Opinion No. 62-103

August 9, 1962

BY: OPINION OF EARL E. HARTLEY, Attorney General Oliver E Payne, Assistant Attorney General

TO: Mr. Dean Zinn, City Attorney, City Hall, Santa Fe, New Mexico

QUESTION

QUESTIONS

1. Does the portion of Section 6, Ordinance No. 1954-3, City of Santa Fe, providing that no appointment to any office or position shall be made without the City Manager's recommendation except by a majority of the Council, conflict with any constitutional or statutory provision?

2. Does the portion of Section 6, Ordinance No. 1954-3, City of Santa Fe, dealing with the procedure for removal of city officials and city employees violate any constitutional or statutory provision?

CONCLUSION

1. Yes, to the extent indicated in the following analysis.

2. No.

OPINION

ANALYSIS

Ordinance No. 1954-3 of the City of Santa Fe created the office of City Manager and enumerated his powers and duties. (Under the authority of Section 14-15-1, et seq., particularly Section 14-15-5, N.M.S.A., 1953 Compilation, the governing authority of the City of Santa Fe was empowered to create such a position.) We will first deal with the appointment provisions of Section 6 of the Ordinance. It provides that when vacancies in city offices are to be filled, the City Manager shall submit to the Mayor the name or names of a person or persons qualified for the office or position to be filled. Immediately thereafter follows the specific appointment provision which is in question: "No appointment to any office or position shall be made without the City Manager's recommendation except by a vote of the majority of the entire council."

The question presented is whether this portion of the Ordinance conflicts with any constitutional or statutory provision. There is no provision in the Constitution of New Mexico which is particularly pertinent to the issue at hand. And since Santa Fe has no

City Charter, it is to the general statutes that we must look. Notwithstanding that the City of Santa Fe has by ordinance created the position of city manager, it is, nonetheless, a mayor-council municipality as opposed to a commission or commission-manager municipality. Section 14-15-1, et seq., and see **Handbook-Mayors and Councilmen,** New Mexico University, Division of Government Research, p. 7 (1960). Thus the pertinent legislative enactments relative to the appointive power are Sections 14-15-5 and 14-17-2, N.M.S.A., 1953 Compilation.

The former provides that the mayor shall have full power to nominate all appointive officers subject to approval of a city council majority. As the compiler of the New Mexico Statutes Annotated points out, this particular portion of Section 14-15-5, supra, may have been superseded by Section 14-17-2, supra. We also believe this is probably the case. Consequently, Section 14-17-2, supra, is the statute which must be most closely analyzed.

Section 14-17-2, supra, provides that the mayor is the chief - executive officer of the city. It further provides that he shall, subject to approval of a majority of the city council, appoint all officers except those who may be required by law to be elected.

We see then that the mayor in municipalities organized under the mayor-council form of government has more power than his counterpart in a commission or commission-manager city. Compare Sections 14-1-11 and 14-10-25 with Section 14-17-2, supra; see **Handbook - Mayors and Councilmen,** New Mexico University Division of Government Research, p. 20 (1960).

At this point we deem it appropriate to discuss the meaning of the word "appoint" when the appointment is subject to confirmation by some other body. When used in such a context, the word appoint means the same thing as nominate. **Rhodes v. City of Tacoma,** 97 Wash. 341, 166 Pac. 647; **Harrington v. Pardee,** 1 Cal. App. 278, 82 Pac. 83; **In re U.S. v. Jacobs,** Ill., 116 F. Supp. 928. This is so because the appointment of a person to a city office by a mayor under a law which requires confirmation by the city council gives the appointee no right to the office without such confirmation by the council. **City of Princeton v. Woodruff,** Ind., 104 N.E. 748.

There is considerable general case law relating to the power of appointment by mayors, councils, city managers and the like as well as the delegation of such power, and much of it bears on the problem here to be resolved.

There can, of course, be no appointment of a municipal officer or employee without legal authority to make the appointment. **MacLeod v. Long,** 110 Cal. App. 334, 294 Pac. 54; **State v. Friend,** 152 Fla. 74 11 So. 2d 182. And the appointment can be made only by the authority empowered to make it. **People v. Sabin,** 75 Colo. 545, 227 Pac. 565; **People v. Welsh,** 260 Ill. 532, 103 N.E. 578; **Sykes v. Heinzman,** 100 N.J.L. 12, 125 Atl. 17. For example, if a statute gives the power to the mayor to make an appointment, an ordinance conferring the power on someone else to make the appointment is invalid. **Bloomfield v. Thompson,** 136 La. 519, 67 So. 352. Likewise, if

the power to appoint is vested by statute in a city council, an ordinance giving such power to the mayor is invalid. **Orre v. Roosma,** 14 N.J. Misc. 529, 185 Atl. 922; **Uhr v. Lambert** Tex. Civ. App., 188 S.W. 946.

Further, when the mayor has the statutory power to appoint with the approval of the council, no power is conferred on the council to appoint upon rejecting the mayor's choice. **Broadwater v. Booth,** 116 W. Va. 274, 180 S.E. 180. Similarly, where the law requires a vacancy to be filled by the mayor and board of alderman, such vacancy cannot be filled by the mayor alone or by the board of aldermen alone. **Brumby v. Boyd,** 28 Tex. Civ. App. 164, 66 S.W. 874.

It is also to be noted that the general rule in regard to the power of appointment is that it cannot be delegated. **Donnelly v. City of New Haven,** 95 Conn. 647, 111 Atl. 897; **City of Sullivan v. Cloe,** 277 Ill. 56, 115 N. E. 135; **Blanks v. Toombs,** 228 Ky. 15 14 S.W. 2d 153; **State v. Newark,** 47 N.J. L. 117. This would be particularly true where the body doing the delegating (city council) is not actually "delegating" its own authority but rather that of the chief-executive officer (mayor). See **Ex parte Bustillos,** 26 N.M. 449, 194 Pac. 886. It is, therefore, not analogous to a situation where a legislative body makes a permissible delegation of a portion of **its** authority to a board or commission.

With the foregoing in mind, we reach the specific issue posed in your first question. As we have pointed out, Section 14-17-2, supra, clearly and unambiguously provides that the mayor shall, subject to approval of a majority of the city council, appoint all officers except those required by law to be elected.

The issue then is whether the practically absolute recommendation authority of the city manager as contained in Section 6 of Ordinance 1954-3 impinges on the mayor's statutory power of appointment (nomination). If it does the provision cannot stand, since an ordinance cannot validly curtail an appointment power granted by State law. See **Hooper v. Creager,** Md. 35 L.R.A. 202.

We believe the almost absolute recommendation authority granted to the city manager in the ordinance in question does attempt to curtail the mayor's statutory power of appointment. Under the statute (Section 14-17-2, supra), the mayor can appoint (nominate) any person he chooses. Under the ordinance, in the absence of a majority council vote dispensing with the requirement of a city manager recommendation, the mayor can only nominate those persons recommended by the city manager. This circumscribes his statutory power of appointment as effectively as would a provision in the ordinance that he could only appoint subject to approval of the city manager. As the New York Court recognized in **In re Kane,** 129 N.Y.S. 280, 144 App. Div. 196, a person who has specifically been granted a statutory appointive power is unduly proscribed in its use by enactment of an ordinance making a recommendation by another a prerequisite to the exercise of such appointive power.

There is no question but that the provision in the ordinance requiring the city manager to submit the names of qualified people to the mayor is valid. But insofar as the portion of

the ordinance is concerned which makes a recommendation by the city manager a prerequisite to the mayor's exercise of his nominating power, it is invalid.

To sum up this point: (1) actual hiring requires the concurrence of a majority of the city council. (2) The city manager must, when it "becomes necessary to employ or appoint a person to fill a vacancy in any departmental administrative office or position of employment", submit to the mayor the name or names of a person or persons qualified for the office or position to be filled. Such recommendations are to be made in accordance with the mandates of Ordinance No. 1954-3. (3) Recommendations by the city manager are not an absolute prerequisite to the mayor's power to appoint (nominate) a person to fill a vacancy, nor is the mayor bound to appoint (nominate) a person recommended by the city manager, although he certainly should give consideration to the person recommended since the city manager has determined that such person is fully qualified to hold the particular office.

Rather than concluding our answer to this question at this point, we would mention that it has been suggested that the authority for the portion of Ordinance No. 1954-3 which is in question might be found in Section 14-19-12, N.M.S.A., 1953 Compilation, authorizing certain municipalities to establish a merit system governing hiring and firing. While it might be that the utilization of this Section would effectively amend the mayor's appointive powers granted by Section 14-17-2, supra (a question we need not and do not decide. See **Paddock v. Brisbos,** 35 Ariz. 214, 276 Pac. 325), it appears that the ordinance in question was not and could not have been adopted pursuant to the merit system statute. At the time the pertinent ordinance was adopted in 1954 the merit system statute only authorized cities with a population in excess of 30,000 inhabitants to establish a merit system. (It has since been amended to permit any municipality to do so). According to the 1950 United States census, the most recent one available at that time, the population of Santa Fe was 27,998.

Section 14-21-36, N.M.S.A., 1953 Compilation, does authorize cities to conduct a municipal census under certain conditions. However, we can find no indication that such a census was taken in Santa Fe during either 1953 or 1954. Accordingly, the rule to be followed is that when utilization of a statute is dependent upon the municipality having a certain population, and the statute is silent as to how such population is to be determined, the last official United States census is to be used. For example, in the case of **In re Assessment for Construction of Sewer,** 54 N.J.L. 156, 23 Atl. 517, the Court held that the term population as used in a statute relating to classification of cities for purposes of municipal legislation has reference to the last official census. See also **Ellis v. Village of Bloomington,** 245 Minn. 292, 72 N.W. 2d 350.

It is our opinion that Section 14-17-2, supra, is in full force in the City of Santa Fe and that its effect on the ordinance in question is as has been previously stated in this opinion.

Your second question is whether the removal procedure contained in Section 6, Ordinance 1954-3, conflicts with any constitutional or statutory provision. The Ordinance provides as follows in regard to removal:

"The City Manager may recommend the removal or suspension of any city official or employee when such action would be in the best interests of the City and the **Mayor and City Council shall give full weight to the City Manager's recommendation.** All recommendations for appointment or removal shall be based solely on the merit, qualifications or disqualifications of the officer or employee concerned, without regard to race, color or creed or to the affiliation or lack of affiliation of any person with any political party or other organizations whatsoever." (Emphasis added)

The powers and duties of mayors, resting as they do upon constitutional provisions, legislative enactments, city charters, city ordinances and regulations adopted pursuant thereto, vary in the many cities and towns of the several states and from city to city in the same state. 3 McQuillen, **Municipal Corporations,** Section 12.43.

The power to appoint usually carries with it the implied power of removal, **unless** the removal power is limited or restricted by some positive provision of the law. **People v. McAllister,** 10 Utah 357, 37 Pac. 578; see **Board of Commissioners v. Department of Public Health,** 44 N.M. 189, 100 P. 2d 222.

It goes without saying that local ordinances must be consistent with the Constitution, statutes, and the city charter, if any. But as the authors of the **Handbook, Mayors and Councilmen,** supra, point out, there is no clear statement in either the Constitution or the statutes with regard to the removal power in mayor-council municipalities. Such being the case, and since Santa Fe has no city charter, the ordinance-making body of the municipality had the power to adopt any reasonable provision covering this governmental subject matter, and this it did in enacting as positive law the Ordinance in question.

The language used in the removal procedure portion of the Ordinance which has been quoted above clearly contemplates a recommendation from the city manager upon which the mayor and city council act by majority vote.

We would conclude by pointing out that there is no legal impediment to the mayor and council voluntarily operating under the present system. In practical effect, the system now used is essentially that of a commission - manager form of government under which "the city manager is basically concerned with the actual operations of the city, while the commissioners are responsible for the legislative policy of the city." **Handbook, Mayors and Councilmen,** New Mexico University Division of Government Research, p. 9 (1960). Such a division of the policy - making function and the day - to - day administrative functions is deemed highly desirable by most authorities of the governmental process. It is a system which more readily lends itself to adequate planning and governmental stability.