STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE (913) 296-2215
CONSUMER PROTECTION 296-3751
ANTITRUST 296-5299

ATTORNEY GENERAL OPINION NO. 79-109

Robert G. Suelter
Barton County Attorney
P. O. Box 881
Great Bend, Kansas 67530

Re: Appointment of Public Officers--Cities--Misconduct

Synopsis: Pursuant to a municipal ordinance requiring consent of the city council for the appointment of a city attorney, the decision of the council to withhold such consent does not, itself, constitute willful misconduct within the meaning of K.S.A. 60-1205.

* * *

Dear Mr. Suelter:

You advise in your letter of May 14, 1979, that the City Council of Great Bend refused, by a vote of five to two, to consent to an appointment, by the Mayor, of a new city attorney. You inquire as to the legal grounds upon which the City Council may properly refuse to confirm an appointment made by the Mayor.

The City of Great Bend, pursuant to the home rule powers granted by Article 12, Section 5 of the Kansas Constitution, enacted Charter Ordinance No. 12, which provides in pertinent part:

> "Section 3. The Mayor shall appoint, by and with the consent of the Council, a City Administrator, City Clerk, City Attorney . . . ." (Code, City of Great Bend, Charter Ordinance No. 12.)

The ordinance itself details no guidelines in regard to the exercise of the council's consent; it simply provides that appointments shall be made "by and with the consent of the Council."

Our extensive research, in both this state and other jurisdictions, discloses very few cases having factual situations sufficiently similar to be of any precedential value. However, in the case of Shaw v. Baker, 179 Kan. 729 (1956), while the legal issues discussed are dissimilar, the facts are strikingly comparable. There, the newly-elected defendant-appellant, Mayor of Galena, did not reappoint the city attorney and instead appointed another person to the office. That appointment did not receive the consent of a majority of the members of the city council. The mayor then refused to sign the pay voucher for the city attorney who continued in office because his successor, although appointed, did not qualify for lack of council consent. The Kansas Supreme Court upheld the order of mandamus issued by the district court requiring the mayor to sign the salary warrant for the incumbent city attorney. In so doing, the Court refused to adopt argument of the mayor that "since defendant became mayor plaintiff and certain democratic members of the council conspired together for the purpose of preventing any persons holding office in the city who were the choice of defendant as mayor in order that defendant might resign as mayor and the president of the council become acting mayor and plaintiff continue to draw his salary as city attorney." Id. at 731.

However, in State ex rel. v. Lander, 87 Kan. 474 (1912), the Kansas Supreme Court considered a statute with language essentially the same as that in the ordinance in question. That statute, Gen. Stat. 1909, §1518, provided that the "mayor shall, by and with the consent of the council, appoint a city clerk, city treasurer." The Court concluded that "[t]he spirit of this statute requires that the council act in good faith upon the appointments made by the Mayor and that if their confirmation be withheld, it be for some reason sufficient to actuate honest men in the performance of their duty although they are not required to express what such reason is." 87 Kan. at 477. In the Lander case, Judge Porter, in his dissent reasoned that the matter should be dismissed for lack of adequate evidence, and he noted that "[t]he burden was upon the state to establish by evidence that the defendants [council members] were guilty of willful misfeasance or malfeasance in office." (Emphasis added.) Id. at 478.

The Lander case, however, provides painfully little guidance as to what factors may be considered by the council in confirming or rejecting an appointment to city office. All that we can clearly ascertain from the case is that upon final consideration in the ouster proceedings, State ex rel. v. Lander, 89 Kan. 178 (1913), the Court found, upon review of the council members' conduct since the filing of the 1912 opinion, that the city council members were, indeed, "guilty of willful misconduct in office and willful and persistent failure to perform their official duties." We can only presume that an extended pattern of unreasonable rejections of mayorial appointments would result in a finding of bad faith.

It must be emphasized that the conferring or withholding of consent by the city council is a discretionary act, not a ministerial act. The wisdom or prudence in the exercise of such authority is not likely to be "seconded-guessed" by Kansas courts. The vote of any individual council member simply will not be compelled by the judiciary. Cf., Leek v. Theis, 217 Kan. 784 (1975), concerning confirmation of gubernatorial appointees by the Kansas Senate.

The remedy of an aggrieved party where the city council has refused to grant consent to mayorial appointments is a proceeding in ouster pursuant to the grounds therefor contained in K.S.A. 60-1205, which provides:

> "Every person holding any office of trust or profit, under and by virtue of any of the laws of the state of Kansas, either state, district, county, township or city office, except those subject to removal from office only by impeachment, who shall (1) willfully misconduct himself or herself in office, (2) willfully neglect to perform any duty enjoined upon him or her by law, or (3) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall forfeit his or her office and shall be ousted from such office in the manner hereinafter provided."

However, we have been unable to find any instance where the failure of city council or other legislative body to consent to a single administrative appointment has been sufficient grounds for ouster. Likewise, we have found no judicial determination in Kansas limiting the considerations of council members regarding confirmation of an appointment to such factors as legal or professional qualifications.

You specifically inquire whether council members may only consider legal qualifications for a particular office in granting or withholding council consent. Based on the foregoing cases and the law regarding misconduct under the ouster statute, we are convinced that council members are not limited merely to the consideration of legal qualifications. In fact, such minimum qualifications are matters of law to be determined by the courts and are not of a discretionary nature within the control of the council.

In the absence of guidelines in the city ordinance, we can only conclude that the withholding of consent to appointments is a legal right, the free exercise of which will not be viewed as willful misconduct absent a showing that such withholding of consent substantially impairs the functioning of city business.

Therefore, it is our opinion that pursuant to a municipal ordinance requiring consent of the city council for the appointment of a city attorney, the decision of the council to withhold such consent does not, itself, constitute willful misconduct within the meaning of K.S.A. 60-1205.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Bradley J. Smoot
Deputy Attorney General

RTS:BJS:gk