
TO: Newburyport City Council President (*By Electronic Mail Only*)
CC: Newburyport Mayor
FROM: Lauren F. Goldberg, Esq.
RE: Appropriating Authority of the City Council
DATE: February 18, 2021

Question: You have requested an opinion concerning funding for City Councilor salaries. In particular, you ask about the application of the provisions of G.L. c.44, §33A and Section 2-4 of the City Charter (the Charter), the necessity of providing funding for such salaries in the budget, and the flexibility, if any, for the Council, on its own, to reduce its salary line from that set by ordinance.

Short Answer: In my opinion, the provisions of the Charter and G.L. c.44, §33A mandate that the Mayor include in the proposed budget amounts required to pay Councilor salaries set by ordinance. In my further opinion, however, whether the Council, as the City's appropriating authority, chooses to fund its own salaries at or below the ordinance level implicates different issues under municipal finance laws. For that reason, in my opinion, if a Councilor desires to be paid for their services to the City they would be entitled to be compensated at the rate set in the salary ordinance. Depending on how much the funding for the Council salary line was reduced, in my further opinion, it is possible such funding source would be depleted relatively quickly, or, if some Councilors chose not to take the full amount of their salary, the monies in the reduced line item might suffice.

Brief Facts: The City Charter provides that any increase or reduction in the salaries for Councilors be undertaken through adoption of an ordinance by a two-thirds vote of the City Council. Further, the provisions of G.L. c. 44, §33A require that the "annual budget include sums sufficient to pay the salaries of officers and employees fixed by law or by ordinance." In this case, I understand that the Mayor included in the proposed budget submitted to the Council sums sufficient to pay the salaries of the City Council at the amount set by ordinance. I am further informed, however, that the City Council itself voted to reduce the line item appropriation available for payment of those salaries. Specifically, and importantly, at that time, I understand that no amendment had been made to the salary ordinance. You ask whether such action violates the Charter.

Section 2-4 of the City Charter provides:

Compensation. The members of the city council shall receive such salary for their services as may from time to time be set by ordinance. No ordinance increasing or reducing the salary of the members of the city council shall be effective unless it shall have been adopted by a two-thirds vote of the full city council. No increase or reduction in such salary shall take effect during the term in which such increase or reduction is voted, and no change in such ordinance shall be made between the election of a new council and the qualification of the new council. Subject to appropriation, members of the city council shall be entitled to reimbursement of their actual and necessary expenses incurred in the performance of their duties

This provision is similar to that found in G.L. c.44, §33A.

Further, G.L. c.40, §32 provides, “The city council may by majority vote make appropriations for the purposes recommended and may reduce or reject any amount recommended in the annual budget. It shall not increase any amount in or the total of the annual budget nor add thereto any amount for a purpose not included therein.”

Case Law: Only one case has been decided under this statute, albeit the matter presented in a slightly different, and important, way. This 1944 case, entitled, Richard B. Rock v. City of Pittsfield, 316 Mass. 348 (1944), analyzed whether an ordinance increasing salaries for police, fire and labor employees, all covered by the Civil Service Law, was valid even though it was passed over a veto. The court acknowledged that the Council was limited by the provisions of G.L. c.44, §32 l from making any increases to the city budget or any line therein. Further, the court noted that G.L. c.44, §§31 and 33, which limit spending to the amount appropriated (with exceptions not relevant here), and authorizes only certain transfers between line items, “restrict[s] the power of city governments to increase salaries during a year”. The court recognized, therefore, that the duty to provide for the increased salaries arises upon general principles [of municipal finance], and not exclusively upon the terms of Section 33A.” The court continues, “The manifest design of these provisions is to provide early in the municipal year a complete schedule of appropriations for the general uses of the city and to discourage a tendency to spend more than the municipal income. In cities other than Boston, within forty-five days after the annual organization of the city government, the mayor has the duty of submitting the annual budget to the city council, which may reject or reduce items but may not increase or add to them.” See G.L. c.44, §32 (emphasis added). The case then examined whether the ordinance at issue was validly adopted during the fiscal year, and, concluded that it was. The court concluded that the amounts must be paid, despite the apparent lack of funding in the line, for several reasons.

Application of Law to Current Facts: To summarize, the laws concerning municipal finance clearly establish the authority of the Mayor to propose the budget she deems appropriate, and, further the role of the Council as the appropriating authority, the body actually authorizing the expenditures. One statutory limitation, paralleled by the Charter, on the Mayor’s discretion is that the Mayor is required to include in the budget proposed amounts for employee salaries set by ordinance. Regardless, however, the Council is prohibited by law from funding matters at a level higher than the Mayor proposes, or from funding different items than what the Mayor

proposes, subject to an exception not relevant here. The Council may only reduce or remove items with which it disagrees, therefor. As such, where the Council has not amended the Council salary ordinance, that ordinance remains in place, in my opinion.

It must be noted that Council’s action to reduce or remove certain budget items may, in fact, create liability in other areas, such as with respect to payment of ongoing services to the municipality provided by a vendor or force layoffs in a particular department. Those other legal issues may serve as impetus to approve amounts proposed by the Mayor. Consider this in conjunction with those tenets of municipal finance discussed above, the Council’s job in this arena is one of appropriation, and any expenditure is limited to the amounts appropriated. Thus, if there is no appropriation, there can be no expenditure.

In stark contrast to court’s conclusion in Pittsfield, however, here the budgetary line item for Councilor salaries was included by the Mayor at the amount set by ordinance. The Council, the legislative branch and appropriating authority of the City, decided not to fund its own salaries at the level set by ordinance. The Councilors, as the local appropriating authority, has control over whether and how much to appropriate for a given purpose, including for their own salaries. With respect to such salaries, the appropriation is limited to the confines of what is authorized by a salary ordinance and as included in the Mayor’s proposed budget. The funding choices open to the Council are expressly limited to decreasing or deleting the amounts for such purposes. Thus, in my opinion, provided that the Mayor includes in the proposed budget the amount required by the Councilor salary ordinance, the Mayor has complied with the law. In contrast, the Council must determine the amount to appropriate for any of the listed purposes, within the Mayor’s recommendations. Here, the line at issue is the line for Councilors’ own salaries, a matter over which it has direct control.

Looking at the facts and the law together, the outcome in the Pittsfield case is instructive. The employees at issue were civil service employees, governed by an entirely different set of complicated laws protecting advancement and employment of particular persons. Their particular roles were critical to the ongoing public health and safety. In that context, if the Mayor omitted funding for salaries required by ordinance for these three types of essential employees, as appears to have been the case in Pittsfield, the Council would, in theory, have no ability to propose increases to those line items, nor would these employees be able to be paid for their work during the year at the higher level in the absence of a supplemental budget presented by the Mayor and approved by the Council. Apparently, the reduction in the salaries set by ordinance did not result in layoffs sufficient to stay within the budget line approved by the Council, but instead, persons worked and were paid less. In 1944, then, under the particular circumstances that court was asked to consider, including that the appropriation made was not sufficient to pay the salaries under the ordinance, the Pittsfield court concluded that, “Since the salaries were validly increased, the plaintiffs [who were paid less than provided by ordinance] are entitled to recover the unpaid balances of the increased salaries, and the fact that the city has failed to make the necessary appropriation therefor constitutes no defence.” This effort is clearly related to the unstated need to ensure that persons who worked for the City were paid at the level the Council had approved, i.e, protecting the workers from shifts by the executive branch during the fiscal year due to political, financial or other concerns.

This conclusion is similar to the way other matters have been resolved since 1944. For example, a large number of municipalities have employees in unions subject to collective bargaining agreements that address how much such employees will be paid. The Council does not have authority to approve or reject such contract; instead, the Council has the choice as to whether to fund the cost items for the first fiscal year of the contract. G.L. c.150E, §7. If the first year cost items are not appropriated, the contract does not take effect, and the parties must return to the table to continue bargaining. There is no mechanism to force a municipality to fund these cost items, even if choosing not to fund them negates the work undertaken by all parties and potentially creates significant problems for the executive branch. Similarly, if the legislative body fails to appropriate funds for a legal obligation there may well be consequences, such as breach of contract claims from vendors or reduction of workforce to enable persons to be paid at the appropriate level under the applicable collective bargaining agreements or ordinance. Even in education, where there are additional considerations governing appropriation of budgets, the provisions of G.L. c.71, §34 have been revised to address the refusal or failure of a municipality to fund what is known as “minimum net school spending”. State law used to provide that the municipality was required to fund the school budget at the amount requested, and the school committee could take court action to collect on the difference. Now, the statute instead provides that, “no city or town shall be required to provide more money for the support of the public schools than is appropriated by vote of the legislative body of the city or town.”

Similarly, here, it is difficult to believe that a reviewing court would find that Council members were entitled to be paid at the amount set by ordinance if the Council itself chooses to appropriate less than was proposed by the Mayor in accordance with the ordinance addressing Councilor salaries, although that is certainly possible, as indicated above. Although there could be many reasons that a Council might choose to underfund its own line, such action is an expression of priorities by the Council, in my opinion.