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In summary, a careful examination of the statutes discloses none which expressly authorizes the warden or superintendents to institute or permit such an operation as that suggested by your inquiry. To the contrary, specific provision is made for the distribution of profits from such type of enterprise.

It is, therefore, my opinion that the wardens and superintendents have no authority to permit employees to place vending machines anywhere on institution premises with the view of retaining the profits from such machines for their own benefit. The profits from such machines must of necessity be placed in the "Inmates' Recreation Fund."

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### OFFICIAL OPINION NO. 46

November 27, 1968

#### **CITY OFFICERS—POLICEMEN AND FIREMEN—Body other than common council as authorized to determine salaries.**

Opinion Requested by Hon. Adam Benjamin, Jr., State Representative.

I am in receipt of your inquiry concerning the salaries of firemen and policemen in second class cities.

The salary of most municipal employees is regulated in Acts 1933, ch. 233, § 20a, as amended by Acts 1965, ch. 437, § 1, the same being Burns IND. STAT. ANN. § 48-1233, which statute provides that the salaries shall be fixed by the mayor subject to the approval of the common council. The statute, however, contains a specific exception: "Provided, That the provisions of this subsection shall not apply to the manner of fixing and

the amount of compensation paid by any city to the members of the police and fire departments.”

Thus, we must look to other statutes to determine the manner in which the salaries of policemen and firemen are to be established.

The basic legislation regulating the operation of a municipal corporation is contained in Acts 1905, ch. 129. Section 159 of that Act, Burns § 48-6102, is mainly concerned with the duties of the board of safety, but does contain this passage:

“The annual pay of all policemen, firemen and other appointees shall be fixed by ordinance of the common council; and it shall be lawful in such ordinance to grade the members of such forces and to regulate their pay, not only by rank, but by their length of service. In default of any ordinance fixing the compensation of any member of such fire or police force, such commissioners shall have the power to fix the same, subject to change by ordinance.”

Certain portions of Burns § 48-6102 have been superseded by later legislation, but the passage quoted above has never been affected by such legislation. Therefore, it appears that the fixing of the salary of policemen and firemen is a duty vested solely in the common council, with authority given to a different agency only if the common council fails to exercise its duty.

The statute quoted above does not indicate either when a salary ordinance must be adopted or the length of time such an ordinance would be effective. Such absence of direction would indicate that the common council has complete freedom in this matter. (This is especially true when contrasted with the provision for other city employees contained in Burns § 48-1233: “All such salaries shall be fixed on or before the first day of August of each year for the next succeeding fiscal year and shall not be increased or reduced during the fiscal year.”)

Various cases decided under this statute support the above interpretation. *Marter v. Vincennes*, 118 Ind. App. 586, 82

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N.E.2d 410 (1948), involved a 1926 salary ordinance which was repealed by a 1935 salary ordinance. The legal issue in the case is not relevant to the present issue, but it is apparent that the firemen in the City of Vincennes had been paid under the 1926 ordinance from the time of enactment of that ordinance until 1936, and that the court did not disapprove of this procedure. *City of Lafayette v. Keene*, 113 Ind. App. 552, 48 N.E.2d 63 (1943), concerned a salary ordinance passed on January 7, 1929, which "ordinance remained of record from the date of its passage until it was repealed on January 1, 1937, during which time it was not amended or superseded by any other salary ordinance." During the depression years of 1933 to 1936, both inclusive, in an effort to reduce the tax burden on local citizens, the common council appropriated only ninety per cent (90%) of the money needed to satisfy the salary set by ordinance and levied taxes only in the amount necessary to satisfy the reduced appropriation. The firemen received only ninety per cent (90%) of the salary provided by ordinance, and subsequently sued the city for the remaining ten per cent (10%). The court held that the firemen were entitled to the unpaid portion of the salary set by ordinance even though the common council had neither appropriated that amount nor levied taxes sufficient to raise that amount.

In conclusion, the salaries of policemen and firemen are to be determined by ordinance adopted by the common council, and the common council has exclusive authority in this area so long as an ordinance is in effect. The council may adopt a salary ordinance at any time (although reason would dictate that for any increases it set an effective date sufficiently removed to enable proper budgeting), and such ordinance will remain effective until repealed or superseded by a subsequent ordinance.