

Opinion No. 63-42

April 23, 1963

BY: OPINION of EARL E. HARTLEY, Attorney General

TO: Mr. C. V. Nunn City Attorney P. O. Box 811 Lordsburg, New Mexico

QUESTION

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1. May the Mayor in a municipality which has a mayor-council form of government suspend or terminate the employment of a municipal employee without a concurrence of a majority of the council?
2. Does the suspended municipal employee have any right to compensation during his period of suspension?

CONCLUSIONS

1. Depends upon whether or not the municipality has legislated upon the matter of employee removal by charter, ordinance, or adoption of a merit system.
2. No.

OPINION

{*85} ANALYSIS

In New Mexico the powers and duties of mayors fall into two categories. On the one hand there is the office of mayor as it exists under the commission and commission-manager form of government. And, on the other hand, there is the office of mayor as it exists in the mayor-council municipalities such as Lordsburg. Handbook, **Mayors and Councilmen**, University of New Mexico Department of Government (1960).

The mayor in municipalities organized under the mayor-council form of government has considerably more power than his counter-part in a commission or commission-manager municipality. The mayor in a mayor-council municipality has the power to appoint, subject to approval of a majority of the council, all municipal employees and officers except those required by law to be elected by the voters, Section 14-17-2, N.M.S.A., 1953 Compilation.

No citation of authority is necessary for the proposition that local ordinances must be consistent with the constitution and state statutes. However, since there is no constitutional or statutory provision dealing with the mayor's power of removal, it is to

the city charter and ordinances that we must next look. This is why the powers and duties of mayors vary considerably from city to city in this State. See 3 **McQuillin, Municipal Corporations**, Section 12.43 (1949).

It is our understanding that Lordsburg has no city charter and that it has enacted no ordinance dealing with the removal of municipal employees. This being the case, we must now determine the rule that is followed when there is no constitutional, statutory or local enactment governing the removal of municipal officers and employees.

The rule is set forth as follows in **State v. City of Lincoln**, 137 Neb. 97, 288 N.W. 499:

{*86} "Indeed, even where the power of removal is not expressly conferred, the general rule is that a grant of the power to appoint is construed to carry with it, by necessary implication, a grant also of the unconditional power to remove, if the term of office is not fixed by law, and the right to remove is not in any other manner restricted."

The power of appointment simply carries with it as an incident thereto, in the absence of legal restraint, the power to remove. **State v. Sullivan**, Mont., 40 p. 2d 995; **State v. Wunderlich**, Minn., 175 N.W. 677.

As we have seen, the mayor has the statutory power to appoint municipal employees, subject to approval of a majority of the council, and there is no constitutional or statutory enactment restraining or in any way dealing with his power to remove such employees. Nor, in the case of Lordsburg, is there any city charter provision or local ordinance dealing with the removal power. The question thus becomes whether the mayor, under such conditions, also needs approval of a majority of the council to remove municipal employees. Our research discloses that he does not need such approval

Probably the leading authority in the United States on municipal law has this to say on the question (4 McMillin, **Municipal Corporations**, § 12.249 (1949):

"The fact that appointments of persons to office requires the approval or confirmation of another officer or tribunal, does not mean that the latter must concur when the power of removal is exercised by the appointing authority."

Accord: **Myers v. United States**, 272 U.S. 52; **Parsons v. United States**, 167 U.S. 324; **In re Hennen**, 10 L. Ed. 138; **Newsom v. Cocks**, 44 Miss. 352.

The answer to your first question is that since the City of Lordsburg has no city charter or ordinance provision governing removal of municipal employees, the mayor has the power to suspend or terminate such employees without majority approval of the council.

You also ask whether a suspended municipal employee is entitled to compensation during the period of suspension. The majority rule is that after a lawful suspension the employee's right to compensation ceases. **State v. Seattle, Wash.** 238 Pac. 1. This is

certainly the rule in New Mexico in view of Section 40-8-12, N.M.S.A., 1953
Compilation, which provides:

"Except in the case of payments covering lawful vacation periods and absences from employment because of sickness, any person who receives payment, or any person who makes payment or causes payment to be made from public money where such payment purports to be for wages, salary, or other return for personal services **and where such personal services have not in fact been rendered**, shall be guilty of a felony. . . ."

(Emphasis added).

By: Oliver E. Payne

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