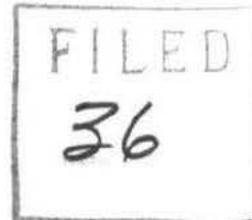


January 12, 1970

OPINION LETTER NO. 36

Honorable John J. Johnson
Senator - 15th District
11001 Patrina Court
Afton, Missouri 63126



Dear Senator Johnson:

This letter is in response to your opinion request concerning whether or not the board of aldermen of a fourth class city can by ordinance provide for the appointment of special counsel when the mayor's temporary appointee and nominee for the office of city attorney is not acceptable to the board. You have furnished us with certain information including what purports to be an ordinance of the fourth class city appointing a person as special counsel and "acting city attorney" for a period of two years and for a designated consideration and authorizing said special counsel to perform the duties of the city attorney.

Insofar as the appointment of a temporary appointee to the office of city attorney is concerned, we note that Section 79.280, RSMo 1959, provides that in the case of a vacancy in any office which is not elective, the mayor shall appoint a suitable person to discharge the duties of such office until the first regular meeting of the board of aldermen thereafter, at which time such vacancy shall be permanently filled. We note also that Section 79.230, RSMo 1959, provides that the mayor with the consent and approval of the majority of the members of the board of aldermen shall have the power to appoint a city attorney.

In our Opinion No. 236, Meyer, 9/9/63, copy enclosed, we held that the mayor can appoint a temporary official to act until the first regular meeting of the board and that the mayor may appoint a temporary official who has been rejected by the board although he may not submit the nomination of any person as a permanent appointee who has previously been rejected. In our view, the conclusion reached in that opinion is correct and the mayor in this instance may continue to appoint a temporary appointee to the office of city attorney even though such appointee has not been approved by the city council as a permanent appointee.

Honorable John J. Johnson

Under Section 79.230, RSMo 1959, the mayor and the board of aldermen may, by ordinance, employ special counsel to represent the city, either in case of a vacancy in the office of city attorney or to assist the city attorney.

As we have stated, examination of the ordinance employing special counsel shows that the special counsel was employed to act as city attorney and to discharge duties peculiar to the office of city attorney.

We do not believe that there is any necessary conflict between the statutes authorizing the appointment of city attorney and the statute authorizing the appointment of special counsel. That is, the mayor has plenary authority to appoint the temporary city attorney and, as we have stated, may appoint as temporary city attorney a person who has been rejected as a permanent appointee. The temporary appointee under Section 79.280 is to "discharge the duties of such office" whereas the appointment of special counsel under the ordinance was to fill a vacancy in the office of city attorney. In our view, the appointment of a temporary city attorney by the mayor fills the vacancy of the office since the office necessarily is occupied by the appointed temporary city attorney. Since there is then no vacancy in the office within the meaning of Section 79.230, the appointment of special counsel to fill the vacancy in such office therefore terminates at such time as the temporary appointee is appointed or re-appointed.

We note that the additional question has been raised as to whether or not the city attorney of a fourth class city must be a resident of such city and whether special counsel need be a resident. Senate Bill No. 15 of the 75th General Assembly removed the residency requirements of previous Section 79.250 as it pertains to the office of city attorney, and the city attorney of a fourth class city need no longer be a resident of such city. Special counsel employed by the city is not an officer of the city and does not have to be a resident.

Yours very truly,

JOHN C. DANFORTH
Attorney General

Enc: Opinion No. 236, Meyer, 9/9/63