

Opinion No. 70-59

July 7, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Mr. Vince Cardinelli City Councilman City of Socorro P.O. Box 1067 Socorro, New Mexico 87801

QUESTIONS

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Section 14-10-6D (1), N.M.S.A., 1953 Compilation states that "the governing body may discharge an appointed official or employee by majority vote of all the members of the governing body." Does the word "all" mean that all the members of the governing body, including the mayor, must be present to conduct business pertaining to the discharge of an appointed official or employee; or can a majority of the members present, assuming there is a quorum, conduct business pursuant to Section 14-11-2B, N.M.S.A., 1953 Compilation, pertaining to the discharge of an official or employee?

CONCLUSION

See analysis.

OPINION

{*99} ANALYSIS

A majority of **members** of a governing body is a quorum for the purpose of transacting business. Section 14-11-2, N.M.S.A., 1953 Compilation; Attorney General Opinion No. 70-48, issued May 6, 1970. The mayor in a mayor-council form of municipal government is considered a member of the governing body and must be counted in determining where a quorum is present to transact business. A "majority" of the governing body, therefore, is more than half the councilmen present at the vote. A mayor is counted for purposes of determining whether there is a quorum, but his vote is counted only if there is a tie vote of councilmen present at the meeting. Attorney General Opinion No. 69-148, issued December 23, 1969. Accordingly, all members need not be present for the transaction of business, as long as there is a quorum. The dismissal of a public employee can certainly be considered the transaction of business, and, as there is no special exception for this particular type of business, only a quorum of members is necessary.

Another question arises, however. It is, assuming that only a quorum of the members is necessary to consider the firing of a public official, what is the number of votes

necessary in a situation where one of the councilmen is absent, to effect such a discharge?

For example, if there were eight members of a city council and only seven were present at a particular meeting, what would be the number of votes necessary to pass a resolution to fire a public employee? Would it be a majority of the members of the council at the meeting, which in this case would be four out of seven, or would it be a majority of all the members of the council, which would be five out of eight? (The mayor is not counted for purposes of voting.)

According to Section 14-10-6D (1), N.M.S.A., 1953 Compilation:

"The governing body may discharge an appointed official or employee by a majority of **all** the members of the governing body." (Emphasis added.)

The language of this statute should be construed strictly. Referring back to Section 14-10-2(C), N.M.S.A., 1953 Compilation, we note that a question should be decided by a majority of all members present, unless "otherwise provided by law." Section 14-10-6(D) 1, **supra**, does provide otherwise and requires a majority of **all** the members, present or not. In the example given, a total of five votes out of eight would be necessary.

{*100} The question is one of statutory interpretation. 43 A.L.R.2d 698 discussed the problem and notes that the fact that some members of the council are absent at the time of the vote has been held not to vary the requirement that the necessary majority is that of the full membership of the body, when so provided by statute. **Illinois Trust v. Arkansas City**, 76 F.2d 271, 34 L.R.A. 518 (1896), concluded that an ordinance was not properly passed at a meeting attended by seven of eight members of the city council where only four voted in its favor and the applicable Kansas statute provided that no ordinance was valid unless a majority of members elect of the council voted in its favor. Where a statute or charter provision, or a rule of the body so requires, a majority vote of all the members of the council is essential, including members who are absent as well as those present. **Nalle v. City of Austin**, 93 S.W. 141, 41 Tex. Civ. App. 423 (1906); **Kinzie v. Town of Haxtum**, 63 P.2d 511, 99 Colo. 588 (1937); **Ross v. Miller**, 178 A. 711, 115 N.J. Law. 61 (1935).

We conclude, therefore, that a quorum of members of the city council in a mayor-council form of government, is necessary to conduct the business of discharging a public employee. All the members of the council need not be present. When a vote is taken on this subject, however, there must be a majority of **all** the members voting for the motion to fire the employee for it to pass.

The Attorney General is authorized to render formal and official opinions only to those public officials set forth in Section 4-3-2 D, N.M.S.A., 1953 Compilation. Necessarily, therefore, the foregoing is not be considered an official opinion of the Attorney General but is an informal and unofficial expression of view given with the desire to be helpful to you.

By: Gary O'Dowd

Deputy Attorney General