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July 7, 1981

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ATTORNEY GENERAL OPINION NO. 81-155

Mr. Bert Rozelle, Mayor
City of Ellsworth
City Hall
First Street & Kansas Avenue
Ellsworth, Kansas 67439

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

Synopsis: The office of county attorney and city attorney are not incompatible as a matter of law. However, should a situation develop where an attorney holding both offices is confronted by a conflict of interest in representing both municipalities, such offices would be incompatible, and the attorney would be precluded as a matter of law from serving simultaneously in both positions. Attorney General Opinion No. 79-25 is affirmed.

A currently serving city attorney is entitled, in the absence of constitutional or statutory provisions to the contrary, to hold over indefinitely until his successor is chosen and has qualified.

Pursuant to K.S.A. 15-204, which statute requires the consent of the city council for the appointment of a city attorney in a city of the third class, the conferring or withholding of consent by the council is a discretionary act, and a council member need not state a reason for withholding his or her consent to appointments made by the mayor. Although the wisdom or prudence of any failure to confirm a mayoral appointment is not likely to be "second-guessed" by

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Kansas courts, an extended pattern of unreasonable rejections of mayoral appointments might constitute bad faith on the part of council members and be grounds for ouster proceedings. Attorney General Opinion No. 79-109 is affirmed. Cited herein: K.S.A. 15-204.

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Dear Mayor Rozelle:

As the newly-elected mayor of the city of Ellsworth, a city of the third class, you request our opinion regarding several questions related to the appointment of a city attorney. You advise that the city council has refused to consent to your proposed appointment of the Ellsworth County Attorney as city attorney, and set forth the following facts:

"As Mayor, I have attempted to make an appointment to the office of City Attorney. However, the City Council has refused to consent to the appointment on the grounds that the person who I have sought to appoint is also County Attorney and that therefore, there is a conflict of interests between the two positions. No other action regarding the office of City Attorney has been taken at this time and therefore, the previous City Attorney has continued to perform the functions of the office of City Attorney."

You first inquire as to whether there is any conflict of interest created where one person simultaneously holds the offices of county attorney and city attorney. In Attorney General Opinion No. 79-25, we considered this precise question in relation to the appointment of the Dickinson County Attorney as city attorney for the city of Herington. We concluded that such dual representation does not, ipso facto, create a conflict of interest, and that the offices of county attorney and city attorney are not incompatible as a matter of law. We also noted, however, that if a situation developed where a person holding both offices could not maintain undivided loyalty to both governing bodies, i.e., the performance of the duties of one office interfered with the performance of the duties of the other, the offices would be incompatible, and one person could not serve simultaneously in both positions. A copy of Attorney General Opinion No. 79-25 is enclosed herewith, and it is hereby adopted as our response to the first question which has been posed.

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Your second question is whether the currently serving city attorney continues to hold office where a proposed mayoral appointment is rejected by the city council. K.S.A. 15-204 relates to the appointment of municipal officers in cities of the third class and provides as follows:

"The mayor, with the consent of the council, may appoint, at the first regular meeting of the governing body in May of each year, the following city officers, to wit: A municipal judge of the municipal court, a clerk, a treasurer, a marshal-chief of police, policemen, street commissioner, and such other officers as deemed necessary; and may retain a licensed professional engineer to act in the capacity of city engineer for specifically defined duties. The duties and pay of the various officers provided for in this section shall be regulated by ordinance. A majority of all the members of the council may remove any such officer; or, for good cause, the mayor may remove any such officer, with the consent of the council." (Emphasis added.)

The Kansas Supreme Court has held that the reference, in the above-quoted statute, to the "first regular meeting of the governing body in May of each year" relates only to the time of appointment, and does not set a definite or fixed term of office for city officers appointed pursuant to K.S.A. 15-204. Gundelfinger v. Thiele, 133 Kan. 31, 36 (1931). Additionally, it is well settled that, in the absence of constitutional or statutory provisions to the contrary, an officer is entitled to hold over until his successor is chosen and has qualified. Murray v. Payne, 137 Kan. 685, 690 (1933); see, also, McQuillan Mun. Corp. (3rd Ed.) §12.110. We are unaware of any constitutional or statutory provision which would prevent a city attorney from holding over until his successor has been chosen, and we will assume, for purposes of this opinion, that no ordinance of the city of Ellsworth prevents the same. Therefore, in our opinion, the currently serving city attorney is entitled to hold over until his successor is duly appointed.

You next inquire as to whether the city council may refuse to consent to a mayoral appointment "for any or no reason at all." In Attorney General Opinion No. 79-109, we considered this exact question in relation to the refusal of the city council of Great Bend to consent to the Mayor's appointment of a new city attorney. We concluded as follows:

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"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."

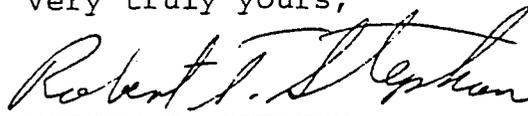
We also noted, however, that an extended pattern of unreasonable rejections of mayoral appointments might constitute bad faith on the part of council members and be grounds for ouster proceedings. Rather than paraphrasing or quoting the previous opinion further, we are enclosing a copy of it herewith, and it is hereby adopted as our response to the third question which has been posed.

Your final question is as follows:

"[W]hat happens regarding the office of City Attorney if the council refuses to consent to any appointment I may make regarding the office of City Attorney?"

The current city attorney may, in our opinion, hold over indefinitely until his successor is chosen and qualified. It has been said that the "hold-over rule" finds its fundamental basis in consideration of public convenience and necessity, 3 McQuillan Mun. Corp. (3rd Ed.) §12.110, and it would seem that such consideration justifies an indefinite hold-over period. Regarding other appointments you propose which may require council consent, the rules stated in response to your third question apply. Cooperation, accommodation, reasonable behavior and mutual respect are to be anticipated between the mayor and city council. Any extended pattern of irrational behavior which proves injurious to the city of Ellsworth will be considered by this office for possible legal recourse as discussed above.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General