



STATE OF KANSAS

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January 4, 1980

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ATTORNEY GENERAL OPINION NO. 80- 4

The Honorable Jim Gilmore
Mayor of Chetopa
City Hall
Chetopa, Kansas 67336

Re: Cities of the Second Class--Powers and Duties
of Mayor and Council--Employment of City
Personnel; Council Meeting Absenteeism

Synopsis: The mayor has no inherent power of appointment of city employees, other than those specifically named as officers in K.S.A. 14-201. The appointment of city employees is a matter of local policy which may be established by a city ordinance or ordinances.

K.S.A. 14-211 empowers the city council to compel the attendance of its members to council meetings, in such manner and under such penalties as it may prescribe, including removal from office for failure to attend a specified number of meetings.

Excessive, deliberate absenteeism may constitute willful misconduct or willful neglect of duty sufficient for ouster of a city council member or members who seek to frustrate the conduct of city business, pursuant to K.S.A. 60-1205 et seq.

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Dear Mayor Gilmore:

On your behalf, City Clerk Patsy J. Lamb has requested the opinion of this office on two questions concerning the powers and duties of the mayor and council relating to the employment of city personnel and the problem of absenteeism in city council meetings.

Ms. Lamb first asks for a general statement of the law governing "the appointment and confirmation of city employees." K.S.A. 14-201 empowers the mayor to appoint "by and with the consent of the council" the municipal judge, the chief of police, the city clerk, the city attorney, policemen and "such other officers as they may deem necessary." (Emphasis added.) The statute further states that said officers shall hold office for one-year terms, and that their duties and compensation shall be specified by ordinance. Additionally, the council by ordinance may abolish any city office created by them whenever that is deemed expedient.

Notably, no mention of "employees" is made in the statute. It is also important to note that, generally speaking, the law makes a distinction between "officers" and "employees." McQuillin, a recognized authority on the law of municipal corporations, states the distinction thus:

"Although an office is an employment, it does not follow that every employment is an office

"The officer is . . . distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office, and usually, though not necessarily, in the tenure of his position

"The essential characteristics which differentiate a public office from mere employment are said to be: (1) An authority conferred by law, (2) the power to exercise some portion of the sovereign functions of government, and (3) permanency and continuity. In every definition given of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment and the nature of the duties to be performed--whether the duties are such as pertain to the particular official designation and are continuing and permanent and not occasional or temporary." 3 McQuillin, Municipal Corporations, §12.30.
(Footnotes omitted.)

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In consideration of the foregoing authority, it is our judgment that the mayor has no inherent power of appointment of city employees, other than those specifically named as officers in K.S.A. 14-201, and that, absent any applicable state law, the appointment of city employees is a matter of local policy which may be established by a city ordinance or ordinances. Ms. Lamb advises that under the City of Chetopa's past practice, the mayor had authority to appoint employees, including the authority to place a new employee on the city payroll for a thirty-day period without prior confirmation by the city council. She further advises, however, that the present council "refuses to recognize this authority" and has given that authority, in at least one instance, to the chief of police in the matter of employment of a police dispatcher. In our opinion, such a policy decision is within the lawful authority of the city council, one among a number of alternatives the council may select, including such alternatives as the appointment of a personnel officer, or the establishment of a local civil service system, as two examples.

Ms. Lamb's second inquiry concerns the problem of absenteeism in meetings of the city council. Specifically, she inquires as to what steps can be taken to remove a council member from office when said council member deliberately fails to attend council meetings so that no meeting can be held for lack of a quorum. She advises that this has become a recurrent problem in recent months involving more than one council member.

K.S.A. 14-111 grants broad discretion to the city council to compel the attendance of its members to meetings, and to penalize absentees. That statute requires that all business must be conducted by a majority of the councilmen elect, thus constituting a quorum, but that "a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as the council by ordinance may have previously prescribed." (Emphasis added.) Although the statute makes no express statement of the "penalties" which may be prescribed, it is our judgment that the council may reasonably provide by ordinance that a member's failure to attend a specified number of council meetings constitutes grounds for removal from office as one of the penalties which may be fixed pursuant to K.S.A. 14-111. See, generally, 62 C.J.S. Municipal Corporations, §390g. It should be noted that, consistent with principles of due process, where the council seeks to remove one of its members for a specified cause, the general rule is that he or she be given adequate notice of the charge or charges and a reasonable opportunity to be heard in the matter before such removal may be effected. Id.

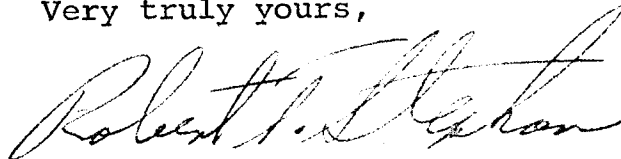
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Additionally, or alternatively, K.S.A. 60-1205 provides a remedy for misconduct of public officers, as follows:

"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 (2) who shall commit any act constituting a violation of any penal statute involving moral turpitude, shall be ousted from such office in the manner hereinafter provided."
(Emphasis added.)

K.S.A. 60-1206 through 60-1208, inclusive, establish the procedure for ouster of public officers. K.S.A. 60-1206 provides that the Attorney General or the county attorney in his or her respective jurisdiction, upon receiving notice in writing that an officer has violated any of the provisions of K.S.A. 60-1205, shall investigate the complaint, and if reasonable cause is found for such complaint, shall institute proceedings to oust such officer. Excessive, deliberate absenteeism may well constitute willful misconduct or willful neglect of duty sufficient for ouster of a city council member or members who seek to frustrate the conduct of city business.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Steven Carr
Assistant Attorney General

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