

Opinion No. 63-02

January 8, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. John M. Lenko City Attorney City of Las Cruces P. O. Box 760 Las Cruces,
New Mexico

QUESTION

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When a mayor has designated a commissioner of a Housing Authority as chairman of that body without stating or otherwise qualifying his term as chairman, is the person so designated entitled to remain as chairman for the duration of his term as a commissioner of the Authority, or may the mayor designate another commissioner as chairman at any time, there being no ordinance bearing on the question?

CONCLUSION

The mayor may designate another member of the Authority as chairman at any time.

OPINION

{*4} ANALYSIS

Section 14-29-5, N.M.S.A., 1953 Compilation, provides that when the governing body of a city has adopted a resolution creating a Housing Authority, the mayor shall appoint five persons as commissioners of the Authority, the Section also providing for fixed terms for such commissioners. Under Section 14-29-7, N.M.S.A., 1953 Compilation, such commissioners are removable by the mayor only for cause and after an opportunity for a hearing.

It will be noted that the power to appoint such commissioners is granted to the mayor notwithstanding whether the municipality has a commission, commission-manager or mayor-council form of government.

Section 14-29-5, supra, also provides, and this is the crucial portion for purposes of your inquiry, that:

"The mayor shall designate which of the commissioners shall be chairman and vicechairman, respectively."

There is no provision for a fixed or definite term or tenure as chairman of the Housing Authority.

The general conclusion to be drawn from the cases is that where an **officer** does not hold office for a fixed term, there is an implied power in the appointing authority to remove such officer without cause, provided there are no limiting constitutional or statutory provisions. **4 McQuillin on Municipal Corporations** (3rd Ed.) § 12.229, P. 230 (1949); Rhyne, **Municipal Law**, p. 141 (1957); 99 ALR 381, 382.

However, while the result would **perhaps** be the same, we do not choose to ground our opinion on this principle. Rather, we are impressed by and concur with the logic used and the conclusion reached in the case of **Kaplan v. Sullivan**, 290 Mass. 67, 194, N.E. 721 (1935).

That case dealt with a statute authorizing the governor to appoint five members of a municipal finance committee, each for a fixed term. In addition, it provided that "the chairman shall be designated by the governor". Members could be removed by the governor only with the advise and consent of the Council. The statute contained no provision concerning removal of the chairman.

{*5} In the course of its opinion, the Court stated as follows:

"A distinction is made in the manner of selection of members and of the chairman of the commission. The word 'appoint' is used with respect to selection of members; the word 'designated' is employed to indicate the method of selection of the chairman. These two words often may have the same meaning, but in this statute they appear to be in contrast with each other and to indicate a difference in signification. There are many connections in which wider and more permanent import is attributable to the word 'appoint' than to the word 'designate'."

The Court then goes on to say: "Since there is no provision in the governing statute as to the tenure of office of chairman, or as to a change in chairman, that is left to implication. The circumstance that a definite term is established for the members of the commission, while no term is fixed for the chairman, is significant. These factors in combination in the same section indicate that the member designated as chairman is not thereby given a statutory permanence in office equivalent to the remainder of his term as member or for any other definite period. The power of the Governor to designate the chairman is a continuing one. In this context, the power to designate the chairman is conferred in general terms and without special or implied restriction. In these circumstances, power in the Governor to terminate a designation previously made is implied. This conclusion is reached as a matter of statutory interpretation. It appears to be necessary in order to give effect to the words used and to the legislative intent expressed by them."

As to any notice being necessary prior to terminating a previous designation as chairman, the Court had this to say:

"There is no provision of law requiring notice of intention to terminate a designation as chairman, or a hearing before executing that intention. None is specified in (the

applicable statute). The express mandate as to the method of removal of members of the commission, in contrast with the omission of any direction as to the removal of the chairman, imports a different legislative intent as to the chairman."

The Court pointed out that the designation of another member to perform the duties of chairman did not amount to a removal from public office of the previous chairman but merely terminated his special duties as chairman of the commission.

The underlying facts in the case from which we have quoted extensively are almost identical to tute the executive is to appoint members of the body for a fixed term with a statutory procedure being set up for removal of such members. In each statute the executive is to designate the chairman of the body with no definite term fixed and no express provision governing removal as chairman.

We are completely satisfied that **Kaplan v. Sullivan**, supra, correctly states the law and we hereby hold in accordance with the principles enunciated therein. **Bryson v. Mayor of Waltham**, Mass., 109 N. E. 2d 453 (1952).

By: Oliver E. Payne

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