

OPINION
69-37

March 5, 1969 (OPINION)

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RE: Cities - Employment of City Officials by City - Mayor

This is in response to your letter in which you set forth that the City of Harvey has employed the mayor as street commissioner to have full charge of street repair and maintenance subject to the orders of the Council. The City Council arranged the employment, set his hours of labor and determined the compensation to be paid. You also set out some reasons why this was done. You also take cognizance of Section 40-08-01 and Section 40-08-09. You then specifically ask: Is the mayor considered a member of the City Council so as to disqualify him from being employed by the City?

Section 40-08-01 provides as follows:

"CITY COUNCIL - WHO CONSTITUTES. The governing body of a city operating under the council form of government shall be the city council, which shall be composed of the mayor and aldermen."

The North Dakota Supreme Court in the case of Nelson v. Gass, 27 N.D. 357, 146 N.W. 537, referred to this section in an oblique manner. The Court did say that the mayor was a member of the City Council in a limited sense. But was in connection with the issue before the Court. The Court was primarily and basically concerned with the provisions of Section 40-08-02 which states that the City Council shall be judge of the election and qualifications of its own members. After studying the case, it appears that the Court could have reached its conclusion without referring to Section 40-08-01.

The Supreme Court of Iowa in Griffin v. Messenger, 86 N.W. 219, had under consideration a question which also concerned itself with the issue of whether or not the mayor is a part of the Council. In this instance, the question was whether or not the mayor should be counted in determining the number of members on the City Council. The statutes were similar to those of North Dakota. The Court held that the mayor is a part of the Council. On page 219 the Court said, "The mayor was by law made a constituent part of the city council. How it is possible to eliminate him in determining the number of persons composing the council, we are unable to see. * * * The language of the statute is clear and unambiguous where it declares that such ordinances shall be read on 'three different days unless three-fourths of the council shall dispense with the rule.' It does not say three-fourths of the council, excluding the mayor, nor three-fourths of the council ordinarily voting, and to give it the construction contended for by the appellant would require judicial legislation." (Citations omitted.)

The Court in arriving at its conclusion took into account the purpose of the statute. We likewise must take into account the purpose and intent of Section 40-08 09 which provides as follows:

"RESTRICTIONS ON MEMBERS OF COUNCIL. No member of the city council shall:

1. Be eligible to any other office the salary of which is payable out of the city treasury;
2. Hold any other office under the city government, or
3. Hold a position of remuneration in the employment of the city."

The purpose and legislative intent was further clarified by the subsection 3 which was added by Chapter 158, Section 95 of the 1967 Session Laws. It is noted that subsection 3 further restricts the previous provisions of Section 40-08-09. Construing the section as it now stands it becomes quite apparent that the legislature intended to prohibit any members of the City Council from being gainfully employed by the City in one manner or another.

It would appear that the legislature wished to avoid situations where a person can be influence, pressure or by any other means impose his wishes upon the City Council resulting in employment. We are not suggesting that this is what took place in your city but we are merely attempting to illustrate what the legislature wanted to avoid.

We are aware of Section 40-13-05 and Section 12-10-06. These sections, however, pertain primarily with doing business with the governing body. In this respect we would note that there is a distinction between doing business with the governing body and being employed or holding another office the salary of which is paid out of the City funds.

We also note that the number of aldermen is based on population, but in each instance the aldermen consist of even numbers - 4, 6, 8, 12, and 14. Thus we have two classes of officers which constitute the Council. They are mayor and aldermen.

It is therefore our opinion that the mayor is considered part of the City Council and would be governed by provisions of Section 40-08-09.

HELGI JOHANNESON
Attorney General