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WHEN A VILLAGE BECOMES A CITY THE VILLAGE OFFICERS REMAIN IN OFFICE WITH THEIR POWERS LIMITED TO THAT OF VILLAGE OFFICERS UNTIL THE CITY OFFICERS ARE ELECTED—THE POWER TO SET SALARIES OF CITY OFFICIALS RESIDES WITH THE CITY LEGISLATURE—WHEN A VILLAGE BECOMES A CITY (NON-CHARTER) THE DULY ELECTED LEGISLATURE SHOULD SET THE SALARIES OF CITY OFFICIALS—§§703.06, R.C., 703.07, R.C., 731.07 R.C., OPINION NO. 3354, OAG, 1941, 4322 OAG 1954.

SYLLABUS:

1. Where pursuant to the provisions of Section 703.06, Revised Code, a village becomes a city, the village officers continue in office under Section 703.07, Revised Code, until the city officers are elected and qualified, but have only the powers and duties of village officers during that period.

2. The power to set the salaries of city officers of a non-charter city is under Sections 705.13 and 731.08, Revised Code, invested in the legislative authority of the city, and the legislative authority of a village is without authority to set the salaries of officers of a city which under Section 703.06, Revised Code, has, or will, succeed the village.

3. Where under Section 703.06, Revised Code, a village becomes a non-charter city, and city officers are duly elected the legislative authority of the city should pursuant to Sections 705.13 and 731.08, Revised Code, set the salaries of all city officers, including the salaries of the members of said legislative authority; and a previously adopted ordinance of the village attempting to set the salaries of the incoming city officers is invalid.

Columbus, Ohio, April 10, 1962

Hon. James A. Rhodes  
Auditor of State  
State House  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"With a great number of villages progressing to city status, as a result of the recent decennial census, a number of questions have arisen with respect to the powers and duties of village officials in connection with the orderly transition from village to city status.

"One such question has been submitted by a city located in the northern part of the State, and deals with the authority of the village council to set the salaries for city officials to be elected at the first regular municipal election after the village has been declared to be a city. Instead of going into details with respect to the problem, I am attaching for your consideration a memorandum prepared by the city solicitor in which two questions are proposed for your opinion."

The memorandum of the city solicitor, to which you refer, reads in pertinent part:

"On January 4, 1961 the Village of Brook Park was certified as a City by the Secretary of State of the State of Ohio. On January 3, 1961 the Village Council passed an ordinance fixing the salaries for those elected officials as provided for by statute, thus commencing on the 1st day of January 1962. On November 7, 1961 City officials for Brook Park were elected in the general election held that date. These officials will assume office on January 1, 1962 and Brook Park will then officially become a City.

"The first questions presented are:

- "1. Was the action of Village Council null and void in that they exceed the authority granted to villages by Title VII of the Revised Code in passing an ordinance setting the compensation for City officials and
- "2. What is the effect of R.C. 703.07 which holds, 'Officers of a village advanced to a city, or of a city reduced to a village shall continue in office until succeeded by the

proper officers of the new municipal corporation at the regular municipal election and the ordinances thereof not inconsistent with the laws relating to the new municipal corporation shall continue in force until changed or repealed.”

From the above specific language and from other statements in the memorandum of the city solicitor, the pertinent questions appear to be (1) whether the compensation of the city officers is governed by the salary ordinance passed by the village council, and (2), if not, may the city council now pass an ordinance setting the salaries of such officers, and may the officers receive the salaries so set.

Section 703.06, Revised Code, provides that upon receiving the results of a federal census the secretary of state shall issue a proclamation stating the names of municipal corporations having a population of five thousand or more, and of those having a population of less than five thousand. The section further states :

“\* \* \* A copy of the proclamation shall forthwith be sent to the mayor of each such municipal corporation, which copy shall forthwith be transmitted to the legislative authority of such municipal corporation, read therein, and made a part of the records thereof. Thirty days after the issuance of such proclamation each municipal corporation shall be a city or village as the case may be.”

Under the facts herein given, I assume that the certification by the secretary of state on January 4, 1961, was made after the thirty day period following the proclamation had elapsed, and that the village became a city on that date. Also, for the purposes of this opinion, I am assuming that the municipal corporation in question is a non-charter municipality.

As to the status of the village officers when the village becomes a city, Section 703.07, Revised Code, states :

“Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new municipal corporation at the regular municipal election, and the ordinances thereof not inconsistent with the laws relating to the new municipal corporation shall continue in force until changed or repealed.”

I have been unable to find any specific statutory provision as to the setting of the salaries of the incoming city officers, and if I am to find

authority for such action by the village council it must be from the words of Section 703.07, *supra*, reading:

“\* \* \* and the ordinances thereof not inconsistent with the laws relating to the new municipal corporation shall continue in force until changed or repealed.”

In the case of *Wise v. The City of Barberton*, 20 C.C. (N.S.), 31 C.D. 373, Aff. 88 Ohio St., 595 (1912), in referring to Sections 3498 and 3499, General Code, now Sections 703.06 and 703.07, Revised Code, it is stated:

“The only things that are made absolutely certain by the two sections are that Barberton was a city, from and after February 17, 1911, and the only officers it had until January, 1912, were the individuals who originally had been elected as village officers. December 11, 1911, the council of the city of Barberton, composed of the individuals who had been elected as members of the council of the village of Barberton, passed an ordinance fixing the salaries of the city officials recently elected, who would come into office the following January.

“*This they had a right to do*, but the mayor vetoed it, and said ordinance was never passed over his veto.” (Emphasis added)

In the *Wise* case, *supra*, the village council acted after the village had become a city, which in itself differentiates that case from the present question to some extent. In the instant case the salary ordinance was passed one day before the village became a city.

In any event, however, while the *Wise* case did state that the village council could set the salaries of the incoming city officers, the case of *State, ex rel. v. Serp*, 125 Ohio St., 87, appears to have modified that decision. The third paragraph of the syllabus in *State, ex rel. v. Serp* reads:

“It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office with the powers and duties only of village officers until the first regular election after the proclamation of the secretary of state has been filed with the mayor of the municipality as provided by Section 3498, General Code.”

At page 93 of *State, ex rel. v. Serp*, the opinion by Marshall, C. J., reads:

“We have examined the case of *Wise v. City of Barberton*, 88 Ohio St., 595, 106 N. E., 1086. That case merely affirmed

without opinion a decision of the Circuit Court reported in 20 C.C. (N.S.), 390, 31 C.D., 373. While that case merely decided the question of the veto power of a mayor of a municipality which had been advanced from the village to a city, the reasoning of the opinion in that case in the court of appeals would lead to a denial of the writ in the instant case. The mere affirmance of the Circuit Court, by this court, did not make authoritative the Circuit Court opinion. The inconveniences, not to say the impossible situations which would necessarily arise in following that authority, are well described by counsel for realtor, and they are so concisely stated that they are adopted in toto:”

Further, in Opinion No. 3354, Opinions of the Attorney General for 1941, page 9, in referring to *State, ex rel. v. Serp*, it is stated at page 15:

“The language contained in the third paragraph of the syllabus in that case is quite broad and leaves no doubt as to the limits of the authority of the village officers who continue in office after the proclamation of the Secretary of State until the next election. It reads as follows:

“‘It is the true intent and meaning of Section 3499, General Code, that village officers shall continue in office, with the powers and duties only of village officers until the first regular election after the proclamation of the secretary has been filed with the mayor of the municipality as provided by Section 3498, General Code.’

“This decision in effect overrules the case of *Wise v. City of Barberton* and the principles of law announced in the *Barberton* case must be regarded as unsound in so far as they are in conflict with the decision of the Supreme Court.

“It is true that Section 3498, General Code, provides that a village whose population has increased to five thousand shall become a city thirty days after proclamation by the Secretary of State, but this change does not increase the powers of the officers of such corporation nor change its form of government until new officers are elected.”

“Also see Opinion No. 1402, Opinions of the Attorney General for 1952, page 333, at 336.)

Under Section 731.08, Revised Code, the salaries and compensation of all officers of a city are to be fixed by ordinance of the legislative authority of the city. A village council is authorized to set the compensation of village officers, but has no statutory authority to do so for officers of the city which succeeds the village. Accordingly, under the reasoning of *State, ex rel. v. Serp, supra*, the village council here concerned having

only the powers of a village council, was without authority to set the salaries of the incoming city officers, and the salaries of such city officers are not, therefore, governed by the salary ordinance passed by the village council.

The next question is whether the legislative authority of the city may now set the salaries of the duly elected city officers, including the salaries of the members of such legislative authority, and whether the persons concerned may receive the salaries so set.

Section 731.08, Revised Code, authorizes the legislative authority of the city to fix the salaries and compensation of the city officers. Section 705.13, Revised Code, directs the legislative authority of a municipal corporation to fix the salary of *its* members. Thus, the legislative authority of the city would appear to have not only the authority but the duty to set the salaries of the duly elected officers of the city, including the salaries of the members of such legislative authority.

It is possible that in the instant case some question might be raised as to an increase or decrease in the salaries set by the city council as compared to the salaries which were attempted to be set by the village council. Here to decide is whether such an action would violate any constitutional or statutory provisions prohibiting an increase or decrease in salary during term.

It is well settled that the prohibition against an increase or decrease in salary during term as found in Section 20 of Article II, Ohio Constitution, does not apply to officers of municipal corporations (Opinion No. 4322, Opinions of the Attorney General for 1954, page 498, at page 503). As to statutory restriction, however, the third and fourth paragraphs of the syllabus in Opinion No. 4322, *supra*, reads:

“3. Statutory provisions fixing the salaries of municipal officers and employes, or prescribing limits within which changes in such salaries may be made, relate to the form or structure of the several statutory plans of municipal government for which the General Assembly has made provision by law as authorized by Section 2, Article XVIII, Ohio Constitution. Immunity from such limiting provisions may be achieved by municipal corporations by the adoption of a charter establishing a form or structure of municipal government at variance with such statutory plans; but such limiting provisions apply to municipal corporations which have elected, by failure to adopt a charter, to operate under a statutory plan of municipal government.

“4. Where a city or village charter confers full authority on the municipal council to fix the compensation of the municipal officers and employes such legislative authority may be exercised without regard to the provisions of Section 731.07 and 731.13, Revised Code; but such statutory provisions are controlling in the case of the council of a city or village which operates under a statutory plan of municipal government.”

Section 731.07, Revised Code, referred to in said Opinion No. 4322, reads as follows :

“The salary of any officer, clerk, or employee of a city shall not be increased or diminished during the term for which he was elected or appointed.

“Unless otherwise provided, all fees pertaining to any office shall be paid into the city treasury.”

While Section 731.07, Revised Code, does thus apply to a non-charter municipal corporation such as here concerned, it deals only with an increase or decrease in the salary of an officer, not the initial fixing of a salary. Accordingly, I do not construe such section to preclude the officers of a city from receiving compensation fixed by the legislative authority of the city, during term, where no compensation has previously been validly provided for such officers.

The same question was considered in the case of *Wise v. The City of Barberton, supra*, in which in referring to Section 4213, General Code, now Section 731.07, Revised Code, it is stated at page 393 :

“This statute applies only to a case where a salary has been fixed and not where no salary has been provided.

“In order to increase or decrease a salary, there must be something to increase or decrease. The Legislature cannot have intended that salaries might not be provided where none had been provided before, for then there would be no way of compensating officers of newly created municipal corporations, and there would be difficulty in finding persons to fill such offices and perform the duties thereof.

“This is the conclusion reached by Judge Evans of the Franklin County Common Pleas Court in a well-reasoned opinion citing authorities which abundantly sustain his views. *State, ex rel. v. Carlisle*, 3 N.P. (N.S.), 544.

“That case was never carried higher, and we concur in the views there expressed.

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Here it will be noted that the above conclusions of the *Wise* case were not overruled or even discussed in *State, ex rel. v. Serp, supra*, and I find that I am in accord with such conclusions.

I have already concluded that in the case at hand, the salary ordinance of the village council was invalid and that no salary was provided for the city officers. It follows, therefore, that there is no question of increase or decrease during term, that the legislative authority of the city may now set the salaries of such officers, and that said officers may receive the salaries so set.

In answer to your specific questions, therefore, it is my opinion and you are advised:

1. Where pursuant to the provisions of Section 703.06, Revised Code, a village becomes a city, the village officers continue in office under Section 703.07, Revised Code, until the city officers are elected and qualified, but have only the powers and duties of village officers during that period.

2. The power to set the salaries of city officers of a non-charter city is under Sections 705.13 and 731.08, Revised Code, invested in the legislative authority of the city, and the legislative authority of a village is without authority to set the salaries of officers of a city which under Section 703.06, Revised Code, has, or will, succeed the village.

3. Where under Section 703.06, Revised Code, a village becomes a non-charter city, and city officers are duly elected, the legislative authority of the city should pursuant to Sections 705.13 and 731.08, Revised Code, set the salaries of all city officers, including the salaries of the members of said legislative authority; and a previously adopted ordinance of the village attempting to set the salaries of the incoming city officers is invalid.

Respectfully,

MARK McELROY

Attorney General