



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

CURT T. SCHNEIDER
Attorney General

August 27, 1975

ATTORNEY GENERAL OPINION NO. 75- 343

Ms. Patricia M. Stuenkel
City Clerk
City of Andover
Post Office Box 295
Andover, Kansas 67002

Re: Cities--Officers--Vacancies

Synopsis: In a city of the third class under the mayor-council form of government, a vacancy in the office of chief of police must be filled by appointment by council, pursuant to K.S.A. 1974 Supp. 15-209, unless provided otherwise by lawful charter ordinance.

* * *

Dear Ms. Stuenkel:

You advise that the governing body of the City of Andover by formal motion on August 20, 1975, has requested an opinion from this office concerning appointments to city offices at times other than at the May organizational meeting. The City of Andover, you advise, is a city of the third class, governed by the mayor-council form of government. Upon the resignation of the chief of police, the mayor made an appointment of a person then holding the part-time position of assistant police chief to that of chief of police. The council refused to confirm that appointment. The mayor nonetheless proceeded to appoint the individual as chief of police, who was given the oath of office by the city clerk. The question is raised concerning the status and effect of the appointment.

K.S.A. 1974 Supp. 15-209 provides for the filling of vacancies in cities of the third class under the mayor-council form of government:

"All vacancies in office, except in the offices of mayor and councilman, may be

Ms. Patricia M. Stuenkel
Page Two
August 27, 1975

filled until the next regular time for appointment by appointment by the governing body."

Thus, the appointment of a person to fill a vacancy in the position of chief of police is vested not in the mayor, but in the council itself. The present appointment, as stated above, was made solely by the mayor, and is thus ineffective to vest title to the office in the person so appointed. The vacancy thus remains, and the council must proceed to fill it, either by appointing the person previously appointed by the mayor, thus ratifying that action, or by appointing some other individual.

The filling of vacancies under this section is thus unlike the procedure prescribed for appointments made at the May organizational meeting, at which appointments are made by the mayor with the consent of the council. In filling those vacancies mentioned above, the appointment is made not by the mayor, but by the council itself. The taking of the oath is not sufficient to vest title to the office in the person appointed by the mayor, if the appointment has not been made in the manner required by law, in this instance, by the council.

The question may arise as to the legal effect of acts performed by the present chief of police pursuant to this appointment by the mayor. It is very likely that in any legal proceeding questioning such actions, they would be upheld as those of an officer *de facto*. In *Parvin v. Johnson*, 110 Kan. 356 (1922), the court stated thus:

"The things required in order to constitute an officer *de facto* are stated in the opinion in a leading case in these words:

"'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised: 1. Without a known appointment or election but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be.'"

Ms. Patricia M. Stuenkel
Page Three
August 27, 1975

However, from the receipt of this opinion, the legal defect in the appointment being known, action must be taken promptly to fill the vacancy.

Yours very truly,

A handwritten signature in cursive script that reads "Curt T. Schneider". The signature is written in dark ink and is positioned above the typed name.

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj