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July 25, 1980

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ATTORNEY GENERAL OPINION NO. 80- 166

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

Re: Cities of the Second Class--Powers of the Mayor--
Removing Police From Mayor's Control

Synopsis: If the city council deems it appropriate to remove the city's police department from the mayor's control and supervision, it may adopt a charter ordinance exempting the city from pertinent provisions of article 3 of chapter 14 of the Kansas Statutes Annotated and providing additional and substitute provisions therefor. The separation of powers doctrine is not applicable to municipal governments and so, therefore, does not operate to preclude the adoption of such charter ordinance. Cited herein: K.S.A. 14-301, 14-305 14-307, 14-309, Kan. Const., Art. 12, Sec. 5(c).

* * *

Dear Mayor Gilmore:

On your behalf, City Clerk Patsy J. Lamb asked for our opinion whether the Chetopa city council has legal authority to adopt an ordinance removing the city police department from the mayor's control. Ms. Lamb has advised that the suggested ordinance would establish a committee of the council members which would be responsible for direction and supervision of the police department.

By statute, in cities of the second class with a mayor-council form of government, the executive power of the city is vested in the mayor.

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K.S.A. 14-301 provides, in part, that "[t]he mayor . . . shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and this act are complied with." K.S.A. 14-305 imposes a duty on the mayor to advise the city council on policy matters with recommendations which "may tend to the improvement of the finances, the police, health, security, ornament, comfort and general prosperity of the city." (Emphasis added.) K.S.A. 14-307 commands that "[t]he mayor shall be active and vigilant in enforcing all laws and ordinances for the government of the city, and . . . shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty." Finally, K.S.A. 14-309 authorizes the mayor "to call on every male inhabitant of the city over eighteen years of age and under the age of fifty years, to aid in enforcing the laws." Thus, though there is no express provision referring specifically to the city's police department, we think it clear from the foregoing that the mayor's statutory duties include control and supervision of the police department.

However, since all of the above-quoted statutes pertain only to cities of the second class, and thus do not apply to all cities uniformly, the city may exempt itself therefrom by charter ordinance, pursuant to Article 12, Section 5(c) of the Kansas Constitution, the home rule amendment. Subsection (c)(1) of the amendment provides:

"Any city may by charter ordinance elect in the manner prescribed in this section that the whole or any part of any enactment of the legislature applying to such city, other than enactments of statewide concern applicable uniformly to all cities, other enactments applicable uniformly to all cities, and enactments prescribing limits of indebtedness, shall not apply to such city."

Accordingly, it is our opinion that if the city council deems it appropriate to remove the city's police department from the mayor's control and supervision, it may adopt a charter ordinance exempting the city from pertinent provisions of the above-quoted Kansas statutes and providing additional and substitute provisions therefor.

In our research of this question, we also have given consideration to whether the suggested ordinance would violate the separation of powers doctrine as a legislative usurpation of the executive powers vested by law in the mayor. The Kansas Constitution, like its federal counterpart, contains no express provision for the separation of governmental powers. The doctrine, however, is implied, and the

Kansas Supreme Court has applied the doctrine to the state government on numerous occasions. See, e.g., State, ex rel. v. Bennett, 219 Kan. 285 (1976); Van Sickle v. Shanahan, 212 Kan. 426 (1973). We can find no Kansas cases, however, expressly extending the doctrine to municipal governments. The principle was mentioned briefly in City of Junction City v. Griffin, 227 Kan. 332 (1980), wherein the Court hinted that the separation of powers doctrine is applicable to municipal government, but unfortunately there is little discussion of this point. Defendant Griffin argued that a city ordinance prohibiting solicitation and providing a mandatory jail sentence infringes the separation of powers doctrine by restricting the judicial power of the municipal court. The Court disposed of the argument thus:

"Finally it is argued the mandatory sentence provision of the ordinance deprives the defendant of liberty without due process of law because the ordinance takes away a prerogative of the judicial branch of government, that of fixing a sentence commensurate with the seriousness of the crime. In Freeman, 223 Kan. 362, Syl. §6, we held the provisions of K.S.A. 1977 Supp. 21-4618 and 22-3717(8), which deny probation and parole privileges to a defendant convicted of using a firearm in the commission of an Article 34 crime, do not impose such a restriction on the judicial power of the sentencing judge as would constitute an impermissible legislative usurpation of the court's prerogatives." 227 Kan. at 339.

It appears that the Court accepts the premise that the separation of powers doctrine is applicable to municipal governments, but that, in this instance, the power of the municipal judge is not infringed or usurped by the city's "legislature," the city commission. However, the Court's opinion makes no express statement that the doctrine is applicable to local governments. The briefs of counsel on this point are not helpful, either.

Notwithstanding the foregoing, it is our opinion that the separation of powers doctrine is not applicable to municipal government, and this conclusion is in accord with the weight of authority on this question. In McQuillin's work on the law of municipal corporations, the following is stated as a general principle:

"Although the [separation of powers] doctrine was accepted in toto in this country, and the separation was set out with precision in the state constitutions and uniformly upheld by the courts, in recent years the original doctrine has undergone modification. Thus it has been held inapplicable to municipal and local officers, notwithstanding it adheres in state government." (Citations omitted.) 2 McQuillin, Municipal Corporations, §9.09. (Accord, 16 Am.Jur.2d, Constitutional Law, §295.)

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In Attorney General Opinion No. 78-336, former Attorney General Curt Schneider reached the same conclusion. He wrote, in pertinent part:

"Under the Kansas Constitution, the executive power is vested in the executive department, legislative power is vested in the legislature, and judicial power is vested in the unified court of justice. Kansas Constitution, Articles 1, 2 and 3. There is no similar constitutional separation of powers applicable to municipal governments in Kansas. Under Article 12, §5(b), Kansas cities are 'empowered to determine their local affairs and government. . . .' This corporate governmental power is vested in the city governing body and entails both administrative, or executive, power, as well as legislative powers. . . .

"The Kansas Constitution contains no provision directing a tripartite separation of powers in Kansas municipal government. Article 12, §5 of the Kansas Constitution is a direct grant of both legislative and administrative powers to Kansas cities, which shall be exercised by the governing body. Since the adoption of the home rule amendment in 1960, the Kansas legislature has repealed a number of statutory provisions describing in some detail the powers of governing bodies of cities of the second class, precisely because a statutory enumeration of those powers was no longer necessary.

"A number of statutes continue to describe the powers of the mayor. K.S.A. 14-301, for example, provides that the 'mayor shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and this act are complied with.' In addition, K.S.A. 14-307 provides that the mayor 'shall be active and vigilant in enforcing all laws and ordinances for the government of the city,' and he 'shall cause all subordinate officers to be dealt with promptly for any neglect or violation of duty. . . .' Thus, the mayor is vested with substantial administrative authority in the conduct of city affairs. At the same time, this administrative authority is not constitutionally exclusive to the mayor alone, by virtue of his office. The council, as the corporate governing body, is not constitutionally prohibited from asserting an active and vigilant voice in the administrative conduct of city affairs." Attorney General Opinion No. 78-336, pp. 3-4. (Emphasis added.)

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Therefore, we conclude that if the city council deems it appropriate to remove the city's police department from the mayor's control and supervision, it may adopt a charter ordinance exempting the city from pertinent provisions of article 3 of chapter 14 of the Kansas Statutes Annotated and providing additional and substitute provisions therefor. The separation of powers doctrine is not applicable to municipal governments and so, therefore, does not operate to preclude the adoption of such charter ordinance.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

A handwritten signature in cursive script, appearing to read "Steven Carr", with a horizontal line extending to the right.

Steven Carr
Assistant Attorney General

RTS:BJs:SC:pf