. 80-002.

Officers who are subject to art. II, § 20 are prohibited from receiving an in-term increase in their compensation, including fringe benefits. See State ex rel. Parsons v. Ferguson, 46 Ohio St. 2d 389 (1976); State ex rel. Artmayer v. Board of Trustees, 43 Ohio St. 2d 62 (1975); 1980 Ohio Op. Att'y Gen. No. 80-002. Indeed, these officials are prohibited by art. II, § 20 from participating in a "pick up in lieu of salary increase" plan (described below) if such plan was instituted after the commencement of the officer's term. See Ohio Op. Att'y Gen. No. 84-036, 84-058, and 86-025. Municipal officers do not, however, fall within the prohibition of Ohio Const. art. II, § 20, since they are "provided for" under the home rule amendments of the Ohio Constitution. See 1980 Ohio Op. Att'y Gen. No. 80-002. Section 731.07 of the Revised Code states that "the salary of any officer of a city shall not be increased or decreased during the term for which he was elected or appointed." See also R.C. 731.13 (prohibiting the legislative authority of a village from increasing or decreasing an elective officer's compensation). However, both chartered and non-chartered municipalities have the authority, under their constitutional home rule powers, to vary the prohibitions of R.C. 731.07 and R.C. 731.13. See Village of Bellville v. Beal, 7 Ohio App. 3d 291 (Richland County 1982); 1983 Ohio Op. Att'y Gen. No. 83-036; 1980 Op. Att'y Gen. No. 80-002. See also Northern Ohio Patrolmen's Benevolent Association v. City of Parma, 61 Ohio St. 2d 375 (1980) (non-chartered, as well as chartered municipalities may, pursuant to Ohio Const. art. XVIII, § 3, enact an ordinance governing its employees' salaries, even though the ordinance is at variance with state statute).

Although it has been held that municipalities have home rule power to vary state statute governing the compensation of municipal officers and employees, 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.

Divisions (D) and (E) of Section 102.03 of the Revised Code are applicable to the question you have raised, and state 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.

The term "public official or employee" is defined for purposes of R.C. 102.03 to include any person who is elected or appointed to an office of a city, or who is an employee of a city. See R.C. 102.01(B) and (C). Therefore, members of city council, the clerk of council, the president of council, and the city treasurer are subject to the prohibitions of R.C. 102.03. See generally Ohio Ethics Commission Advisory Opinions No. 86-002 and 88-004.

The term "anything of 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). Therefore, compensation received by a city official for performing his official duties falls within the meaning of "anything of value." To clarify the issue of the pension "pick-up", a public appointing authority may institute a "pick-up" plan, whereby the appointing authority assumes and pays its officials' and employees' retirement contributions, in order to help them realize a federal income tax savings. As summarized in 1982 Ohio Op. Att'y Gen. No. 82-071:

It is my understanding that the motivation for employers to "pick up" these contributions is found in federal tax law. Under 26 U.S.C. §414(h)(2), when a governmental employer, see 26 U.S.C. §414(d), picks up employee contributions to a pension plan qualified under 26 U.S.C. §§ 401(a) and 501(a) (as PERS is), such contributions are treated as employer contributions, even though they may be designated under state law as employee contributions. See 1979 Op. Att'y Gen. No. 79-001; 1978 Op. Att'y Gen. No. 78-049. Accordingly, the contributions are excludable from the employee's wages for purposes of income tax withholding, 26 U.S.C. §3401(a)(12)(A), and from the employee's gross income until such funds are distributed to the employee, 26 U.S.C. §402. See Rev. Rul. 36, 1981-1 C.B. 255; Rev. Rul. 35, 1981-1 C.B. 255; Rev. Rul. 462, 1977-2 C.B. 358.

There are two types of "pick-up" plans: the "salary reduction" method, and the "pick up in lieu of salary increase" method. See 1984 Ohio Op. Att'y Gen. No. 84-036. Under the first method, the employer assumes and pays each employee's contribution, but reduces the employee's salary by the amount of that contribution, so that there is no increased cost to the employer; the benefit to the employee is realized through the tax savings. Id. Under the second method, the employer pays the employees' retirement contributions in addition to the salaries employees are currently receiving. Id. The second method constitutes an added expense for the employer, and is considered to be a fringe benefit and compensation to the employee. Id. The first method is not considered to be a fringe benefit or additional compensation paid by the employer to the employee since the amount of compensation paid by an employer and received by an employee remains the same; the "pick-up" goes merely to the method by which an employer accounts for its employees' compensation. Id.

You have stated that in this instance, the city officials' salaries would not be reduced by the amount of the "pick-up". Therefore, the ordinance authorizing the "pick-up" would, in effect, increase the compensation of the city officials. See 1984 Ohio Op. Att'y Gen. No. 84-036 and 84-058 ("pick-ups" made by the "pick up in lieu of salary increase" method constitute "compensation" for purposes of the constitutional prohibitions against certain elected officials receiving in-term increases in compensation). Therefore, a pension "pick-up" under the "pick up in lieu of salary increase" method would constitute a thing of value for purposes of the prohibitions of R.C. 102.03. In order to determine whether the "pick up" would be of such character as to manifest an improper influence upon city officials with respect to their duties, it is necessary to examine the duties of those officials about whom you have asked.

CITY COUNCIL MEMBERS

The Ethics Commission has consistently held that R.C. 102.03(D) prohibits a city council member or other public official from using his position to benefit his personal or private financial interests. See Advisory Opinions No. 80-007, 86-007, and 88-004. The standard in judging whether a city council member may participate in a matter under R.C. 102.03(D) is whether the matter before council would provide such a definite and particular benefit for the council member "that his private interest could impair his independence of judgement or unbiased discretion in making his official decisions." Advisory Opinion No. 88-004. In this instance, city council would enact an ordinance instituting the "pick up." The "pick up" would constitute an increase in compensation, and the increase would provide a definite and particular financial interest to the council member such that his independence of judgement or objectivity in deciding, as a council member, whether the "pick up" is in the best interests of the city, could be biased or impaired. R.C. 102.03(D) would, therefore, 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. See generally Advisory Opinion No. 87-008. If council has acted to increase the compensation of council members, the current members would be prohibited by R.C. 102.03(E) from receiving such in-term increase for the duration of their terms.

It may be argued that because the thing of value--the compensation--is, in this instance, paid as a result of the performance of the officials' public duties, the compensation could not, as a matter of law, be of such character as to improperly influence the council members with respect to their official duties. As noted above, R.C. 102.03 prohibits a public official from using his position to benefit his personal financial interests. Many situations addressed by the Commission have involved the participation of a public officer in a matter affecting his financial interests held separate and part from his position as a public official. See, e.g., Advisory Opinions No. 80-007 and 88-004 (matters affecting value of real property held by official); 85-006 (matters affecting outside employment); 86-007 (matters affecting private business). In this instance, however, the financial benefit to the council members--the increase in compensation--is attendant to the officials' public positions.

Prior to the enactment of Am. Sub. H.B. 300, 116th Gen. A. (1986) (eff. Sept. 17, 1986), R.C. 102.03(D) prohibited a public official or employee from using his position to secure anything of value for himself "that would not ordinarily accrue to him in the performance of his

official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties" (emphasis added). In Advisory Opinion No. 76-005, the Commission interpreted this "ordinarily accrue" language, stating that the thing of value or benefit "must be something other than the regular salary, expenses and fringe benefits received by that public official or employee, and every other public official or employee in a similar position for the performance of his official duties." The Commission applied this analysis in Advisory Opinion No. 76-007, wherein it was asked whether R.C. 102.03(D) would prohibit the city from paying the annual dues for membership in the Chamber of Commerce for the mayor's assistant to represent the city at Chamber functions. The Commission stated in Advisory Opinion No. 76-007:

It is clear that the salary, expenses and fringe benefits paid by the city to an employee "ordinarily accrue" if they are in payment for the performance of official duties. If the city deems it an official duty of the mayor's administrative assistant to represent the city in Chamber of Commerce functions, the "valuable thing or benefit," payment by the city of the fifty dollars for the annual membership dues, ordinarily accrues to the administrative assistant, and is not within the prohibitions of Section 102.03(D) of the Revised Code.

It is apparent, therefore, that a city council member would not have been prohibited from receiving an in-term increase in compensation under the former language of R.C. 102.03.

Am. Sub. H.B. 300, however, deleted the requirement that the thing of value not ordinarily accrue to the public official or employee in the performance of his official duties, as well as the requirement that the thing of value be for the official or employee himself, thereby substantially broadening the scope of the prohibition of R.C. 102.03(D). See Advisory Opinion No. 88-004. R.C. 102.03(D), therefore, is no longer flatly inapplicable to situations where a thing of value accrues to a public official as a result of the performance of his official duties. Rather, the facts and circumstances of each case must be examined for a determination of the applicability of R.C. 102.03.

In this instance, the city council would vote to approve an in-term pay increase for its members. Although the compensation is associated with the members' public office, it would, nonetheless, accrue to the council members' private or personal financial benefit. Council is charged with the authority to fix the compensation of city officials through the enactment of ordinance. See R.C. 731.08. See generally R.C. 731.17. 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 has previously held that there may be instances where R.C. 102.03(D) and (E) do not prohibit a public official or employee from soliciting, accepting, or using his official position to secure a thing of value where the thing of value would accrue to the person in his official capacity, even though the person would be prohibited from soliciting, accepting, or using his official position to secure the thing of value in his individual or personal capacity. For example, in Advisory Opinion No. 89-002, the Commission held that officials or employees of

the Industrial Commission are not prohibited from accepting or soliciting donations of equipment from private companies on behalf of the Industrial Commission as part of their official responsibilities, even though they would be prohibited from soliciting or accepting such donations for their personal benefit. See also Advisory Opinion No. 88-005.

In this instance, the compensation is paid to the city council members as a result of the performance of their official duties. The compensation is not, however, paid to the officials on behalf of, or for the benefit of, the city in the sense that such compensation is received by the officials for the purpose of turning it over to the city treasury. Indeed, it is the city which is the source of the payments. The compensation is paid by the city in consideration of the officials' service and accrues to the personal financial benefit of the council members rather than to the members in their "official capacity."

Your question raises the issue whether council members who abstain from participating in the deliberations or vote upon the issue, or who vote against the raise may receive the increase if the ordinance passes.

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. 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 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.

As noted above, in the case of Village v. Bellville v. Beal, 7 Ohio App. 3d 291 (Richland County 1982), the court upheld the village council's authority to enact an ordinance providing an in-term increase for council members. See also 1983 Ohio Op. Att'y Gen. No. 83-036. The issue in Beal was whether a non-chartered village had the authority under its home rule powers to enact such an ordinance in light of R.C. 731.13, which prohibits the legislative authority of a village from increasing or decreasing an officer's compensation during his term of office. The analysis and conclusion of Beal relate solely to the scope of a non-chartered municipality's home rule power to enact legislation governing the compensation of its officials and employees which is in conflict with a civil state statute regulating that subject. The court does not discuss the

ramifications of the Ethics Law, and there is no indication that the Ethics Law was considered. In Advisory Opinion No. 83-004, the Commission held:

The Ohio Ethics Law and related statutes are general laws establishing a standard of conduct for all citizens who serve as public officials or employees. These provisions 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. Therefore, Chapter 102. and Section 2921.42 of the Revised Code prevail over the city charter provision. See: Fitzgerald v. City of Cleveland, 88 Ohio St. 338 (1913), Leis v. Cleveland Railway Company, 101 Ohio St. 162 (1920), Garcia v. Siffren, 63 Ohio St. 2d 259 (1980), and State ex rel. Evans v. Moore 69 Ohio St. 2d 88 (1981).

R.C. 102.03 prevails therefore over a city ordinance permitting what R.C. 102.03 prohibits. R.C. 102.03 prohibits the members of city council from accepting an in-term increase in compensation authorized by council during their service.

Your question also raises the issue of the applicability of R.C. 2921.42(A)(1), (3), and (4) which read:

(A) No public official shall knowingly do any of the following:

(1) Authorize, or employ the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest;. . .

(3) During his term of office or within one year thereafter, occupy any position of profit in the prosecution of a public contract authorized by him or by a legislative body, commission, or board of which he was a member at the time of authorization, and not let by competitive bidding or let by competitive bidding in which his is not the lowest and best bid.

(4) Have an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected.

Division (E)(1) of Section 2921.42 defines a "public contract" to include the purchase or acquisition or a contract for the purchase or acquisition of goods or services by or for the use of a political subdivision. Although an employment relationship between a political subdivision and an employee is deemed to be a "public contract" under R.C. 2921.42, the Commission has held that the compensation of an elected officeholder is an incident of public office rather than a matter of contract, and that a city ordinance authorizing a salary increase of elected officials is not a public contract and does not fall within the prohibitions of R.C. 2921.42. See Advisory Opinion No. 83-008. As discussed above, however, R.C. 102.03 prohibits all members of city council from receiving an in-term increase in compensation which is authorized by council during their service thereon.

CLERK OF COUNCIL

You have also asked whether the clerk of council may participate in a pension "pick-up" plan enacted pursuant to ordinance during his term.

Section 731.04 of the Revised Code reads as follows:

Within ten days from the commencement of their term, the members of the legislative authority of a city shall elect a president pro tempore, a clerk, and such other employees as are necessary, and fix their duties, bonds, and compensation. Such officers and employees shall serve for two years, unless the members of the legislative authority serve terms of four years pursuant to division (B) of section 731.03 of the Revised Code, in which case these officers and employees shall serve for four years, but may be removed at any time for cause, at a regular meeting of the legislative authority by a two-thirds vote of the members elected.

The clerk of council is, therefore, chosen by council pursuant to election by members of council. The clerk serves for a term of office, but may be removed for cause by council.

The clerk of council does perform certain duties with respect to ordinances enacted by council. R.C. 731.20 provides that, "ordinances, resolutions, and bylaws shall be authenticated by the signature of the presiding officer and clerk of the legislative authority of the municipal corporation." It is well-established, however, that the clerk's authentication does not affect the validity of an ordinance regularly passed by council, and that an ordinance does not have to be authenticated in order to be a valid enactment. Stradtman v. City of Brunswick, 49 Ohio App. 2d 28 (Medina County 1974). The authentication has been deemed to be a "clerical formality," *id.*, and the clerk's duty to authenticate an ordinance is considered to be a mandatory, rather than discretionary act. State ex rel. City of Mansfield v. Lowrey, 3 Misc. 174 (C.P. Richland County 1974). See also Blanchard v. Bissell, 11 Ohio St. 96 (1860); 1962 Ohio Op. Att'y Gen. No. 2746, p.10.

The clerk performs other duties pertaining to the recording and publication of ordinances, once they have been enacted. See, e.g., R.C. 731.20 ("as soon as a bylaw, resolution, or ordinance is passed and signed, it shall be recorded by the clerk in a book furnished by the legislative authority for that purpose"); R.C. 731.21 (C) (clerk shall supply copies of text of ordinances to any person upon request and must post a copy of the text); R.C. 731.23 (clerk and mayor certify as correct the revision, codification, and rearrangement of ordinances published in book form); R.C. 731.24 (clerk's certification as to legal publication of ordinances or summary of ordinances); R.C. 731.25 (clerk's certification as to publication by posting of ordinances or summary of ordinances). Again, these functions are ministerial or clerical in nature. See 1962 Ohio Op. Att'y Gen. No. 2746, p. 10 (while the clerk is apparently an officer, his functions are purely clerical and ministerial).

It is apparent that the clerk of council would receive a definite and direct, personal pecuniary benefit from the pension "pick-up" plan. Unlike the members of council, however, the clerk has no authority to introduce the ordinance establishing the benefit or to determine its

content or substance, and has no discretion or decision-making authority as to whether the ordinance will be enacted. Rather, the clerk has the mandatory and clerical duty imposed by law to authenticate and record the ordinance.

The clerk's authority may be distinguished from that of the members of council in that the clerk of council does not set the compensation attendant to his position. R.C. 731.04 provides that council fixes the compensation of its clerk and other employees. The council may increase the clerk's compensation, just as any appointing authority may fix and increase the compensation of its employees. See generally Ebert v. Stark County Board of Mental Retardation, 63 Ohio St. 2d 31 (1980). The fact that the clerk is "elected" to his position by council, and serves for a fixed term does not alter the fact that the clerk does not have the authority to fix or increase his own compensation; such authority rests solely with his appointing authority, the city council.

Therefore, the clerk's objectivity and independence of judgment could not be impaired by enactment of the ordinance providing the benefit to him during his term, and Section 102.03(E) would not prohibit the clerk from receiving the benefit during his term of office, even though he performs ministerial functions with respect to the ordinance enacting the benefit. See Advisory Opinion No. 90-004. See generally Advisory Opinion No. 75-006 (describing what constitutes a ministerial function). It must be emphasized that this conclusion is based on an interpretation of R.C. 102.03, and does not purport to interpret R.C. 731.13, or bear on any local provisions prohibiting in-term increases for council clerks.

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

As set forth above, R.C. 2921.42(A)(1) prohibits a public official from authorizing or using his authority or influence to secure authorization of, a public contract in which he has an interest, and Division (A)(3) prohibits a public official from profiting from any public contract authorized by him or by a legislative body of which he was a member at the time of authorization. As discussed above, elected officials serve pursuant to law and not pursuant to contract, and the right of an elected official to his compensation or salary "does not depend on contract, but is a creature of law." Advisory Opinion No. 83-008. The Commission held in Advisory Opinion No. 83-008, therefore, that a proposed city ordinance increasing the salary of the office of mayor "would not be a change in the terms or conditions of a 'public contract,'" for purposes of the prohibitions of R.C. 2921.42. Although a city clerk is appointed to his position through "election" by the members of council and serves for a term of years, absent removal for cause by council, he cannot be said to serve in the same manner as an official who is elected to office by the electorate. He is appointed to his position by the legislative body, even though the council, as a multi-member body, must appoint him by acting through a majority of its members to "elect" him.

His compensation is fixed by council, and he may be removed by council. Thus, the clerk's relationship with the city, like that of other city employees, may be deemed to be a "public contract," for purposes of R.C. 2921.42.

An ordinance increasing the compensation of the city clerk would be a change in the terms and conditions of a public contract, and a clerk would be "interested" in and would "profit" from an increase in his compensation for purposes of R.C. 2921.42 (A)(1) and (A)(3). Therefore, R.C. 2921.42(A)(1) and (A)(3) prohibit the city clerk from authorizing, or using his authority or influence to secure authorization of, the increase in his compensation, and from profiting from any increase he authorizes.

The Ethics Commission has held that a public official or public body will be deemed to have "authorized" a public contract for purposes of R.C. 2921.42(A)(1) and (A)(3) where the public contract could not have been awarded without the approval of the official or public body. See Advisory Opinions No. 87-004 and 88-008. Division (A)(1) also prohibits a public official from using his authority or influence to secure the authorization or award of a public contract in which he has an interest. As described above, the clerk performs various responsibilities with respect to regularly enacted ordinances. Such functions are, however, ministerial and mandatory in nature, and generally do not affect the validity of the ordinances. See Blanchard v. Bissell, Stradtman v. City of Brunswick, and State ex rel. City of Mansfield v. Lowrey (authentication); Upington v. Oviatt, 24 Ohio St. 232 (1873) and City of Cincinnati v. Board of Education, 63 Ohio App. 549 (Hamilton County 1940), appeal dismissed, 137 Ohio St. 568 (1941) (failure to record an ordinance or resolution under what is now R.C. 731.20 does not affect the validity of the enactment). R.C. 731.26 does provide that "it is a sufficient defense to any suit or prosecution under an ordinance, to show that no publication or posting was made as required by sections 731.21 to 731.25, inclusive, of the Revised Code." It cannot be said, however, that the clerk's responsibilities to post or certify publication of the ordinances amount to approval or authorization of the ordinances, or to use of authority or influence to secure approval or authorization of the ordinances. Such duties are mandatory in nature, and the clerk does not exercise discretionary, decision-making authority. See State ex rel. City of Mansfield v. Lowrey; 1962 Ohio Op. Att'y Gen. No. 2746, p.10. The clerk cannot be deemed to authorize or approve or to use his position to secure authorization or approval of, the ordinance providing for an increase in his compensation. Therefore, neither R.C. 2921.42(A)(1) nor (A)(3) would prohibit the clerk from receiving an increase in compensation pursuant to ordinance, even though he performs the authentication, recording, certification and posting duties required under law.

It must be noted, however, that if a local charter or ordinance authorizes the city clerk to exercise greater authority or discretionary powers with respect to the enactment of ordinances, the appropriation of city funds, or the setting of the clerk's compensation, then the prohibitions of R.C. 102.03 and 2921.42 would be implicated.

PRESIDENT OF COUNCIL

You have also asked whether the president of council is prohibited from accepting benefits under a "pick-up" plan enacted by ordinance during his term of office.

R.C. 733.09 provides that the president of the legislative authority of a city is elected to office for a term of either two or four years. R.C. 733.09 further provides that the president of council "shall preside at all regular and special meetings of such legislative authority, but he shall have no vote therein except in case of a tie." The president of council is not considered to

be a member of council, but, rather serves in the executive branch of city government. See R.C. 733.01; 1946 Ohio Op. Att'y Gen. No. 744, p. 68. See also State ex rel. Roberts v. Snyder, 149 Ohio 333 (1948); 1990 Ohio Op. Att'y Gen. No. 90-063. The president of council serves as acting mayor when the mayor is absent from the city or is unable to perform his duties, R.C. 733.07, and the president of council becomes the mayor for the unexpired term in the case of the death, resignation, or removal of the mayor, R.C. 733.08.

The president of council, like the clerk of council, is required to authenticate all ordinances, resolutions, and bylaws. R.C. 731.20. The president's duty to authenticate an ordinance, like the clerk's duty, is mandatory, rather than discretionary in nature, and the president's authentication is not necessary to the validity of an ordinance. See Blanchard v. Bissell; Stradtman v. City of Brunswick; State ex rel. City of Mansfield v. Lowrey.

However, although the president of council is not a member of council, he does exercise responsibilities in the enactment of ordinances that cannot be described as merely ministerial or clerical. He presides at all meetings of council, and has the power to vote on the enactment of an ordinance in case of a tie. Therefore, the president has the opportunity to directly exercise authority and exert influence in the enactment of an ordinance granting an increase in benefits. R.C. 102.03(D) would prohibit the president of council from voting to break a tie in favor of granting to the president an in-term increase in compensation, and from otherwise using his authority or influence, formally or informally, to secure an increase. Division (E) would prohibit the president, as well as the members of council, from accepting an in-term increase in compensation enacted by council, as discussed above. This would hold true regardless of whether the president was required to vote in favor of the increase in order to break a tie on council. As noted above, the president of council is charged with presiding at all meetings of council, and would have the opportunity to influence council's discussions and vote, if not the authority to vote formally on the matter. See Advisory Opinions No. 89-016, 90-007, and 90-008 (R.C. 102.03(D) prohibits a public official from using the authority or influence of his office, formally or informally, to secure a thing of value that is of an improper character). Furthermore, there may be instances where the president would be called upon to break the tie on an ordinance increasing his compensation, where he would obviously have the deciding vote on the matter. His objectivity in casting that crucial vote could obviously be impaired by considerations of his private financial interests. The president of council, is by virtue of his position as presiding officer of council, in a position to exert discretion and influence over the actions of the members of council. See Advisory Opinions No. 87-008, 88-005, and 90-003. If the president were permitted to accept an in-term increase in compensation, it would be possible for him to exert that influence over the members in order to secure the increase. Therefore, the president of council who serves at the time an ordinance is enacted increasing the compensation for that position is prohibited by R.C. 102.03(E) from accepting the increase for the duration of his current term.

CITY TREASURER

You have also asked whether the city treasurer may accept in-term increases in compensation enacted by council. Under one ordinance, the treasurer would receive the "pick-up" benefit, and under a second ordinance, the treasurer would receive an increase in salary. See

Advisory Opinion No. 91-008 (an increase in salary constitutes a thing of value under R.C. 102.03). R.C. 733.42 provides for the election of a city or village treasurer. The treasurer must receive and disburse all funds of the city. R.C. 733.46. The treasurer must keep accounts of moneys received and disbursements made by him, R.C. 733.43, and demand and receive moneys due the municipality and disburse funds on the order of authorized persons, R.C. 733.44. The treasurer is also required to settle and account with the legislative authority and report to it the condition of the finances of the city. R.C. 733.45.

The treasurer exercises no discretionary, decision-making authority under the law with regard to the enactment of ordinances or the appropriation of moneys for the purpose of funding increases in compensation. Although the treasurer is required to receive and disburse funds of the city and to account for such receipts and disbursements, the treasurer exercises no discretionary authority as to whether an ordinance authorizing the expenditure of money, such as an increase in compensation, shall be enacted. See Urner v. State ex rel. Alcorn, 51 Ohio App. 97 (Hamilton County 1935), appeal dismissed, 130 Ohio St. 196 (1935) (the city treasurer has no power to make an appropriation of any money for any purpose; the power rests with city council). The city treasurer, like the city clerk, has no authority to fix or increase his own compensation. Therefore, Division (E) of Section 102.03 would not prohibit a city treasurer from receiving an increase in salary or benefits during his current term of office, unless local provisions grant the city treasurer discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the setting of the treasurer's compensation. (Again, this conclusion does not constitute an interpretation or application of R.C. 731.13 or similar local provisions prohibiting such increase.)

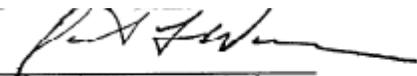
Division (D) of Section 102.03 would prohibit the city treasurer from misusing his position or influence, formally or informally, to secure an in-term increase in compensation.

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 Ethics Commission, and you are so advised, that: (1) Division (D) of Section 102.03 of the Revised Code prohibits the members of city council from enacting an ordinance granting an in-term increase in compensation for the current members of council; (2) Division (E) of Section 102.03 of the Revised Code prohibits a member of city council from accepting, for the duration of his present term, an increase in compensation enacted by council while he was a member thereof. A city council member is bound by this prohibition regardless of whether he votes for or against the increase, or whether he abstains from participating in the issue; (3) Division (D) of Section 102.03 of the Revised Code prohibits the

president of city 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 otherwise using his authority or influence, formally or informally, to secure an increase in compensation; (4) Division (E) of Section 102.03 of the Revised Code prohibits the president of city council from accepting, for the duration of his current term, an increase in compensation enacted by city council while he was president thereof. The president is bound by this prohibition regardless of whether he voted in favor of the increase in order to break a tie on council; and (5) The clerk of council and the city treasurer are not prohibited by Section 102.03 or Section 2921.42 of the Revised Code from accepting an increase in compensation enacted by city council during their current term of office, unless a local provision authorizes the clerk or treasurer to exercise discretionary authority with respect to the enactment of legislation, the appropriation of city funds, or the establishment of the compensation for their respective positions.



Dr. David Warren, Chairman
OHIO ETHICS COMMISSION