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November 5, 1980

ATTORNEY GENERAL OPINION NO. 80-240

Mr. Dennis E. Shay
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Smith, Shay, Farmer & Wetta
Eighth Floor, Olive W. Garvey Building
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Wichita, Kansas 67202

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

Synopsis: The chief of police of a city of the third class is an officer of such city, to be appointed pursuant to K.S.A. 15-204. As a public officer, therefore, the chief of police does not derive either his authority to act in such capacity or his tenure out of any contractual relationship between such officer and the city, since the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Thus, it is inappropriate for a city of the third class to enter into an "employment contract" with its chief of police.

Even though the formal statutory requirements for the appointment of a chief of police in a city of the third class have not been followed, where the actions of the mayor and council are tantamount to the appointment of such officer and confirmation thereof, respectively, and are in substantial compliance with the applicable statute's provisions, the chief of police is to be regarded as a duly appointed officer of such city. Cited herein: K.S.A. 14-201, 15-204.

*   *   *

Dear Mr. Shay:

As city attorney for the City of Colwich, Kansas (a third class city), you have requested the opinion of this office in connection with the existing employment of the chief of police of said city.

Your inquiry is the result of a situation which started with the current chief of police commencing his duties on September 16, 1978, based on an oral agreement with the mayor and without any written evidence thereof. (Approximately two months later on November 27, 1978, the city attorney submitted a written contract to the mayor and city council, though it was never signed.) The chief of police continued to work approximately ten more months until he executed a written contract for the first time on September 1, 1979, which was entered into on behalf of the City of Colwich by its mayor. The minutes of the meetings of the governing body are silent as to the date the chief of police commenced upon his duties, as to the written contract entered into between the mayor and the chief of police and as to any other circumstances involved in this working relationship. In addition, it is important to note that the chief of police received payment of his salary on a regular basis and received all other fringe benefits due him according to the contract of September 1, 1979.

The questions presented for our consideration are as follows:

> "(1) Can an individual be employed in the capacity of Chief of Police by the City of Colwich, Kansas under an oral agreement if the Governing Body of such city has not authorized such employment by formal motion set forth in the regular minutes of such Governing Body?
>
> "(2) Does the Mayor of a third class city have unilateral authority to hire employees under written contracts without the approval of the City Council made in the form of a motion, duly introduced and passed?
>
> "(3) Can an existing council bind future councils by entering into employment contracts, the terms of which extend beyond the term of office of a majority of the members of such prior council?"

In the light of the above facts and the several questions you have posed, it is apparent that the first legal issue to be resolved is whether the chief of police of Colwich can hold

office by virtue of a contract with the city's governing body. Irrespective of whether the particular contract in question has been validly executed, it must first be determined if the Chief of police can derive his authority from an employment contract. Of pertinence to this consideration is K.S.A. 15-204, which provides:

> "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.)

From the emphasized portions of the foregoing statutory provisions it is clear that the marshal-chief of police in third class cities is an appointive officer of the city, as distinguished from an employee thereof. Even absent this statutory expression of such fact, it is our judgment that a chief of police is a public officer, since the position requires the exercise of a portion of the city's sovereign power. See 63 Am.Jur.2d, Public Officers and Employees, §§2, 9, 11. As a public officer, therefore, the authority of the chief of police to act in such capacity cannot arise out of any contractual relationship between that officer and the city. The general rules in this regard are stated in 63 Am.Jur.2d, Public Officers and Employees:

> "The nature of the relation of a public officer to the public is inconsistent with either a property or a contract right. Every public office is created in the interest and for the benefit of the people, and belongs to them." (Footnote omitted.) Id. at §8.

This encyclopedic statement continues, as follows:

> "The right of an incumbent of an office does not depend on any contract in the sense of an agreement or bargain between him and the public. A

> public office is not a contract, nor the same thing as a contract, and an appointment or election to a public office does not establish a contract relation between the person appointed or elected and the public. The incumbent is not under contract as to withdraw his tenure, salary, etc., from the control of the State." (Footnotes omitted.) Id. at §10.

The case of Miller v. Ottawa County Commissioners, 146 Kan. 481 (1937), distinguished the contractual rights of public employees and public officers. In holding that a city engineer appointed by the board of county commissioners was a public officer and the written appointment was not a contract, the Court quoted 53 A.L.R. 595:

> "'It may be stated, as a general rule deducible from the cases discussing the question, that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned . . . .'" 146 Kan. at 485.

Based on these authorities, it is apparent that the powers, duties, salaries, and emoluments of an officer must be prescribed by law, either by state statute or by appropriate action of the public body which he serves. Thus, we must conclude that the chief of police of Colwich cannot derive his powers, duties and authority from the contract in question, regardless of whether such contract was properly executed.

Moreover, it is clear that such contract is ineffectual in prescribing the tenure of this officer. By K.S.A 15-204, the legislature has not only vested in the mayor, with the consent of the city council, the power to appoint the chief of police, it also has provided for the removal of such officer. By this statute, it is clear that the mayor, "with the consent of the council," is vested with lawful authority to remove the chief of police from office "for good cause." More importantly, though, the statute gives to the council itself an unrestricted power to remove the chief of police from office. Thus, this officer serves at the pleasure of the council.

In light of this authority, we are of the opinion that the contract in question cannot establish any tenure or term of office for the

chief of police. The issue of whether a public officer holds his position for a "term of office" was discussed in Barrett v. Doff, 114 Kan. 220, 229 (1923):

> "The word 'term' when used in reference to the tenure of office ordinarily refers to a fixed and definite time and does not apply to an appointive office held at the pleasure of the appointive power."

Even assuming arguendo the appropriateness of an employment contract for a public officer, such contract cannot be executed in derogation of existing statutory provisions. As pronounced by the Kansas Supreme Court in Steele v. Latimer, 214 Kan. 329 (1973), quoting 17 Am.Jur.2d Contracts §257, pp. 654-655:

> "'It is a general rule that contracting parties are presumed to contract in reference to the existing law; indeed, they are presumed to have in mind all the existing laws relating to the contract, or to the subject matter thereof. Thus, it is commonly said that all existing applicable or relevant and valid statutes, ordinances, regulations, and settled law of the land at the time a contract is made become parts of it and must be read into it just as if an express provision to that effect were inserted therein, except where the contract discloses a contrary intention. . . .'" Id. at 336.

The foregoing further supports our conclusion that the contract in question is ineffective in prescribing terms and conditions of the chief of police's service that are in derogation of the city council's lawful right to remove him from office.

Having made these determinations, the question then arises as to the present right of the chief of police to hold office. While we are mindful of the fact that K.S.A. 15-204 requires that the chief of police be appointed by the mayor "with the consent of the council," we note that this statute details no guidelines in regard to the exercise of the city council's consent. However, a Kansas case also involving a mayoral appointment made without formal council approval can be looked to in addressing this issue. Riggs v. City of Beloit, 199 Kan. 425 (1967), though involving a second class city, concerned a man appointed by the mayor of Beloit to fill a vacancy in one of the town's two police officer positions, where no formal action to approve the appointment was

taken by the city council. Mr. Riggs, plaintiff, was discharged due to a personality conflict three months after his appointment, and in his suit against the city asking for reinstatement and recovery of past due salary, the court discussed the issue raised by the city, which was whether his appointment was illegal because the mayor and city governing body failed to formally make and confirm his appointment. The relevant statute relating to appointments of officers for second class cities cited in Riggs, also does not prescribe how the mayor shall appoint or how the consent of the city councilmen shall be given. K.S.A. 14-201 states in part:

> "The mayor shall appoint, by and with the consent of the council, a municipal judge of the municipal court, a city marshal-chief of police, city clerk, city attorney, and may appoint policemen and such other officers as they may deem necessary."

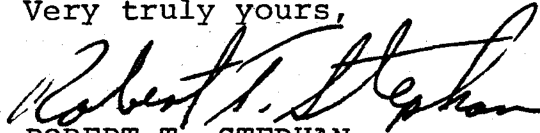
In view of the fact Riggs performed his duties nearly three months and received seven paychecks, according to the repeated passage of five payroll ordinances by the mayor and council, the court held he was a "de jure" and not a "de facto" officer of the city, and that his appointment by the mayor with the consent of the city council substantially complied with the statute.

As stated in Riggs, supra, the important question is the substance of the matter and not mere form and ceremony of the governing body. 199 Kan. at 428. Although the Kansas law pertinent here, K.S.A. 15-204, stating that an appointment by the mayor is to be supported by consent of the city council, has not been expressly followed in the present situation in Colwich, we have no difficulty in finding that the contract entered into between the chief of police and the mayor, on behalf of the city, was tantamount to a mayoral appointment. Furthermore, it must be recognized that the chief has performed his duties since his appointment, has received a salary on a regular basis since September 16, 1978, and has been provided all the other emoluments of his office according to his September 1, 1979 contract. These facts certainly demonstrate the city council's acquiescence in the mayor's appointment. Thus, in consideration of the Riggs decision and of the particular facts involved, it is our opinion that the mayor and city council have substantially complied with K.S.A. 15-204, and that the chief of police is a duly appointed officer of the City of Colwich.

In reaching the foregoing conclusions, we have not responded directly to each of the questions you have posed. Although

your questions are phrased in general terms, it is apparent that they derive from the specific factual situation recited above. It is equally apparent that your questions regarding the particulars necessary for the execution of an employment contract for the chief of police are all predicated on the premise that it is appropriate in such instance to execute an employment contract. However, as we have noted above, such premise is incorrect, and for this reason, we are unable to provide any meaningful response to your specific inquiries. Nonetheless, we believe that the opinions expressed herein have adequately addressed the legal issues underlying your request.

Very truly yours,



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