



STATE OF KANSAS

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June 6, 1980

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ATTORNEY GENERAL OPINION NO. 80- 126

Mr. Robert D. Beall  
Lansing City Attorney  
P.O. Box 369  
818 North Seventh St.  
Leavenworth, Kansas 66048

Re: Cities of the Third Class--Election, Appointment and  
Removal of City Officers--Holding Over in Office

Synopsis: Upon the failure or refusal of the city council to confirm a new appointee to a city office, the incumbent officer continues in office until a successor is appointed and qualified, notwithstanding the absence of specific statutory authority for such holding over in office. Cited herein: K.S.A. 13-527, 13-2101, 14-201, 14-1501, 15-204, 15-1601.

\* \* \*

Dear Mr. Beall:

You have requested our opinion on a legal question which arises out of a dispute between the mayor of Lansing and some members of the Lansing city council over the appointment of a police officer. You advise that at the first council meeting in May of this year, the mayor nominated a person to serve as a police officer but the council, by a 3-2 vote, failed to confirm the appointment. You state that, in making this nomination, the mayor would have replaced a police officer who has served the city the previous nine or ten months because he had no desire to renominate this individual. But the council refused to confirm the new appointee, and the question then arose whether the incumbent police officer, the individual whom the mayor sought to replace, continued to hold over in office to serve until such time as a new officer is appointed and confirmed by the council. You have stated your opinion that there is no authority for such incumbent appointive officers to hold over in office until successors are appointed and qualified, and you have asked for our opinion, on behalf of the mayor and council, to resolve the current dispute.

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K.S.A. 15-204 provides that the mayor of a city of the third class, with the consent of the city council, may, at the first regular meeting of the governing body in May of each year, appoint the several city officers, including police officers, whose term of office extends to the next regular time for appointments, or one year, except that any appointed city officer may be removed from office at the pleasure of the city council. You have correctly noted that, unlike K.S.A. 14-201 and 14-1501, pertaining to appointive officers in cities of the second class, and K.S.A. 13-2101, pertaining to appointive officers in cities of the first class with the commission form of government, K.S.A. 15-204 makes no provision for appointive officers to continue to serve in office until their successors are appointed and qualified. You argue that the absence of such holdover language in K.S.A. 15-204 must reflect a legislative intent that incumbent officers in cities of the third class should not hold over, in contrast with the above-noted express authority therefor granted to cities of the first and second class. (It is important to note, however, that K.S.A. 13-527, which statute pertains to appointive officers of cities of the first class with a mayor-council form of government, contains no language authorizing appointive officers to hold over pending the appointment and qualification of their successors. Note further, however, that K.S.A. 15-1601, which section authorizes the appointment of officers in cities of the third class with a commission form of government, does contain such language, and provides thus: "Such persons [appointive officers] shall hold their respective offices until their successors shall have been appointed and qualified.")

We must respectfully record our disagreement with your conclusion, in view of the long-established general rule that "[s]ince the public interest ordinarily requires that public offices should be filled at all times without interruption . . . in the absence of an express or implied constitutional provision to the contrary, an officer is entitled to hold office until his successor is appointed or chosen and has qualified." 67 C.J.S. Officers, §71. The Kansas Supreme Court has affirmed this principle, noting that it is "[t]he prevailing rule in the United States." Murray v. Payne, 137 Kan. 685, 690 (1933).

At issue in Murray v. Payne, supra, was a legislative enactment which cancelled city elections in Kansas City, Kansas in 1933, and, in Section 2 of the act, which extended the terms of office of the incumbent city officers. The act was adopted as an economy measure, to avoid the "'expense of unnecessary elections'" (137 Kan. at 686) and to provide for uniformity in the commencement of terms of office. Plaintiff challenged the act on several constitutional and statutory grounds. Plaintiff contrasted the Kansas City, Kansas statutes establishing the terms of city offices

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with other statutes applicable to cities of the first class generally, as noted in the following:

"The general law relating to cities of the first class provides that the term of all elective officers shall be two years and until their successors are elected and qualified. (R.S. 13-307.) The general commission form of government law provides for the election of a mayor and commissioners who shall hold their offices for a term of two years and until their successors are elected and qualified. The commission form of government statute specially applying to Kansas City (R.S. 13-1707) says 'All commissioners elected shall hold their offices for a term of four years.' Plaintiff makes much of the omission of the usual provision for holding over." (Emphasis added.) 137 Kan. at 690.

But the Court was not persuaded that the absence of the hold-over language in 13-1707 (repealed L. 1953, ch. 97), the Kansas City statute, was a conspicuous omission. The Court said:

"There is no implication here that the legislature thought anything about holding over, much less that it intentionally added another specialty to the act, abrogated the rule relating to public officers generally, and prohibited holding over in Kansas City.

"The result of the foregoing is that if section 2 [of the act in question] had not been inserted in the act, incumbents would hold over until the next election in 1935." (Emphasis added.) 137 Kan. at 690.

In short, in the absence of specific language in a statute authorizing city officers to hold over pending the selection and qualification of successors, the Court affirmed that the above-mentioned general rule, the holdover rule, would have application. In the Murray case, as the Court recognized in the above quotation, the legislature obviated the need for application of the general rule by its insertion of section 2

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in the act in question which section expressly authorized city officers to hold over. But, the Court emphasized that had the legislature not inserted said section 2 the holdover rule would apply.

Other jurisdictions have recognized the holdover rule. In Grooms v. La Vale Zoning Board, 340 A.2d 385 (1975), for example, the Court of Special Appeals of Maryland stated the rule thus:

"It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provisions to the contrary, that public offices should be filled at all times, without interruption . . . . In accord with this principle, the [Maryland] Court of Appeals has recognized that an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of his office until his successor qualifies, whether or not the statute creating the office so provides." (Citations omitted.)  
340 A.2d at 391.

In consideration of the foregoing authority, it is our opinion that, upon the failure or refusal of the city council to confirm a new appointee to a city office, the incumbent officer continues in office until a successor is appointed and qualified. We reached a similar conclusion with reference to the appointment of a city attorney by a city of the third class in Attorney General Opinion No. 79-295, a copy of which is enclosed for your consideration.

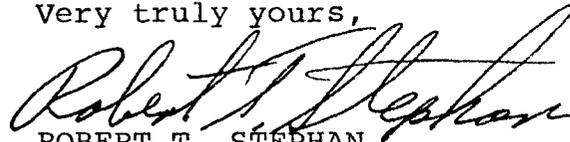
You further argue, however, that since the position in question is merely a discretionary appointment of the mayor, and not one required to be filled, the holdover rule has no application or justification since the mayor could elect to allow that position to be vacant, if he determined that the city's police protection needs could be satisfied with fewer officers, and thus eliminate the office in any particular year.

You have indicated, however, that neither the mayor nor the council have made any such determination, but apparently agree that the position should be filled. Thus, if the position is open, the office is a continuing one, and the holdover rule should apply. As noted above, the purpose for the holdover rule

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is to prevent a hiatus in government service which would be detrimental to the public interest by permitting offices to be filled at all times without interruption. Presumably, if the governing body of the city has determined that the City of Lansing has need of a certain number of police officers to insure adequate police protection in the city, it seems sensible that the holdover rule should apply to maintain police protection and to protect the public interest until such time as a new officer or officers can be appointed and confirmed to replace the incumbents. Although the mayor may exercise discretion in making the appointments of city officers, mayorial discretion does not eliminate the need for application of the holdover rule to protect the public interest, while, as here, the mayor and council attempt to reach agreement on a suitable appointee to fill the office in question, if both the mayor and council agree that such position is necessary to properly serve the city's needs.

Very truly yours,



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Attorney General of Kansas



Steven Carr  
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RTS:BJs:SC:pf  
Encl. - Attorney General Opinion No. 79-295.