February 14, 2011

Dear Mayor:

You have several questions about the mayor’s powers:

**1. Can the mayor temporarily fill offices over which he has the power of temporary appointment?**

In my opinion, the answer is no.

It is a violation of the common law for a person on a governing body to hold incompatible offices, or for a governing body to appoint to an office a member of that body over which it (or he or she) has the power of appointment. [State ex rel. v. Thompson, 246 S.W.2d 59 (Tenn. 1952) (Disapproving the appointment of a member of the Paris, Tennessee, city commission to the office of city manager)]. The same rule undoubtedly applies to the self-appointment by a mayor to a position over which the mayor has the power of appointment.

The common law can be “overturned” by statute [Jackson v. Hensley, 715 S.W.2d 605 (Tenn. App. 1986)], but I find nothing in the your City Charter or the general state law that allows the mayor to appoint himself to positions over which he has the temporary power of appointment under Section 7 of the your City Charter.

**2. Which positions in the city are officer positions?**

- It is clear that the city judge is an officer.

- It is a close question whether the city recorder is an officer or an employee. Section 15 of the charter provides that

The office of recorder of the city is hereby created. The recorder shall be elected by the Board of Mayor and Aldermen of the city and shall hold office at the will and pleasure of the Board; provided, however, (s)he shall be considered a permanent employee and shall be suspended or dismissed only for cause.

The language of that provision is inconsistent in making the recorder an employee at will and providing that he/she can be dismissed only for cause, but it does expressly make the recorder a “permanent employee.” In addition, the same provision continues that the recorder has the duties given to him/her by ordinance, but prescribes certain duties for that office. The duties prescribed to the recorder in the charter might have made him/her an officer notwithstanding the designation of that position a “permanent employee.” But it appears to me that it was the intent of the charter to make the recorder an employee. Indeed, while I do not have the city’s personnel policy and regulations governing the classification of employees, I suspect that the recorder is treated by that policy as an employee.

- The police chief also appears to be an employee under the charter. He is given no duties in the charter, and is also denominated a “permanent employee,” who also serves “at the will and pleasure of the board,” yet can be suspended and dismissed only for cause.

- The city judge is clearly an officer under Sections 16A and 16B of the charter.

I see no other positions in the charter that lend themselves to an analysis of whether those positions are officers or employees. There are, of course, members of boards and commissions established under state law whose membership is appointed by the mayor or the board. Most of those positions are probably officer positions. A list of the various boards and commissions of the city can be found in Title 2 of the your Municipal Code.

In spite of the language in Section 7 of the charter that, “The Mayor may fill all vacancies occurring in any office except the Alderman,” it seems to me the mayor should be hesitant to fill any office whose appointment is prescribed by state law, such as the member of the planning commission appointed by the board from the membership of the board. It does not seem to me that such statutes contemplate temporary appointments by the mayor.

**3. How broad is the mayor’s power with respect to his right, under Section 1-201 of the your Municipal Code, to “examine and inquire into the conditions of the several offices, the books and papers, and records therein, the manner of conducting official business, and may call upon any officer of the city for any information pertaining to his office”?**

I have had to give considerable thought to that provision. On its face, it is narrow, expressly pertaining as it does, to “offices” and “officers” of the city. As pointed out above, there appear to be few officers of the city, outside the mayor and aldermen. Causing me problems with the mayor’s power is that in Tennessee, a mayor has no legislative or administrative powers except those given to him by the charter or state law. I have attached a letter I wrote to Mayor Pro Temp X, on that subject on April xx, 2008, for your perusal. While Section 7 of the charter gives the mayor considerable legislative powers, neither it nor any other provision of the charter gives the mayor any administrative powers. In fact, Section 2 of the charter provides that, “The legislative *and supervisory power* of the city is vested in the Board of Mayor and Aldermen elected under this charter....”

But that fact does not necessarily intercept Section 1-201 of the your Municipal Code. The governing body of a city can delegate to the mayor its administrative (but not legislative) powers. It appears to have done that in Section 1-201. Frankly, I think that the board of mayor and aldermen may have intended that the mayor’s administrative powers to “examine and inquire” with respect to the “several *offices*” and to “call upon any *officer*” for information apply to department heads, and to other municipal employees, but that is not what Section 1-201 says. The general rule with respect to the powers of cities and the power of officers of cities is that where there is any doubt about the power, that doubt is resolved against the city or city officer. For that reason, I would be cautious about relying on Section 1-201 for doing any “examination and inquiry.”

But Section 1-210 of the Your City Municipal Code, which governs investigations done by the board, is much broader than Section 1-201. Subsection 1-210 delegates to the mayor the same powers the board has under subsections (2) and (3). Those subsections give the mayor the power to “inquire into the conduct of any department or office of the city, and to make investigations as to city affairs,” and gives the mayor the further power to “subpoena witnesses, administer oaths and compel the production of books, papers or other evidence.”

However, let me say something here about subpoenas: It does not appear to me that the city council can be given the same power as a court to punish for refusal to obey an “order or subpoena.” In Leahy et al v. City of Knoxville, 245 S.W.2d 772 (1952), it was declared that a municipal governing body, in its legislative capacity, has the power to subpoena witnesses and papers. But the power to enforce such a subpoena appears to be in the courts, and not independently in the political entity that has been given the power of subpoena. In Leahy, above, it was the chancery court that made the initial judicial determination of the legality of the subpoenas.

*Leahy dealt with the city’s investigation of its own employees; there is no indication that the subpoenas in that case applied to any private person or entity.* The Court reasoned that “We think that a municipality has the inherent authority to investigate the activities of its several departments and employees,” but it also pointed out that the city had several charter provisions that authorized the city to do investigations of its employees, and that those charter provisions authorized both fines and jail for contempt, including incarceration until the recalcitrant witness purged himself of contempt by agreeing to testify. This case also held that the power of subpoena applied to both witness and their documents, *including private records, although it is not clear what private records were involved.* However, this case relies on the law as I was in 1952; it absolutely should not be relied on by a municipality to invoke contempt powers that involve the imposition of fines and incarceration, or to obtain the *private* records of employees. Today, Tennessee’s Open Records Law has opened most municipal records to wide inspection.

Please let me know if I can help you further in these or any other matters.

Sincerely,

Sidney D. Hemsley

Senior Law Consultant

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