

disposal of his body might have an effect on this decision regardless of who finances the funeral arrangements. Note also that Florida has adopted the Uniform Anatomical Gift Act, Ch. 736, F. S., which would take precedence over relatives with regard to the legal right to the remains of the deceased.

If there is no next of kin, or if the body is unclaimed or is required to be buried at public expense, then such body is to be sent to the Division of Universities of the Department of Education, under the authority of §245.06, F. S. This section seems to cover bodies to be buried at public expense even though there are existing relatives who might desire to claim such body. In AGO 056-303, one of my predecessors in office said that:

Although this act does make a reference to bodies to be buried at public expense, it is my opinion that the legislature did not intend this to be the governing factor in determining which bodies are to be turned over to the anatomical board [now the Division of Universities of the Department of Education].

The principal and governing factor in such cases is, in my opinion, that the body be unclaimed and the relatives unknown

Based on this opinion, it would seem that in a situation where a person claims a body but is unable to pay for funeral expenses, the state, or political subdivision thereof, is responsible for burial and would decide the disposition of the remains. If the deceased was indigent and there are no next of kin, there is a provision in §245.08, F. S., for the body to be claimed by a friend or any representative of a fraternal society of which the deceased was a member, or a representative of any charitable or religious organization, which person would then decide the disposition of the remains. If there are no next of kin but the deceased is not indigent, disposal of the remains may, in appropriate cases, be decided by the executor of the decedent's estate.

073-276—August 14, 1973

MUNICIPALITIES

REGULATION OF SALARIES OF MAYOR AND COUNCILMEN BY ORDINANCE

To: R. W. "Smokey" Peaden, Representative, 2nd District, Pensacola

Prepared by: Jan Dunn, Assistant Attorney General

QUESTION:

May a city council raise or lower the compensation for the offices of mayor and city councilmen?

SUMMARY:

When compensation and expense allowances of the mayor and councilmen of a municipality are set by its charter act, the governing body thereof cannot by ordinance change them. Upon the effective date of the Municipal Home Rule Powers Act (Ch. 73-129, Laws of Florida), October 1, 1973, the governing body may by ordinance establish or alter the compensation and expenses of such officials.

Section 76 of the Charter of the City of Pensacola (Ch. 15425, 1931, Laws of Florida, as amended by Ch. 26135, 1949, Laws of Florida, and Ch. 59-1731, Laws of Florida; §76 of the city code) determines and sets the compensation of the city councilmen and the mayor of Pensacola. Chapter 2, Art. 3, §2-22.1 of the city ordinances contains the same provisions. The compensation and expense

allowances are thus set by the city charter. Under Art. VIII, §2(b), State Const., and its implementing statute, §167.005, F. S. 1971, a municipality may not enact an ordinance which is prohibited by general or special law. It has been held that this prohibition may be either express or implied. Attorney General Opinions 071-335 and 071-54. Therefore, since the compensation and expense allowances of these officials are fixed by the charter, the city council cannot at present enact any ordinance changing such compensation from that fixed by the charter, in the absence of express charter-act authority to do so.

The Municipal Home Rule Powers Act, Ch. 73-129, Laws of Florida, effective October 1, 1973, which repeals Ch. 166, F. S., and in lieu thereof adopts §§166.011-166.411, F. S., will vest in the city council the power to determine and fix the compensation and expense allowance of city officials by ordinance.

Section 166.021, F. S., in pertinent part provides:

(1) As provided in §2(b) Art. VIII of the state constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law.

(2) "Municipal purpose" means any activity or power which may be exercised by the state or its political subdivisions.

(3) The legislature recognizes that pursuant to the grant of power set forth in §2(b), Article VIII of the state constitution, the legislative body of each municipality the power to enact legislation concerning any subject matter upon which the state legislature may act

There are certain exceptions set out in the act: Municipalities do not have the power to do anything which is expressly prohibited or preempted by the Constitution, general law, county charter, or certain special laws. Section 166.021(3) (a)-(d), F. S. Therefore, a municipality has the power to regulate the compensation and expense allowances of the mayor and councilmen unless these matters fall within one of the above-stated exceptions.

The only constitutional provision relating to the compensation of public officials is found in Art. II, §5(c), State Const., which says:

The powers, duties, compensation and method of payment of *state* and *county* officers shall be fixed by law. (Emphasis supplied.)

This section does not by its terms apply to municipal officers. *See State ex rel. Gibbs v. Couch*, 190 So. 723 (Fla. 1939). There are no general laws fixing the compensation and expense allowance of municipal officials, nor is this subject preempted to the county under a county charter. Section 166.021(4), F. S., created by Ch. 73-129, Laws of Florida, prohibits changes in a city charter or special law pertaining to such things as terms, elections, and powers of elected officials without the approval of the city electors in a referendum election. This section does not affect the legislative power vested in the city council to fix and determine or alter the compensation and expense allowances of city officials by ordinance. Therefore, there seems to be no constitutional, general law, county charter, or special law prohibition on the enactment of a municipal ordinance regulating the compensation and expense allowances of appointive or elective city officers. Since the provisions relating to the compensation and expenses of the mayor and the councilmen are found in the city charter act, subsections (4) and (5) of §166.021, F. S., apply:

(4) . . . Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

(5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality except as otherwise provided in subsection (4) shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances.

Under these provisions, a city council can, by ordinance, establish or alter the compensation or expense allowances of the mayor or councilmen.

Your question is answered in the negative. Upon the effective date of the Municipal Home Rule Powers Act, October 1, 1973, your question may be answered in the affirmative.

073-277—August 14, 1973

RETIREMENT

BENEFITS PAYABLE TO BENEFICIARY OF DECEASED MEMBER OF FLORIDA RETIREMENT SYSTEM

To: John Forbes, Representative, 17th District, Tallahassee

Prepared by: Rebecca Bowles Hawkins, Assistant Attorney General

QUESTION:

Is the optional form of retirement prescribed by §121.091(6)(a) 2., F. S., available to the beneficiary of a member of the Florida Retirement System who dies after the completion of ten years of creditable service but prior to actual retirement?

SUMMARY:

Under §121.091(7)(a), F. S., when a member of the Florida Retirement System dies before retirement after completing ten years of creditable service, the surviving spouse or other dependent may receive monthly payments of death benefits for the remainder of his or her lifetime. The retirement benefits for a ten-year period under §121.091(6)(a) 2., *id.*, are not available as death benefits when a member dies prior to retiring.

The benefits payable under the Florida Retirement System are prescribed in §121.091, F. S. Under subsection (6)(a) of that section, a member who retires must, prior to receiving his first monthly retirement payment, elect whether to take the maximum retirement benefit payable to the member during his lifetime; a decreased retirement benefit which, in the event of his death within ten years after his retirement, is payable to his named "beneficiary" for the balance of such ten-year period; a decreased retirement benefit payable during the joint lifetime of the member and his "joint annuitant" and, upon the death of either, to the survivor for his or her life; or a decreased retirement benefit payable during the joint lifetime of the member and his "joint annuitant" and, upon the death of either, in a reduced amount to the survivor for his or her lifetime.

The "beneficiary" referred to in the second option, *supra*, is the person designated by the member to receive his retirement benefits, in the event of his death, for the balance of the ten-year period. The "joint annuitant" entitled to receive the benefits payable under the third and fourth options, *supra*, is the member's spouse or other dependent. See §121.091(6)(c) and (d), *id.* Provision is made in §121.091(7) *id.*, for "death benefits" payable when a member dies without having retired. If he dies after having completed ten years of creditable service, there is a statutory presumption that he retired as of the date of his death under the appropriate retirement plan (normal, dual, or early) and that he had