

**OPINION
70-43**

March 10, 1970(OPINION)

Mr. John A. Zuger

City Attorney

Bismarck, North Dakota

RE: Cities - Initiative - Salaries

This is in response to your letter in which you state that petitions under the provisions of Chapter 40-12 of the North Dakota Century Code seek to initiate a municipal ordinance reading as follows:

"Be it enacted by the Board of City Commissioners of the City of Bismarck that the present salaries of the policemen and firemen of the City of Bismarck be increased by no less than 15 (fifteen) percent;

"Be it further enacted that (1) this increase in salaries shall take effect within three months from the date of passage (2) passage of this ordinance shall in no way prohibit the Board of City Commissioners from enacting larger salary increases in the future and (3) the necessary funds for the increased salaries shall come from the general funds of the City of Bismarck or from a special levy for this purpose only, if such general funds are not available."

You then ask whether such an ordinance can be the subject of or within the operation of Chapter 40-12 of the North Dakota Century Code.

For our benefit you make reference to section 40-12-02 of the North Dakota Century Code, the Annotations in 122 A.L.R., page 782, and the case of Murphy v. Gilman, 214 N.W. 679. You also make reference to section 40-05-01(2), section 40-13-04, section 40-05-01, and Chapter 40-40 of the North Dakota Century Code. You also call our attention to the salary plan contained in the Revised Ordinances of 1966.

Chapter 40-12 of the North Dakota Century Code permits the adoption and enactment of ordinances by use of the initiative process in the commission form of government, such as the City of Bismarck. Nowhere is Chapter 40-12 do we find any provisions which limits or restricts the type of ordinances that may be initiated thereunder.

The prevailing statutory provision in this respect is section 40-13-04, which provides as follows:

"SALARIES OF OFFICERS FIXED BY ORDINANCE - DIMINUTION DURING TERM PROHIBITED. Except where otherwise provided in this code, any officer or employee of a municipality shall receive the salary, fees, or other compensation fixed by ordinance or resolution, and after having been once fixed, the same shall not be diminished to take effect during the term for which the officer was elected or appointed."

The term, "except as otherwise provides", apparently refers to such city officials where a specific ordinance governs the salary of such official or where the Legislature has proscribed certain limitations on salaries and made them contingent upon the population of the municipality.

The fact that the city has adopted a salary plan by an ordinance would not prohibit another ordinance to be enacted which would modify, amend, or repeal the existing ordinance.

We are not aware of any provision of law comparable to the North Dakota Constitution which sets forth certain requirements in passing a bill that would have application to the adoption or enactment of a city ordinance. In the absence of such provision, it would seem that common law principles would apply. The adoption or enactment of an ordinance which refers to some other ordinance or provision does not appear to be, in itself, contrary to any principles of law. Even under the North Dakota Constitution legislation of such character is permissible. Reference to other laws or existing situations is not contrary to law.

McQuillan on "Municipal Corporations", 2nd Edition, Volume 2, section 535, Page 304, contains the following statement:

"Usually the council or governing legislative body is given power to fix salaries of municipal officers and employees, which is done generally by ordinance (a legislative act) and not by mere resolution."

In this State this is controlled by section 40-13-04 of the North Dakota Century Code.

We have examined the Annotations found in 122 A.L.R. 782, and conclude that no authority is found in said Annotations which would have adverse application to the North Dakota statutory provisions of section 40-13-04. In fact, such authority is in complete harmony with this statutory provision. Some of the comments and results reached therein are predicated on language which is not found in our situation.

We have also examined the case of *Murphy v. Gilman*, 214 N.W. 681, and conclude that the decision and discussion therein has no application to the present matter. The Court in the cited case had a statute under consideration which provided substantially as follows:

"Every other officer or assistant shall receive such salary * * * as the council is by ordinance provided, payable in equal monthly installments. The salary or compensation of all other employees of such city shall be fixed by the council and shall be payable monthly or at such shorter periods as the council shall determine."

In the cited case the statute actually invested the power of setting salaries or compensation for employees with the city council, whereas the North Dakota says that such salaries shall be fixed by ordinance.

Chapter 40-45 of the North Dakota Century Code permits the city to adopt a pension plan which, according to your letter, has been accomplished. The pension plan in Chapter 40-45 makes no reference as to the salary except the percentages to be contributed to the pension program under section 40-45-08, which provides that each member shall be assessed not less than three percent (3%) nor more than five percent (5%) as determined by the governing body of the municipality upon the amount of the salary paid to him.

The fact that a pension plan has been adopted does not prohibit the enactment of an ordinance on the subject of salaries.

Basically, Chapter 40-40 of the North Dakota Century Code contains various provisions pertaining to budgeting municipal expenditures.

We can recognize that it is possible the current budget might not contain sufficient funds to take care of the additional expenditures which would occur if the proposed ordinance is enacted, but this in itself does not constitute a legal impediment against having such ordinance enacted. It could be argued with modest success that by enactment of the ordinance by the people the budget has, in effect, been modified or adjusted with approval.

We are aware that if the ordinance is adopted it may be amended or repealed only by the electorate, but this again does not constitute a legal impediment from enacting such ordinance.

It is our opinion that the proposed ordinance comes within the provisions of Chapter 40-12. In reaching this conclusion we are aware that problems might arise in implementing its provisions but this does not prevent the ordinance from being enacted. If future problems constituted legal criteria or grounds which would prevent a law from being enacted very few, if any, laws would ever be enacted.

HELGI JOHANNESON
Attorney General