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ATTORNEY GENERAL OPINION NO. 2018- 7

Ryan B. Denk, City Attorney
City of Gardner, Kansas
McAnany, Van Cleave & Phillips, P.A.
10 E. Cambridge Circle Dr., Ste. 300
Kansas City, KS 66103

Re: Cities and Municipalities—General Provisions—“Governing Body” Defined

 Cities and Municipalities—Miscellaneous Provisions—Official Newspaper
 In Cities of Second and Third Classes; Qualifications

Synopsis: The mayor of a second or third class city is a member of the city’s
 governing body for the purposes of K.S.A. 12-1651. Cited herein: K.S.A.
 12-104; 12-1651; 14-101; 14-301; 15-301

* * *

Dear Mr. Denk:

As City Attorney for the City of Gardner, you ask our opinion on a matter related to the mayor of a second or third class city and the mayor’s membership on the city’s governing body. As background, you describe the City of Gardner’s designation of a newspaper of record pursuant to K.S.A. 12-1651 and the mayor’s vote on the resolution. Specifically you ask whether the Mayor of Gardner, Kansas, was properly permitted to vote on the issue of the designation of a newspaper of record under the applicable statutes of the State of Kansas and under the City of Gardner’s Charter Ordinances.

For the reasons discussed below, we conclude the answer to your question is yes.

State law directs each city of the second and third class to designate an official city newspaper.¹ The governing body is charged with designating the official city newspaper by passing a resolution to that effect.² The governing body may designate a different newspaper to be the official city newspaper by passing a new resolution designating a different official city newspaper.³ The official city newspaper must meet minimum publishing, subscription, and general content requirements.⁴

The term “governing body” is defined by law in certain circumstances. “In acts granting or limiting executive or administrative powers to city governments, or prescribing procedure, the designation of ‘the governing body’ shall be held to include mayor and council, mayor and commissioners and board of commissioners, as the status of cities affected may require . . .”⁵

Before deciding whether the “governing body” in K.S.A. 12-1651 includes the mayor and council, we must first determine if K.S.A. 12-1651 is an act “granting or limiting executive or administrative powers to city governments, or prescribing procedure,” and thus whether the term “governing body” in K.S.A. 12-1651 meets the conditions to be defined as “mayor and council” under K.S.A. 12-104.

Black’s Law Dictionary defines executive power as “the power to see that the laws are duly executed and enforced.”⁶ Black’s Law Dictionary does not define administrative power, but administrative is defined in various contexts to refer to: a public official’s “power to exercise judgment in the discharge of its duties,”⁷ “an act made in a management capacity,”⁸ and “involving the work of managing a company or organization; *executive*.”⁹ A procedure is “a specific method or course of action.”¹⁰

It does not appear the Kansas Supreme Court has established a test for determining whether any given statute represents a grant of executive or administrative power or a prescription of procedure. However, even in the absence of judicial guidance, it is clear that K.S.A. 12-1651 grants cities of the second and third class the power to designate an official city newspaper, limits that grant of authority by setting minimum qualifications for the official city newspaper, and prescribes the procedures for doing so. We therefore conclude the term “governing body” in K.S.A. 12-1651 should be read to mean “mayor and council” pursuant to K.S.A. 12-104.

¹ K.S.A. 12-1651(a).

² *Id.*

³ *Id.*

⁴ K.S.A. 12-1651(b).

⁵ K.S.A. 12-104.

⁶ Black’s Law Dictionary (10th Ed. 2014).

⁷ Black’s Law Dictionary (10th Ed. 2014) (defining “administrative discretion”).

⁸ Black’s Law Dictionary (10th Ed. 2014) (defining “administrative act”).

⁹ Black’s Law Dictionary (10th Ed. 2014) (defining “administrative”) (emphasis added).

¹⁰ Black’s Law Dictionary (10th Ed. 2014).

However, we must also examine the source of the mayor's right to vote as a member of the governing body. Because Gardner is a city of the second class, K.S.A. 14-301 applies. It states:

The mayor shall preside at all meetings of the city council, and shall have a casting vote when the council is equally divided and none other, and shall have the superintending control of all the officers and affairs of the city, and shall take care that the ordinances of the city and this act are complied with.¹¹

In your request for an opinion, you acknowledge the argument that K.S.A. 14-301 could be read to allow the mayor to vote only when the city council is equally divided. You also note K.S.A. 12-1651 directs the *governing body* to designate the newspaper of record, not the *city council*.

We have addressed a similar question in Attorney General Opinion No. 2005-18, in which we opined that the mayor of the City of Topeka was allowed to vote on the adoption of a charter ordinance under Article 12, Section 5(c)(2) of the Kansas Constitution, which requires “a two-thirds vote of the members-elect of the governing body of such city.”¹² This was true even though the council-manager form of government adopted by the city under its home rule powers generally precluded the mayor from voting as a member of the city council. In reaching this conclusion, we relied on the definition of “governing body” in K.S.A. 12-104 and the fact the Legislature continued to use the term—originally defined in 1923—in a manner that would support this interpretation.

Because the Legislature is presumed to have acted with knowledge of existing statutory law and cases,¹³ we presume the Legislature intended for the term “governing body” in K.S.A. 12-1651 to mean “mayor and council” as defined by K.S.A. 12-104. We therefore conclude the mayor of a second or third class city may vote on the resolution designating the official city newspaper pursuant to K.S.A. 12-1651.

You also ask whether the mayor was permitted to vote on the official city newspaper resolution under the charter ordinances of the City of Gardner and included in your correspondence three charter ordinances: Nos. 19, 26, and 27. Each charter ordinance defines the “governing body” as “the mayor and five councilmembers.”¹⁴ Because this definition does not change the statutory definition in K.S.A. 12-104, we do not believe it changes the results of our analysis above.

¹¹ K.S.A. 14-301. Cities of the second class are governed by Chapter 14 of the Kansas Statutes. See K.S.A. 14-101. We note cities of the third class have an identical statute. K.S.A. 15-301.

¹² Kan. Atty. Gen. Op. No. 2005-18.

¹³ *State ex rel. Bd. of Healing Arts v. Beyrle*, 269 Kan. 616, 629 (2000).

¹⁴ Ryan B. Denk, Correspondence, October 4, 2017.

In summary, the mayor of a second or third class city is permitted, as a member of the governing body, to vote on the resolution designating the official city newspaper pursuant to K.S.A. 12-1651. We reach this result because K.S.A. 12-1651 satisfies the threshold requirements to employ the definition of “governing body” in K.S.A. 12-104, and because the statute restricting the mayor’s votes to breaking a tie applies to votes of the city council, not to votes of the governing body.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/ Craig Paschang

Craig Paschang
Assistant Attorney General

DS:AA:CP:sb