Opinion No. 57-126

June 11, 1957

BY: OPINION OF FRED M. STANDLEY, Attorney General Robert F. Pyatt, Assistant Attorney General

TO: Mr. Manuel Garcia, Jr., Assistant District Attorney, Eighth Judicial District, Raton, New Mexico

QUESTIONS

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1. See opinion for both question and analysis.

2. Is that portion of § 14-11-6, N.M.S.A., 1953 Compilation, which provides that a vacancy occurs in the office of commissioner whenever such member removes himself from the district, unconstitutional?

3. The extent of the "write in" privilege contained in § 14-11-10.

4. The instances in which secret meetings may be held by a city commission.

5. May new administrative departments be created by ordinance or resolution?

6. The procedure to be followed for the adoption of ordinances by cities under the commission form of government.

7. Whether the requirement in § 14-11-23 as to publication of financial reports has been superseded by § 5-6-7.

8. Is notice and a hearing necessary before the city manager can be removed by the commission?

9. Must the commission approve appointments or discharges of administrative employees, following action by the city manager?

10. The legal significance of the phrase "proper administration of all the affairs of the city" contained in § 14-11-28.

CONCLUSIONS

1. See opinion.

2. Such language is an unconstitutional restriction.

3. The write in privilege is restricted as set forth in § 14-11-10.

4. See Opinion.

5. By ordinance or by resolution.

6. The statutory procedure must be followed. See Opinion.

7. The provisions of § 5-6-7 govern.

8. No notice and hearing is necessary.

9. No approval by the commission is necessary.

10. See opinion.

OPINION

ANALYSIS

We are unable to ascertain the precise question requested by you under No. 1. If you mean to inquire as to whether it is necessary to publish the provisions of § 14-11-1 et seq., the answer is in the negative. We believe your question has reference to the notice required by § 14-11-2 to be published. Under this section, it is not necessary to publish the entire charter, but it is enough that publication be had of the notice of special election as set forth in the above section. Substantial compliance with the statutory form of notice is sufficient.

Your second question relates to the language of § 14-11-6 which provides that in case of removal by a commissioner from his district, a vacancy in such district shall thereupon be created and which shall be filled by appointment by the remaining members of the commission. You inquire as to whether such provision is unconstitutional. In **Gibbany v. Ford,** 29 N.M. 621, there was involved a statute providing that when a city had been divided into wards or other divisions and that councilmen, aldermen or trustees should be residents of the ward and if they removed from the ward or subdivision they should then forfeit their office and a vacancy would be thereby created. In holding that such restriction was unconstitutional, the Court stated at page 624 as follows:

"The only provision to be found in the Constitution having in the least to do with this situation is section 13 of Article 5, which provides:

'All district, county, precinct and municipal officers, shall be residents of the political subdivision for which they are elected of appointed."

It therefore becomes apparent that the only restriction against the right of every citizen of the United States who is a resident of and a qualified voter within this state to hold any public office is that all district, county, precinct, and municipal officers shall reside within the political subdivision for which they were elected or appointed. The question presented, then, is whether a ward within a city, town, or village is a political subdivision within the intendment and meaning of the Constitution. If it is not, then residence within the municipality meets the constitutional requirement, and the Legislature has no power to add restrictions upon the right to hold office beyond those provided in the Constitution, because the constitutional provision is not a negative one, providing that no person shall be eligible to hold an office unless he possess certain qualifications, as is often the case in other states, but is a positive provision, giving the right to every person possessing the qualifications therein set forth to hold office, except as otherwise provided in the Constitution itself. Manifestly, therefore, the Legislature is without power to make added restrictions as a qualification to the right to hold the office of alderman. To permit it to do so would authorize the superaddition of requirements to hold office beyond those provided by the Constitution. We have recently so held. Board of Commissioners v. District Court, supra.

In determining whether wards are political subdivisions we must keep in mind our recent holding that aldermen are not elected by the voters of their respective wards, but by the voting citizenry of the city at large. Wright v. Closson (N.M.), 224 Pac. 2d 483, recently decided, and not yet (officially) reported. There is therefore no legal entity to wards for the purpose of electing aldermen. Under the laws of this state as they now exist, wards within a municipality exercise no governmental functions. They are not political entities for any governmental purposes, and they possess no powers of local self-government. Cities, towns, and villages are divided into wards in order to obtain more convenient representation on the city government, but all powers of local self-government in such municipalities, under the present status of the law, are vested in the council or board of aldermen. Wards are not entities for voting purposes; they do not even elect their own aldermen, but must join with the entire voting population of the city. We know of no internal affair of a governmental character which is controlled by the inhabitants of one ward acting singly, alone, and separately from the remainder of the inhabitants of such municipality. Under such circumstances, they cannot be political subdivisions, because the very term implies a division of the parent entity for some governmental purpose, a thing which a ward does not have. In order to be political subdivisions, they must be formed or maintained for the more effectual or convenient exercise of political power within certain boundaries or localities, to whom the electors residing therein are, to some extent, granted power to locally self-govern themselves. We know of no such powers now vested in the wards of a municipality, and counsel for appellant has been unable to suggest any such."

And further added at page 628:

"To permit the Legislature to say that a person who resides within a municipality cannot hold the office of alderman unless he also resides within the ward he represents authorizes a restriction and an added eligibility to hold that office, which the Constitution

in plain term denies. No such superaddition can be made effective until such time as the Legislature confers upon wards of a city, town, or village some powers or functions of local self-government, so that they may be said to be political subdivisions. When that time shall have come, perhaps a law of this kind may be valid; but so long as wards are completely shorn of any functions of self-government, and do nothing in the way of discharging any such powers or functions, they are not such political subdivisions as the Constitution comprehends or contemplates."

Despite the great reluctance of this office to render an opinion holding a legislative pronouncement unconstitutional, the above decision in **Gibbany v. Ford** clearly indicates that the statutory language in question amounts to an unconstitutional restriction in that it seeks to create a vacancy upon removal from a ward, district or subdivision of a municipality, which is clearly afoul of the holding of the Gibbany case.

Section 14-11-10, giving rise to your third question, is as follows:

"Any qualified voter shall be eligible to any elective office and may have his name placed upon the official ballot by filing with the city clerk, not more than one (1) month, nor less than two (2) weeks before the date of the election, a statement of his proposed candidacy, together with an affidavit signed by two (2) other qualified voters of the city, that he is duly qualified under the law, not suffering any legal disability, temporary or permanent. If no more candidates qualify than there are places to be filled they shall be declared elected without a vote, upon the certificate of the city clerk. If no candidate qualifies in the manner prescribed, the ballot shall be printed without any names, and it shall be lawful for any voter to write the names of any qualified electors upon the ballot."

Under this section, the right to "write in" is restricted to where no candidate for the office qualifies by having his name appear on the ballot, i.e., the statute means just what it says. **Ostic v. Stephens,** 55 N.M. 497, 236 P. 2d 727.

Insofar as commission meetings are to be public, § 14-11-18 requires that all commission meetings are to be public unless there exists a special consideration of a peculiar nature, in which event the meeting may be secret when a majority of the commission so declares.

You inquire as to whether new administrative departments of a city under the commission plan of government may be created by ordinance or whether they may be created by resolution. In our opinion, new administrative departments may be created by either ordinance or resolution. Section 14-11-21 provides that additional offices may be created by the commission without saying whether this is to be by ordinance or resolution, and in the absence of such directive, we believe that either method may be employed to create new administrative departments. You will observe that the same statute requires the commission to pass all ordinances **and other measures** conducive to the city's welfare.

Your sixth question deals with the publication of ordinances adopted by the city commission. You inquire as to whether in cases of emergency the ordinance may go into effect immediately upon its passage without regard to the requirements of § 14-11-22 as to publication of the same. We feel that the statutory procedure set forth in this section, for the adoption, holding and publication of ordinances must be followed and while a pressing need may occur, we see no alternative to obedience to the method prescribed by statute.

In our opinion, in reference to your seventh question, it is not mandatory that the commission make a monthly publication of its receipts and expenditures. Section 14-11-23, enacted in 1933, makes mandatory the publication of receipts and expenditures by the commission. On the other hand, § 5-6-7, enacted in 1939 and amended in 1947 and 1953, now makes such publication discretionary with the council, commission or trustees of every city, town or village. While repeals by implication are not favored in New Mexico, nevertheless, we feel that we have in this instance two statutes dealing with the same subject matter, one of which makes the publication mandatory, and the other makes the publication discretionary in the governing board of the municipality. We feel that the latter (§ 5-6-7) must prevail, and therefore, such publication is a matter solely in the discretion of the commission.

Your eighth question, arising under § 14-11-25, deals with the right of a city manager to be given notice and hearing before removal by the commission, and also with whether the commission may establish a procedure for removal. We believe that this section, in providing that the city manager shall be employed for an indefinite term and shall hold office until, among other things, he is removed by the commission, is tantamount to saying that the manager holds office at the pleasure of the commission and so is not entitled as a matter of law to notice and hearing prior to removal. However, if the commission so desires, we find nothing to prohibit the commission from establishing some sort of procedure governing removal.

Must the commission approve appointments or discharges of administrative employees following appointment or discharge by the manager? This question arises under § 14-11-28. In our opinion, this section recognize the manager as the chief administrative officer of a city under the commission-manager form of government, responsible only to the commission who may discharge him at will. Of course, the Commission is, in turn, responsible to the electorate, but under this section sole authority to hire and fire the personnel of the city is vested in the manager without concurrence of the commission. There is no language such as "by and with the advice and consent of" or "with the concurrence of a majority" etc. Absence of such language or similar language compels the conclusion that the above authority is vested solely in the city manager.

You desire to know the legal significance of the words "proper administration of all the affairs of the city". This language is used in § 14-11-28 in making the city manager responsible to the commission for such administration. Language of this nature is not subject to precise definition in advance but must await given factual situations as they arise. In general, it may be said the manager is charged with the efficient operation of

the city as a body politic and corporate. Some assistance is gained from further language of the statute charging the manager with enforcement and carrying out all ordinances, rules and regulations enacted by the commission. On the other hand, we do not believe that any language in § 14-11-28 can, by any stretch of the imagination, be taken as authorizing the city manager to act contrary to or in disobedience of ordinances, resolutions, etc. enacted by the commission.