

Opinion No. 51-5375

June 20, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. E. M. Barber Acting City Attorney Post Office Box 68 Truth or Consequences, New Mexico

{*56} In reply to your letter requesting an opinion regarding our interpretation of § 14-1602 of the 1941 New Mexico Compilation and whether or not an officer appointed under this section by the mayor and not confirmed by the council can make legal arrests for any violation of city ordinances.

§ 14-1602 reads as follows:

"The mayor of any incorporated city, town or village shall be the chief executive officer thereof. He shall, subject to approval of a majority of the city council, or board of aldermen, or board of trustees, as the case may be, appoint all officers except those who may be required by law to be elected by the voters of the city, town or village. The mayor shall also designate, subject to the approval of a majority of the city council, or board of aldermen, or board of trustees, as the case may be, the employees of such city, town or village to perform any service which may be authorized by the city council or board of aldermen, or board of trustees, and such approval must first have been had before any officer, or employee appointed by the mayor shall be considered a duly appointed and qualified officer, or employee of any city, town or village. Provided, however, that the mayor of any such city, town or village shall have power to employ on behalf of {*57} the city such temporary, extra or emergency police officers or other employees as may be required in the proper administration of the municipal affairs, who shall serve only until the next regular meeting of the council at which a quorum is present, and such employee so appointed by the mayor will be entitled to receive the usual, ordinary and reasonable compensation for services rendered such municipality under such appointment or appointments, but such temporary employment shall cease, and such appointee or employee shall not be reappointed or reemployed unless his name is submitted to such meeting for confirmation and such confirmation granted. In case of the mayor's death, disability or resignation, the city council, board of aldermen, or board of trustees, as the case may be, shall elect a mayor by a majority vote of such council, or board, to fill the vacancy for the remainder of the vacant term, and may elect any qualified elector to act as mayor, who shall serve until his successor is regularly elected and qualified."

You will note that under the latter part of this statute that the mayor has the authority to employ in behalf of the city, town or village such temporary extra or emergency police officers or other employees as may be required in the proper administration of municipal affairs. The temporary employees can serve only until confirmed by the council. Such request for confirmation must be made at the next council meeting at which a quorum is

present. Employment of a temporary policeman, whose employment is not confirmed at a meeting of the council held at which a quorum is present, would be illegal. This means that if a meeting were held on the 15th of the month, with a regular meeting scheduled for the next 15th day of the month, and appointment of a temporary policeman made on the 16th, the employment would have to be confirmed at the next meeting 29 days later, if a quorum of the council were present. If no quorum were present at the next meeting, his temporary employment could be continued until the next meeting at which a quorum is present. Employment cannot be extended beyond the time of the next meeting at which a quorum is present. The employment must be confirmed or rejected by the council as the case may be. If the meetings were held weekly or bi-weekly, the temporary employment would be regulated accordingly. This statute is mandatory and I find that no amendments have been made, nor has it been repealed and is therefore in force and effect. I find no other statute superseding this one so it is controlling on the question of temporary appointments by the mayor of any town, city or village.

On the question of whether or not a temporary appointee, appointed by the mayor under the above statute, can make legal arrests for any violation of city ordinances, I believe that such an appointee is a de facto officer and, in this connection, I refer you to Sec, 495 of Vol. 43, Am., Jr., which reads as follows:

"The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those having official business to transact, and to prevent a failure of public justice. Third persons, from the nature of the case, cannot always investigate {*58} the right of one assuming to hold an important office. They have a right to assume that officials apparently qualified and in office are legally such, even though a contest is pending. Furthermore, the de facto officer is estopped from taking advantage of his own want of title."

The appointed officer by your mayor can make legal arrests for any violation of city ordinances.

Regarding your question as to whether the mayor of any city, town or village has acquired additional authority under the Civil Defense program, I am, at the present time, unable to advise you as to this point but I doubt if any additional powers are acquired under the Civil Defense program.

Trusting that this fully answers your inquiry, I remain