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ATTORNEY GENERAL OPINION NO. 79-295

The Honorable Albert J. Jenks
Mayor of DeSoto
City Hall
DeSoto, Kansas 66018

Re: Cities of the Third Class--Election, Appointment,
Removal of Officers--Appointment of City Attorney

Synopsis: If the mayor of a city of the third class appoints the incumbent city attorney at the regular time fixed for appointments of city officers by K.S.A. 15-204, but the city council reasonably refuses to consent to that appointment, the incumbent continues in office until a successor is appointed and confirmed.

The council may reject subsequent mayorial appointments to said office, but must do so in good faith. Thereafter, the council, acting as a majority of the members of the governing body, may proceed to vacate the office pursuant to K.S.A. 15-204, and to select its own appointee to fill the vacancy thus created, pursuant to K.S.A. 15-209. The governing body's power of appointment derives from its authority to remove an incumbent appointive officer.

* * *

Dear Mayor Jenks:

Through your former city attorney, Mr. David Waxse, the city has requested the opinion of this office as to the rights and responsibilities of the mayor, council and city attorney in the matter of the appointment of the city attorney.

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Your inquiry is the result of a dispute between the mayor and council over the mayor's reappointment of Mr. Waxse at the governing body's organizational meeting in May, 1979. The council refused to consent to that appointment. Mr. Waxse then advised that no vacancy existed in the office of city attorney and that he would remain in office as a holdover officer pending the appointment and confirmation of a new city attorney. Sometime later, the council voted to remove Mr. Waxse from office. At the first meeting in July, a motion was made for the appointment of Mr. Joseph Perry. The mayor found the motion to be out of order, that no vacancy then existed in the office of city attorney, and finally, that his right to appoint a city attorney pursuant to K.S.A. 15-204 was superior to any right the council might have to make such an appointment.

Thereafter, you requested our opinion to resolve the legal question raised by the dispute. We have been informed since that time that the mayor appointed and the council unanimously confirmed Mr. Waxse's replacement, but you have renewed the request for our opinion in the event such disputes should again occur.

Former Attorney General Vern Miller considered a nearly identical factual situation precipitating a "stalemate" between the mayor and council of Hill City over the mayor's desire to reappoint the incumbent city attorney at the organizational meeting of the governing body, the first meeting in May. The question which arose after the council refused to confirm the mayor's appointment was whether the incumbent city attorney should continue in office until a successor was appointed and confirmed. General Miller determined, in consideration of general authority, that the incumbent city attorney should hold over. See Opinions of the Attorney General, Vol. VIII, pp. 257-258. (Copy enclosed for your consideration.) We agree with that conclusion.

However, we respectfully record our disagreement with the remainder of General Miller's opinion concerning the power of appointment, discussed in the following excerpt. The Attorney General wrote:

"The mayor is vested by statute with sole and exclusive power of appointment. The council has not [sic] power of appointment whatever. Rather, it is authorized to grant or withhold its consent to an appointment made by the mayor [T]he mayor . . . possesses sole statutory appointive power [I]n the absence of an appointment

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of a successor as authorized by K.S.A. 15-204, the incumbent city attorney continues in office until a regular appointment is made under K.S.A. 15-204 . . . or until the present city attorney resigns and the resulting vacancy is filled as provided by law." Id.

It is our judgment that in reaching the above conclusion, General Miller failed to consider other relevant provisions concerning appointment of city officers. Contrary to his assertion, it is our opinion that the mayor does not have sole power of appointment. Note that K.S.A. 15-204 also provides that "[a] majority of all the members of the council may remove any such [appointive] officer; or, for good cause, the mayor may remove any such officer, with the consent of the council." K.S.A. 15-209 also is relevant. That section provides in part:

"All vacancies in office, except in the offices of mayor and councilman, may be filled until the next regular time for appointment by appointment by the governing body." (Emphasis added.)

Clearly, appointive officers serve at the pleasure of the council, or may be removed by the mayor, for good cause shown, with the council's consent. If a majority of the members of the council vote to remove an officer, a vacancy is thereby created, and the "governing body" is then empowered, as noted above, to fill the office until the next regular time for appointments. K.S.A. 12-104 defines "governing body" thus:

"In acts granting or limiting executive or administrative powers to city governments, or prescribing procedure, the designation of 'the governing body' shall be held to include mayor and council, mayor and commissioners and board of commissioners, as the status of cities affected may require; . . ."

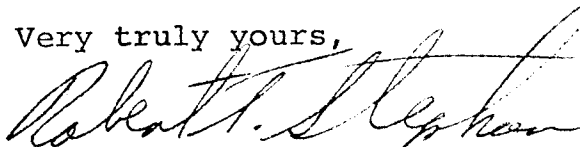
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If the mayor and council cannot agree upon a suitable appointee under K.S.A. 15-204, it is our judgment that the council may remove the incumbent officer, as provided by that statute, and may proceed to make its own appointment as the majority of the "governing body" referred to in K.S.A. 15-209, quoted above. K.S.A. 77-201, Fourth, confirms this conclusion. That statute provides as follows: "Words giving a joint authority to three or more public officers or other persons shall be construed as given [sic] such authority to a majority of them, unless it be otherwise expressed in the act giving the authority."

We can find no expression of legislative intent that only the mayor may select candidates for appointment to city offices or that the city council plays only a consenting role in such appointments. However, we think it important to note that the mayor's power of appointment vested by K.S.A. 15-204 is an important incident of the mayor's authority under Kansas law and should not be lightly considered. The city council must act in good faith in withholding its confirmation of mayorial appointees, and must afford the mayor a reasonable time in which to make a new appointment if the council rejects an appointee. (See Attorney General Opinion No. 79-109, published earlier this year, for our discussion of this reasonableness requirement, enclosed.)

In summary, we conclude that upon the city council's rejection of the mayor's reappointment of the incumbent city attorney, the incumbent "holds over," i.e., continues in office until a successor is appointed and confirmed. The city council must act in good faith in withholding its confirmation of the mayor's appointees, and must afford the mayor a reasonable time in which to make a new appointment if the council rejects an appointee. However, in the event of a disagreement or dispute in matters of appointments in the factual context upon which your request is based, the governing body, by a majority of its members, has authority to appoint officers, which authority derives from its power to remove incumbent appointive officers and to fill the vacancies thus created.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

RTS:WRA:SC:gk

Enclosures: Attorney General Opinion No. 79-109
Attorney General Opinion No. 73-184