



CITY OF CAMBRIDGE

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September 20, 1990

Mr. Robert W. Healy
City Manager
City Hall
Cambridge, MA 02139

Re: Advisory Commission on Appointments

Dear Mr. Healy:

On May 16, you requested my opinion on the attached order of the City Council which proposes to amend the Cambridge Municipal Code, s. 2.58.010. The gist of the amendment is as follows:

1. Every person appointed to a Cambridge board or commission "shall be appointed to a fixed term not to exceed three years, and may be so reappointed."
2. Vacancies in boards and commissions shall be filled within ninety days.
3. Whenever any vacancy arises in any board or commission to be filled by the City Manager, an Advisory Commission on Appointments, shall, within 60 days, after a public process, recommend at least three applicants to the City Manager. The City Manager may not fill the position until the Commission has made its recommendations or until the expiration of the 60 days. The Commission is to consist of Cambridge residents appointed by the City Manager.

QUESTION

The issue is whether the proposed amendment, if passed in proper form, would contravene the Plan E City Charter, G.L. c. 43, ss. 1-45, 93-116.

DISCUSSION

General Laws, Chapter 43, s. 103 provides that the City
 Manager

... shall be the chief administrative officer of the city and shall be responsible for the administration of all departments, commissions, boards and officers of the city
 ...

Section 104 states:

Except as otherwise specifically provided in this chapter, it shall be the duty of the city manager to act as chief conservator of the peace within the city; to supervise the administration of the affairs of the city; to see that within the city the laws of the commonwealth and the ordinances, resolutions and regulations of the city council are faithfully executed; ...

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He shall make all appointments and removals in the departments, commissions, boards and offices of the city for whose administration he is responsible, except as otherwise provided in this chapter, and shall perform such other duties as may be prescribed by this chapter or be required of him by ordinance or resolution of the city council. The city manager shall have and possess, and shall exercise, all the powers, rights and duties, other than legislative, had, possessed or exercised, immediately prior to the adoption of this plan, by the mayor, board of aldermen, common council and all other boards, commissions and committees of the city and their members, severally or collectively, except such as are by this chapter conferred upon the school committee or are otherwise provided for thereby. (emphasis supplied)

Section 105 provides:

Such officers and employees as the city council, with the advice of the city manager, shall determine are necessary for the proper administration of the departments,

commissions, boards and offices of the city for whose administration the city manager is responsible shall be appointed, and may be removed, by the city manager. The city manager shall report every appointment and removal made by him to the city council at the next meeting thereof following such appointment or removal. The city manager may authorize the head of a department, commission or board, or the holder of an office, for whose administration he is responsible, to appoint and remove subordinates in such department, commission, board or office. All appointments by, or under the authority of, the city manager, if subject to chapter thirty-one and the rules and regulations made under authority thereof, shall be made in accordance therewith, and all other appointments as aforesaid shall be on the basis of executive and administrative ability and training and experience in the work to be performed. (emphasis supplied)

Section 107 states:

Neither the city council nor any of its committees or members shall direct or request the appointment of any person to, or his removal from, office by the city manager or any of his subordinates, or in any manner take part in the appointment or removal of officers and employees in that portion of the service of said city for whose administration the city manager is responsible....

In my opinion it is clear from sections 103-105 of the Charter that the City Manager is the chief executive officer and the appointing authority for the City. See Curry v. Cambridge, 351 Mass. 28, 30 (1966); City Manager of Medford v. Civil Service Commission, 329 Mass. 323, 330 (1952); Welch v. Contributory Retirement Appeal Board, 343 Mass. 502, 505-506 (1962); 2 McQuillan, Municipal Corporations, s. 9.21 (1988). His appointment power covers all City boards and commissions. G.L. c. 43, ss. 103, 104.

The proposed amendment raises the question whether it contravenes the Charter to provide that the Manager must delay appointments to boards and commissions for up to sixty days pending the receipt of recommendations from an advisory commission. An additional question raised is whether the City Council, by establishing such an advisory commission, would "take part in the appointment ... of officers and employees in that portion of the service of said city for whose administration the city manager is responsible". G.L. c. 43, s. 107.

The word "appointment" has been defined as follows:

The selection or designation of a person, by the person ... having authority therefor, to fill an office or public function and discharge the duties of the same. (citation omitted)

The term "appointment" is to be distinguished from "election". The former is an executive act

Black's Law Dictionary (1968)

See 6 C.J.S., "Appointment", p. 102 (1975).

"The power to appoint and the power to remove officers are in their nature executive powers." Opinion of the Justices, 303 Mass. 615, 623 (1939); Opinion of the Justices, 302 Mass. 605, 620-621 (1939); Murphy v. Webster, 131 Mass. 482, 488 (1881).

In Massachusetts, there are more cases dealing with the City Manager's removal power than his appointment power. See, e.g. Welch v. Contributory Retirement Appeal Board, 343 Mass. 502 (1962), which held that the City Manager of Medford at his pleasure was entitled to remove the Director of Public Works from office

without complying with the procedures specified in G.L. c. 32, s. 16(2) pertaining to contributory retirement. The Court stated that, "The plain language of (G.L. c. 43), s. 105 seems to contemplate giving immediate effect to the removal and complete freedom of action by the city manager." Id. at 507-508.

The Welch case follows Williams v. City Manager of Haverhill, 330 Mass. 14 (1953), where the facts were as follows: Haverhill had a Plan D form of government, similar to Plan E, which became effective in Haverhill on January 7, 1952, and, on the same day one McLean was appointed City Manager. On January 2, 1950, Williams had been appointed a member of the board of assessors for a term of three years, and he was acting in that capacity on March 6, 1952 when he received a letter from the City Manager notifying him that he was removed from office. Williams brought a petition for mandamus seeking reinstatement.

In finding in favor of the City Manager, the Court held

(1) that the assessing department was one of the departments for whose administration the City Manager was responsible, and, therefore, that an assessor was removable by the City Manager; and

(2) that the Manager was not required to furnish the assessor with specifications of the charges against him or to grant him a hearing.

During the course of its opinion, the Court in Williams stated that under s. 90 of the Plan D Charter, which corresponds to s. 104 of the Plan E charter,

... full and plenary power to make all appointments and removals in various branches of the municipal service has been conferred upon the city manager in order to secure effective administration of those branches for

which the city manager is responsible.

330 Mass. at 17-18.

In Cambridge, it is clear that the City Manager is responsible for the administration of all City boards and commissions. g.L. c. 43, s. 103. It follows from this that the Manager has "full and plenary power" to make all appointments and removals regarding such boards and commissions. According to Black's Law Dictionary (1968), "plenary" means

Full, entire, complete, absolute, perfect, unqualified.

See also Webster's II, New Riverside University Dictionary (1984).

In G.L. c. 43, s. 104, it is stated, inter alia, that the City Manager

shall make all appointments and removals in the departments, commissions, boards and offices of the city for whose administration he is responsible, except as otherwise provided in this chapter, and shall perform such other duties as may be prescribed by this chapter or be required of him by ordinance or resolution of the city council.

It seems clear to me that the "other duties as may be ... required of him by ordinance ..." are duties other than his duty to make all appointments and removals, which is imposed on him by s. 104, and, further, that his duties imposed by ordinance may not impinge on his duty to make appointments and removals.

In Williams, the Court stated:

Nowhere in the various places in the charter where the power of removal is conferred upon the city manager is there the slightest intimation that it should be exercised in any particular manner, nor is there contained therein any indication that it is to be

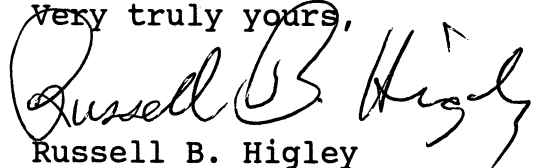
limited in any way except as to persons in the classified civil service.

330 Mass. at 18.

I believe that the same can be said regarding the City Manager's power of appointment.

In my opinion, the proposed Advisory Commission on Appointments would qualify and infringe the City Manager's appointment power under G.L. c. 43, s. 104, and, therefore, would be inconsistent with that section, which is part of the Plan E Charter. Of course, an ordinance which is inconsistent with a state statute is invalid. See, e.g., Bloom v. Worcester, 363 Mass. 136 (1973); Beard v. Salisbury, 378 Mass. 435, 440 (1979); Tierney v. Mayor of Boston, 10 Mass.App.Ct. 404, 405 (1980).

Very truly yours,

A handwritten signature in cursive script that reads "Russell B. Higley". The signature is written in dark ink and is positioned to the right of the typed name.

Russell B. Higley

RBH/jab

Opin#2\ADVCOMM.APT

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EXECUTIVE DEPARTMENT
ROBERT W. HEALY
City Manager

RICHARD C. ROSSI
Deputy City Manager

September 24, 1990

To the Honorable, the City Council:

In response to Calendar Item #3 of May 14, 1990 regarding an Advisory Commission on Appointments, attached is a report from the City Solicitor, Russell Higley.

Very truly yours,

Robert W. Healy
City Manager

Attachment

Agenda # 8 A-64

Calendar Item # 3 of May 14, 1990
regarding an Advisory Commission on
Appointments.

In City Council,

Sept. 24, 1990

Placed on file