STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 90-06

Date issued: February 5, 1990

Requested by: Gerald Rustad
Williston City Attorney

- QUESTION PRESENTED -

Whether an ordinance fixing the salary and fringe benefits of city employees at a certain level may be enacted by initiative in cities operating under the commission form of government.

- ATTORNEY GENERAL'S OPINION -

It is my opinion than an ordinance fixing the salary and fringe benefits of city employees at a certain level may be enacted by initiative in cities operating under the commission form of government if the ordinance is of a general application and permanent nature. Each proposed ordinance addressing city employee salaries must be reviewed on a case-by-case basis to determine whether it may be enacted by the initiative process.

- ANALYSIS -

The power to initiate and refer municipal ordinances in cities operating under the commission form of government is specifically provided by N.D.C.C. ' 40-12-01. A proposed ordinance may be submitted to the governing body by petition signed by a certain number of voters. N.D.C.C. ' 40-12-02. After the petitions are deemed to be sufficient, the governing body may either pass the proposed ordinance, call a special election for the voters to consider the proposed ordinance, or submit the proposed ordinance at the next general municipal election, depending upon the number of petition signatures. N.D.C.C. ' 40-12-06. If the majority of the qualified electors approve of an initiated ordinance, it becomes a valid and binding ordinance of that city. N.D.C.C. ' 40-12-07.

There are no North Dakota cases on the question of whether all municipal ordinances are subject to the power of initiative and referendum provided for in N.D.C.C. ' 40-12-01. The North Dakota Supreme Court has acknowledged a legislative-administrative dichotomy in determining the extent of the power of initiative and referendum. McCallum v. City Comm'rs of Bismarck, 393 N.W.2d 263 (N.D. 1986). Although the court noted that N.D.C.C. ch. 40-12 did not distinguish between legislative and administrativeordinances, it did not resolve the issue whether the legislative administrative dichotomy should be adopted. Id. at 264. The issue has been addressed in other jurisdictions however and has resulted in a generally accepted rule of law on the initiative and referral of municipal ordinances.

> Generally, an enactment originating a permanent law or laying down a rule of conduct or course of policy for the guidance of citizens or their officers or agents is purely legislative in character and referable, while an enactment which simply puts into execution previously declared policies or previously enacted laws is administrative or executive in character and not referable.

42 Am. Jr.2d Initiative and Referendum, ' 12 at 660 (1969).

> The test of what is a legislative and what is an administrative proposition, with respect to the initiative or referendum, has further been said to be whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. Similarly, an act or resolution constituting a declaration of public purpose in making provision for ways and means of its accomplishment is generally legislative as distinguished from an act or resolution which merely carries out the policy or purpose already declared by the legislative body.

5 E. McQuillin, Municipal Corporations, ' 16.55, at 266 (3d Rev. Ed. 1969).

The rule that only legislative, as opposed to administrative, ordinances are subject to the initiative and referendum has generally been justified by the requirements of the efficient administration of government.

> To give a small group of the electorate the right to demand a vote of the people upon every administrative act of the governing body would place municipal governments in a straightjacket and make it impossible for the city's officers to carry out the public's business.

Cuprowski v. City of Jersey City, 242 A.2d 873, 878 (N.J. Super.), aff'd 247 A.2d 28 (N.J. Super.), cert. denied, 248 A.2d 433 (N.J. 1968).

This office has adopted the legislative-administrative distinction for determining which municipal ordinances are subject to the referendum in several opinions. This office has concluded that zoning ordinances (1981 N.D. Op. Att'y Gen. 1), resolutions approving tax exemption of property (1983 N.D. Op. Att'y Gen. 103), cable television franchise ordinances (1985 N.D. Op. Att'y Gen. 24), ordinances annexing territory to the city (1985 N.D. Op. Att'y Gen. 73) and a home rule ordinance authorizing a sales and use tax (1986 N.D. Op. Att'y Gen. 63) may not be referred to the electors of the city. In each of these cases, the ordinance or resolution in question was deemed administrative in character because it placed into operation that which had already been provided for by the body itself or by a superior body.

In light of this generally-accepted rule with respect to the authority to initiate and refer municipal ordinances, I believe the legislative-administrative dichotomy should be continued until such time as a court of law rules to the contrary. Thus, the resolution of the question presented depends upon whether the proposed ordinance establishing the salaries of city officials at a certain level constitutes a legislative or an administrative function. If the ordinance constitutes a legislative function, it is subject to the power of the initiative. If the ordinance constitutes an administrative function, it is not subject to the power of the initiative and may not be proposed by the voters.

The question of whether an initiated measure fixing the salaries of city officials and employees is an administrative or legislative function, is a question upon which state courts are sharply divided. Some jurisdictions have adopted the position that the establishment of salary levels is a legislative function and may be the subject of an initiated measure. Collins v. City and County of San Francisco, 247 P.2d 362 (Cal. Dist. Ct. App. 1952); Glass v. Smith, 244 S.W.2d 645 (Tex. 1952); Washington ex rel Payne v. City of Spokane, 134 P.2d 950 (Wash. 1943); South Dakota ex rel Martin v. Eastcott, 220 N.W. 613 (S.D. 1928). The primary reason supporting this view is that the power to fix salaries results from the power to establish the office which is a legislative function.

> The creation of an office is a legislative function. If the legislative arm of the government has the power to create an office and prescribe its duties, it must surely follow that it has the power to prescribe its emoluments.

Taxpayers' Ass'n v. City of Houston, 105 S.W.2d 655, 657 (Tex. 1937).

Another reason supporting the view that an ordinance fixing salaries is a legislative function is that this is an issue of a general character. "Actions relating to subjects of a permanent and general character are usually regarded as legislative, and those providing for subjects of a temporary and special character are regarded as administrative." 5 E. McQuillin, Municipal Corporations, ' 16.55 at 266 (3d Rev. Ed. 1969).

Other state courts have held that an ordinance establishing salary levels is an administrative act not subject to the power of initiative or referendum. City of Lawrence v. McArdle, 522 P.2d 420 (Kan. 1974); City of Newport v. Gugel, 342 S.W.2d 517 (Ky. Ct. App. 1960); Shriver v. Bench, 313 P.2d 475 (Utah 1957); Gilet v. City Clerk of Lowell, 27 N.E.2d 748 (Mass. 1940); People ex rel Halvey v. Kapp, 189 N.E. 920 (Ill. 1934); Murphy v. Gilman, 214 N.W. 679 (Iowa 1927); McElroy v. Hartsfield, 194 S.E. 737 (Ga. 1937).

The primary argument in favor of the latter position is that an ordinance establishing salary levels involves many factors which must be considered by those persons entrusted with the efficient administration of city government.

> Personnel administration is primarily an administrative matter, at

> least as far as concerns the details of management. To permit the electorate to initiate piece-meal measures affecting the fiscal affairs of the city without regard for the overall fiscal program, or measures not embodying a basic plan or policy for the entire area of government activity upon which the measure touches, could result in destruction of the efficient administration of the affairs of the city, and we do not believe the initiative statute so intends.

City of Newport v. Gugel, 342 S.W.2d at 520.

Additionally, the setting of salary amounts may be regarded as temporary and subject to further review as economic conditions change.

> But the fixing of the compensation to be paid its [fire department] members is a matter of administrative exercise of a power. What is a proper compensation may depend upon many changing conditions, which have to be met from time to time, and may properly be provided for in a less permanent way than by ordinance.

Murphy v. Gilman, 214 N.W. at 681.

Resolution of this issue is not without difficulty nor doubt. Case law from other states differs sharply on whether ordinances may be initiated to freeze salary amounts for public officials.

However, it is my opinion that an ordinance proposing to establish salary levels for city officials and employees may be initiated by the city's electors if that ordinance is of general application and of a permanent nature. Under those circumstances, the ordinance may be regarded as legislative and, hence, subject to the power of initiative. Factors indicating permanency and general application include applicability of its provisions to all officials and employees, its consideration of budgetary and monetary resources, and an indefinite time period during which the ordinance will be in effect.

On the other hand, if the proposed ordinance is to take effect temporarily and addresses a limited or specialized subject, it may be regarded as administrative and not subject to the power of initiative. Factors to be considered in determining whether the proposed ordinance is temporary and of a special nature include its limited application to named officials or employees, lack of consideration of budgetary or monetary issues or resources, and a specific time period during which the ordinance would be in effect.

The determination of whether any particular ordinance is legislative or administrative must be resolved on a case-by-case basis using the factors outlined above and case law from other jurisdictions. Thus, I must leave to the Williston city officials the determination of whether the ordinance in question falls within the legislative or administrative category based upon the legal principles described within this opinion.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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