



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

July 15, 1975

ATTORNEY GENERAL OPINION NO. 75-292

Mr. Richard C. Dearth
City Attorney of Chetopa
1712 Broadway
Parsons, Kansas 67357

Re: Cities--Mayor--Power of Appointment

Synopsis: The president of the council of a city of the second class may not, in the absence of the mayor, but while said office is not vacant, appoint persons to city office, under the ordinances of the City of Chetopa, Kansas.

* * *

Dear Mr. Dearth:

You inquire concerning the legality of the appointment of the city clerk of the City of Chetopa, made at a meeting of the city council on May 6, 1975.

You advise that for the previous two years, Juanita Beck, now McKinney, has been serving as clerk of the city. Her term expired under the ordinance, as did the terms of all appointed officers and employees, at the time of the second regular meeting of the council in April, 1975. At that meeting, the mayor appointed another person as clerk, which the council failed to confirm. No further appointment was made or presented at that meeting.

Mrs. McKinney continued to serve as acting clerk. On May 6, 1975, at a council meeting, the council recessed to executive session. Upon returning to the regular session, the Mayor left the meeting, and the president of the council, while presiding, appointed Mrs. McKinney as city clerk, which appointment was unanimously approved by the council. The meeting then adjourned. The minutes of the meeting describe the foregoing thus:

Mr. Richard C. Dearth
Page Two
July 15, 1975

"Council President requested and council concurred that the meeting enter into an executive session. All persons except the Mayor and council left the meeting room. At the close of the executive meeting the Mayor left the building. The Clerk was called back into the meeting. Council President Rupert became the presiding officer in the absense [sic] of the Mayor. As acting-Mayor Rupert appointed Juanita Beck as City Clerk. Motion to confirm that appointment was by Councilman Taylor with second by Councilman Littlejohn. Council was unanimous."

So far as concerns the question involved here, this provision is substantially identical to K.S.A. 1974 Supp. 14-204.

According to your letter, there is some dispute as to certain factual occurrences. The Council President contends that in executive session, the Mayor agreed to leave the meeting and allow the President to appoint Mrs. McKinney as clerk, so that the impasse could be resolved without compromising the position taken by the Mayor. The Mayor contends there was no such agreement, and that the Council President does not have the power of appointment.

Ordinance No. 1-202 of the City of Chetopa, a copy of which you enclose, provides that the city clerk, as well as certain other officers and employees, shall be appointed "by the Mayor, by and with the consent of the Council." Thus, the power of appointment is vested solely in the Mayor, or any person authorized by law to exercise the powers and privileges of that office. The powers and duties of the mayor, in addition to those concerning appointment described above, are set out in Ordinance 1-104. It directs as follows, in pertinent part:

"In the absence of the Mayor, the President of the Council shall preside. In the absence of both, the Councilmen shall elect one of their number a temporary chairman, who shall be styled 'Acting President of the Council.' The President and Acting President, when

Mr. Richard C. Dearth
Page Three
July 15, 1975

occupying the place of the Mayor, shall have the same privilege as other members of the council." [Emphasis supplied.]

Thus, in the absence of the Mayor, the President of the Council does not succeed to the office of Mayor and all the powers and duties thereof. In the absence of the Mayor, the President of the Council "shall preside" at meetings of the council. However, when doing so, the President of the Council retains the "same privilege as other members of the Council.

The president of the council does succeed to the office of mayor when a vacancy occurs therein. Ordinance No. 1-105 states thus in pertinent part:

"Whenever a vacancy shall occur in the office of mayor, the president of the council for the time being shall exercise the office of mayor, with all the rights, privileges and jurisdiction of the mayor; and, in case such vacancy in the office of mayor shall be other than temporary by death, resignation, removal from the city, removal from office, refusal to qualify, or otherwise, the person exercising the office of mayor shall become mayor until the next regular city election." [Emphasis supplied.]

Thus, Ordinance No. 1-104 empowers the president of the council only to "preside" in the absence of the mayor, retaining the privileges of a member of the council. Ordinance No. 1-105, on the other hand, entitles the president of the council not merely to preside, but to "exercise the office of mayor with all the rights, privileges and jurisdiction, thereof, whenever a vacancy shall occur in the office of mayor. This latter ordinance goes on to distinguish between a temporary and permanent vacancy, a distinction without any apparent difference, because in either event, whether the vacancy be temporary or permanent, the president succeeds to all rights, privileges and jurisdiction of the mayor.

Mr. Richard C. Dearth
Page Four
July 15, 1975

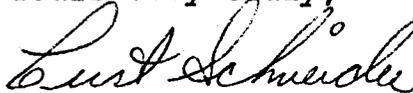
Generally speaking, an office "is vacant when it is empty and without an incumbent who has a right to exercise its functions and take its fees or emoluments. . . ." 63 Am.Jur.2d, *Public Officers and Employees*, § 130 at p. 709. Clearly, no vacancy occurred in the office of mayor at any time during the council meeting on May 6, 1975. The elected mayor was at all times legally privileged to exercise the functions and powers of the office. Physical absence from a particular council meeting does not in and of itself result in a vacancy in the office held by the absent member. In the absence of the mayor, of course, the president of the council was eligible to preside at the meeting, but under the city ordinance, he retained only the privileges of council member, and did not succeed to the powers, authority and jurisdiction of the mayor. The president of the council succeeds to those powers only upon the occurrence of a vacancy therein.

The disputed question whether an agreement was entered into between the mayor and the council president regarding this appointment is legally immaterial. The powers of the mayor are vested in the holder of that office by operation of law, and the mayor may not by private agreement with another officer of the city vest in such other officer powers and authority which under state law and city ordinance may be exercised only by the mayor. Certainly, the mayor may delegate the performance of particular tasks to others in city government. The power of appointment, however, is vested by law in the mayor alone, and no person may become city clerk, or any other officer of the city, save by the exercise of the appointive power by the officer holding that power by law.

We cannot but conclude that the power to appoint to the office of city clerk is vested in the mayor of the City of Chetopa, and that the exercise of that power by the president of the council at a time when the mayor was absent, but when no vacancy existed in the office of mayor is legally ineffective to vest in Mrs. McKinney the powers, duties, rights and privileges of the office of city clerk.

If further questions should arise, please feel free to call upon us.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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