

Opinion No. 87-69

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OPINION OF: HAL STRATTON, Attorney General

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TO: Michael Olguin, State of New Mexico House of Representatives, 701 Liles,
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QUESTIONS

1. May the Socorro City Council directly appoint a city manager, pursuant to Section 3-13-3 NMSA (1978), or must the mayor appoint the manager subject to the approval of the city council?

2. A. Is the mayor empowered to discharge a city manager pursuant to Section 3-11-6(D) NMSA (1978)?

B. In addition, is the city council empowered to do so pursuant to Section 3-14-13 NMSA (1978)?

3. A. Do the city manager and the mayor have concurrent power to employ and discharge persons engaged in the "administrative services" of the municipality?

B. Is a definition of "administrative services" which includes all employees except appointive officers legally sustainable?

4. May a city manager also serve as the clerk of the municipality?

CONCLUSIONS

1. The mayor is responsible for appointing the city manager, although his appointment is subject to the city council's approval.

2. A. Yes, but only with the city council's approval.

B. No. The city council derives such powers from Section 3-11-6(D) NMSA 1978.

3. A. Yes.

B. Yes.

4. Yes, as long as the duties of the two offices are not incompatible.

ANALYSIS

New Mexico has two separate statutory schemes for municipal governments. Chapter 3, article 11 NMSA 1978 governs municipalities organized under a mayor-council form of government. Chapter 3, article 14 NMSA 1978 governs municipalities organized under a commission-manager form of government. We understand that Socorro is a mayor-council municipality.

(1) Section 3-11-6 NMSA 1978 provides, in part: "[S]ubject 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 offices...." The plain language of section 3-11-6 does not allow the city council to appoint or hire directly the city manager. In *Arellano v. Lopez*, 81 N.M. 389, 391, 467 P.2d 715, 717 (1970), the Supreme Court of New Mexico held that, because the mayor's power to appoint officers and employees is subject to the governing body's approval, there can be no appointment until approval is obtained. Accordingly, the mayor would have the initial responsibility of selecting the city manager, and his or her appointment would be subject to council approval.

(2) Section 3-13-3 NMSA 1978 governs the creation of Socorro's city manager position:

[T]he governing body of any municipality having a population of three thousand or more persons may provide for a manager either by ordinance or by an election to be called by the governing body upon the filing of a petition containing the signatures of at least ten percent of the registered voters in the municipality. **The office of manager shall carry the same qualifications, duties and responsibilities as provided for a manager under Sections 3-14-13 through 3-14-15 NMSA 1978.**

(emphasis added). Section 3-14-13 provides:

The manager shall be the chief administrative officer. He shall be employed for an indefinite term and until a vacancy is created by death, resignation **or removal by the commission**. The manager shall be appointed solely on the basis of administrative qualifications and his selection shall not be limited by reason of former residence. The manager shall receive a salary to be fixed by the commission.

(emphasis added). Section 3-14-14 provides:

A. The manager shall:

(1) enforce and carry out all ordinances, rules and regulations enacted by the commission;

(2) employ and discharge all persons engaged in the administrative service of the municipality;

(3) prepare and submit an annual budget; and

(4) make recommendations to the commission on all matters concerning the welfare of the municipality.

B. The manager shall have a seat, but no vote, at every meeting of the commission. Except when clearly undesirable or unnecessary, the commission shall request the opinion of the manager on any proposed measure.

Section 3-14-15 provides: "The administration of the affairs of the municipality shall be divided into as many departments as may be deemed desirable by the commission. Each department shall be under the charge of a person employed by the manager."

The Socorro city council and mayor could terminate a city manager. In this matter, he would not differ from any other employee. The council could discharge the city manager by a majority vote, pursuant to section 3-11-6(D)(1): "[T]he governing body may discharge an appointed official or employee by a majority of all the members of the governing body." The mayor could discharge the manager, subject to the approval of a majority of the council, pursuant to section 3-11-6(D)(2): "[T]he mayor may discharge an appointed official or employee upon the approval of a majority of all of the members of the governing body...." It is our opinion that either the Socorro city council, or the mayor with the approval of the council, could discharge a manager.

Section 3-13-3, and through it sections 3-14-13, 3-14-14 and 3-14-15, do not alter this result. Section 3-13-3 provides only that the "qualifications, duties and responsibilities of the city manager shall be those found in Sections 3-14-13, 3-14-14 and 3-14-15." It does not address, and thus change, the council's and the mayor's power to discharge an officer or employee, including the manager. Moreover, section 3-14-13 merely reiterates the council's power to discharge a manager pursuant to section 3-11-6(D)(1).

(3) The city manager and the mayor each have power to employ and discharge persons engaged in the municipality's "administrative services." Section 3-14-14(A)(2) specifically empowers the city manager to employ and discharge all persons engaged in the administrative service of the municipality: "[T]he manager shall: ... (2) employ and discharge all persons engaged in the administrative service of the municipality." On the other hand, section 3-11-6 generally empowers the mayor to hire and discharge employees with the council's approval. Section 3-13-3's incorporation of section 3-14-14 creates an inconsistency: the manager can hire and fire the administrative employees without city council approval, whereas the mayor cannot. We do not, however, read section 3-14-14(A)(2) as superseding the mayor's or city council's power to hire or discharge an employee.

Accordingly, Socorro's proposed ordinance needs clarification. The last sentence of Section 4 states as follows: "[T]he mayor's and council's authority to discharge and **employ** under Section 3-11-6 NMSA is not superseded by the City Manager's authority to discharge persons in the administrative service." (emphasis added). We do not find authority for the city council to hire employees anywhere in Section 3-11-6; the council only approves the mayor's appointments.

The proposed ordinance defines employees in "administrative service" to include "all city employees in non-exempt status, and specifically excludes all appointed officers of the city." We approve of this definition of administrative service in light of Sections 3-13-3, 3-14-14, 3-11-5, and 3-11-6, and *Sanchez v. City of Belen*, 98 N.M. 57, 644 P.2d 1046 (Ct. App. 1982). In *Sanchez*, the Court of Appeals affirmed the district court's interpretation of the statutory provisions governing mayor-council municipalities, and the lower court's decision upholding the Belen city manager's and city council's decision to fire a Belen city employee. The Court held:

[T]here is no reason to interpret § 3-14-14(A)(2) to mean that only the city manager would fire Sanchez. Section 3-14-14(A)(2) imposes on the city manager the duty of hiring and firing "all persons engaged in the administrative service of the municipality". There is no definition of "administrative service" in this area of the statutes. There is also nothing in that statute to indicate that the mayor's and/or city council's authority to discharge and employ under § 3-11-6(D) is superseded by the city manager's authority to discharge those persons in administrative service.

Therefore, § 3-11-6(D)(1) can be applied in this case to the procedures followed in Sanchez' discharge. The statute provides that a majority of the city council can discharge an employee. On April 22, 1980, the Belen city council unanimously voted to confirm Sanchez' discharge. This action can be interpreted as a valid discharge under § 3-11-6(D)(1).

Id. at 59, 644 P.2d at 1048.

(4) Section 3-12-4 NMSA 1978 provides that the governing body of a municipality "shall provide for the office of clerk, treasurer and police officer. The office of clerk and treasurer may be combined and one person appointed to perform both functions." This section is silent whether the offices of city manager and city clerk may be combined. We do not find that this silence demonstrates legislative intent to preclude the same person from serving in both offices unless the duties of the two offices are incompatible.

In *Haymaker v. State ex rel. McCains*, 22 N.M. 400, 163 P. 248 (1917), the Supreme Court of New Mexico ruled that one person should not serve as a member of a board of education and a clerk of the same board. In so ruling the court set forth the following rule for determining whether two offices are incompatible:

In legal contemplation, incompatibility between two offices is an inconsistency between the functions of the two. The offices must subordinate, one to the other, and they must, per se, have the right to interfere with the other before they are incompatible.... The incompatibility between two offices, which upon the acceptance of the one by the incumbent of the other operates to vacate the latter, is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.

Id. at 403-404, 163 P. at 249.

A city clerk's office is not antagonistic to a city manager. The city manager and city clerk are appointed by the mayor and dischargeable by both the mayor and the city council. Both are essentially "at will" employees for the mayor and the city council. The clerk's duties include recording minutes at the city council meetings and running the municipal elections. The city manager's duties include enforcing all rules and regulations enacted by the city council and preparing an annual budget. The city manager has a seat on the council, but cannot vote. We find no potential conflict exists between the two offices. Therefore, based on statutory construction and established case law, we are of the opinion that the offices of clerk and city manager may be filled by one person.

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