

Opinion No. 63-74

July 9, 1963

BY: OPINION of EARL E. HARTLEY, Oliver E. Payne

TO: Mr. Tibo J. Chavez City Attorney Belen, New Mexico

QUESTION

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- (1) May a mayor in a municipality which has a mayor-council form of government hire permanent city employees without the approval of a majority of the council?
- (2) May a mayor in a municipality which has a mayor-council form of government hire temporary city employees without the approval of a majority of the council?
- (3) Where the city does not have a charter and does not have any ordinance dealing with the power to fire city employees, can a majority of the city council fire such an employee without the mayor's approval?

CONCLUSIONS

- (1) No.
- (2) Yes.
- (3) No.

OPINION

{*153} Your first question asks whether a mayor in a municipality which has a mayor-council form of government may hire permanent city employees without the {*154} approval of a majority of the city council. The answer is no.

Section 14-17-2, N.M.S.A., 1953 Compilation, covers the hiring authority in a mayor-council municipality and provides in part as follows:

"The mayor of an 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 . . .**" (emphasis added)

We see then that the legislature itself has imposed this approval requirement, and such being the case any ordinance which purported to eliminate the need for majority council approval would be invalid.

Your next question asks whether a mayor in a mayor-council municipality may hire city employees on a temporary basis without the approval of a majority of the city council. We answer this question in the affirmative.

Section 14-17-2, *supra*, also provides as follows:

"Provided, however, that the mayor of any such city, town or village shall have power to employ on behalf of 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.**" (Emphasis added)

In your third question you ask whether a majority of the city council can fire city employees without the approval of the mayor when there is no city charter and no ordinance governing the matter of firing city employees. The answer is no.

As we pointed out in Opinion No. 63-42, the mayor's firing power stems from his statutory hiring power. In the absence of legal restraint, the power to appoint simply carries with it as an incident thereto the power to remove. **State v. Sullivan**, Mont., 40 P.2d 995; **State v. Wunderlich**, Minn., 175 N.W. 677. Since the appointing power has been placed in the mayor by the legislature, {**155*} albeit with council approval, the removal power rests solely in the mayor.

Our conclusion is further confirmed by Sections 14-15-4 and 14-17-4, N.M.S.A., 1953 Compilation. The former provides that the mayor is the chief executive officer of the city and the latter provides that the city council constitutes the legislative branch of the city "and shall not perform any executive functions of government." Since the matter of firing municipal employees is an executive function, it is one to be performed by the mayor in a mayor-council municipality.

Assistant Attorney General