

Opinion No. 66-147

December 29, 1966

TO: 02,05,50 Honorable Alan H. Koff Mayor, City of Lordsburg 206 South Main
Lordsburg, New Mexico

QUESTION

FACTS

The chief of police of a mayorcouncil municipality was appointed by the mayor on a temporary basis at the organizational meeting and was confirmed as such officer by a majority of the council. At the following meeting the mayor announced that he was being kept in office on a temporary basis. He has drawn the salary of such officer and performed the duties of such officer for several months thereafter.

QUESTION

What is the present status of such police chief?

CONCLUSION

An appointed official of such municipality.

OPINION

{*190} ANALYSIS

The applicable provisions of the municipal code read as follows:

"14-10-5. MAYOR -- APPOINTMENT OF OFFICERS AFTER ELECTION. -- A. At the organizational meeting of the governing body, which shall be held on the second Monday following the election, **the mayor shall submit, for confirmation** by the governing body, **the names of persons who shall fill the appointive offices** of the municipality and the names of persons who shall be employed by the municipality. **If the governing body fails to confirm** any person as an appointive official or employee of the municipality, the mayor at the next regular meeting of the governing body shall submit the name of another person to fill the appointed office or to be employed by the municipality.

"B. Any person holding an appointed office at the time of the municipal election shall continue in that office until his successor has been appointed and qualified." (Emphasis added.)

"14-10-6. MAYOR -- AUTHORITY TO APPOINT, SUPERVISE AND DISCHARGE EMPLOYEES. -- A. **Subject to the approval of a majority** of all members of the governing body, the mayor shall:

- (1) **appoint all officers** and employees except those holding elective office; and
- (2) designate an employee to perform any service authorized by the governing body.

B. The mayor may appoint temporary employees as required for the proper administration of municipal affairs. The employees shall serve only until the next regular meeting of the governing body at which a quorum is present. The temporary employment shall cease and the employee shall not be reappointed unless his appointment is confirmed by the governing body. A temporary employee is entitled to the usual, ordinary and reasonable compensation for services rendered to the municipality.

C. The mayor shall:

- (1) supervise the employees of the municipality;
- (2) examine the grounds of reasonable complaint made against any employee; and
- (3) cause any violations or neglect of the employee's duties to be corrected promptly or reported to the proper authority for correction and punishment.

{*191} D. Subject to the limitation of a merit system ordinance adopted as authorized in section 14-12-4 New Mexico Statutes Annotated, 1953 Compilation:

- (1) **the governing body may discharge an appointed official** or employee by a majority of all the members of the governing body;
- (2) **the mayor may discharge an appointed official or employee upon the approval of a majority of all the members of the governing body; or**
- (3) the mayor may suspend an appointed official or employee until the next regular meeting of the governing body at which time the suspension shall be approved or disapproved by a majority of all the members of the governing body. If the suspension of the appointed official or employee is disapproved by the governing body, the suspended appointed official or employee shall be paid the compensation he was entitled to receive during the time of his suspension.

E. Any appointed official or employee who is discharged shall:

- (1) upon his request, be given, by the mayor in writing, a list of reasons for his discharge; and

(2) be paid any vacation pay which he may have accrued." (Emphasis added.)

The municipal code was enacted in 1965 and the above provisions are new in such code. Neither these provisions nor somewhat similar ones in existence prior to the adoption of the code have been construed by our Supreme Court in such a way as to be of assistance in answering the question.

The chief of police is specifically named as an appointive officer of a municipality, Section 14-11-4, N.M.S.A., 1953 Compilation (P.S.).

Sections 14-10-5 and 14-10-6, supra, make no provision for the temporary appointment of an officer of the municipality by the mayor. He may only make temporary appointments of employees. Such being the case the attempt to make the appointment temporary was beyond the authority of the mayor and the confirmation of the majority of the council was of the appointment without regard to the attempted limitation of its duration.

This same conclusion is reached when the attempt of the mayor to continue the appointment beyond the meeting following the organizational meeting is considered. Again such attempt is not only clearly without authority but Section 14-10-5, supra, specifically prohibits the naming of the same person for the same position.

Finally, it is noted that the words "confirmation", "confirm", and "approved" as used in Section 14-10-5 and 14-10-6, supra, have the same meaning and can be used interchangeably. Unlike most provisions requiring confirmation or approval or advice and consent of a body, the above sections do not set forth any particular form or manner in which the approval or confirmation is made. It is stated in **The Law of Municipal Corporations**, McQuillan (3rd Ed. Rev.) Section 12.87, p. 387, as follows:

"The consent of the council to an appointment made by the mayor need not be expressed in any particular form unless the applicable law so requires. Thus it is held that recognition of an appointment by an approval of the pay rolls every month for several years sufficiently established the consent of the council to an appointment made by the mayor. . . ."

It further states in Section 12.88, p. 388 as follows:

". . . . And it has been held that, although an appointment was unauthorized because not made by a council in the manner required by law, the act of the council in recognizing and accepting the officer in a formal meeting was equivalent to the making of a valid appointment."

{*192} The above is the general rule. The case of **Larson v. St. Paul**, 83 Minn. 473, 86 N.W. 459, involved appointment of a police sergeant by the mayor. No express action was ever taken by the council on the appointment although its "advice and consent" was required by law. The court found such by implication, stating:

". . . . No particular form of expressing its advice or consent or concurrence in the appointment was required. Nothing whatever was done, except that the council approved the monthly pay rolls, in which respondent's name appeared as sergeant, and authorized payment to him as such officer, for more than seven years. . . ."

Similarly, in **McMahon v. Des Moines**, 232 Iowa 240, 4 N.W.2d 866 a vacancy was declared in an appointive office because the council had never expressly confirmed the appointment. On appeal it was held that no vacancy existed, the court saying:

"Each year the city council made an appropriation for his salary which has been paid to him since his appointment in 1936. Intervenor's appointment by the superintendent was not formally approved by the city council. Assuming approval of the appointment by the council was necessary (see *Loran v. City of Des Moines*, 201 Iowa 543, 207 N.W. 529), the council, by its actions, confirmed and ratified the appointment and appellant's contention intervenor was not appointed to the position in 1936 cannot be sustained."

The council necessarily and for several months, approved the monthly payroll of the municipality which includes pay to the incumbent chief of police. It also met with him at formal meetings in his capacity as police chief. Although such recognition was not of the duration shown in the above cited cause, it was sufficient to show an implied confirmation or consent.

Whether the confirmation, approval or ratification of the governing body be direct or by implication, nevertheless the governing body did confirm the appointment of the municipal officer and he has the same status as any other duly appointed and qualified municipal officer.