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April 5, 2005

OFFICIAL OPINION 2005-1

The Honorable Brent Waltz
State House
200 West Washington Street
Indianapolis, Indiana 46204-2785

Re: Indiana Code section 36-8-4-6.5

Dear Senator Waltz:

You requested an opinion on the following question:

A city ordinance allows for the waiver of the requirement that an applicant for appointment to the positions of chief, assistant chief, or deputy chief of police have five years of continuous service (hereinafter "continuous service requirement"). The ordinance provides that the continuous service requirement may be waived "by majority vote of the common council on the request of the city executive." Does such an ordinance impermissibly conflict with Indiana Code section 36-8-4-6.5(c), which indicates that the continuous service requirement "may be waived by the city executive"?

Pursuant to duties under Indiana Code section 4-6-2-5, the Indiana Attorney General provides legal opinions to state officials upon request. The objective is to provide an unbiased overview of the correct application of the law. Opinions of the Attorney General are informational only and have no precedential effect. *State Bd. of Tax Com'rs. v. Methodist Home for Aged of the Ind. Conf. of the Methodist Church, Inc.*, 241 N.E.2d 84, 89 (Ind. App. 1968). If uncertainty exists concerning the executive or legislative nature of a duty or power within the government of a municipality, a petition may be filed in a local court where the court will determine the nature of the power and which branch of the municipality is authorized to exercise the duty or power. Ind. Code § 36-4-4-5.

Short Answer

The legislature intended for all sections of Indiana Code chapter 36-8-4 to apply to all cities, even those cities with a merit system ordinance adopted under Indiana Code section 36-1-4-14. Under section 36-8-4-6.5, the legislature clearly intended to grant to the city executive the exclusive authority to waive the continuous service requirement for applicants for appointment to the positions of chief, assistant chief, or deputy police chief.¹ This grant of authority is consistent with other statutory provisions that place decisions regarding upper level policymaking positions solely with the city executive, without the need for approval or consent by the legislative branch of the city. The legislature has established a uniform procedure and explicit instruction to cities with regard to the method for waiving the continuous service requirement. A city ordinance, like that of the City of Greenwood, that deviates from the statute would impermissibly conflict with the statutory scheme set out by the legislature.

Analysis

A. Merit Systems

Indiana Code article 36-8 sets out a framework for local units of government to establish and operate law enforcement systems. Generally, a city's board of public safety administers its police and fire departments and appoints all employees of the police department except those in upper level policymaking positions. Ind. Code § 36-8-3-2 and -3. However, a city may choose to establish a merit (civil service) system under Indiana Code chapter 36-8-3.5. Merit systems are enacted to improve police departments by insuring that the tenure of police department members depends only on their ability to perform and that the members remain "free from political control." *Coleman v. City of Gary*, 44 N.E.2d 101, 106 (Ind. 1942). If a merit system is established, the city's merit commission has "exclusive authority over the appointment, discipline, demotion, promotion, and suspension of police officers," except for the appointment and removal of members in upper level policymaking positions who are appointed by the city executive. *Warner v. City of Terre Haute*, 30 F.Supp 2d 1107, 1122-23 (S.D. Ind. 1998).

Prior to 1980, the state code contained various statutes for establishing police and fire department merit systems. See Ind. Code § 36-8-3.5-1(b). In 1981, the merit statutes were re-codified at Indiana Code chapter 36-8-3 and chapter 36-8-3.5 was added. Originally, chapter 3.5 indicated that the statutory provisions provided "the exclusive statutory manner for such a unit to exercise the power of establishing a merit system for its police or fire department." Ind. Code § 36-8-3.5-1 (1981). A 1987 Indiana Supreme Court decision held that the legislature sought to establish a uniform statewide model merit system for the state and if a "municipality or township modifies an existing [merit system] or creates a new one, I.C. 36-8-3.5 becomes controlling." *City of Evansville v. Int'l Assoc. of Fire Fighters, Local 357*, 516 N.E.2d 57, 60 (Ind. 1987). In 1988, soon after the *Evansville* decision was issued, the language of the statute was again

¹ Under Indiana Code section 36-8-1-12(2), "upper level policymaking positions" may include the police chief and the next two ranks and pay grades immediately below the chief in cities where the police department has more than fifty (50) members. Under Greenwood City Ordinance 99-10, the next two ranks under the police chief include the assistant chief of police and the deputy chief of police.

amended and the reference to the statute being the “exclusive statutory manner” for establishing a merit system was deleted and what resulted was statutory language similar to that of the current statute which states, in pertinent part:

(a) This chapter applies to each municipality or township that has a full-time paid police or fire department. A municipality may exercise the power of establishing a merit system for its police or fire department under this chapter or by ordinance adopted under IC 36-1-4-14. . . . This chapter does not affect merit systems established:

- (1) by ordinance under IC 36-1-4-14, except as provided by subsection (e);
- (2) by resolution under IC 36-1-4-14, except as provided by subsection (f);
- or
- (3) by a prior statute, except as provided by subsection (b).

. . . .
(e) An ordinance adopted under IC 36-1-4-14 to establish a police or fire merit system must include a provision under which the commission, or governing board of the merit system, has at least one-third (1/3) of its members elected by the active members of the department . . .

Ind. Code § 36-8-3.5-1 (2004).

B. Greenwood Merit System Ordinance:

In 1982, the Greenwood Common Council established a merit system for its police department. Section VII of Ordinance number 82-10 states:

The [Merit] Commission shall appoint and may remove members of the police department, except for the Chief of Police and the Assistant Chief of Police. The Mayor of the City shall have the right to appoint these two (2) positions. These two (2) positions serve at the pleasure of the Mayor of the City. . . . A person appointed to the position of Chief of Police or Assistant Chief of Police must have at least five (5) years of continuous service with the department immediately before his appointment. However, this requirement may be waived by majority vote of the common council on the request of the city executive, although the person must still have at least five (5) years service on a full-time paid police department or agency.

City of Greenwood, Ind., Ord. No. 82-10, sec. VII (1982) (emphasis added).

In 1993, the merit system ordinance was amended and adopted under Indiana Code section 36-1-4-14, but the section regarding the waiver remained the same. City of Greenwood, Ind. Ord. No. 93-3, art. II. In 1999, the Common Council added an additional upper level policymaking position by creating the position of Deputy Chief of Police. The merit system ordinance was modified as follows:

The Commission shall appoint and may remove members of the Police Department, except for the chief, the assistant chief, and the deputy chief of police. The Mayor of the City shall have the right to appoint these three (3) positions, who serve at the pleasure of the Mayor. . . . A person appointed to the position of chief, assistant chief, or deputy chief of police must have at least five (5) years of continuous service with the department immediately before his appointment; however, this requirement may be waived by majority vote of the common council on the request of the city executive, although the person must still have at least five (5) years of service on a full-time paid police department or agency.

City of Greenwood, Ind., Ord. No. 99-10, sec. 2 (1999) (emphasis added).

C. Indiana Code Section 36-8-4-6.5 Applies to All Cities, Including Those with Merit Systems

Indiana Code chapter 36-8-4 “applies to all cities” and governs police and fire department employment policies. Ind. Code § 36-8-4-1. Chapter 4 contains statutory requirements regarding residence of officers, use of vehicles, payment for police officer or firefighter injuries, and maximum age requirements, among other provisions. Ind. Code § 36-8-4-1, -2, -4, -5, -7.

Indiana Code section 36-8-4-6.5 (hereinafter “section 6.5”), which is the subject of your inquiry, deals with the appointment of police chiefs and assistant or deputy police chiefs “in all cities.” Indiana Code section 36-8-4-6.5 states:

- (a) This section applies to the appointment of a police chief or deputy police chief in all cities.
- (b) An applicant must meet the following requirements:
 - (1) Have five (5) years of service as a police officer with a full-time, paid police department or agency.
 - (2) Be a citizen of the United States.
 - (3) Be a high school graduate or equivalent.
 - (4) Be at least twenty-one (21) years of age.
 - (5) Be free of mental illness.
 - (6) Be physically fit.
 - (7) Have successfully completed the minimum basic training requirements established by the law enforcement training board under IC 5-2-1, or have continuous service with the same department to which the applicant was appointed as a law enforcement officer before July 6, 1972.
- (c) In addition to the requirements of subsection (b), an applicant for appointment as police chief or deputy police chief must have at least five (5) years of continuous service with the police department of that city immediately before the appointment. This requirement may be waived by the city executive.

(emphasis added).

The answer to your question turns on whether or not the provisions under chapter 36-8-4 apply to cities with merit systems established under section 36-1-4-14, or whether cities with such merit systems may ignore the provisions under chapter 36-8-4 in favor of their own ordinances.

In interpreting a statute, one should first determine the intent of the legislature. *MDM Inv. v. City of Carmel*, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000). The words of the statute should be given their plain and ordinary meaning. Ind. Code § 1-1-4-1(1); *Town of Merrillville v. Merrillville Conservancy Dist.*, 649 N.E.2d 645, 649 (Ind. Ct. App. 1995). The “goals of the statute and the reasons and policy underlying the statute’s enactment” should be considered. *MDM Inv.*, 740 N.E.2d at 934. One must presume that the legislature is aware of existing statutes in the same area and must construe differing statutes together to produce a harmonious result. *Schafer v. Sellersburg Town Council*, 714 N.E.2d 212, 217 (Ind. Ct. App. 1999).

Cities with merit systems are exempted from only one section of chapter 36-8-4. Under Indiana Code section 36-8-4-6, the statute specifically indicates that the promotion policies of chapter 4 do not apply to police departments and fire departments in second and third class cities that are governed by a merit system. Under the rules of statutory construction, one may presume that all other sections of the chapter 36-8-4 “appl[y] to all cities” whether or not the city has a merit system. See generally *Brandmaier v. Metro. Dev. Comm. of Marion Co.*, 714 N.E.2d 179, 180-81 (Ind. Ct. App. 1999) (noting that under the maxim of statutory construction *expressio unius est exclusio alterius*, when the same term is present in certain parts of an act, but not in others, the reference applies only where it is mentioned). Therefore, section 36-8-4-6.5 regarding the method for waiving the continuous service requirement for chiefs, assistant chiefs and deputy police chiefs applies to all cities, even those with merit systems in place.

The history of Section 6.5 also provides insight into the legislature’s intent. Section 6.5 was originally enacted in 1987. Pub. Law 348-19878, § 3. The original statutory language was different from the current statute in two respects. First, section (c) did not apply to all cities, but only to those cities having a population of at least ten thousand. Additionally, the last sentence of section (c) originally provided that “[t]his requirement may be waived by a majority vote of the city legislative body upon request of the city executive” – in other words, language similar to the current Greenwood city ordinance on the matter. The statute was first amended in 1992² and, for purposes of your inquiry, the most relevant amendment took place later in 1996. The 1996 amendment made only one change, that being that a majority vote of the city legislative body was no longer required in order to waive the continuous service requirement. The statute was changed to allow the waiver to be made by the city executive only. Pub. Law 68-1996, § 8. The change in the statute by the legislature expresses a clear intent to provide the city executive with the exclusive authority to grant a waiver of the continuous service requirement without the consent or approval of the city legislative body.

The exclusive authority given to the city executive to grant a waiver of the continuous service requirement under section 6.5 also conforms with other statutory provisions that establish

² In 1992, section (c) was revised and made applicable to all cities, not just those with populations of at least ten thousand. P.L. 148-1992, § 3.

a framework clearly placing the authority for employment decisions regarding chiefs and assistant or deputy chiefs of police with the executive branch of city government. (See Ind. Code § 36-4-4-4 (the legislative branch may not elect or appoint a person to office except as expressly provided by statute); § 36-4-9-2 (the executive shall appoint the head of city departments including that of public safety); § 36-4-9-8 (the executive shall appoint the chief of police and other officers and employees required by statute)); and § 36-4-4-2 (a power belonging to one branch of city government may not be exercised by another branch).

In summary, it appears that the legislature intended for all sections of chapter 36-8-4 to apply to all cities, unless otherwise expressly indicated. Cities with merit systems are only exempted from the requirements under section 36-8-4-6, the section regarding promotion policy. The legislative changes made in 1996 to section 36-8-4-6.5 clearly granted the city executive with the authority to waive the continuous service requirement without the consent or approval of the city legislature. This grant of authority is consistent with other statutory provisions placing the employment decisions regarding upper level policymaking positions solely with the city executive.

D. A City Ordinance in Conflict with Indiana Code Section 36-8-4-6.5 is Invalid

The Home Rule Act, enacted by the legislature in 1980, extends to all local units of government powers specifically granted by statute and all other powers necessary to conduct affairs even though not granted by statute. Ind. Code § 36-1-3-4. The Home Rule Act provides, "if there is a constitutional or statutory provision requiring a specific manner for exercising a power, a unit [including a municipality] wanting to exercise the power must do so in that manner." Ind. Code § 36-1-3-6(a).

Municipal ordinances are subordinate to state laws. *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987) (citations omitted). When the legislature intends for a state law to occupy an area to the exclusion of municipal regulation, a city may not legislate further by ordinance. *Id.* "If a city attempts to impose regulations in conflict with rights granted or reserved by the legislature, such ordinances or regulations are invalid." *Id.* (citations omitted). If the state has not chosen to occupy an area to the exclusion of municipal law, those parts of city ordinances imposing regulations that conflict with state law are invalid. *Id.* At the same time, a reasonable ordinance that supplements the state statute may be recognized as permissible. *Id.*

One case illustrates when a city ordinance is considered to properly supplement, but not conflict with, chapter 36-8-4. In *City of Indianapolis v. Fields*, the issue was whether a city regulation that required injured officers to obtain treatment at Wishard Hospital conflicted with Indiana Code section 36-8-4-5, which provided that cities must pay for the care of injured officers. *Id.* at 1129-30. The court held that the state had not completely occupied the area of law concerning liability for medical expenses and the city's regulation was an additional, reasonable regulation that properly supplemented the state statute in order to limit the city's costs. *Id.* at 1131. The Court's holding was narrow, however. The court held as unenforceable part of the city law that required officers to either get written authorization from superiors to obtain medical assistance from a hospital other than Wishard, or be held responsible for the

Senator Brent Waltz

April 5, 2005

Page 7

unauthorized medical expenses. The state law requires the city to pay reasonable costs for medical expenses. *Id.* The court held that even if the services were not from Wishard, as long as the cost was reasonable, the city was required to pay and could not adopt an ordinance in conflict with that responsibility. *Id.* *Fields* illustrates that if a city enacts an ordinance that supplements chapter 36-8-4, it will be upheld as long as the intent of the state law remains unchanged.

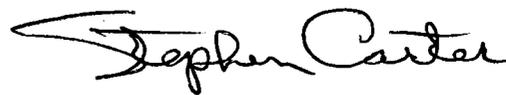
In another case involving an ordinance in conflict with chapter 36-8-4, *Board of Public Safety v. Benkovich*, 388 N.E.2d 582, 585 (Ind. Ct. App. 1979), the Court of Appeals held that where the state regulated in detail the residence requirements of municipal firemen (now 36-8-4-2), then a conflicting ordinance passed by the city that interfered with the legislature's plan for statewide uniformity in residence requirements could not be given effect.

Under Indiana Code section 36-8-4-6.5, the legislature has established a uniform procedure and explicit instruction to cities with regard to the method for waiving of the continuous service requirement for chiefs and assistant or deputy chiefs of police. A city ordinance that deviates from the statute would impermissibly conflict with the statutory scheme set out by the legislature. The conflict seems even more evident if the ordinance actually removes the waiver power completely from the executive branch of the municipality and places the ultimate decision regarding the waiver with the legislative body.

Summary

For the reasons stated herein, in my opinion, sections of City of Greenwood's ordinance numbers 83-10 and 99-10 that allow for the continuous service requirement to be waived "by a majority vote of the common council on the request of the city executive" are in conflict with the statutory requirements for waiver under Indiana Code section 36-8-4-6.5, and would therefore be considered invalid.

Sincerely,



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