

November 19, 2008

The Honorable Thomas L. Sartini
Ashtabula County Prosecuting Attorney
Ashtabula County Courthouse
25 West Jefferson Street
Jefferson, Ohio 44047-1092

SYLLABUS:

2008-037

Absent a charter provision, ordinance, resolution, or language of a collective bargaining agreement declaring otherwise, R.C. 124.57(A) prohibits a firefighter/paramedic in the classified service of the City of Mentor from serving simultaneously as a member of the City of Ashtabula's legislative authority.



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OPINION NO. 2008-037

The Honorable Thomas L. Sartini
Ashtabula County Prosecuting Attorney
Ashtabula County Courthouse
25 West Jefferson Street
Jefferson, Ohio 44047-1092

Dear Prosecutor Sartini:

You have requested an opinion whether a firefighter/paramedic in the classified service¹ of the City of Mentor may also serve as a member of the City of Ashtabula's legislative authority. Absent a charter provision, ordinance, resolution, or language of a collective bargaining agreement declaring otherwise, R.C. 124.57(A) prohibits a person from holding these two positions simultaneously.

R.C. 124.57(A) prohibits a firefighter/paramedic in the classified service of a city from engaging in certain political activities:

No officer or employee in the classified service of the ... cities ... shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political party or for any candidate for public office; ... nor shall any officer or employee in the classified service of the ... cities ... be an officer in any

¹ Pursuant to R.C. 737.11, a city fire department "shall be maintained under the civil service system," which is divided into the classified service and unclassified service, *see* R.C. 124.11. The classified service of a city fire department shall comprise all persons in the employ of a city not specifically included in the unclassified service. R.C. 124.11(B); 2 Ohio Admin. Code 123:1-46-02(A)(1).

political organization or take part in politics other than to vote as the officer or employee pleases and to express freely political opinions.

Accord 2 Ohio Admin. Code 123:1-46-02(A).

The language of R.C. 124.57(A) has been interpreted by the courts as prohibiting an officer or employee in the classified service of a city from engaging in partisan political activity. 2000 Op. Att’y Gen. No. 2000-033 at 2-202; *see Heidtman v. City of Shaker Heights*, 163 Ohio St. 109, 126 N.E.2d 138 (1955) (syllabus, paragraph two) (the term “politics” as used in what is now R.C. 124.57 “must be defined as politics in its narrower partisan sense”); *see also Gray v. City of Toledo*, 323 F. Supp. 1281, 1286 (N.D. Ohio 1971) (upholding the constitutionality of R.C. 124.57, using the narrow interpretation of “politics” adopted in *Heidtman*, and indicating that if “politics” were read more broadly as referring to “the science of government and civil polity,” R.C. 124.57 would be unconstitutional). On the basis of this judicial interpretation of R.C. 124.57(A), the Director of the Ohio Department of Administrative Services has adopted and promulgated rule 123:1-46-02. This rule lists specific political activities in which an officer or employee in the classified service of a city may and may not engage. Under division (C) of this rule, an officer or employee in the classified service of a city is prohibited from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election. *See* 2001 Op. Att’y Gen. No. 2001-034 at 2-202; 2000 Op. Att’y Gen. No. 2000-033 at 2-202; *see also* 1996 Op. Att’y Gen. No. 96-035 at 2-138 (“[a] classified employee takes part in a partisan activity when he becomes a candidate for public office in a partisan election”). Hence, a firefighter/paramedic in the classified service of the City of Mentor is prohibited from being elected to a public office in a partisan election or accepting a party-sponsored appointment to a public office that is normally filled by partisan election.

According to information provided in conjunction with your letter, the members of the City of Ashtabula’s legislative authority are elected in partisan elections. *See generally* R.C. 3513.251 (“[n]ominations of candidates for election as officers of a municipal corporation having a population of two thousand or more shall be made either by primary election in conjunction with a partisan general election or by nominating petition in conjunction with a nonpartisan general election, as determined under [R.C. 3513.01]”); City of Ashtabula Charter § 42 (“[t]he nomination of candidates for elective offices of the City shall be made in the manner provided by the general laws of the State of Ohio now in force or as hereafter amended, except that primary elections for the nomination of such candidates shall be held on the first Tuesday after the first Monday in May in the odd-numbered years”). Therefore, R.C. 124.57(A) prohibits a firefighter/paramedic in the classified service of the City of Mentor from serving simultaneously as a member of the City of Ashtabula’s legislative authority. *See generally* R.C. 124.34(A) (“[t]he tenure of every officer or employee in the classified service of the ... cities ... holding a position under [R.C. Chapter 124], shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer’s or employee’s longevity reduced or eliminated, except as provided in [R.C. 124.32, which sets forth the instances in which a person holding an office or position in the

classified service may be transferred to another office or position], and for ... violation of [R.C. Chapter 124] or the rules of the director of administrative services”); R.C. 124.62 (“[a]fter a rule has been duly established and published by the director of administrative services or by any municipal ... civil service commission according to [R.C. Chapter 124], no person shall ... willfully refuse or neglect to comply with or to conform to the sections of [R.C. Chapter 124], or willfully violate any of the sections. If any person who is convicted of violating this section holds any public office or place of public employment, such office or position shall by virtue of such conviction be rendered vacant”);² rule 123:1-46-02(D) (“[a]n employee in the classified service who engages in any of the activities listed in [rule 123:1-46-02(C)(1)-(13)] is subject to removal from his or her position in the classified service. The appointing authority may initiate such removal action in accordance with the procedures in [R.C. 124.34]. The director [of administrative services] may also institute an investigation or action in case of a violation”).

We note, however, that the prohibition set forth in R.C. 124.57(A) can be overcome through the exercise of the City of Mentor’s home rule powers under Article XVIII, §§ 3 and 7 of the Ohio Constitution. See 2004 Op. Att’y Gen. No. 2004-051 at 2-436 and 2-437. See generally *Hudak v. Cleveland Civil Serv. Comm’n*, 44 Ohio App. 3d 15, 17, 540 N.E.2d 741 (Cuyahoga County 1988) (“[t]he city’s charter generally controls its civil service practices, pursuant to its home rule powers. Hence, Section 140 of the Cleveland Charter governs this dispute, rather than R.C. 124.57 which governs classified civil service employees outside charter municipalities” (citations omitted)); *Harbarger v. Ballard*, 53 Ohio App. 2d 281, 283-84, 373 N.E.2d 390 (Summit County 1977) (“a city ... has home rule powers under [Ohio Const. art. XVIII, § 3] in matters affecting civil service and public employee situations. It is obvious from this authority that [a city] is not bound by the state law”). Article XVIII, § 3 of the Ohio Constitution authorizes cities “to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Article XVIII, § 7 of the Ohio Constitution provides that a city “may frame and adopt or amend a charter for its government and may, subject to the provisions of [Article XVIII, § 3 of the Ohio Constitution], exercise thereunder all powers of local self-government.” The City of Mentor thus under its home rule authority, may exercise its powers of local self-government to overcome the prohibition set forth in R.C. 124.57(A).

Under Ohio home rule jurisprudence, in matters of local self-government a city charter provision prevails over a conflicting state statute. As explained in *State ex rel. Lightfield v. Village of Indian Hill*, 69 Ohio St. 3d 441, 442, 633 N.E.2d 524 (1994):

The Home Rule Amendment to the Ohio Constitution governs the respective legislative roles of the state and its municipalities. In matters of local

² A firefighter/paramedic in the classified service of the City of Mentor who violates R.C. 124.62 “shall be fined not less than fifty nor more than five hundred dollars or be imprisoned not more than six months, or both.” R.C. 124.99.

self-government, if a portion of a municipal charter expressly conflicts with a parallel state law, the charter provisions will prevail. The appointment of officers to a municipality's police force is an exercise of local self-government within the meaning of the Ohio Constitution. In order for the municipal charter to supersede the state law regarding police promotions, the conflicts must be in the "express ... language" of the charter and not by mere inference. Furthermore, while the express language of a charter may nullify a state civil service law, express charter authorization is necessary to enable municipalities to adopt ordinances or administrative rules that will prevail over statutory provisions in case of conflict. (Citations omitted.)

accord State ex rel. Regetz v. Cleveland Civil Serv. Comm'n, 72 Ohio St. 3d 167, 648 N.E.2d 495 (1995); *State ex rel. Bednar v. City of North Canton*, 69 Ohio St. 3d 278, 631 N.E.2d 621 (1994); *State ex rel. Bardo v. City of Lyndhurst*, 37 Ohio St. 3d 106, 524 N.E.2d 447 (1988).

Accordingly, if a provision in the City of Mentor's charter conflicts with R.C. 124.57(A), the charter provision prevails.³ See *State ex rel. Lightfield v. Village of Indian Hill*; *State ex rel. Bardo v. City of Lyndhurst*. Moreover, an ordinance of the City of Mentor is capable of superseding R.C. 124.57(A) when (1) the city's charter reserves home rule authority to permit enactment of ordinances or resolutions at variance with state statutes and (2) the city's legislative authority enacts an accompanying ordinance or resolution that conflicts with the state statute. See *State ex rel. Regetz v. Cleveland Civil Serv. Comm'n*; *State ex rel. Lightfield v. Village of Indian Hill*; *State ex rel. Bednar v. City of North Canton*; *State ex rel. Bardo v. City of Lyndhurst*. Accordingly, R.C. 124.57(A) applies to the position of firefighter/paramedic in the classified service of the City of Mentor unless there is either (1) a conflicting charter provision or (2) a charter provision that reserves home rule authority to permit enactment of ordinances or resolutions at variance with state statutes and an accompanying ordinance or resolution that conflicts with R.C. 124.57(A).

Our review of the provisions of the City of Mentor's charter does not disclose a provision that supersedes R.C. 124.57(A). Moreover, information you have provided us indicates that the City of Mentor has not enacted an ordinance or resolution that conflicts with R.C. 124.57(A). Hence, R.C. 124.57(A)'s prohibition applies to the position of firefighter/paramedic in the classified service of the City of Mentor.

³ In order for a provision of the City of Mentor's charter to supersede R.C. 124.57(A), the conflict "must be in the 'express ... language' of the charter and not by mere inference." *State ex rel. Lightfield v. Village of Indian Hill*, 69 Ohio St. 3d 441, 442, 633 N.E.2d 524 (1994) (quoting *State ex rel. Bardo v. City of Lyndhurst*, 37 Ohio St. 3d 106, 110, 524 N.E.2d 447 (1988)); *accord State ex rel. Bednar v. City of North Canton*, 69 Ohio St. 3d 278, 280, 631 N.E.2d 621 (1994); see 2004 Op. Att'y Gen. No. 2004-051 at 2-436 n.6.

In addition, language of a collective bargaining agreement entered into by the City of Mentor and its firefighter/paramedics pursuant to R.C. Chapter 4117 may, notwithstanding R.C. 124.57(A), permit a firefighter/paramedic in the classified service of the city to be elected to a public office in a partisan election or accept a party-sponsored appointment to a public office that is normally filled by partisan election. *See* 1991 Op. Att’y Gen. No. 91-065 (syllabus, paragraph one). *See generally* R.C. 4117.03(A)(4) (public employees are authorized to bargain collectively with a public employer “to determine wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, and enter into collective bargaining agreements”); R.C. 4117.08(A) (“[a]ll matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section”); R.C. 4117.10(A) (“[a]n agreement between a public employer and an exclusive representative entered into pursuant to [R.C. Chapter 4117] governs the wages, hours, and terms and conditions of public employment covered by the agreement”). For the purpose of this opinion, it is assumed that no such language exists in a collective bargaining agreement entered into by the City of Mentor and its firefighter/paramedics.

In conclusion, it is my opinion, and you are hereby advised that, absent a charter provision, ordinance, resolution, or language of a collective bargaining agreement declaring otherwise, R.C. 124.57(A) prohibits a firefighter/paramedic in the classified service of the City of Mentor from serving simultaneously as a member of the City of Ashtabula’s legislative authority.

Respectfully,



NANCY H. ROGERS
Attorney General