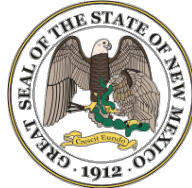


STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

June 23, 2022

The Honorable Candy Spence Ezzell
New Mexico State Representative
P.O. Box 2125
Roswell, NM 88202

Re: Authority of City Manager in a Mayor-Council Municipality

Dear Representative Ezzell:

You have requested an opinion regarding the scope of authority exercised by the mayor and city manager in a mayor-council municipality that has provided for a city manager by ordinance. In particular, you ask:

1. Are the municipal offices of clerk, municipal attorney, police officer, treasurer and manager part of the “administrative service” under NMSA 1978, Section 3-14-14(B)?
2. If not, does a person hired for one of those positions by the city manager have legal authority to perform the duties of the position?
3. May the city manager eliminate the office of clerk and require the person holding the position of clerk to report to the city attorney?
4. May the city manager unilaterally change the salary and benefits package provided to appointed officers?
5. What responsibility does the city manager have to report to and execute the policy decisions of the city council?
6. (A) Do the mayor’s law enforcement functions under NMSA 1978, Section 3-11-4 mean that enforcement actions or prosecutions of city ordinances rest with the discretion of the mayor? Is the mayor ultimately responsible for exercising prosecutorial discretion?

(B) Does the city manager have similar, concurrent or superseding authority under state law?

As discussed below, based on our examination of the applicable constitutional, statutory and case law authority and information provided with the request, we conclude:

1. The municipal offices of clerk, city attorney, police officer, treasurer and manager are not part of the “administrative service” under NMSA 1978, Section 3-14-14(B).
2. The Municipal Code does not give the city manager authority to fill appointed municipal offices.
3. The city manager has no authority to eliminate or change the duties of the office of clerk.
4. The city manager has no authority to make unilateral changes to the salary and benefits of appointed municipal officers.
5. The city manager serves at the pleasure of the city council and, like other municipal officers, is responsible for reporting to and carrying out the policy decisions of the council.
6. (A) Enforcement actions and prosecutions of persons who violate city ordinances do not rest with the discretion of the mayor. The mayor does not have responsibility for exercising prosecutorial discretion.

(B) The city manager’s authority to enforce municipal ordinances and regulations is narrower than that conferred on the mayor under NMSA 1978, § 3-11-4.

“Administrative Service” Under Section 3-14-14 of the Municipal Code

The Municipal Code permits the governing body of a municipality with a mayor-council form of government to provide for a manager by ordinance or election. NMSA 1978, § 3-13-3 (1991). The office of city manager carries “the same qualifications, duties and responsibilities as provided for a manager under Sections 3-14-13 through 3-14-15 [of the Municipal Code].” *Id.*

Sections 3-14-13 through -15 are part of the Municipal Code applicable to municipalities with a commission-manager form of government. In pertinent part, they provide that:

- the manager is the chief administrative officer and serves indefinitely until a vacancy is created by death, resignation or removal by the governing body. NMSA 1978, § 3-14-13 (1965);

- the manager’s duties include: “enforc[ing] and carry[ing] out all ordinances, rules and regulations enacted by the [governing body] and “employ[ing] and discharg[ing] all persons engaged in the administrative service of the municipality.” *Id.* § 3-14-14(A)(1), (2) (1965); and
- the governing body may divide the municipality’s administration “into as many departments” as it “deem[s] desirable,” and “each department shall be under the charge of a person employed by the manager.” *Id.* § 3-14-15 (1965).

Your first four questions concern the scope of the city manager’s authority to “employ and discharge persons engaged in the administrative service” and its applicability to appointed officers. The Municipal Code does not define “persons engaged in the administrative service,” as used in Section 3-14-14(A). Absent a statutory definition, the meaning of a “word or phrase ... is determined by its context, the rules of grammar and common usage.” NMSA 1978, § 12-2A-2. When interpreting the language used in a statute, courts “read the entire statute as a whole so that each provision may be considered in relation to every other part.” *New Mexico Pharm. Ass’n v. State*, 1987–NMSC–054, ¶ 8, 738 P.2d 1318.

Section 3-12-4 of the Municipal Code requires the governing body of a municipality to provide for the offices of clerk, treasurer and police officer (generally referred to as the chief of police) and permits the governing body to provide for the office of attorney and for deputy appointed officials. The city council is charged with “prescrib[ing] the powers and duties of those officers whose terms of office or powers and duties are not defined by law, and impos[ing] additional powers and duties upon those officers whose powers and duties are prescribed by law.” *Id.* § 3-12-3(A)(9).

Subject to the approval of the governing body, the mayor appoints “all officers and employees except those holding elective office.” *Id.* § 3-11-6(A). *See also* § 3-11-5(A) (at the organizational meeting following a municipal election, the mayor “submit[s], for confirmation by the governing body, the names of persons who shall fill the appointive officers and ... who shall be employed by the municipality”). “Subject to the limitation of a merit system ordinance,” the governing body, or the mayor with the approval of the governing body, may discharge an appointed official or employee.” *Id.* § 3-11-6(D). New Mexico courts have interpreted the limitation imposed by a merit system ordinance in Section 3-11-6(D) to apply only to employees. *Webb v. Village of Ruidoso Downs*, 1994-NMCA-026, ¶¶ 9, 11, 871 P.2d 17 (municipality had no authority to apply its merit system ordinance to village clerk-treasurer appointed under 3-12-4).

Reading Section 3-14-14(A) in the context of the above provisions, we conclude the phrase “persons engaged in the administrative service of the municipality” can reasonably be interpreted to refer to employees who carry out the daily operations of the municipality and to exclude appointed municipal officers. The legislature has provided the governing body of a municipality with authority to appoint officers and to prescribe their powers and duties. Appointed officers serve at the pleasure of the governing body and, unlike municipal employees, are not be protected by a merit system ordinance. The governing body’s direct authority over appointed officials under

current law is inconsistent with an interpretation of Section 3-14-14(A) that allows one appointed officer - the city manager - to supervise, “employ and discharge” all other appointed officers. Had the legislature intended that interpretation, we believe it would have used language expressly including appointed municipal officers among the “persons engaged in the administrative service of the municipality” under the supervision of the city manager. *See also* N.M. Att’y Gen. Op. No. 87-69 (1987) (concluding that a proposed municipal ordinance providing for a city manager properly defined “administrative service” to exclude “all appointed officers”).

For the reasons discussed above, our answers to your first four questions are as follows:

1. The municipal offices of clerk, municipal attorney, police officer, treasurer and manager are *not* part of the “administrative service of the municipality” under NMSA 1978, Section 3-14-14(B).

2. Because appointed offices are not part of the administrative service of the municipality, the city manager has no authority to fill them. An appointment by the city manager would be vulnerable to legal challenge, unless the appointment was approved or ratified by the mayor and city council under Section 3-11-6(A). *See Sanchez v. City of Belen*, 1982-NMCA-070, ¶ 11, 644 P.2d 1046 (city council’s ratification of allegedly illegal discharge by the city manager “was sufficient by itself to terminate [the person’s] employment under § 3-11-6(D)(1)”).

3. The city manager has no legal authority to eliminate the office of city clerk. The office of city clerk is not included in the administrative service of the municipality, and the office and its duties are prescribed by law. NMSA 1978, §§ 3-12-4, 3-13-1. The city council is permitted to impose additional powers and duties on the office of city clerk, *id.* §§ 3-12-3(A)(9), but only the legislature has the power to eliminate the office or change its statutorily-imposed duties.

4. The city manager has no authority to change the salary and benefits of persons holding appointed offices without the approval of the city council.

City Manager’s Responsibility for Executing Policy Decisions of the City Council

The city manager is the chief administrative officer. NMSA 1978, § 3-14-13. Like other appointed officers in a mayor-council form of government, the city manager is appointed by the mayor, with the approval of the city council. *Id.* § 3-11-6(A). The city manager serves “an indefinite term ... until a vacancy is created by death, resignation or removal” by the governing body. *Id.* § 3-14-13. *See also* N.M. Att’y Gen. Op. No. 87-69 (1969) (noting that Section 3-14-13 “merely reiterates the [city] council’s power to discharge a [city] manager pursuant to section 3-11-6(D)(1)”).

The absence of a definite term and the governing body’s removal authority “is tantamount to saying that the manager holds office at the pleasure of the [city council].” 1957 N.M. Att’y Gen. Op. No. 57-126 (1957) (reviewing a predecessor provision to Section 3-14-13). *See also Trujillo v. Northern Rio Arriba Electric Coop., Inc.*, 2002-NMSC-004, ¶ 22, 41 P.3d 333 (“[e]mployment

without a definite term is presumed to be at will”). These provisions make the city manager accountable to the mayor and city council, and responsible for carrying out the council’s policy decisions consistent with the council’s expectations. *See also* N.M. Att’y Gen. Op. No. 79-28 (1979) (city manager “operates under the superior power or control of the governing body”).

Law Enforcement Responsibilities of the Mayor and City Manager

A. Authority of the Mayor Under Section 3-11-4

In pertinent part, Section 3-11-4 of the Municipal Code provides that the mayor, as chief executive officer, shall:

- A. cause the ordinances and regulations of the municipality to be obeyed; [and]
- B. exercise, within the municipality, powers conferred upon sheriffs of counties to suppress disorders and keep the peace....

A mayor’s authority to exercise “powers conferred upon sheriffs of counties to suppress disorders and keep the peace” gives the mayor some law enforcement functions, but does not make the mayor a law enforcement officer. *See, e.g., Montes v. Gallegos*, 812 F.Supp.1165, 1172 (D.N.M. 1992) (holding that a mayor is not a law enforcement officer for the purpose of waiver of immunity under the Tort Claims Act). The mayor does not have authority to make arrests, hold people in custody, or otherwise “directly impact public order.” *Dunn v. McFeeley*, 1999-NMCA-084, ¶ 25, 984 P.2d 760 (citing *Montes v. Gallegos*).

Judicial opinions addressing the mayor’s law enforcement authority generally support a mayor’s actions to “suppress disorders and keep the peace” indirectly through the police. For example, the New Mexico Supreme Court has held that a mayor who has probable cause to believe that a crime is being committed in his presence may order a police officer to make an arrest. *Cherry v. Williams*, 1957-NMSC-08, 316 P.2d 880. Similarly, a mayor might arrange for police officers to be present in situations where the mayor believes a disturbance or disruption of the peace might occur, such as a public protest or controversial meeting of the city council. *See Salazar v. Town of Bernalillo*, 1956-NMSC-125, ¶ 11, 307 P.2d 186 (a mayor has “power and authority to direct the deputy marshal to enforce the peace and quell disturbances...”).

The limited law enforcement functions conferred under Section 3-11-4 do not give the mayor discretionary authority over enforcement actions against or prosecutions of persons who violate city ordinances. As noted above, Section 3-12-4 requires a municipal governing body to appoint a police chief and, in Section 3-13-2, the legislature has provided police officers with separate and independent authority to enforce municipal ordinances. In particular, Section 3-13-2(A)(4)(d) states that a police officer “shall ... within the municipality apprehend any person in the act of violating the laws of the state or the ordinances of the municipality and bring him before competent authority for examination and trial.” *See also* NMSA 1978, § 3-13-2(B) (“a police officer shall have the same powers and be subject to the same responsibilities as sheriffs in similar cases”).

Nothing in these provisions suggest that a municipal law enforcement officer's authority and responsibility to enforce municipal ordinances are subject to the mayor's discretion.

The mayor does not have prosecutorial discretion. Prosecutorial discretion generally rests with a person, usually an attorney such as the attorney general, a district attorney or municipal attorney, who prosecutes criminal cases on behalf of the government. Prosecutorial discretion is the "power to choose from the options available in a criminal case, such a filing charges, prosecuting, not prosecuting, plea bargaining, and recommending a sentence to the court." *Black's Law Dictionary* (11th ed. 2019). *See also State v. Estrada*, 2001-NMCA-034, ¶ 10, 24 P.3d 793 ("if the prosecutor has probable cause to believe that an accused has committed a crime, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests within the prosecutor's discretion").

B. Authority of the City Manager

The city manager's authority to enforce municipal ordinances and regulations is narrower than the mayor's. Specifically, the city manager is authorized to "enforce and carry out all ordinances, rules and regulations" enacted by the city council, NMSA 1978, § 3-14-14(A)(1), but has no authority to "exercise ... powers conferred upon sheriffs of counties to suppress disorders and keep the peace" within the municipality.

Please be advised that our response to your opinion request is a public document and is not protected by attorney-client privilege. If this office may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Sally Malavé
Assistant Attorney General
Director, Open Government Division

CC: Mayor Tim Jennings, City of Roswell
A.J. Forte, Director of the NM Municipal League