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Via email transmission only: opinion.committee@oag.texas.gov

Honorable Ken Paxton
Office of the Attorney General
P.O. Box 12548
Austin, TX 78711-2548

Re: Separation of powers respecting municipal personnel matters. REQUEST FOR OPINION

Dear Sir:

I am submitting this request for an opinion on behalf of the Honorable Pamela Miller, Mayor of the City of Glen Rose.

Issue

Is municipal government subject to the separation of powers set forth in Article II, Section 1 of the Texas Constitution? Has the management of municipal personnel been confided to the Executive branch of municipal government, particularly in the case of a Type A General-Law Municipality? If so, would it be unlawful for a City Council to adopt ordinances or policies inserting itself into day-to-day personnel matters such as hearing appeals of disciplinary action and hearing workplace grievances?

Background

The City of Glen Rose, a Type A General-Law Municipality, has a Personnel Policy which was adopted by ordinance and which, from time to time, is amended by action of the Glen Rose City Council (Council). The policy provides that employees may appeal disciplinary action initiated by management to the Council for reversal or other action. The policy also provides that if an employee is not satisfied with management's response to workplace grievances, that those grievances may be appealed to the Council for its consideration and action.

Concern

This arrangement for Council involvement in employee appeal and grievance proceedings tends to subvert the chain of command, as employees are inclined to approach sympathetic Council members about personnel matters before management, operating under the Mayor's executive authority, has had an opportunity to address said matters through the methods prescribed in the

Personnel Policy, creating confusion and politicizing the management of the City's personnel. Also, the Council's involvement fundamentally alters the nature of the proceedings. The Executive branch is free to handle personnel matters discreetly, the Legislative branch, being subject to the Open Meetings Act, is not (Texas Government Code [TGC] §551.002). Although personnel matters can be handled in a closed meeting, at an employee's request, it has to be handled in an open one (TGC §551.074).

Arguments and Authorities

The doctrine of the separation of powers is foundational to our system of government at all levels: federal, state, and local. Article II, Section 1 of the Texas Constitution provides that, "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

In 1972 in conjunction with the adoption of a revised Texas Constitution, a brief analysis of Article II of that document was provided to the State Legislature by George D Braden in, The Constitution of the State of Texas: An Annotated and Comparative Analysis, "The importance of Article II is not in its precise language but in the general concept of government it announces - a concept that in turn pervades the remainder of the Texas Constitution and has been vigorously developed by the courts and attorneys general in application to government at both the state and local level. The principle has basically two facets. The first is obvious from a reading of Article II--that no member of one branch or "department" of government may exercise powers that are confided to another. The second is present by implication from the first--that those powers constitutionally confided to one body of government cannot be delegated to another body..."

Municipalities are political subdivisions of the state, being recognized as such by statutory law (i.e., Texas Local Government Code [TLGC] §304.001 and Civil Practice and Remedies Code §100.001(3)(B)) and by case law, where we find the court has recognized that municipalities are "created as political subdivisions of the state . . . for the exercise of such powers as are conferred upon them They represent no sovereignty distinct from the state and possess only such powers and privileges as have been expressly or impliedly conferred upon them." *Payne v. Massey*, 196 S.W.2d 493, 495 (Tex. 1946). Being a political subdivision of the State, it would follow that municipal government is subject to the separation of powers as set forth above.

On the municipal level, it is clear that the mayor embodies the executive function. According to §22.042 of the TLGC, Powers and Duties of Mayor (of a Type A General-Law Municipality), "The mayor is the chief executive officer of the municipality. The mayor shall at all times actively ensure that the laws and ordinances of the municipality are properly carried out...The mayor shall inspect the conduct of each subordinate municipal officer and shall cause any negligence, carelessness, or other violation of duty to be prosecuted and punished." Although the word supervision is not used, to "inspect the conduct" of subordinates would be a supervisory function and would be consistent with the exercise of executive authority. The language used in the statute under consideration dates back to the 1879 Revised Statutes of Texas. Similar use of this terminology is found in a law from 1862 on page 979 in Laws Relating to the Navy, Annotated,

by George Melling, where a Commander in the Navy is instructed, “to be vigilant in inspecting the conduct of all persons placed under their command.”

It is equally clear that the City Council embodies the legislative function as pursuant to TLGC §51.001, “The governing body of a municipality may adopt, publish, amend, or repeal an ordinance, rule, or police regulation that is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality...” The City Council is the governing body of a Type A General Law Municipality pursuant to TLGC §21.002, “A reference in this code or another statute to the governing body of a municipality includes a municipal governing body regardless of the name, including board of aldermen, city commission, or city council...”

Summary

Whereas Article II the Texas Constitution prohibits the Legislative, Executive, and Judicial branches of Texas' government from exercising "any power properly attached to either of the others, except in instances herein expressly permitted"; whereas municipalities are political subdivisions of the State and, thus, are subject to the aforementioned constitutional separation of powers; whereas the mayor of a Type A General Law Municipality is recognized as the municipality's chief executive officer; and, whereas the enforcement of ordinances and supervision of personnel, which would include the hearing of appeals of disciplinary matters and the hearing of workplace grievances, are clearly enumerated among the mayor's powers; therefore, the City Council, which is the legislative branch of government on the municipal level, should not arrogate to itself via ordinance or policy the day-to-day management of a municipality's personnel by hearing appeals of disciplinary action or hearing workplace grievances, as such would represent a violation of the doctrine of the separation of powers.

Sincerely,

/s/ Andrew Lucas

Andrew Lucas
Somervell County Attorney

cc: Pam Miller
Mayor, City of Glen Rose, Texas