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MUNICIPAL OFFICIALS IN TEXAS

By

ELLIOTT G. FLOWERS

Research Assistant in the Bureau of
Municipal Research

Bureau of Research in the Social Sciences
Municipal Studies

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The benefits of education and of useful knowledge, generally diffused through a community, are essential to the preservation of a free government.

Sam Houston

Cultivated mind is the guardian genius of Democracy, and while guided and controlled by virtue, the noblest attribute of man. It is the only dictator that freemen acknowledge and the only security which freemen desire.

Mirabeau B. Lamar

Municipal Studies of The University of Texas

BUREAU OF MUNICIPAL RESEARCH

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FOREWORD

To meet a long-felt need on the part of the officeholder, the student of local government, and the layman, the Bureau of Municipal Research published late in 1938 a volume entitled *Police and Allied Powers of Municipalities in Texas.* To comply with a like demand a companion study treating of *Municipal Officials in Texas* is now being presented. It is hoped that these studies will complement each other and that together they will afford a source of valuable information concerning the powers and duties of the municipality and its officials.

Acknowledgment must be made to the Bureau of Research in the Social Sciences of The University of Texas, of which Professor W. E. Gettys is Director, for its financial support. Funds obtained from this agency made possible the preparation and publication of this study.

STUART A. MACCORKLE
Director of the Bureau of Municipal Research

PREFACE

For many years there has been a constantly increasing need for information concerning city officials in Texas, but no concerted effort has been extended toward fulfilling this want. Consequently this study was devised, not to give the new officeholder or the student of government an exhaustive statement of each official's daily duties, but to present an over-all picture of the situation surrounding each office. At this time, however, space does not permit a consideration of all municipal officers, and the discussion is therefore limited to the most common and the most representative officials. Likewise, because of the great variations in duties and powers which occur between cities, only the ordinary activities of the individual officers are treated.

In order that a true picture be presented, forty-five Texas cities and towns representing the various population groups and the different geographical localities were visited. The material obtained in the field was supplemented by information obtained through an exhaustive search of case and statutory law of Texas, and in a few instances other jurisdictions were studied. Correlation and comparison of the many items obtained from these sources serve to emphasize the differences between practice, theory, and law.

The large number of city officials who were interviewed in the preparation of this study offered invaluable aid, and their advice settled many troublesome problems. Special mention must be accorded Mr. E. E. McAdams and Mr. C. C. Crutchfield of the League of Texas Municipalities for their painstaking efforts and time devoted to advising the author. Mr. McAdams, Mr. Crutchfield, and Mr. R. R. Lewis, former City Attorney, Houston, read the entire manuscript, and due to their suggestions many improvements were made. Individual chapters were read and criticized by Mr. George C. Hawley, Chief Engineer, State Fire Insurance Division, Austin; Mr. J. M. Nagle, Director of Public Works, Houston; Mr. Bob Jones, Chief of Police, and Mr. H. P. Kucera, City Attorney, Dallas; Mr. W. H. Gilmartin, Judge of the Corporation Court, Fort Worth; and the following officials of the City of Austin: Mr. Tom Miller, Mayor, Mr. Guiton Morgan, City Manager, Dr. B. M. Primer, Health Officer, Mr. Truman O'Quin, Assistant

City Attorney, Mr. J. E. Motheral, City Engineer, Mr. R. D. Thorp, Chief of Police, and Mr. John Woody, Fire Chief.

Special mention must be given to the staff members of the Bureau of Municipal Research. The Director, Dr. Stuart A. MacCorkle, is responsible for a great amount of whatever merit this work possesses. He conceived the study, outlined the procedure, and carefully supervised the development of the project. Mr. M. G. Toepel, Research Assistant, devoted considerable time to discussion of various problems encountered in the preparation of the manuscript, and he read and ably criticized many portions of it. Much credit must be given to Mrs. Margaret Davis Webb, Secretary to the Director, who read the manuscript and whose assistance on matters of form and rhetoric was invaluable.

ELLIOTT G. FLOWERS.

Austin, Texas,
August, 1939.

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CHAPTER I

INTRODUCTION

A study of the Texas statutes will disclose that there are several available methods of classifying urban communities in this state. First, cities operating under the general laws may be classified as cities and towns or as towns and villages. Title 28 of the Revised Civil Statutes of Texas is denominated "Cities, Towns and Villages," and is divided into twenty chapters, with Chapters 1 through 10 governing cities and towns and Chapter 11 controlling towns and villages. Under Chapter 1, incorporated cities and towns with a population of over 600 or with one or more manufacturing establishments within their limits may accept the provisions of the title. Furthermore, the power to incorporate has been conferred upon the cities and towns of over 600 inhabitants. Communities with a population of not less than 400 and not over 10,000 may incorporate as town or village, but this type of government is rarely found in Texas. For these types of communities a mayor-aldermanic form of government has been devised.

A second method of classification is by type of government, namely mayor-aldermanic, commission, and council-manager. Under Chapter 12 of the Revised Civil Statutes cities or towns of from 500 to 5,000 population incorporated under provisions of Title 28 or any other general law, and any incorporated towns or villages of from 500 to 1,000 population incorporated under Chapter 11, or any other general law, are eligible to adopt the commission form of government.[1] In addition to these possibilities, any unincorporated cities or towns in this state having a population of 500 to 5,000 individuals or any unincorporated town or village of 200 to 1,000 inhabitants may become incorporated under the commission form of government.[2]

As no provision is made for a city manager type of government in the general statutes, this form of government has a tendency to be limited to cities incorporated under the home rule amendment.

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[1]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1154. When an aldermanic general law city has adopted the commission form of government, apparently it is unable to return to its original form.

[2]*Id.* art. 1155.

Several cities under 5,000 population, however, have provided for city manager government by passing an ordinance creating the office of city manager. No one has questioned this action in Texas. Some authorities believe that the manager's position is more unstable and less permanent when it is created by ordinance rather than by a charter provision, but experience in Texas does not bear out this contention.

The third and relatively the simplest classification is to divide the urban communities into "general law" and "home rule" cities, this division being based upon the form of fundamental law under which the city, town, or village operates. Cities under 5,000 population have no choice but to operate under the general laws, although in some few instances they have special charters which govern those cities in so far as the charters do not conflict with the statutes. By the Texas Constitution, Article XI, Section 5, cities of over 5,000 population may adopt a home rule charter. Such cities may "adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinances passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State. . . ."[3] Chapter 13 of Title 28 of the Revised Civil Statutes, which governs cities, towns, and villages of this state, is devoted exclusively to home rule cities.

In the present work all of the above classifications are referred to and used from time to time, but the classification most frequently employed is "general law" and "home rule" cities and towns.

Officials and Employees

It is interesting to note that in many instances there is no uniformity as to who are officials. It is true that the meaning of "official" as distinguished from "employee" has never been fitted into a set pattern and consequently no one can tell who is an official and who is an employee even though it is certain that an employee is not an officer.[4] However, it is a conspicuous fact that a person occupying a certain position in one city may be classed

[3]Tex. Const. Art. XI, §5.

[4]See State *ex rel.* Allen v. City of Spokane, 273 Pac. 748 (Wash. 1929), *aff'd on rehearing,* 277 Pac. 999 (1929).

as an official whereas in another city he might be ranked as an employee. In this study every effort is exerted to classify properly those who are called officials in a majority of the cities. During a recent survey of this problem every city studied was allowed to name those positions in its structure which are classed as offices. Data were compiled upon this problem after a study of forty-five Texas cities representing the various population levels.

When the question is presented as to what individuals fall within the classification of "officers," there immediately arises a great amount of uncertainty and doubt. There is usually some basis for this due to the fact that the circumstances surrounding the particular position vary from city to city. The doubt cannot be resolved through resort to a dictionary but must be clarified only through a broader interpretation of many elements. However, there are certain factors which will distinguish the "office" in all communities. Although an office is an employment, an employment is not necessarily an office. An office, however, is a continuing position, not dependent upon the incumbent. It carries with it a certain amount of dignity, and a varying degree of importance, and is not dependent upon other positions. Customarily an oath and a bond are required of the incumbent. The possessor of the office has definite powers, which may be ministerial in nature but which usually call for an exercise of discretion in the limited scope of the position. An office denotes a position and service of a public character, and every officer should be selected with the welfare of the public in mind.[5]

Municipal offices can be created only by legislative authority, express or implied.[6] In the absence of special charter provisions or legislative enactment, such positions can be created only by ordinance, and not by resolution or mere appointment.[7] The city, however, can fix reasonable restrictions upon the right to hold

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[5]See the following authorities: 43 C. J., Municipal Corporations §§971, 973; COOLEY, ROGER W., HANDBOOK OF THE LAW OF MUNICIPAL CORPORATIONS (1914) §54 (cited hereafter as COOLEY, MUNICIPAL CORPORATIONS); 2 MCQUILLIN, EUGENE, THE LAW OF MUNICIPAL CORPORATIONS (2d ed. 1928) §437 (referred to hereafter as MCQUILLIN, MUNICIPAL CORPORATIONS); and Beale, J. H., *The Progress of the Law* (1920) 33 HARV. L. REV. 1058.

[6]Benson v. Hines, 144 S.E. 287 (Ga. 1928).

[7]Holcombe v. Grota, 129 Tex. 100, 102 S.W.(2d) 1041 (1937).

office under charter.[8] Furthermore, it must not be forgotten that every city office created by charter is subject to abolition through the right of the people to change or amend the organic law.[9]

Some discussion of the city "employee" is in order at this point and note should be taken of his status in the framework of the municipal government and how his position differs from that of the municipal "officer." Naturally, the key differences are lodged in the relative importance of the positions, the employee occupying a position of much less importance than the officer. Furthermore, his position is continuing as well as dependent. In determining whether a particular position is an employment or an office, it is necessary to consider a portion or all of the following factors: (1) relative importance; (2) tenure; (3) supervision; (4) dependence or independence; (5) nature of selection; (6) time of selection; (7) manner of filling vacancies; (8) power to remove and suspend others; (9) manner or mode of creating the position; (10) powers and duties; (11) qualifications of the incumbent; (12) number of positions held by the incumbent; (13) applicability of civil service regulations; (14) personal liability; (15) bond; (16) oath; and (17) compensation and source of payment.[10]

The "employee" is supervised by and works under the "officer." He occupies a permanent position and performs a continuous service, the duties being purely ministerial. Cooley states that the employee is without power to represent or bind the employer.[11]

The determination of the problem lies in the provisions of charters and statutes, so that where elective and appointive officers are absolutely named and fixed by charter, all others connected with

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[8]Lindsey v. Dominguez, 20 P.(2d) 327 (Cal. 1933).

[9]Bennett v. City of Longview, 268 S.W. 786 (Tex.Civ.App. 1925).

[10]This discussion is a compilation of the elements discussed in the following authorities: 43 C. J., Municipal Corporations §973; and 2 McQuillin, Municipal Corporations §§435, 437.

[11]For a discussion of this, see 43 C. J., Municipal Corporations §973; Cooley, Municipal Corporations §54; 2 McQuillin, Municipal Corporations §441. The provisions of a city charter relating to employment become a part of contracts with city employees; furthermore, all contracts for employment are subject to the power of the people to change their form of government. Smith v. City of Port Arthur, 62 S.W.(2d) 385 (Tex.Civ.App. 1933).

the city government must be employees, agents, or servants.[12] Such a charter classification cannot be changed by the city commission, unless the charter makes provision for such action.[13] Municipal officers are sometimes spoken of as being of two classes, governmental and municipal, although police officers are generally held to be state officers as distinguished from municipal officers.[14]

From the standpoint of agency law, many officers and employees are "agents" of the city, and this is of importance in many connections, especially in regard to liability. A city is not liable for the negligence of its agents, servants, or employees in the performance of a duty as representative of the state; but it is liable if acting in a private capacity.[15] A park board, subject to the city council, has been held to be the mere agency of the city in managing and maintaining the park.[16] A park director has no authority to purchase animals for the park, as that necessitates a discretion which is a matter for the park board to determine, as it is charged with the trust of spending the money set aside for the maintenance of the parks.[17] However, a board having charge of municipal affairs may appoint agents to discharge ministerial duties not calling for the exercise of discretion.[18] A city engineer not authorized by ordinance cannot bind a city to pay for certain land and also for removing a building thereon.[19] Likewise, the knowledge of a superintendent of the sanitary sewer department of a city that the payees of certain warrants were fictitious persons entered by him on the time sheets is not imputable to the city.[20]

The relation of master-servant may exist between a city and its employees who are engaged in a proprietary work as distinguished

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[12]30 TEX. JUR., *Municipal Corporations* §105.

[13]*Ibid.*

[14]COOLEY, MUNICIPAL CORPORATIONS §55.

[15]City of Fort Worth v. Wiggins, 5 S.W.(2d) 761 (Tex.Comm.App. 1928).

[16]Wiggins v. City of Fort Worth, 299 S.W. 468 (Tex.Civ.App. 1927), *aff'd*, 5 S.W.(2d) 761 (Tex.Comm.App. 1928).

[17]Horne Zoological Arena Co. v. City of Dallas, 45 S.W.(2d) 714 (Tex. Civ.App. 1931).

[18]*Ibid.*

[19]City of Corpus Christi v. Johnson, 54 S.W.(2d) 865 (Tex.Civ.App. 1932).

[20]National Surety Co. v. State Trust & Savings Bank, 119 Tex. 353, 29 S.W.(2d) 1027 (Tex.Comm.App. 1930).

from officers and employees engaged in public service in a governmental capacity.[21]

Who Are City Officials?

Under the mayor-aldermanic form of government in the general laws, the officers include the mayor, the aldermen, treasurer, assessor and collector, secretary, city attorney, marshal, city engineer, and such other officers as the city council may direct.[22] In this type of city the offices of treasurer, assessor and collector, city attorney, and city engineer may be dispensed with by ordinance and their duties conferred upon other officers.[23] This is also true of the marshal in cities under 3,000 population.[24] All of these officers are to be elected for two-year terms.[25]

The only officers expressly mentioned in the chapter on towns and villages[26] are mayor, marshal, and five aldermen,[27] who are elected immediately in order to make the new community function. In the commission form of government as set forth under the general laws, the officers mentioned are the mayor and two commissioners and a clerk who shall act as treasurer and assessor and collector.[28] An attorney, police officers, and other necessary officers may be appointed.[29]

Charters in the home rule cities name the officials in the particular city. For instance, the charter of Marshall reads:

> In addition to the five commissioners [the officers] shall be a City Treasurer, an Assessor and Collector of Taxes, a City Attorney and a Recorder. . . .
>
> All officers not provided for in this section are hereby abolished, and their occupants shall be deemed employees. . . .[30]

On the other hand, the officials in San Antonio include the mayor

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[21]30 TEX. JUR., *Municipal Corporations* §105.

[22]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 977.

[23]*Ibid.*

[24]*Id.* art. 999.

[25]*Id.* art. 977.

[26]C. 11, Revised Civil Statutes.

[27]Art. 1141.

[28]*Id.* arts. 1158, 1161.

[29]*Ibid.*

[30]Sec. 53 as amended in 1927.

and commissioners, city attorney, city physician, city auditor, purchasing agent, city clerk, and judge of the corporation court.[31]

De Facto and de Jure Officers

The question often arises as to the difference between a *de facto* officer and a *de jure* officer. A *de jure* officer is one who holds his office by right, and has complied with all requirements pertaining to the position. An officer *de facto* is one who, under claim of right or color of title, holds an office *de jure*, and performs the functions thereof with the acquiescence of the public.[32] He has the reputation or appearance of being the officer he assumes to be, but in fact, under the law, he has no right or title to the office he assumes to hold.[33] Even special policemen, continuing to act, with the acquiescence of the city council, after the expiration of their appointment, are *de facto* officers;[34] and the rights, if any, of one appointed chief of police, by written order at a special council meeting having less than a quorum, are those of a *de facto* officer.[35] However, a mere usurper or intruder is not an officer *de facto* as he lacks the color of title and the public reputation and acquiescence essential to a *de facto* officer.[36] There seems to be conflict on the question of whether there can be a *de facto* officer without a *de jure* office.[37] Justice Harlan said:

> A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.[38]

It has been suggested that the term "*de facto* officers" might well

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[31]Charter of the City of San Antonio, secs. 9, 16.

[32]COOLEY, MUNICIPAL CORPORATIONS §59.

[33]2 McQUILLIN, MUNICIPAL CORPORATIONS §500.

[34]Whatley v. State, 110 Tex.Crim.Rep. 337, 8 S.W.(2d) 174 (1928).

[35]City of Desdemona v. Wiley, 262 S.W. 185 (Tex.Civ.App. 1924).

[36]COOLEY, MUNICIPAL CORPORATIONS §59.

[37]Holcombe v. Grota, 129 Tex. 100, 102 S.W.(2d) 1041 (1937) stated that in the absence of an office *de jure* there is no officer *de facto*.

[38]TOOKE, C. W., CASES ON THE LAW OF MUNICIPAL CORPORATIONS (1931) 157, quoting Waite v. Santa Cruz, 184 U.S. 302, 322 (1901).

be applied to those officers who have acted under a statute that has subsequently been declared unconstitutional.[39] McQuillin states that as a general rule there is no *de facto* officer if there is no corresponding office known to the law. Yet it is often held that an officer may be *de facto* under a void law until the law is adjudged invalid.[40] One writer points out that under the older Texas view color of right was required plus such performance of the duties of the office that the public would believe without inquiry that the incumbent was a *de jure* officer.[41] This is the present majority rule, apparently, although it has been stated in Texas that *de facto* officers are those acting in a necessary capacity for a long time with the acquiescence of the public and regarded by it as officers and receiving pay, even though not inducted or appointed to such offices by color of right or title.[42] A public officer *de jure* or *de facto* in possession of an office is entitled to an injunction to restrain anyone disputing his right to it or interfering with his discharge of its duties.[43] Likewise, it has been held that in a suit to enjoin officers from putting into effect ordinances for street paving or collecting the assessments therefor, the right of the mayor *de facto* to hold his office could not be questioned, as acts of *de facto* officers will be sustained in tax cases as in other cases.[44] In another instance a city was organized in 1873, and the organization lasted until 1876. In 1885 a new city was formed, and this community organization lasted until 1890, at which time the courts held that the act of 1873 was still in force. Bonds had been issued in 1885, but the officers acting under the irregular, second organization were held to be *de facto* officers, so that the bonds issued by them were good.[45]

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[39]State of Ohio v. Omar N. Gardner, 42 N.E. 999 (Ohio, 1896).

[40]2 McQuillin, Municipal Corporations §502.

[41]Note (1929) 7 Tex. L. Rev. 318.

[42]*Ex parte* Tracey, 93 S.W. 538 (Tex.Crim.App. 1905).

[43]Uhr v. Brown, 191 S.W. 379 (Tex.Civ.App. 1916).

[44]Cole v. Forto, 155 S.W. 350 (Tex.Civ.App. 1913).

[45]City of Lampasas v. Talcott, 94 Fed. 457, 36 C.C.A. 318 (5th 1899), *cert. denied*, 178 U.S. 612.

Furthermore, an election is good even though ordered by officers *de facto* of the corporation.[46]

The acts of *de facto* officers are valid so far as they concern the public or third persons who have an interest in the thing done. The acts of such officers are validated only from motives of public policy to preserve the rights of third persons and the organization of society.[47] In other words, the title of one who is exercising municipal functions and who is acting as a *de facto* officer cannot be attacked collaterally, before title to the office is determined.[48]

Liability of Municipal Officers

A city is not liable for torts committed by those serving it in the performance of a governmental or public function, but it is usually liable for negligence in carrying on a corporate or private function relating to the city only.[49] Health, sanitation, and fire prevention activities are generally held to be governmental in character, whereas activities such as operating a public utility or maintaining the streets and alleys are normally held to be corporate.

To render a municipal corporation liable for the acts of its agents, the acts must be performed within the scope of the agent's authority

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[46]State *ex rel.* Goodnight v. Goodwin, 69 Tex. 55, 5 S.W. 678 (1887). If the charter gives no time for the election, mayor and aldermen can fix a time and the officers elected have *de jure* title, even though the mayor issuing a call did not have *de jure* title to his office. State *ex rel.* Eckhardt v. Hoff, 29 S.W. 672 (Tex.Civ.App. 1895), *aff'd*, 88 Tex. 297, 31 S.W. 290 (1895). However, where a date is prescribed, though the election is invalid because not held on that day, the mayor and aldermen who are elected and act in their offices are *de facto*. City of Christine v. Johnson, 255 S.W. 629 (Tex. Civ.App. 1923).

[47]2 McQUILLIN, MUNICIPAL CORPORATIONS §504.

[48]*Id.* §505.

[49]White v. City of San Antonio, 94 Tex. 313, 60 S.W. 426 (1901); Barnes v. City of Waco, 262 S.W. 1081 (Tex.Civ.App. 1924, writ of error refused); City of Wichita Falls v. Robison, 121 Tex. 133, 46 S.W.(2d) 965 (1932); Tompkins v. Williams, 62 S.W.(2d) 70 (Tex.Civ.App. 1933); Jones v. City of Texarkana, 100 S.W.(2d) 198 (Tex.Civ.App. 1936, writ of error dism'd). See Note (1925) 11 VA. L. REV. 315.

It was held in Wisconsin that in a tort action brought by the city the contributory negligence of one of its officers whose duties are governmental cannot defeat the defendant's liability. City of Milwaukee v. Meyer, 235 N.W. 768 (1931).

or authorized by the city.[50] Thus, if the servants of a municipality negligently made an opening in the fence of a railroad company and a horse strayed through the fence and was killed by a train, the city is not liable to the railroad company unless the creation of the opening in the fence was within the scope of authority of the agent.[51] When a municipal officer, whose duty it is to permit the use of water to irrigate, willfully deprives a person of water when it is needed by such person, who is legally entitled to it, such an act is within the scope of the officer's duty.[52]

As a general rule it may be stated that municipal officers are not liable for acts carefully performed within the scope of their duties.[53] Thus a suit against a mayor and commissioners of a municipality for their refusal to permit the erection of a filling station was not allowed.[54] The general rule states that no liability will be imposed on municipal officials for injuries arising from their discretionary acts.[55] However, in some instances liability may be imposed for injuries arising from discretionary acts, as when the officer exceeds his authority.[56] Municipal officials are liable for injuries resulting from their ministerial acts, and mistake as to their duty and honest intentions will not excuse the offenders. Although not the general rule, some jurisdictions make a distinction between nonfeasance and misfeasance. In these courts liability will be imposed only for misfeasance and not for mere omission.[57]

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[50]Christopher v. City of El Paso, 98 S.W.(2d) 394 (Tex.Civ.App. 1936, writ of error dism'd).

[51]Chicago, R. I. & G. Ry. v. Porter, 166 S.W. 37 (Tex.Civ.App. 1914, writ of error dism'd).

[52]City of Ysleta v. Babbitt, 8 Tex.Civ.App. 432, 28 S.W. 702 (1894).

[53]2 McQUILLIN, MUNICIPAL CORPORATIONS §556; Ross v. Gonzales, 29 S.W. (2d) 437 (Tex.Civ.App. 1930, writ of error dism'd).

When a municipality is authorized to take private property for public use, its officers and agents making the proposed public improvement cannot be held personally liable for the compensation expressly granted by the Constitution if such improvement is made without negligence which caused the damage to private property. Blair v. Waldo, 245 S.W. 986 (Tex.Civ.App. 1922).

[54]Ross v. Gonzales, 29 S.W.(2d) 437 (Tex.Civ.App. 1930, writ of error dism'd).

[55]43 C. J., Municipal Corporations §1198; 2 McQUILLIN, MUNICIPAL CORPORATIONS §556.

[56]*Ibid.*

[57]*Ibid.*

Many instances are found in municipal case law of personal liability of city officials, and an examination of a few of these will not be amiss. For instance, city officials are personally liable when they illegally disburse public funds.[58] The unlawful and malicious assumption of the power of removal by the mayor to remove an officer will impose liability upon the mayor.[59] But he will not usually be held liable in damages, especially if he acts in good faith and follows a precedent formerly established at the instance and for the benefit of the officer whom he attempts to remove.[60] The silence of a member of a legislative body does not necessarily indicate his acquiescence in the passage of a measure and thus does not render him liable as a joint tort-feasor, for tortious acts done in pursuance thereof.[61] However, it has been held in Texas that officers with legislative powers are exempt from individual liability for the passage of an ordinance within their authority; and furthermore, they are exempt even though the ordinance is not authorized, as under those circumstances the ordinance is void and need not be respected or obeyed.[62] It will be readily admitted that any other rule would make it difficult to obtain competent city officials. Even when the city governing body neglects to perform its duty the members cannot be held liable, since a refusal to exercise its powers is a refusal of the body and not of the individuals composing it. Following this rule the surety on a tax collector's bond, after paying the loss occasioned by the failure of the bank holding the city's collections, was held unable to sue the members of the council personally for their failure to select a depository and require a bond.[63] It must be noted, in addition to this, that the council's duty to select a city depository and require a bond is discretionary and not purely ministerial.[64]

In some instances the same individual may hold two positions,

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[58]Comment (1925) 13 N. C. L. REV. 248; 2 MCQUILLIN, MUNICIPAL CORPORATIONS §562.

[59]43 C. J., Municipal Corporations §1210.

[60]2 MCQUILLIN, MUNICIPAL CORPORATIONS §566.

[61]*Id.* §557.

[62]Ross v. Gonzales, 29 S.W.(2d) 437 (Tex.Civ.App. 1930, writ of error dism'd).

[63]Hartford Accident & Indemnity Co. v. Templeman, 18 S.W.(2d) 936 (Tex.Civ.App. 1929).

[64]*Ibid.*

such as secretary and treasurer, and he will often execute a bond for each office. When, as secretary, he receives and retains money unlawfully, then as treasurer he and his bondsmen are liable, due to the fact that as treasurer he had no justification for permitting the secretary to hold the money.[65]

The courts in the United States are divided as to the liability of a public officer who has funds intrusted to his care. Some courts say he is a bailee, and the situation is governed by the law of bailments, the officer being liable for negligence and dishonesty, whereas other courts impose absolute liability upon the grounds of public policy.[66] In some cases exceptions are made to the latter rule, which is rather harsh. These exceptions are acts of God, acts of public enemies, and overruling necessity.[67]

A police officer who makes an arrest without authority to do so is a trespasser and is personally liable. But the city is not liable for damages arising from acts done by its officers within the authority of city ordinances.[68] Thus, officers are not liable for enforcing a valid ordinance, even though they have discriminated in its enforcement.[69] But they are liable for their negligent or oppressive acts in the enforcement of ordinances and for damages inflicted in attempting to enforce a void ordinance.[70]

It is interesting to note, however, that in Texas it has been held that funds appropriated to indemnify a city officer against liability for acts done within his official duties constitute a public expense.[71]

Another problem which disturbs city officials is whether a tort committed by a subordinate will impose liability upon the officials personally. Generally it is held that an official is not liable for the misfeasance or nonfeasance of subordinates legally employed by him. The officer, however, may be liable for the wrong if he

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[65]Brown v. City of Amarillo, 180 S.W. 654 (Tex.Civ.App. 1915, writ of error refused).

[66]2 McQUILLIN, MUNICIPAL CORPORATIONS §561; Note (1926) 10 MINN. L. REV. 174.

[67]*Ibid.*

[68]Harrison v. City of Columbus, 44 Tex. 418 (1876); see City of Corsicana v. White, 57 Tex. 382 (1882).

[69]30 TEX. JUR., *Municipal Corporations* §142.

[70]City of Desdemona v. Wilhite, 297 S.W. 874 (Tex.Civ.App. 1927).

[71]City of Corsicana v. Babb, 290 S.W. 736 (Tex.Comm.App. 1937).

is negligent in choosing an incompetent person or if he directs the wrong or fails properly to supervise the work of subordinates.[72] An official will not be held liable generally if he has no choice in the selection of the subordinate and such subordinate is not removable by the officer.[73] If the officer acts gratuitously, without compensation, he is not personally liable for the torts of those he necessarily has to employ.

In Texas it has been held that a chief of police is not liable for the negligence of another police officer, not his deputy and not appointed by him.[74] A state statute provides that sheriffs shall be liable for the official acts of their deputies,[75] and such a statute is said to be declaratory of the common law.[76] By the common law or otherwise, the doctrine is firmly implanted in the law that the deputy is not a public servant but is in the employ of his superior. This theory of agency should not be applicable, however, when the subordinate is appointed by civil service regulations.[77]

Criminal liability may be attached to the city official in many instances. These officials are forbidden to be pecuniarily interested in certain contracts upon penalty of a fine.[78] Nor may they trade in claims against the city,[79] accept any frank, privilege, or utility service free or at a rate lower than the regular rate.[80] A city marshal or other person collecting money belonging to the city must make a monthly report to the mayor and council or suffer a penalty.[81] City treasurers must make certain reports or suffer a penalty.[82] Misapplication of public funds,[83] as well as the acceptance of bribes,[84]

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[72] 2 McQUILLIN, MUNICIPAL CORPORATIONS §571; 43 C. J., Municipal Corporations §1199.

[73] *Id.* §1198.

[74] Stinnett v. City of Sherman, 43 S.W. 847 (Tex.Civ.App. 1897).

[75] TEX. VERNON'S ANN. CIV. STAT. (1925) art. 6870.

[76] Rich v. Graybar Elec. Co., 125 Tex. 470, 84 S.W.(2d) 708, 102 A.L.R. 171 (Tex.Comm.App. 1935).

[77] Note (1929) 43 HARV. L. REV. 327.

[78] TEX. PEN. CODE (1925) art. 373.

[79] *Id.* art. 371.

[80] *Id.* art. 372.

[81] *Id.* art. 392.

[82] *Id.* art. 424.

[83] *Id.* art. 95.

[84] *Id.* arts. 159, 160.

is also forbidden. When a municipal corporation causes a stream to become polluted, the mayor and aldermen, knowing of the offense, are liable as representatives of the city.[85] The official in charge of the fire or police department is subject to a fine for violating the statute governing the wages and hours of labor of those working in those departments.[86]

Bonding City Officials

Official bonds usually have two purposes: first, to protect the governing unit against monetary loss by public employees and officials, and second, to guarantee faithful performance of duty on the part of those same individuals. It is a very difficult matter to recover upon the second provision, as it is practically impossible to determine when an official has been unfaithful in the performance of his duties.[87] This type of provision is often limited to such duties as may be prescribed by statute. It is held in some jurisdictions, including Texas,[88] that liability of an officer under a bond can arise only for breaches of the bond by acts done *virtute officii*,[89] and that there is no liability for acts done *colore officii*.[90] In spite of this rule, however, it is said the sureties may be liable if they assent to the action which makes the loss possible. In other jurisdictions the rule is that the sureties are liable under the bonds for acts done by the officer *colore officii* in line of official duty, although such acts are illegal. The conflict between the various jurisdictions is only as to acts done *colore officii*, because necessarily the sureties are liable for acts done *virtute officii*, where the bond is broken thereby.[91]

Formerly sureties of bonds were responsible citizens who had confidence in the officials, but at the present time the sureties are usually corporations organized to do such business. Formerly a personal bond was the form used, that is, a bond on the individual

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[85]*Id.* art. 698.

[86]TEX. PEN. CODE (Supp. 1938) art. 1583.

[87]Fesler, Mayo, *A Sound Policy for Bonding City Officials* (1934) 16 PUBLIC MANAGEMENT 49.

[88]Gold v. Campbell, 117 S.W. 463 (Tex.Civ.App. 1909) and authorities therein cited.

[89]Acts within authority but improper exercises of authority.

[90]Acts for which there is no authority.

[91]2 McQUILLIN, MUNICIPAL CORPORATIONS §569.

named therein, but today a position bond is customarily utilized. This type of bond, covering the position instead of the individual, is usually acceptable to the agent as he can do more business with less effort, and it is preferable to the authorities since it means a reduction in the rates and less trouble in changing the bonds when the personnel changes.[92]

It is wise for a city to develop a sound bonding policy in order to avoid the waste of time and money in bonding officials. A sound bonding policy includes the following features: (1) paying for bonds out of official funds; (2) limiting the bonds to the positions in which the officers or employees handle money or valuable property which can be converted into money; (3) having the bond written to cover the position rather than the individual; (4) placing the purchasing of bonds on a competitive basis and providing for an annual or biennial letting; and (5) purchasing bonds only from a surety company whose reputation is good and whose solvency is assured.[93]

General law cities have the power to require a bond of all officers for the faithful performance of their duties.[94] The marshal,[95] treasurer,[96] police officers,[97] and assessor and collector[98] are specifically named. In addition to these the mayor and commissioners in cities operating under the commission form are required to execute a bond.[99] Furthermore, home rule charters often prescribe bonds for various officials.

Prohibition against Occupying Two Offices

The Texas Constitution provides that no person "shall hold or exercise, at the same time, more than one civil office of emolu-

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[92]Fesler, *A Sound Policy for Bonding City Officials* (1934) 16 PUBLIC MANAGEMENT 49.

[93]*Ibid.*

[94]TEX. VERNON'S ANN. CIV. STAT. (1925) arts. 1002, 1146 (8).

[95]*Id.* art. 999.

[96]*Id.* art. 1001.

[97]*Id.* art. 998.

[98]*Id.* art. 1044.

[99]*Id.* art. 1162.

ment."[100] The common law rule states that an officer cannot hold two incompatible and inconsistent offices,[101] but many constitutions, like that of Texas, make no express point of incompatibility. When the officer accepts and qualifies for the second office the first office is automatically vacated,[102] as a person appointed to two offices can elect which he will hold but he may not hold both. This rule holds true even though the office obtained second in point of time is inferior to the first or title to the second office fails. However, if the consent of superiors is necessary to a relinquishment of the first office, then acceptance and qualification of the second office do not relinquish the first.[103]

If the two offices in question are incompatible then the constitutional provision forbidding the holding of two offices is not controlling. Thus if the city aldermen have power over both the school property and the duties of the school trustees, the offices of alderman and school trustee are incompatible.[104] Disregarding the question of incompatibility, as mentioned above, it will be noted that the Texas Constitution limits the prohibition to offices of emolument. For example, if the offices are not inconsistent, one person can hold both so long as no pay is received for one.[105] Furthermore, under these circumstances a person can qualify as city assessor without vacating his office of school trustee.[106]

The board of aldermen of a town may not authorize a health inspector to perform duties and receive compensation of the health

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[100]TEX. CONST. Art. XVI, §40. Art. XVI, §17 of the Texas Constitution, which provides that all officers in the state shall continue to perform their duties until a successor has been qualified, does not govern cases falling under Art. XVI, §40. Note (1934) 12 TEX. L. REV. 367. See TEX. VERNON'S ANN. CIV. STAT. (1925) art. 988.

[101]Note (1927) 12 IOWA L. REV. 203; Note (1934) 12 TEX. L. REV. 367. Rules similar to these are both logical and desirable but it is true that in many instances a hardship is worked upon the individual. See Comment (1935) 10 ST. JOHN L. REV. 83.

[102]State *ex rel.* Kingsbury v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109 (1886).

[103]Note (1934) 12 TEX. L. REV. 367.

[104]Thomas v. Abernathy County Line Indep. School Dist., 290 S.W. 152 (Tex.Comm.App. 1927).

[105]See Graves v. M. Griffin O'Neil & Sons, 189 S.W. 778 (Tex.Civ.App. 1916).

[106]State *ex rel.* Brennan v. Martin, 51 S.W.(2d) 815 (Tex.Civ.App. 1932).

officer, as in such case he would have two offices.[107] Nor may one man hold both the position of assessor and collector for an independent school district and assessor and collector for a city in that district.[108] But a different situation arises where additional duties are conferred upon a particular office. Thus the legislature may impose upon the city assessor and collector the duty of collecting school district taxes and he is not considered as holding two different offices.[109] Likewise a new office is not created when a charter provision makes some of the aldermen members of the board of appraisement, conferring duties on them to equalize taxes.[110] It is said to be settled in Texas that these additional duties may be placed on an official, and his salary increased, without violating the Texas Constitution.[111]

The general laws of Texas provide that no member of the city council may hold any other office under the city government while he is a member of the council,[112] although additional duties may be placed upon him.[113]

Conclusion

The foregoing discussion has been designed to acquaint the reader with the basis of municipal officialdom in Texas, and to serve as a background for the specific material which is to follow. As mentioned above, each city studied was asked to list its officers, as distinguished from employees, and it is upon this listing, the Texas statutes, and various city charters, as well as upon common practice and court decisions, that the following chapters are based. Since it is impossible to execute a comprehensive list of city officials in Texas, the positions which occur most commonly in a majority of cities are discussed.

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[107]Brumby v. Boyd, 28 Tex.Civ.App. 164, 66 S.W. 874 (Tex.Civ.App. 1902).

[108]Odem v. Sinton Indep. School Dist., 234 S.W. 1090 (Tex.Comm.App. 1921). The Attorney General of Texas on February 23, 1939, ruled that a teacher in a state college was not prohibited from holding a municipal office.

[109]First Baptist Church v. City of Fort Worth, 26 S.W.(2d) 196 (Tex. Comm.App. 1930).

[110]City of Houston v. Stewart, 99 Tex. 67, 87 S.W. 663 (1905).

[111](1936) 23 TEXAS MUNICIPALITIES 69.

[112]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 988.

[113]TEX. CONST. Art. XVI, §30.

CHAPTER II

MEMBERS OF THE GOVERNING BODY

Under any available test, a member of a municipal governing body must be classed as an "official," and not as an "employee," because of the relative importance of the position, the control of municipal affairs lodged in the office, and the multitude of duties and powers enjoyed by it. The statement has been made that all powers conferred upon the city and not granted to any particular officer belong to the council.[1] Variations occur between cities. For instance, in the aldermanic and commission-governed cities the governing bodies perform administrative functions as well as legislative, whereas in cities with city managers, the latter possess all administrative powers.

In colonial days the governing bodies of cities were bicameral in form, but through the years the unicameral body has proven more effective, more economical, and more helpful in defining responsibility and centralizing authority. With two exceptions,[2] all governing bodies in Texas are unicameral in form. There is also a definite tendency to establish and maintain a smaller group, which operates in a much less unwieldy manner than the large councils.

The types of men sitting on city councils in this state are so varied that they form a conglomerate group of individuals; and this is true even though all charters, in addition to the general laws, attempt to standardize the position to a certain extent by setting up formal requirements. These formal standards are common to all communities, but there are other, equally important, gauges to determine fitness for a position which are never mentioned or written into charters and statutes. For instance, one of the most important attributes of a councilman or a commissioner is his interest in city and civic affairs. He must have a genuine, unaffected, driving interest in the affairs of the community, without regard to the desires of isolated, particular groups who attempt to

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[1]KNEIER, CHARLES M., CITY GOVERNMENT IN THE UNITED STATES (1934) 341.
[2]Beaumont and Sherman.

influence him for their own betterment. *Western City*, a magazine devoted to the interests of cities in several western states, recently published the following criteria to be applied to members of governing bodies:

> A term as a member of a City Council—or a Planning Commission or a Library Board—can be a rich and varied experience for a man. A certain amount of education is required, not formal learning, but a sense of the eternal fitness of things and of proper proportions, which is a mark of true education. A legislative official or one who sits upon the directorate for some particular municipal function, need not have any great accumulation of factual knowledge concerning the administration of government. But he does need judgment. He needs judgment to fit the immediate problem into its proper perspective. He needs to be sensitive to the countless problems which face him, and all of us, in this world in which we live today. He sits in a position of authority and power on questions of social interrelationships and personal interests, fully as often as he must make policy determinations on matters of public safety to water supply. Discrimination, tolerance, and ability to distinguish the sham from the genuine, a tough hide and a certain persistence toward a high standard of decency in government—these are the qualities needed in a Councilman, regardless of the size of the city he serves.[3]

Although constituting a regrettable condition which cannot be remedied or adjusted without a relaxation of the standards, the statutory and charter requirements placed upon prospective councilmen and commissioners are stereotyped and straitlaced. The sole statutory provision applying to cities and towns incorporated under the general laws requires the councilman or alderman to be a resident of the ward from which he is elected,[4] and if he moves from that ward his office is deemed vacant.[5] In towns and villages incorporated under Chapter 11 of the Revised Civil Statutes, Title 28, the councilman must be twenty-one years of age, and in addition to being a qualified elector under the laws of the state he must have resided in the limits of the town for six months.[6] There is but little variation in the standards of eligibility designated by the charters of cities and towns operating under the home rule amend-

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[3] (Jan. 1939) 15 WESTERN CITY 11.

[4] In this type of community there are two aldermen elected from each ward. TEX. VERNON'S ANN. CIV. STAT. (1925) art. 987. If the city is not divided into wards, five aldermen are elected from the whole city. *Id.* art. 977.

[5] *Id.* art. 987.

[6] *Id.* arts. 1141, 1137.

ment, and in most instances charters adopt and enlarge upon the statutory provisions governing the general law cities and towns. The most common charter requirements are as follows: the individual member of the governing body must (1) be of at least a certain age, usually twenty-five years; (2) be a resident citizen, sometimes for a definite period of time; (3) be a citizen of the United States; (4) possess the qualifications of an elector; (5) be an owner of property in the city; and (6) not owe the city any money or taxes. The individual city may adopt one or more of these requirements, or any combination which it may feel is best suited to its needs.

In addition there are certain negative qualifications placed upon the office of alderman or commissioner which in effect operate as very definite eligibility standards governing the office. The general laws specify several limitations of this type: first, the officer can hold no other office under the city government;[7] second, he must not be interested in any contract or work which must be paid for by the city; third, he is forbidden to be surety for any person holding a contract with the city which requires security; and finally, he must not be surety on a bond for any city officer.[8] Most city charters contain virtually the same provisions, as the framers were very zealous in safeguarding the integrity of city offices. However, some variations occur, as in Houston, where the charter provides that the commissioners cannot be interested in any public work or contract which is supervised or paid for by the State of Texas or any of the counties or municipalities therein, whether incorporated under general or special law.

Members of governing bodies in Texas cities are universally elected by popular vote. Aldermen may be elected by wards or at large, whereas all true commissioners are elected at large. In many cities "aldermen" are elected to head departments; so frequently it is impossible to determine the exact nature of the form of government used in the particular city. There is much variation in the commission-governed cities and towns as a commissioner may be

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[7]See c. I, pp. 23–25.

[8]Tex. Vernon's Ann. Civ. Stat. (1925) art. 988. Generally a municipal contract in which a member of the council is pecuniarily interested is void. City of Edinburg v. Ellis, 59 S.W.(2d) 99 (Tex.Comm.App. 1933).

elected without reference to department, or may be elected as director of a particular subdivision of the city government.[9] Houston, whose history is typical of many Texas cities, adopted the commission form of government in 1905. Under the original form, departmental heads were not designated, but later the commissioners were assigned to departments. In 1913 charter amendments clarified the duties of the commissioners, making one individual the land and tax commissioner, another the fire commissioner, the third the street and bridge commissioner, and the fourth the water commissioner. The mayor was in charge of all departments not assigned to the commissioners. In 1932 an amendment was adopted removing the commissioners from departments and designating them 1, 2, 3, and 4, and the power to operate and direct all departments was lodged in the commission as a whole.

The prevailing term of office of councilmen and commissioners is two years in duration, this period being expressly fixed by statute for the aldermanic[10] and commission cities[11] incorporated under the general laws, and by charter provision in most cities operating under charter. In towns and villages, which are the communities incorporated under Chapter 11 of Title 28, the term of office of all elective officials is one year.[12] Although there is probably less need of a longer term for the councilman or commissioner than for any other municipal official, there still exists an excellent opportunity to improve the office by lengthening the term, when the present constitutional objections are removed.

Salaries are an important factor to be considered in connection with an discussion regarding the type of men desired in an office. The position must appeal to the highest type of individual, and upon this supposition it might be argued that a good salary is necessary. However, there are many civic-minded people who will accept a position of this type without pay; and many students of the problem advocate the election of such an individual, believing that a salary attracts only those of mediocre ability.[13] On the other

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[9]See p. 35.

[10]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 977.

[11]*Id.* art. 1158.

[12]*Id.* arts. 1143, 1144.

[13]KNEIER, CITY GOVERNMENT IN THE UNITED STATES, 327-28.

hand, a salary must be paid if it is necessary to have representation of all classes, because the individuals whose salaries are within the lower income brackets cannot afford to donate their services.

The great majority of the cities studied require the members of the governing bodies to work only part time. In the general law aldermanic cities the monthly salaries are nominal, just as is true of the aldermanic charter cities. In some cities, however, a small monthly salary, such as $5 or $10, is paid. Furthermore, in some of the general law cities there are councilmen who work without pay. Provision is made in the statutes governing the general law commission cities for the commissioners to be paid $5 for each regular meeting and $3 for each special meeting, with the special meetings expressly limited to five each month.[14] In lieu of this type of payment, cities over 2,000 population may provide for an annual salary of $600 for each commissioner.[15] In practice not all general law cities follow the statutory provisions, and if any salary is paid at all, it is but nominal in amount. Commissioners in some home rule cities are paid $5 a meeting, in others $5 a month, and in some as high as $200 a month for part-time work. In San Antonio and Houston, where the commissioners work full time, the monthly salaries are $500 and $300, respectively.

In city manager cities, the members of the governing body work only part time and consequently are paid but small amounts, usually about $10 or $20 per meeting, and sometimes with an annual maximum of $520 or $1,040, which is based upon fifty-two weekly meetings.

None of the aldermanic cities studied place their councilmen under a bond, but this form of control finds great favor in the commission-governed cities. In the general law commission cities all three of the members of the board of commissioners are required to enter into a $3,000 bond conditioned for the faithful performance of the duties of their office.[16] All of the cities studied within this classification comply with the requirement of a bond, but not with the amount stated. Approximately one-half require a $3,000 bond, whereas the remainder require only $1,000 or $1,500.

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[14]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 1164.

[15]*Ibid.*

[16]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1162.

Of the cities operating under the home rule amendment, slightly less than one-half of those studied do not require a bond of their commissioners, but the balance of the cities place bonds upon their commissioners ranging in amount from $2,000 to $5,000. San Antonio requires only the commissioner of taxation to be bonded. Not infrequently the commissioners in city manager cities are required to give a bond, usually in the amount of $1,000.

In the general law aldermanic city or town, if a vacancy occurs the city council is required to order a new election to fill it.[17] The aldermen in those communities may be removed from office for official misconduct, willful violation of any ordinance, habitual drunkenness, incompetency, or for such other cause as may be prescribed by ordinance.[18] When a written, sworn complaint is given to the mayor, he files it and notifies the alderman so charged by causing him to be served with a copy. A day is set for trial and all aldermen are notified. The mayor and the aldermen, other than the one charged, constitute a court to try and determine the case.[19] In this trial the rules of procedure governing a justice of the peace court are in effect. If two-thirds of the members of the court present find the defendant guilty and determine that the charges are sufficient cause for removal from office, the presiding officer of the court enters judgment removing the alderman from office. Any municipal officer so removed is not eligible for reëlection to the same office for two years from the date of removal.[20]

If a vacancy occurs in any office created either by the section of the statutes governing towns and villages or by the board of aldermen acting under its provisions, such vacancy is filled by the acting aldermen.[21] This provision apparently includes the office of alderman. If there is a vacancy on the board of commissioners in general law commission cities, the other commissioners fill it by appointment; however, if two vacancies occur at the same time they

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[17] *Id.* art. 989. Vacancies in positions other than mayor or councilman are filled by appointment by the mayor, confirmed by the council. *Ibid.*

[18] *Id.* art. 5991.

[19] *Id.* art. 5992.

[20] *Id.* art. 5994. Apparently this procedure applies to commissioners also.

[21] *Id.* art. 1146.

are filled through a special election called by the county judge of the county.[22]

If a vacancy occurs in the council of a home rule city, there are two currently popular methods by which it may be filled. One is for the remaining members, by a majority vote at a regular meeting, to elect a member to fill the vacancy, and the other is to call a special election. One charter provision reaching the courts provided that in the event an elective office became vacant the council on the mayor's nomination should fill the vacancy by a majority vote. The court held that under such a provision the power to fill vacancies is in the council composed of the mayor and board of aldermen, and the mayor may not fill a vacancy by his individual appointment, even though the council is not in session. Furthermore, the aldermen cannot appoint by themselves.[23]

In the city of Uvalde, any member of the council who may be indicted upon a felony charge, or against whom impeachment charges have been preferred, is automatically suspended. Other grounds of removal usually stated in home rule aldermanic cities are drunkenness, unexcused failure to attend meetings for a certain number of times, misconduct, and willful neglect of duties. Members are usually protected by provisions affording them a hearing after the charges are put in writing.

Commissioners in most home rule cities may be removed for malfeasance, nonfeasance, misfeasance, misconduct, acceptance of bribes, continual drunkenness, or other grounds sufficient in the

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[22]*Id.* art. 1159. In one case in order to fill certain vacancies an election should have been called, but the mayor appointed the necessary two commissioners. They were held to be *de facto* officers. City of South Houston v. Carman, 6 F.(2d) 358 (C.C.A. 5th 1925), *cert. denied*, 269 U.S. 563 (1925).

[23]Brumby v. Boyd, 28 Tex.Civ.App. 164, 66 S.W. 874 (1902). A charter granting the council authority to appoint policemen and prescribe their duties and compensation was held to be self-executing, requiring no resolution or ordinance to make it effective. City of Paris v. Cabiness, 44 Tex.Civ.App. 587, 98 S.W. 925 (1906).

judgment of the commission.[24] Whenever a vacancy occurs in the commission it may be filled by various methods. For instance, in some cities the remaining commissioners may appoint a person without restriction, whereas in others this appointment is valid only if certain factors or conditions are present, and if they are not persent a special election is necessary. Other cities provide for an election as the only available method.

In the home rule city manager cities studied, provision is often made that in the event there is a vacancy on the council the remaining members have the power to fill it. If a large number of vacancies occur a special election is frequently necessary.

The grounds for removal are virtually the same in all cities, whether they operate under an aldermanic, commission, or city manager form of government. The only difference lies in the manner of expression and the terminology utilized. Similarly, the methods of filling vacancies, as we have seen, do not vary greatly with the various types of cities.

Powers of Governing Bodies

In General

The statutes governing the communities incorporated under the general laws operate as a "charter" for those cities, whereas the charter proper operates as the guide and standard for the cities and towns operating under the home rule amendment. A home rule city possesses powers not inconsistent with the constitutions of the United States and Texas or with the general laws of the state;[25]

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[24]When city commissioners are under an indictment charging them with the commission of offenses against the city, they cannot use public funds to pay attorneys to defend such action. State *ex rel.* La Cross v. Averill, 110 S.W.(2d) 1173 (Tex.Civ.App. 1937, writ of error refused); City of Del Rio v. Lowe, 111 S.W.(2d) 1208 (Tex.Civ.App. 1937), *rev'd on other grounds,* 122 S.W.(2d) 191 (S.Ct. 1938).

[25]See Keel v. Pulte, 10 S.W.(2d) 694 (Tex.Comm.App. 1928). The charter of the City of Victoria, Sec. 62, provides: "The City Council shall have full power and authority, subject to the veto power of the Mayor, the Constitution and laws of the State, to exercise all powers conferred upon the City of Victoria by this Charter."

and all powers of the city are in actuality powers of the governing body, if they are not specifically conferred upon another agency.[26] A city council, when acting on subjects over which it has the power to legislate, is an entirely independent law-making body and can neither be interfered with nor be subjected to inquiry by the courts as to its motives, reasons, or purposes in enacting ordinances.[27] The governing body, however, cannot abrogate power and discretion vested in it by the voters.[28] In like manner, if the city can drain and clean land, the council is without power to leave to the determination of the health officer the question of necessity for work done, or to the city engineer the kind of work necessary to be done, without an exercise of its own discretion.[29] Furthermore, a city charter will not be construed to empower the city council to destroy city government, if the language is susceptible of an application which will preserve all of the law intact.[30]

The powers of city councils and city commissions are very similar in Texas general law cities, there being no essential difference in the type of function or operation of the bodies. This is well illustrated by Article 1163, which provides the following:

> The "Board of Commissioners" of all incorporated and unincorporated cities or towns and villages of over five hundred and less than five thousand inhabitants incorporated under or adopting the commission form of government under the provisions of this chapter, shall have all the authority and powers, and be subject to all of the duties granted and conferred under Chapters 1 to 10 both inclusive of this title, except where same may conflict with some provision of this chapter. In incorporated and unincorporated towns and villages of more than two hundred and not more than five hundred inhabitants, adopting or incorporated under the commission form of government hereunder, the "Board of Commissioners" shall have all authority and powers conferred under Chapter 11 of this title except where the same may be in conflict with some provision contained herein.[31]

By conferring the powers of the aldermanic cities upon the com-

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[26]See note 1, *supra.*

[27]Houston Elec. Co. v. Mayor and City Council of City of Houston, 212 S.W. 198 (Tex.Civ.App. 1919, writ of error dism'd).

[28]Fooshee & Hungerford v. City of Victoria, 54 S.W.(2d) 220 (Tex.Civ.App. 1932, writ of error dism'd).

[29]Lufkin v. City of Galveston, 56 Tex. 522 (1882).

[30]Fenet v. McCuistion, 105 Tex. 299, 147 S.W. 867 (1912).

[31]Tex. Vernon's Ann. Civ. Stat. (1925).

mission-governed cities it will be seen that the functions of a city council and of a city commission are essentially the same, although a few variations are possible due to the difference in governmental structures. The same is true of home rule cities, some charters attempting to set forth a comprehensive list of powers of the governing bodies, and others merely providing for a general grant of power.

As pointed out previously,[32] city commissioners sometimes are elected as heads or directors of specific departments, and when this occurs their powers are limited functionally in practice to the duties of their department, just as in practice ward aldermen are limited organically to their wards. In San Antonio the commissioners are divided so as to direct the activities of the following departments: department of taxation, department of sanitation, parks, and public property, department of streets and public improvements, and department of fire and police. The commissioner of taxation is given charge of the assessment and collection of taxes and the collection of all revenues of the city. He directs, inspects, and supervises all accounts and records. The commissioner of sanitation, parks, and public property supervises sanitation and has control of all parks, watercourses, sewers, the city hall and market house, and all other buildings and grounds belonging to the city. The commissioner of streets and improvements has charge of the construction, improvement, and maintenance of all highways in the city. The commissioner of fire and police directs all fire and police regulations of the city. Galveston names the departments in this manner: finance and revenue, waterworks and sewerage, streets and public property, and police and fire. The fire and police commissioner possesses duties similar to those of the same official in San Antonio, although he is in express charge of the police and fire stations. The waterworks and sewerage commissioner supervises the construction and maintenance of the waterworks and sewer system. The commissioner of streets and public property has charge of the streets, alleys, public grounds, and property of the city, lighting the streets and cleaning them. The commissioner of finance and revenue enforces all laws for the assessment and collection of taxes of every kind and the collection of all revenues

[32]See p. 29.

belonging to the city. He examines into and keeps himself informed as to the finances of the city.

It is rare for a councilman or a commissioner to perform duties other than those attendant upon his position as a member of the governing body of the city. There are several reasons for this, the foremost of which is the constitutional prohibition against holding two positions. There is also a feeling among the inhabitants of the cities, towns, and villages that the members of the legislative bodies of their communities should remain separate from the daily turmoil surrounding the routine city affairs. Furthermore, civic-minded individuals will frequently accept a nomination to a city council, whereas they would hesitate to accept any other position with the city government. A relatively rare situation occurs in Southside Place, however, where the aldermen are appointed to the following positions by mutual consent among themselves: secretary, assessor and collector, treasurer, head of the sanitary, street, and bridge department, and building inspector. These men, in turn, employ a full-time paid assistant who is virtually a city manager. Pelly has a division somewhat similar to this, and in Robstown one of the councilmen is chief of the fire department.

Although the proper name for city manager cities is "council-manager," most Texas cities utilizing this form of government operate with a commission rather than a council. There is probably a historical reason for this terminology. The first type of government used in Texas was the mayor-aldermanic form. After the storm of 1900 the city of Galveston adopted the commission form, and many cities, after following the lead of Galveston, retained this form for a number of years. Thus, when the city manager plan gained in popularity and cities began adopting that form of government, members of the governing bodies were frequently spoken of as commissioners. The terms "commission" and "council" are generally treated as being synonymous in most Texas cities, regardless of the form of government.

Legislative Powers

The inhabitants of most Texas cities have a somewhat perverted view of the meetings of the governing body. This is due in a measure to newspaper reporting, and also to the fact that all too often city councils operate in any but a harmonious manner. News-

papers have a tendency to emphasize the news which has the most human appeal for its subscribers, and as a result they publish only the more exciting incidents which occur in council meetings. The members of the city commissions and councils foster this tendency by continually attempting to maintain their names before the public and the voters, and the easiest manner in which this may be done is to appear argumentative, pugnacious, and antagonistic in the presence of their compatriots. Such action is a part of our municipal political activities and is not entirely an indictment of municipal government.

The regularity of council or commission meetings varies, but they commonly take place once a week or twice a month. Stated meetings in general law aldermanic cities may be held at such times and places as the council directs by resolution,[33] and special meetings may be called by the mayor upon his own motion or that of three of the aldermen, by giving notice to each member, to the secretary, and to the city attorney.[34] In general law commission-governed cities the board is required to hold at least one regular monthly meeting, and in addition to this the mayor or two of the commissioners may call as many special meetings as are necessary.[35] The latter provision is indirectly limited by the same statute, which provides that the board shall not be paid for more than five meetings in any month.[36] In the cities operating under the home rule amendment some charters provide for a definite number of meetings, while others merely provide that the governing body may determine the times it shall meet. Such charters do not state in detail the procedure to be followed.

Members of city councils and city commissions are usually required to attend meetings. In general law aldermanic cities, if a member does not attend meetings he is fined $3 for each meeting missed, unless he is absent on account of his sickness or that of his family.[37] If a member is absent from three consecutive regular meetings without excuse he is deemed to have vacated his office.[38]

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[33]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1008.
[34]*Ibid.*
[35]TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 1164.
[36]*Ibid.*
[37]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1009.
[38]*Ibid.*

In practice, not all cities levy fines, although a few penalize the absent member by withholding his salary. Not all commission cities operating under the general laws require attendance at board meetings, but as in some aldermanic cities, when a commissioner is required to attend and he fails to do so, his pay will frequently be withheld.

There is a similar situation in the cities operating under the home rule amendment, as some cities prefer to penalize the absent member, whereas others do not. In some of the cities which have a rule penalizing absence, the requirement is not always enforced. However, offsetting a total lack or laxity of enforcement there is apparently a feeling among the councilmen and commissioners that they have a moral duty to attend all meetings.

In the cities incorporated under Chapters 1 to 10 of Title 28 of the Revised Civil Statutes, as soon as possible after the election of the city officials, one of the aldermen is elected president *pro tempore;*[39] and similar provisions for a mayor *pro tem* are made in virtually all city charters. It is this individual who performs the duties of the mayor in the latter's absence or when the office of mayor has been vacated.

Within its own sphere of jurisdiction the council is virtually autocratic. Thus, under the general laws the body determines its own rules of procedure and is the judge of the election and qualification of its members.[40] Home rule and special charters provide substantially the same thing, allowing the governing body to determine the details of its operation. A journal of the proceedings of the governing body must be kept, although in some cities this duty is implied rather than expressed. The council, of course, is aided in this function by the city secretary or clerk.

The power to approve various matters, such as the compromise of litigation by the city attorney, or the sale of realty by an officer, is important and is often exercised by the city council or the board of commissioners and in some instances by the mayor. Although charters and governing bodies often require the approval of the

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[39]*Id.* art. 991.

[40]*Id.* art. 1008. It has no jurisdiction to determine a contest of an election for city marshal, although it passed an ordinance providing it might do so. Vosburg v. McCrary, 77 Tex. 568, 14 S.W. 195 (1890).

mayor in connection with legislation or of the mayor or city manager relative to action undertaken by the city, most steps taken or performed by any city official must be validated or allowed by the governing body. In practice, the official involved in the particular activity suggests or recommends to the governing body the course of action to be adopted, and the board follows that recommendation. This requirement of consent or approval is very broad and its operation permeates the whole field of municipal activity. Consequently any discussion of its limits is inadequate.

The governing body of any city, within statutory or charter limits, possesses power to create and abolish offices, to fix salaries and bonds of the incumbents of those positions, and to transfer duties pertaining to them. General law city councils may require additional duties of all officers whose duties are set out by statute,[41] but this does not confer upon that body the authority to place upon one officer the powers and duties given to another under the statutes.[42] Similar to the authority to create an office, conferred by statutes and charters, express provision is frequently made for the abolition of certain offices. These two powers, of creation and abolition, can be used to improve city government to such an extent that all arguments against their exercise are overruled; yet on the other hand they may be the subject of much abuse. Efficiency in operation and improvement in personnel may be guaranteed through a careful and judicious exercise of the power to create and abolish municipal offices. In many cities there are offices which are unnecessary to successful operation of the city government and which possess too many duties for the incumbent to perform with efficiency. A new council or commission discovers that it is extremely easy to create an office or to confer additional duties upon an existing one, but that it is difficult to abolish an office or to divest a position of a portion of its duties, because when this is done someone is unemployed or placed in a position with less authority.

The power possessed by the council in its control of the salaries of city officials is somewhat analogous to the powers possessed by it in the creation and abolition of duties and offices. By statutory permission, the city council in general law communities fixes the

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[41]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1002.

[42]Beard v. Decatur, 64 Tex. 7, 53 Am.Rep. 735 (1885).

compensation to be paid officers elected or appointed by it, and such compensation may not be changed during the term for which the officers are elected or appointed.[43] Similar authority is given to most cities operating under a charter. Furthermore a salary fixed before an election cannot be increased after the election by permitting a recovery on a *quantum meruit.*[44] A city council empowered by charter to regulate by ordinance the compensation of officers and employees is without authority to pass a resolution empowering the mayor to contract for the collection of delinquent taxes.[45]

Virtually all cities in Texas possess the power, by charter and statute, to fix the bond under which many of their city officials operate. This is merely another indication of the control exercised by cities over their officers. Statutory bonds are designated for certain offices in the various types of cities; for example, a bond is required of the mayor and commissioners[46] under the commission form of government and of the treasurer in cities adopting the provisions of Chapters 1 to 10 of Title 28.[47] In towns and villages bonds may be required of the marshal and other officials and if the marshal does not comply within five days another is to be appointed.[48]

The extremely strategic control possessed by the governing bodies over municipal finances and the essential part played by such groups in budget formation are characteristic of the fundamental powers of the legislative branch of city government. The mayor also fulfills an essential part in the formation of the budget, as he is designated the budget officer for the city governing body except in cities operating under the city manager form of government, in which case the city manager acts as the budget officer.[49] After the budget has been prepared by the mayor or the city manager the governing body provides for a public hearing thereupon,[50] which

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[43]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1010.

[44]Bickle v. City of Panhandle, 43 S.W.(2d) 640 (Tex.Civ.App. 1931, writ of error refused).

[45]Brand v. City of San Antonio, 37 S.W. 340 (Tex.Civ.App. 1896).

[46]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1162.

[47]*Id.* art. 1001.

[48]*Id.* art. 1146.

[49]TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 689a-13.

[50]*Id.* art. 689a-15.

must take place within fifteen days after the budget is filed and before the governing body makes its tax levy. Possessing authority to make such changes as it judges best, the governing body must act on the budget at the conclusion of the hearing.[51] Although the mayor, or the manager in council-manager cities, possesses tremendous power in preparing the budget, the city council or board of commissioners has even more strength, as it has the authority to change or alter, to pass or reject, the budget as prepared by the executive.

The governing body of every incorporated city, town, or village is authorized by statute to receive applications from banking associations or firms and bankers for the custody of city funds.[52] After the bids have been received the governing body selects a depository, which must comply with certain conditions precedent, such as the giving of a bond. When this is done, the city council or commission executes an order designating the firm or person selected as the depository.[53]

An additional control exerted by the governing body over municipal finances is the power to pass ordinances, resolutions, and other measures which have an effect upon the moneys received and expended by the city. For instance, the council may decide to license vegetable dealers and in order to enforce the regulations suitably it levies a license fee. On the other hand, the body may decide to pave a certain street or to buy land for public purposes. The cumulative effect of the many small items passing over the council table is not inconsiderable.

The power to tax is, of course, exclusively within the control of the city council, although many details have been conferred upon other municipal officials by statute or by ordinance.[54] Charters commonly provide that cities may levy taxes, such grants being very general in terminology. In towns and villages incorporated under Chapter 11 of Title 28 of the Revised Civil Statutes the alder-

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[51] *Ibid.*

[52] *Id.* art. 2559.

[53] *Id.* art. 2561.

[54] In general law cities the aldermen may sit as a board of equalization, but before they undertake this duty it is advisable to pass an ordinance to that effect. *Id.* art. 1048.

men have the power to levy and collect occupation taxes and real and personal property taxes at the rate of one-fourth of one per cent on the $100 valuation.[55] The Constitution of Texas fixes the maximum tax rates in cities and towns operating under both the general laws and home rule charters. In the former the rate cannot be over one and one-half per cent of the taxable property,[56] whereas in the home rule cities it cannot be over two and one-half per cent.[57] Some charter cities have different rates than those prescribed by the Constitution, as for instance Houston, where the rate is two per cent. The provisions of these charters govern the particular city in so far as they do not conflict with the Constitution and general laws.

The most important single grant of power conferred upon cities by statute or by charter provision is the authority to pass ordinances. The general laws provide that the city council may:

> . . . pass, publish, amend or repeal all ordinances, rules and police regulations, not contrary to the Constitution of this State, for the good government, peace and order of the city and the trade and commerce thereof, that may be necessary or proper to carry into effect the powers vested by this title in the corporation, the city government or in any department or office thereof; to enforce the observance of all such rules, ordinances and police regulations, and to punish violations thereof. No fine or penalty shall exceed one hundred dollars.[58]

This general grant of power is often copied substantially into home rule charters of this state,[59] although some charters dismiss the grant with a terse statement that "The commission shall enact all ordinances and resolutions and adopt all regulations. . . ."[60] The power to enact ordinances is incidental to the creation of municipal corporations,[61] but all ordinances must be in subordination to the charter, as the power of the city or town cannot exceed that conferred by the charter.[62] Although there is a presumption that the

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[55]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1146.

[56]TEX. CONST. Art. XI, §4.

[57]*Id.* §5.

[58]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1011. See also *id.* arts. 962, 968, 1145.

[59]See Charter of the City of San Benito, Art. II, Sec. 2.

[60]Charter of the City of Harlingen, Art. V, Sec. 10.

[61]30 TEX. JUR., *Municipal Corporations* §154.

[62]Vosburg v. McCrary, 77 Tex. 568, 14 S.W. 195 (1890).

governing body intended the adoption of a valid ordinance,[63] an ordinance passed without authority is void.[64]

An ordinance is a by-law of the municipality, enacted by the council or commission as a local law prescribing a general and permanent rule for persons or things within the corporate boundaries.[65] In other words, it is a by-law passed by the governing body

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[63]City of Fort Worth v. Gulf Refining Co., 125 Tex. 512, 83 S.W.(2d) 610 (1935).

[64]Goar v. City of Rosenberg, 53 Tex.Civ.App. 218, 115 S.W. 653 (1909).

As demonstrated in the text, the authority for a municipal ordinance may be found either in an express grant of power, in a grant of power general in its nature, or in incidental or implied powers. If an ordinance is passed by virtue of an express power, the courts cannot inquire into the reasonableness of it, as such inquiries in that case rest with the law-making body. But questions as to the original power to enact ordinances or as to the constitutionality thereof may be decided by the courts. In the case of a grant general in nature and in the case of incidental or implied powers, the court may inquire into reasonableness of the ordinance. See 2 McQUILLIN, MUNICIPAL CORPORATIONS §760. See also Royal Indemnity Co. v. Schwartz, 172 S.W. 581 (Tex. Civ.App. 1914, writ of error dism'd); Munger Oil & Cotton Co. v. City of Groesbeck, 194 S.W. 1121 (Tex.Civ.App. 1917); City of San Antonio v. Fetzer, 241 S.W. 1034 (Tex.Civ.App. 1922, writ of error refused); City of Bowie v. Painter, 255 S.W. 498 (Tex.Civ.App. 1923); Scruggs v. Wheeler, 4 S.W.(2d) 616 (Tex.Civ.App. 1927, writ of error refused). But in cases where reasonableness may be inquired into, the courts presume that the ordinance was enacted in the exercise of sound discretion and unreasonableness must clearly appear. If there is any doubt, then the ordinance will be upheld. West v. City of Waco, 275 S.W. 282 (Tex.Civ.App. 1925), *aff'd*, 116 Tex. 472, 294 S.W. 832 (1927); *Ex parte* Wilchar, 102 Tex.Crim.Rep. 549, 278 S.W. 850 (1925); City of Dallas v. Ingram, 284 S.W. 345 (Tex.Civ.App. 1926, writ of error refused); Harvey v. City of Seymour, 14 S.W.(2d) 901 (Tex.Civ.App. 1929); Miks v. Leath, 26 S.W.(2d) 726 (Tex.Civ.App. 1930); City of San Antonio v. Teague, 54 S.W.(2d) 566 (Tex.Civ.App. 1932, writ of error refused). The enactment of a void ordinance will be enjoined where mere enactment of itself will work irreparable injury, without the aid of some wrongful act committed within and authorized by its terms. Garitty v. Halbert, 225 S.W. 196 (Tex.Civ.App. 1920); City of Dallas v. Couchman, 249 S.W. 234 (Tex.Civ.App. 1923, writ of error refused); Atlas Metal Works v. City of Dallas, 30 S.W.(2d) 431 (Tex.Civ.App. 1930). And when it is impossible to separate the valid from the invalid portions of an ordinance the whole ordinance must be condemned. Sam's Loan Office, Inc. v. City of Beaumont, 49 S.W.(2d) 1089 (Tex.Comm.App. 1932).

[65]COOLEY, MUNICIPAL CORPORATIONS §49.

for the regulation and control of its affairs and those of its citizens.[66] A resolution, on the other hand, "is an appropriate form for an act of temporary character, not prescribing a permanent rule of government."[67] It is not a law, but is the mere expression of the opinion or mind of the council concerning some matter of administration.[68]

One difference between a resolution and an ordinance is that while no set form of words is essential to constitute a resolution if the requirement which calls for an expression of the opinion of the governing body is met,[69] it is essential that an ordinance be in writing before it is acted upon by the council, and it must be at least substantially invested with the formalities and characteristics of an ordinance as distinguished from a motion or resolution. Another difference is that sometimes the mayor may veto ordinances but not resolutions or motions. Furthermore, if the charter gives the governing body the power to act by ordinance upon a particular matter, the council or commission cannot act by resolution or motion.[70] While it seems "that the expression of a command by

[66]30 TEX. JUR., *Municipal Corporations* §154. McQuillin says this power seems to be as old as the Twelve Tables of the Roman Civil Law. 1 MCQUILLIN, MUNICIPAL CORPORATIONS §377.

[67]COOLEY, MUNICIPAL CORPORATIONS §49.

[68]30 TEX. JUR., *Municipal Corporations* §155.

[69]*Ibid.*

[70]*Id.* §156. A resolution of a city council is not an ordinance where the charter prescribing the manner in which ordinances must be passed was not complied with. American Construction Co. v. Davis, 141 S.W. 1019 (Tex.Civ. App. 1911, writ of error refused). Thus a vote of council will be set aside upon the grounds that it was a resolution instead of an ordinance, when the charter requires an ordinance and certain formalities in its enactment. Masterson v. Town of Hedley, 265 S.W. 406 (Tex.Civ.App. 1924). Likewise an attempt of the council to levy a tax for current expenses by means of a simple motion instead of by ordinance is ineffectual. City of Odessa v. Elliott, 58 S.W.(2d) 34 (Tex.Comm.App. 1933). Under charter, the purchase and improvement by the city of land for a public park with funds raised by the sale of interest-bearing bonds are acts of a permanent nature, and legislation in regard to such acts must be evidenced by an ordinance duly passed by the council and not by a mere resolution. City of Beaumont v. Matthew Cartwright Land & Improvement Co., 224 S.W. 589 (Tex.Civ.App. 1920, writ of error refused). A levy made by the city council pursuant to the adoption by the council of a report of a finance committee recommending the amount of taxes to be levied and how they shall be apportioned, and not by ordinance as required by statute, is void. People's Nat'l Bank v. City of Ennis, 50 S.W. 632 (Tex.Civ.App. 1899).

the council, though in the form of a resolution, may be valid as an ordinance even where the charter requires the council to legislate by ordinance—provided it is passed in conformity to the other requirements of the charter relating to ordinances—yet a resolution cannot be deemed an ordinance . . . if it is not expressed in the mode or form required by the charter." This is true where it does not contain the enacting clause prescribed for ordinances by a mandatory charter provision.[71]

If no form for ordinances is prescribed by statute or charter, any form is permissible so long as it expresses the corporate will and clearly indicates its terms and the object to which it applies.[72] The validity of an ordinance is determined not alone by the caption and the phraseology, but also by its practical operation and effect.[73] As an ordinance must be reduced to writing before it can be acted upon by the city council it "means something more than a verbal motion subsequently reduced to writing" by the clerk or secretary of the council.[74]

The Texas Constitution requires a statute to state the subject in the title, but this requirement is generally held not to apply to municipal ordinances.[75] However, some charters provide that ordinances and resolutions be confined to one subject which is to be expressed in the title. Ordinances enacting building codes do not violate this requirement.[76] Furthermore, an ordinance is not invalid by reason of surplusage.[77]

A Texas statute provides that:

The style of all ordinances shall be "Be it ordained by the city council of

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[71]30 TEX. JUR., *Municipal Corporations* §156.

[72]Community Natural Gas Co. v. Northern Texas Utilities Co., 13 S.W.(2d) 184 (Tex.Civ.App. 1928, writ of error dism'd).

[73]*Ex parte* Baker, 127 Tex.Crim.Rep. 589, 78 S.W.(2d) 610 (1934).

[74]American Construction Co. v. Seelig, 104 Tex. 16, 133 S.W. 429 (1911).

[75]30 TEX. JUR., *Municipal Corporations* §157; Craddock v. City of San Antonio, 198 S.W. 634 (Tex.Civ.App. 1917, writ of error refused); Northern Texas Utilities Co. v. Community Natural Gas Co., 297 S.W. 904 (Tex.Civ. App. 1927, writ of error refused). All of the cities studied in a recent survey inserted the purpose of the ordinance in the caption.

[76]Magnolia Petroleum Co. v. Beck, 41 S.W.(2d) 488 (Tex.Civ.App. 1931, writ of error dism'd).

[77]Bassett v. City of El Paso, 28 S.W. 554 (Tex.Civ.App. 1894), *aff'd*, 88 Tex. 168, 30 S.W. 893 (1895).

the city of....." (inserting the name of the city); but it may be omitted when published in the form of a book or pamphlet.[78]

Similar provisions governing enacting clauses are found in home rule charters and in special charters. Such provisions are mandatory,[79] and an ordinance without an enacting clause is void.[80] The corporate name of the city of Calvert is "Mayor, Aldermen, and Inhabitants of the City of Calvert," but an enacting clause of an ordinance reading "Be it ordained by the city council of the city of Calvert" is valid.[81] An ordinance of the city of Brownsville reading "Be it ordained by the city of Brownsville" as required by charter is not void because it did not include the phrase "by council of."[82] An ordinance is not invalid because it uses "ordered" instead of "ordained."[83] The enacting clause need not be at the beginning of the ordinance,[84] but in practice nearly all cities place it at that point.[85]

The city council may rescind any action previously taken, and may repeal ordinances unless vested rights have accrued and are interfered with, or unless the statutes of the state limit the repeal

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[78]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1012.

[79]At least substantial compliance is necessary, as illustrated elsewhere. Vance v. Town of Pleasanton, 261 S.W. 457 (Tex.Civ.App. 1924), *aff'd*, 277 S.W. 89 (Tex.Comm.App. 1925).

[80]Galveston, H. & S. A. Ry. v. Harris, 36 S.W. 776 (Tex.Civ.App. 1896). See Harvey v. City of Seymour, 14 S.W.(2d) 901 (Tex.Civ.App. 1929).

[81]*Ex parte* Keeling, 54 Tex.Crim.Rep. 118, 121 S.W. 605, 130 Am.St.Rep. 884 (1908).

[82]City of Brownsville v. Fernandez, 202 S.W. 112 (Tex.Civ.App. 1918).

[83]30 TEX. JUR., *Municipal Corporations* §157.

[84]Community Natural Gas Co. v. Northern Texas Utilities Co., 13 S.W.(2d) 184 (Tex.Civ.App. 1929, writ of error dism'd).

[85]It is often suggested that a city install a bill drafting bureau for the city council or commission, and such suggestions merit considerable attention in the larger cities. The City Club of New York, Committee on City Administration, recommends that the council appoint a legislative counsel or commissioner whose qualifications shall be: an attorney admitted to practice, a skilled legislative draftsman, and a person versed in the city and state law. His duties would be to approve as to form all local laws and resolutions before their introduction to the council, and upon request of a council member or committee to draft or aid in drafting any measure, and also upon request of such to advise as to the constitutionality and effect of proposed legislation. CITY CLUB OF NEW YORK, A BILL DRAFTING BUREAU FOR THE CITY COUNCIL (1938) 6.

of prior ordinances.[86] The Texas Constitution[87] provides that no law shall be amended by reference to its title, but apparently this provision does not apply to municipal ordinances.[88] Where a statute or an ordinance consists of numbered sections, each dealing with the same subject matter, one or more of these sections may be amended without interfering with other parts of the article or ordinance.[89]

An ordinance may be repealed only by another ordinance with the same formalities, and an oral motion or a mere resolution cannot amend or affect an ordinance.[90] It has been held that as an ordinance cannot be repealed by a resolution, a resolution fixing the compensation of the city treasurer and secretary did not repeal an ordinance, but the ordinance setting the salary had ceased to operate by reason of its temporary nature because it was passed under article 1010 of the Texas Revised Civil Statutes.[91] This same article was held to have repealed an ordinance theretofore passed, fixing the salary of the mayor of the city.[92] Therefore the legislature may repeal an ordinance.[93]

Repeal of a measure by implication, as distinguished from an express repeal, is frowned upon by the courts. It has been held that a comprehensive zoning ordinance, covering the entire subject of earlier ordinances, impliedly repealed the earlier ordinances on

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[86]City of Belton v. Head, 137 S.W. 417 (Tex.Civ.App. 1911).

[87]Art. III, §36.

[88]Craddock v. City of San Antonio, 198 S.W. 634 (Tex.Civ.App. 1917, writ of error refused).

[89]City of Laredo v. Frishmuth, 196 S.W. 190 (Tex.Civ.App. 1917, writ of error dism'd).

[90]COOLEY, MUNICIPAL CORPORATIONS §50; 30 TEX. JUR., *Municipal Corporations* §163; City of Panhandle v. Bickle, 31 S.W.(2d) 843 (Tex.Civ.App. 1930, writ of error dism'd).

[91]Brown v. City of Amarillo, 180 S.W. 654 (Tex.Civ.App. 1915, writ of error refused). Article 1010 reads as follows: "The city council shall, on or before the first day of January next preceding each election, fix the salary and fees of office of the mayor to be elected at the next regular election, and fix the compensation to be paid to the officers elected or appointed by the city council. The compensation so fixed shall not be changed during the term for which said officers shall be elected or appointed."

[92]City of Uvalde v. Burney, 145 S.W. 311 (Tex.Civ.App. 1912).

[93]COOLEY, MUNICIPAL CORPORATIONS §50.

zoning.[94] But an ordinance giving the city attorney 10 per cent of all sums collected for the city whether he assisted in their collection or not was not considered as being repugnant to a subsequent ordinance giving him a salary and fees in addition to specified cases attended to by him, and was not impliedly repealed thereby.[95] Furthermore, an ordinance of San Antonio prohibiting meat markets within six blocks of the city market was not impliedly repealed by a subsequent ordinance requiring a license from the city board of health for the operation of food products establishments, there being no repugnancy between the two.[96] On the other hand, a valid ordinance is not repealed by an unconstitutional ordinance.[97] In a similar manner, a municipal ordinance prohibiting the reconstruction of buildings damaged by fire is not repealed by a building code ordinance which provides for the repeal of all ordinances in conflict therewith, when the building code ordinance depends for its enforcement upon the establishment of fire zones and the city had not passed ordinances creating or establishing such zones.[98]

An important question that arises in connection with the passage of an ordinance is what constitutes a quorum of the council or commission, or how must the governing body vote to put a measure into effect? In cities incorporated under Chapters 1 to 10 of Title 28 it is provided that the city council shall be composed of the mayor and two aldermen from each ward, of which a majority will constitute a quorum. A two-thirds vote of the full board is necessary at called meetings or "meetings for the imposition of taxes."[99] If a city is not divided into wards, then the council shall be composed of the mayor and five aldermen.[100] In cities incorporated under Chapter 11 the provision is made for the mayor and three of

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[94]Scott v. Champion Bldg. Co., 28 S.W.(2d) 178 (Tex.Civ.App. 1930).

[95]City of Austin v. Walton, 68 Tex. 507, 5 S.W. 70 (1887).

[96]Tomassi v. City of San Antonio, 268 S.W. 273 (Tex.Civ.App. 1924, writ of error refused).

[97]City of Laredo v. Frishmuth, 196 S.W. 190 (Tex.Civ.App. 1917, writ of error dism'd).

[98]Scanlan v. Home Ins. Co., 79 S.W.(2d) 186 (Tex.Civ.App. 1935, writ of error refused).

[99]See State *ex rel.* Rea v. Etheridge, 32 S.W.(2d) 828 (Tex.Comm.App. 1930).

[100]Tex. Vernon's Ann. Civ. Stat. (1925) arts. 977, 1033.

the five aldermen to constitute a quorum.[101] In commission cities a mayor and two commissioners are provided for but there is no provision concerning the necessity of a quorum to transact business.[102] Home rule charters, as a group, usually have provisions covering all situations. For instance, the charters of the cities of Marshall,[103] and Houston[104] require an affirmative vote of the majority of the members elected in order to pass an ordinance or resolution, whereas the charter of Amarillo requires only a majority of the quorum.[105]

McQuillin defines a quorum as "that number of the body which when legally assembled in their proper place will enable them to transact their proper business, or, in other words, the number that makes a lawful body and gives them power to pass a law or ordinance or do any other valid corporate act."[106] When the statutes are silent, the common law states that a majority of the members-elect constitute a legal body.[107] Following the common law, in the absence of charter or statutory provisions, a majority of the quorum is all that is necessary to pass an ordinance or motion.[108] Members present but not voting may be counted in order to have a quorum.[109] Where a specified vote is necessary the question arises as to whether it means a percentage of the whole number or of the quorum.

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[101]*Id.* art. 1145.

[102]Revised Civil Statutes, c. 12.

[103]Charter of the City of Marshall, Sec. 39.

[104]Charter of the City of Houston, Art. VII, Sec. 6. Under an old Austin charter provision was made for fourteen councilmen and the mayor could vote in case of a tie. One councilman died and one was absent, and out of the remaining twelve, seven voted in favor of a measure and five against. The mayor voted also, voting in favor of the measure. The ordinance was upheld, as it received a majority, and the court did not consider the contention that the mayor could not vote as there was no tie. Nalle v. City of Austin, 41 Tex. Civ.App. 423, 93 S.W. 141 (1906, writ of error refused).

[105]Charter of the City of Amarillo, Art. V, Sec. 14.

[106]McQUILLIN, EUGENE, MUNICIPAL ORDINANCES (1904) §103.

[107]Heiskell v. Mayor, *etc.*, of Baltimore, 4 Atl. 116, 57 Am.Rep. 308 (Md. 1885).

[108]McQUILLIN, MUNICIPAL ORDINANCES §105.

[109]*Ibid.*

Applicable to state legislatures also, the general rule is that it means a percentage of the quorum.[110]

In case a majority of a quorum is allowed to act, if all the members of a six-man council are present and three vote in favor of a measure and three remain silent, the latter three will be held to have acquiesced in the affirming vote. Four of the six members would constitute a quorum and three of that number would be effective, and the court expressly states that "it is always the vote of the majority of the quorum that is effective."[111] There is apparently a conflict, however, on this decision.[112]

Ordinances must be adopted according to law,[113] and they must be in writing before they are acted upon. If no provision is made otherwise, the council may enact its own rules of procedure, but mere failure to conform to rules of parliamentary usage will not invalidate an ordinance.[114]

In cities and towns operating under the general laws all ordinances and resolutions adopted by the council must go to the city secretary

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[110]*Id.* §106. But see State *ex rel.* Rea v. Etheridge, 32 S.W.(2d) 828 (Tex. Comm.App. 1930), for an exception.

[111]Rushville Gas Co. v. City of Rushville, 23 N.E. 72 (Ind. 1889). It has been held that where four councilmen were present, three constituting a quorum, an official vacancy was validly filled by a vote of two, the other two not voting. This was held to be true even though the latter two had previously expressed opposition. Martin v. Ballenger, 77 P.(2d) 888 (Cal. 1938).

[112]McQUILLIN says that the silence of a member of a municipal legislative body is not assent and does not render him liable as a joint-tort-feasor for tortious acts done in pursuance thereof. 2 McQUILLIN, MUNICIPAL CORPORATIONS §557.

[113]Kerr v. Shambaugh, 86 S.W.(2d) 798 (Tex.Civ.App. 1935); Peters v. Gough, 86 S.W.(2d) 515 (Tex.Civ.App. 1935); *Ex parte* Farnsworth, 61 Tex. Crim.Rep. 342, 135 S.W. 538 (1911); City of Fort Worth v. Lillard, 272 S.W. 577 (Tex.Civ.App. 1925), *aff'd*, 116 Tex. 509, 294 S.W. 831 (1927).

[114]McQUILLIN, MUNICIPAL ORDINANCES §115; 30 TEX. JUR., *Municipal Corporations* §158.

and then the mayor signs those which he approves.[115] Where the approval by the mayor of ordinances and resolutions is necessary, such is indispensable to the validity of the measures.[116] The act on the part of the mayor is not a ministerial, but a legislative act, and the approval must be active and direct.[117] Where the charter or law requires his approval or signing, his presence at a meeting or his approval of the minutes thereof will not constitute a signing or an approval so as to render the proceedings valid.[118] The adoption of an ordinance must be shown by formal entry in a book provided for that purpose and kept where it is conveniently accessible to members of the municipal governing body, and to the public.[119]

In general law cities and towns all ordinances and resolutions not signed by the mayor are returned to the council with his objections. After reconsideration the ordinance or resolution shall be in force if a majority of the whole number of aldermen agree to pass it. It goes into effect three days after it is given to the secretary's office if the mayor neglects "to approve or object to any such proceedings."[120] Under a similar provision in an old Galveston charter it was held not necessary that a veto message of the mayor should be returned to the council within three days after passage of the ordinance or resolution. No such duty is inferred from the requirement to place such resolution or ordinance in the office of the city clerk and for it to remain there for three days before going into

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[115]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 997. Similar provisions are found in special charters. Some charters provide that approval of the mayor is unnecessary. The Dallas charter, Sec. 173, reads: "The final passage of an ordinance by the Council or other governing body and the publication of the same when so required shall be all that is necessary to make such ordinances valid and effective. The approval or signature of the Mayor shall not be necessary."

[116]State *ex rel.* Osburn v. City of McAllen, 127 Tex. 63, 91 S.W.(2d) 688 (Tex.Comm.App. 1936).

[117]*Ibid.*

[118]*Ibid.*

[119]City of Weslaco v. Porter, 56 F.(2d) 6 (C.C.A. 5th 1932). See TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1000.

[120]*Id.* art. 997.

effect. It there awaits, for three days, the veto or the express or silent approval of the mayor.[121]

In some special charters the power of veto exists only in case the council takes action in the nature of legislation by ordinance or resolution,[122] and under other charters the power is confined to ordinances.[123]

In towns and villages incorporated under Chapter 11 of Title 28 no ordinance or by-law shall be enforced until it has been published at least ten days in three public places in the town, or in a newspaper if one is published in the town.[124] In cities incorporated under Chapters 1 to 10 of Title 28 every ordinance imposing any penalty or fine shall be published in every issue of the official paper for ten days. If the official paper is published only once a week, then publication shall be made in only one issue.[125] Such statutory or charter provisions are mandatory.[126] Proof of publication is made by the printer or publisher of the newspaper by affidavit filed with the city secretary, and that is prima facie evidence of such publication in all courts of the state.[127]

Initiative ordinances adopted by a majority vote of the electors are effective when the result of the election is ascertained and de-

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[121]City of Galveston v. Morton, 58 Tex. 409 (1883).

[122]In an old case it was held that the mayor has no veto on action taken by adopting a motion accepting a contract authorized by a previous resolution or ordinance, so as to force a two-thirds vote to consummate the agreement. *Ibid.*

[123]30 TEX. JUR., *Municipal Corporations* §159.

[124]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1152.

[125]*Id.* art. 1013.

[126]But a paving assessment ordinance is not an ordinance imposing a fine within the meaning of the above statute requiring publication. West Texas Construction Co. v. Doss, 59 S.W.(2d) 866 (Tex.Civ.App. 1932), *aff'd*, 128 Tex. 339, 96 S.W.(2d) 116 (Tex.Comm.App. 1936).

[127]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1013. H. B. 413, which became effective April 15, 1939, provides that "all ordinances passed by Home Rule Cities in the State of Texas . . . shall be published only as provided by the charters of such cities, provided that if there is no provision in the charter for the publication of such ordinances, then every ordinance . . . prescribing penalties for the violation thereof shall, before the ordinance is passed, be published at least twice in the official newspaper of the city."

clared by the proper authority.[128] If there is no provision as to when ordinances shall take effect, the general rule provides that they shall take effect upon passage.[129] Article 1013 of Texas Revised Civil Statutes provides that ordinances which do not have to be published take effect upon passage, but that ordinances which must be published take effect from and after publication.

Charters sometimes provide that ordinances shall not take effect until a certain number of days from the last publication or after passage and approval have elapsed, unless an emergency has been declared. Under a charter which declares ordinances shall take effect as approved, when several are approved on the same day they must take effect at different times, and their order is a question of fact.[130]

Many charters provide that no ordinance shall be passed on the day it is introduced unless it is an emergency measure and passed by a unanimous vote or a vote of two-thirds of the council. Thus when an emergency is recited an ordinance may be passed on the first reading. Many cities resort to this procedure too frequently,[131] but the majority of the cities do not invoke the emergency clause except when it is necessary. When it is used, Houston requires the ordinance to be read in full once and twice by caption, in the same meeting, whereas in all other cases the ordinances are passed after three separate meetings.

In Dallas an ordinance does not go into effect for thirty days after final passage, unless it is an emergency measure. The Houston charter and others require that franchises granted by the city be read at three separate meetings. However, under such a re-

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[128]City of Dallas v. Dallas Consolidated Elec. St. Ry., 159 S.W. 76 (Tex. Civ.App. 1913, writ of error refused). Many charters provide for initiative and referendum, but some courts have frowned upon such provisions. However, the tendency among Texas courts is otherwise.

[129]30 TEX. JUR., *Municipal Corporations* §162.

[130]City of Marshall v. Elgin, 143 S.W. 670 (Tex.Civ.App. 1912, writ of error refused).

[131]One city official admitted the governing body used this clause when it thought the measure would not be contested.

quirement an ordinance regulating jitneys does not have to be so read as it is not considered a franchise.[132]

Article 1013 of the Revised Civil Statutes provides that in any city or town desiring to publish its ordinances in pamphlet or book form, the ordinances that have already been published need not be republished. Such ordinances when published and printed by authority of the city council shall be admitted in all courts without further proof.

Cities of over 40,000 population by the preceding United States Census and incorporated under either general or special law are given the power to codify their civil and criminal ordinances and to adopt a code of ordinances with appropriate penalties for violation.[133] If it is necessary in such a codification to change or repeal any part, such change being occasioned by a change in the form of government and redesignation of offices and officers, then the city can amend, omit, or repeal the same without the necessity of reënacting any such ordinance incorporated in the code.[134] The ordinance adopting such code shall be published as provided for by law; but if the city has a special charter the special provision shall be the guide. The code need not be published. The printed code is "prima facie evidence in all courts of the existence and regular enactment of such particular ordinance."[135] Of the cities studied in a recent survey it was discovered that one-half have either codified their ordinances in the past or are doing so at the present time, some of the cities taking advantage of W.P.A. help in this work.

It is not wise for a city to incorporate by reference in codifying ordinances, as the theory of codification is to bring together permanent enactments in a compact, orderly, and easily understood

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[132]City of Dallas v. Gill, 199 S.W. 1144 (Tex.Civ.App. 1917, writ of error refused).

[133]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 1176a.

[134]*Ibid.*

[135]*Ibid.* Magnolia Petroleum Co. v. Beck, 41 S.W.(2d) 488 (Tex.Civ.App. 1931, writ of error dism'd) held requirement of publication was inapplicable to codification of entire system of law by a home rule city.

arrangement. Too extensive use of incorporation by reference would do violence to the whole idea of codes.[136]

Where the city council has the power to revise, codify, and publish all previous ordinances in force, it is presumed an ordinance published in a pamphlet, purporting to be a revision and codification, is such.[137] "In other words, the presumption must be indulged that . . . an ordinance relating to the general subject was in force which it was advisable to revise and codify."[138] Considering the condition in which ordinances in many cities are found, they should be frequently revised and codified, with all obsolete ordinances being repealed. Codification also makes it easier to acquaint the inhabitants of the city with the regulations under which they live.

"Code" means the whole body of the law—a compilation and systematic arrangement of the principles intended to supersede all other laws within its competence. It is to be distinguished from a "compilation," which is a mere attempt to rearrange all statutes in force at a given time to serve as prima facie evidence of existing law, and from "revision," which is a modification and amendment, in addition to rearrangement, of existing law. This definition is usually too rigid for municipal codes, but it does serve as a standard by which all codes should be guided.[139]

Through a lack of understanding of their nature, penal ordinances frequently cause trouble. This type of ordinance prohibits an act and imposes a penalty for its commission.[140] McQuillin lists the parts of a penal ordinance as follows: title, preamble, enacting clause, the command to do or not to do and subjects and objects of operation, the penalty, and the naming of the time when it is to take effect.[141] In cities and towns operating under the general laws there is a statutory limit upon the amount of the pen-

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[136]SLY, JOHN F., FORDHAM, JEFFERSON B., and SHIPMAN, GEORGE A., THE CODIFICATION AND DRAFTING OF ORDINANCES FOR SMALL TOWNS (Municipal Administration Service, New York, 1932) 16.

[137]30 TEX. JUR., *Municipal Corporations* §158.

[138]Magnolia Petroleum Co. v. Beck, 41 S.W.(2d) 488 (Tex.Civ.App. 1931).

[139]SLY, FORDHAM, and SHIPMAN, THE CODIFICATION AND DRAFTING OF ORDINANCES FOR SMALL TOWNS 3.

[140]30 TEX. JUR., *Municipal Corporations* §164.

[141]MCQUILLIN, MUNICIPAL ORDINANCES §138.

alty; it may not exceed $100.[142] This limit does not apply to special charter cities where a different amount is fixed. If there is no express authority in the charter to impose a penalty, but authority is granted by general law, an ordinance must conform to the delegated authority, and the municipality may not prescribe a greater or less punishment than is specified in the law.[143] Fines may be remitted by a vote of two-thirds of the members of the council present.[144] Such penal ordinances must not penalize a state of mind, but should be directed at an overt act. They must be definite and not in conflict with the Constitution or statutes.[145] The rule that a city ordinance in conflict with the state law on the same subject is void has no application unless the state law is operative in the city.[146] Only the legislature may suspend state laws, and not a city. Therefore a city may not prohibit the blowing of locomotive whistles in the city limits when a state law requires them to be sounded at crossings.[147] But as a city may require more than the state statute requires, a city could require a train to whistle while in motion in the city limits.[148]

Administrative Control

The city council or the city commission is known, primarily, as the legislative body of the city and frequently is believed to exercise only legislative duties. This idea has developed from the theo-

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[142]TEX. VERNON'S ANN. CIV. STAT. (1925), arts. 1011, 1146 (5).

[143]30 TEX. JUR., *Municipal Corporations* §164.

[144]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1014.

[145]30 TEX. JUR., *Municipal Corporations* §164. Bohmy v. State, 21 Tex. App. 597, 2 S.W. 886 (1886); City of Houston v. Richter, 157 S.W. 189 (Tex.Civ.App. 1913); Zucarro v. State, 82 Tex.Crim.Rep. 1, 197 S.W. 982, L.R.A. 1918B, 354 (1917); Levy v. State, 84 Tex.Crim.Rep. 493, 208 S.W. 657 (1919); McCutcheon v. Wozencraft, 116 Tex. 440, 294 S.W. 1105 (1927); Cameron v. City of Waco, 8 S.W.(2d) 249 (Tex.Civ.App. 1928); Lamar & Smith v. Stroud, 5 S.W.(2d) 824 (Tex.Civ.App. 1928, writ of error dism'd); Brewer v. State, 113 Tex.Crim.Rep. 522, 24 S.W.(2d) 409 (1930); City of Sweetwater v. Foster, 37 S.W.(2d) 799 (Tex.Civ.App. 1931).

[146]Robinson v. City of Galveston, 51 Tex.Civ.App. 292, 111 S.W. 1076 (1908).

[147]Curtis v. Gulf, C. & S. F. Ry., 26 Tex.Civ.App. 304, 63 S.W. 149 (1901).

[148]Gulf, C. & S. F. Ry. v. Calvert, 11 Tex.Civ.App. 297, 32 S.W. 246 (1895, writ of error refused).

retical division of powers into executive, legislative, and judicial which permeates every line of endeavor in our government, federal, state, and local. In fact, the city governing body possesses much more power and performs many more duties than the casual observer would believe were legal or possible. The administrative activities and duties possessed by the council or commission in all but city manager cities reach considerable proportions and constitute a major portion of the routine business. Between the administrative functions and the legislative powers of the governing body is a "twilight zone" where there are located many activities not capable of easy definition. They are neither clearly legislative nor properly administrative and may be included within either category.

The part of the governing board of the city is very important in connection with appointments to and removals from city offices. There is apparently no city in Texas today that does not have a council or commission active in the appointment of at least a part of the officials of the city. Statutes provide that in the general law city or town the city officials are to be elected by popular vote, although some of the positions may be abolished by the council and duties conferred upon other officers.[149] The council also may create subordinate jobs, making provision for the appointment of the incumbents by the council. State statutes often provide for the city council to appoint the members of various boards and commissions, such as the board of equalization[150] and a zoning commission.[151] On the other hand, the council may act as a confirmation agent with some official, such as the mayor, making the actual appointment.

Towns and villages incorporated under Chapter 11, Title 28, of the Revised Civil Statutes have been given the express authority to appoint officers, and that provision has been held to authorize the board of aldermen to appoint a policeman.[152]

In commission-governed cities operating under the general laws,

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[149]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 977. This is also true of the position of marshal in cities under 3,000 population. *Id.* art. 999. See Alexander v. City of Lampasas, 275 S.W. 614 (Tex.Civ.App. 1925).

[150]TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 1048.

[151]*Id.* art. 1011f.

[152]Early v. State, 50 Tex.Crim.Rep. 344, 97 S.W. 82 (1906).

the board of commissioners has broad and important appointive powers. The secretary, who is also the treasurer and assessor and collector, is appointed by the board, which also has authority to appoint a city attorney, such police force and other officers as may be necessary.[153] As in aldermanic cities, subordinate positions may be created and the incumbents appointed by the council.

The part that the governing body plays in appointing city officers in home rule cities is usually broader than that found in the cities operating under the general laws, because the former includes more positions. The council or commission, however, does not usually possess an absolute power of appointment, as commonly its part consists solely of confirming or ratifying an appointment made by the mayor or the city manager. In a city supervised by a city manager, the absolute power of appointment of administrative officials probably should lie in the hands of the manager, but in many Texas cities the governing body has retained a certain amount of control or supervision over the process, usually by possessing the authority to confirm or ratify the manager's selection. In any event, this power in the hands of the council operates as a factor to be considered in balancing the powers of the different branches of the government. By exercising an absolute power of removal or merely a ratification of an existing appointment, the council is enabled to wield considerable influence over the mayor and other officials in the city.

Many interesting questions arise in connection with the power of appointment. In an Illinois case the city council approved an appointment and then upon reconsideration disapproved it. It was held that there was no valid appointment, as the ordinary parliamentary rules of procedure applied and thus allowed the city council to reconsider its action.[154] This case was severely criticized on the grounds that the appointment was already completed. As an appointment is an executive act, the council was acting in an executive capacity when it approved, and once it acted its power

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[153]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1161.

[154]People *ex rel.* MacMahon v. Davis, 120 N.E. 326 (Ill. 1918).

terminated; thus the appointee should remain in office until removed by the body having the power of removal.[155]

In a Texas case, a city charter required the commissioners to appoint a chief of police, the police and fire commissioner presenting his recommendations to the board. It was held that under this provision the police and fire commissioner had a right to nominate for the office of chief of police, and that unless he failed to make such a nomination within the time prescribed the board had no right to appoint a person on the nomination of any other commissioner.[156]

The power of removal also operates as an advantage for the city governing body, because it is another method of control which may be exercised over city departments. Not only may the political leaders improve the efficiency of the city by removing employees who have proven themselves unfit for service, either because they are incompetent or are guilty of misfeasance in office, but they may chart and in many instances direct a particular course of action by removing political opponents. Removal for political reasons is frowned upon by all authorities, but such action is commonplace in Texas cities and must be recognized in order that it may be successfully attacked. An exercise of the power of removal is so often disguised and operated under a subterfuge that the average city dweller is totally unfamiliar with the reasons behind the surface manifestations. In order to avoid the stigma of removal from service, most city officials merely resign, but whether a resignation will be voluntary or requested will depend upon the facts and circumstances surrounding the particular case. When a removal is effectuated for political purposes, oftentimes the result substantially betters the city government, but over a long period of time this type of activity on the part of the city fathers has a devastating effect upon the morale of city employees. Consequently any kind of system which relies upon a demonstration of merit by employees is more to be desired than a haphazard "to the victor belong the spoils" policy.

Provision is made in the statutes governing cities under 5,000 population for the council to remove *any* officer after notice and

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[155](1919) 32 HARV. L. REV. 292.

[156]Perett v. Wegner, 139 S.W. 984 (Tex.Civ.App. 1911).

hearing, for incompetency, corruption, misconduct, or malfeasance in office.[157] If the complaint is against the mayor, a majority of the aldermen constitutes a court to try him,[158] but if the complaint is against an alderman the mayor and remaining aldermen constitute the court.[159] If two-thirds of the members of the court present find the defendant guilty and there is sufficient cause for removal, the mayor or alderman shall be removed from office; and if this occurs he may not be reëlected to such office for two years after removal.[160] However, the provisions of this last statute do not give the aldermen such power in their unlimited discretion, irrespective of whether the mayor has been guilty of an offense against the law.[161] The council may also remove any officer "elected by them," by a resolution declaratory of their want of confidence in the officer; but two-thirds of the aldermen elected must vote in favor of the resolution.[162] The question arises as to which of the above methods of removal is used when the council appoints an officer who is required by statute to be elected, but apparently no appellate court in Texas has passed upon this problem.

The charter provisions, express or implied, granting authority to remove officers, are found in all cities in the state, although they are not as detailed as the statutes governing general law cities. Several cases have arisen in this state concerned with the reasons underlying the removal of city officials. In 1898 it was held that the jurisdiction of the Galveston city council in removing policemen was exclusive and final, and the courts could not inquire into the regularity of its judgment or the competence or sufficiency of evidence to support it.[163] In 1927 the commissioners of the city of Electra were held to be empowered by charter to remove the chief

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[157]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1006. See also *id.* art. 5991.

[158]*Id.* art. 5993.

[159]*Id.* art. 5992. Apparently this applies to commissioners also.

[160]*Id.* art. 5994. These rules, it must be emphasized, apply only to general law cities. *Id.* art. 5995.

[161]Milliken v. City Council of The City of Weatherford, 54 Tex. 388, 38 Am.Rep. 629 (1881).

[162]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1006. When such a phrase states "elected" by the commission or council, an appointment is meant, as "election" is the embodiment of the popular will. Commonwealth *ex rel.* Benjamin v. Likely, 110 Atl. 167 (Pa. 1920).

[163]Doherty v. City of Galveston, 19 Tex.Civ.App. 708, 48 S.W. 804 (1898).

of police and fire marshal without giving any reason.[164] A charter provision of the city of San Antonio gave the city commissioners the power to remove employees, if it was done publicly and on written charges, and it was held that their action could not be restrained if it was not based on fraud or corrupt motives.[165]

A check over other administrative powers is the power conferred upon many governing bodies to investigate the various departments of the city. As in the general law communities, many charter cities confer this power upon the mayor or the city manager. In some instances authority is conferred upon the initiating agency, whether it is the mayor, city manager, or governing body, to appoint a committee to undertake the work of investigation. Although this authority to investigate appears to be rather strong in operation, it is rarely exercised, and most groups or individuals prefer to use it as a threat. It is a supervisory control to be exercised or operated by the agency upon which it is conferred. Some charters merely state that the proper official may investigate the departments of the city government, others broaden the scope to include financial matters, and a few charters provide that the power includes the acts of officers and the conduct of the affairs of the various departments.

This investigatory power is usually reinforced by granting authority to the initiating agency, whether mayor or council, to compel the attendance of witnesses and the production of necessary books and papers, allowing these officials to administer oaths to the witnesses. If a witness fails or refuses to appear, he may be adjudged in contempt of court and also subjected to various penalties in the form of a fine, which usually varies from $25 to $200, and/or a jail sentence.

Many mayors and city managers have bettered their office routine and improved the efficiency of their personnel through the use of reports and conferences. Likewise, a council or commission may find its path less rocky and its work less burdensome if it requests written reports from the mayor or city manager who may in turn obtain reports from departmental officials. By utilizing reports the

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[164]City of Electra v. Taylor, 297 S.W. 496 (Tex.Civ.App. 1927).

[165]San Antonio Fire Fighters' Local Union No. 84 v. Bell, 223 S.W. 506 (Tex.Civ.App. 1920, writ of error refused).

city councilmen will be enabled to direct city affairs and to legislate upon municipal matters with more wisdom and sagacity than they would otherwise. The reason for this is perfectly apparent and logical. The council, concerned with all city activities, is a "Jack of all trades, but master of none," whereas the departmental supervisors are specialists and are in a better position to recommend improvements. The same result—efficiency in operation—may be obtained by utilizing a periodic conference between the governing board and the city officials in control of the matter with which the board is concerned. There is no vital necessity of this procedure, however, as usually the departmental head will make his recommendations to the mayor or the city manager, who in turn recommends to the council or commission. The latter procedure is generally preferred because it abolishes unnecessary detailed work which interferes with the more important issues.

Miscellaneous

The city council and the board of commissioners operate as protectors of the public in so far as police powers are concerned. Only by a well-defined exercise of the police power will the city council aid and further the public health, safety, morals, and welfare. Under such authority councilmen or commissioners may zone the city,[166] erect hospitals, regulate the inspection of food, prevent all breaches of the peace,[167] suppress disease, prevent the introduction of contagious diseases into the city, make quarantine laws and require vaccination, abate nuisances, regulate foundries, livery stables, manufacturing establishments, stockyards, and slaughterhouses, inspect meat, and prohibit animals running at large. The list of regulations is too long for further enumeration within these pages and is too comprehensive for a satisfactory definition. All measures of this type are regulatory in nature and virtually unlimited in extent, imposing restrictions upon individuals in order that the public may be benefited. The individual is not recompensed for any harm resulting from an enforcement of the police power, as occurs when the right of eminent domain is exercised, but he gains through the benefit conferred upon the public, of which he is a

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[166]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) arts. 1011a–1011j.

[167]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1015.

member. In imposing such restrictions upon persons and commerce, the municipal governing board can determine the reasonableness and necessity of its own regulations.[168]

There are numerous activities performed or initiated by the city council or the board of commissioners. The ramifications attendant upon elections, bond issuances, and the granting of public utility franchises are of importance to the inhabitants of the city. Similarly, the exercise of the right of eminent domain, the installation of lighting systems, and the annexation of new territory involve considerable discretion in the governing body. Miscellaneous powers and duties of this nature comprise much of the business of the council.

Statutes and charters usually confer a "catch-all" power upon cities, towns, and villages, and provide that these communities may do whatever is necessary to give effect to the other granted provisions or to provide for the good government of the community. Such provisions are an integral part of the granted powers and are as important as the express powers.

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[168]City of San Antonio v. Teague, 54 S.W.(2d) 566 (Tex.Civ.App. 1932, writ of error refused).

CHAPTER III

THE MAYOR

The mayor is ordinarily regarded as the chief executive officer of American cities.[1] Although the title of Mayor is the preferred form, it is not universally used, for the chief executive may be designated intendent, chairman, president, or mayor-commissioner. The title in this country depends largely upon the type or form of government adopted by the particular community.[2]

The golden age of the mayor developed prior to 1900, but after Galveston popularized the commission form of government, the strong-mayor organization suffered a noticeable decline in popularity. The mayor was still further denuded of his authority in cities later adopting council-manager government.

Under the aldermanic form of government, the mayor is the central figure of the administration, although his position, his powers, and his functions vary in degree between cities because of local conditions. He may be at once the director of political activities, the administrator of the various governmental departments, and the director of legislation. His function is to direct the administration of the city and to supervise its operation, although at times he actually participates in numerous transactions.

When the commission form of government is viewed, attention is immediately focussed upon the fact that the mayor has been shorn of many of the powers possessed by the strong mayor under the aldermanic form, and that he has become merely a cog in the machinery of government. In many commission towns he is the first among equals, but in practice he may become an active, guiding force in community affairs.

Under city manager government, disregarding the influence wielded by the mayor as a member of the governing body, he may be relegated to a dim, and sometimes musty, background. The

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[1]See TEX. VERNON'S ANN. CIV. STAT. (1925) art. 994. Sometimes he is designated the head of and has charge and supervision of all departments. Charter of the City of Uvalde, Art. II, §5.

[2]In England the office is held by a Lord Mayor, in Scotland and France by the Prevost and Maire, while Burgomaster and Alcalde are common in Germany and Spain. 2 McQUILLIN, MUNICIPAL CORPORATIONS §446.

mayor becomes the titular head of the city, with virtually no independent power other than to shake hands with visiting delegates and to address club meetings and welfare organizations. In all instances, however, the power and position of the mayor will depend to a great extent upon his personality and his ability to influence others. Without a doubt many mayors are powerful forces within their communities, and their functions and participation in municipal affairs cannot easily be dispensed with by the city and its inhabitants.

Although the general laws governing cities and towns in Texas do not expressly specify the eligibility requirements for officers in commission-governed cities, they do state that under the aldermanic form the mayor must be a qualified voter, and he must have resided within the city for a period of twelve months preceding his election.[3] Charters make similar provisions, but in many instances they go even further than the general laws. For instance, they often state that the prospective mayor must have attained a minimum age, that he own real estate, and that his taxes and other debts to the city be paid. Various cities combine one or more of these requirements; therefore it is impossible to set up a definite standard of eligibility. Under most circumstances, such requirements are superficial and merely set limits which are observed diffidently.

The mayor, universally, is an elective official,[4] and his term of office is usually two years, although in general law towns and villages it is only one year.[5] In a few home rule commission-governed cities, even though a commissioner may be elected for a

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[3]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 987. *Id.* art. 2927 provides: "No person shall be eligible to any State, county, precinct or municipal office in this State unless he shall be eligible to hold office under the Constitution of this State, and unless he shall have resided in this State for a period of twelve months and six months in the county, precinct, or municipality, in which he offers himself as a candidate, next preceding any general or special election, and shall have been an actual bona fide citizen of said county, precinct, or municipality for more than six months." Art. 987 was not repealed by art. 2927. Fortinberry v. State *ex rel.* Myers, 283 S.W. 146 (Tex.Comm. App. 1926). See also arts. 1137 and 1141 of the Revised Civil Statutes.

[4]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 979. The mayor must take and subscribe to the required oath. *Id.* art. 993.

[5]*Id.* art. 1143.

two-year term, the governing body may choose him as mayor to hold office for one year.

The statutes governing all general law cities provide that the mayor may be removed for official misconduct, willful violation of any ordinance of the city, habitual drunkenness, incompetency, and for such other causes as may be prescribed by the ordinances of the city or town.[6] Whenever a complaint is made against the mayor, it is presented to an alderman of the city, who files it and causes the mayor to be served with a copy. A day for trial is set by the alderman and notice given to the mayor and council to appear upon that day. A majority of the aldermen constitute a court to try and determine the complaint against the mayor, and the members select one of their number to preside during the trial.[7]

In cities operating under the home rule amendment, the grounds for removal of the mayor are virtually the same, the only difference being in the mode of expression. The grounds are usually stated as consisting of misconduct, malfeasance, incompetency, drunkenness, conviction of a felony, and various similar causes.

When a vacancy occurs in the office of the mayor in general law aldermanic cities, a new election must be ordered by the city council.[8] In the general law commission cities, if the mayor dies or resigns the commission fills the vacancy by appointment.[9] When, however, a vacancy occurs in the positions of mayor and one or two commissioners at the same time, the vacancies are filled by a special election called by the county judge.[10] In charter cities, aldermanic and commission, there are two methods whereby vacancies may be filled: appointment by the governing body, and special

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[6]*Id.* art. 5991. *Id.* art. 1006 states the following grounds: incompetency, corruption, misconduct, and malfeasance.

[7]*Id.* arts. 5993, 5995. It has often been suggested that certain judges should be allowed to remove mayors; but this is not judicial procedure and only adds to court delay. (1923) 8 MASS. L. Q. 87.

[8]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 989. Provision is made for the election of one of the aldermen to act as president *pro tempore*, and he holds office for one year. If the mayor is unable to act or refuses to act, the president *pro tempore* performs the duties and receives the fees and compensation of the mayor. *Id.* art. 991.

[9]*Id.* art. 1159.

[10]*Ibid.*

election. Frequently when a special election is necessary, the mayor *pro tem* occupies the position of mayor in the interim.

The mayors in general law communities usually devote but a part of their time to the office. When a mayor in a general law aldermanic city works on a part-time basis his monthly salary, if any, will rarely be over $100.[11] The same is ordinarily true of home rule aldermanic cities, but if the full time of the incumbent is required, then occasionally the salary is $250 a month. The great majority of mayors in commission cities, soon after their election, discover that their position requires but a portion of their time, although their salaries are predominantly higher than the salaries paid in the corresponding aldermanic cities. Under the general laws, the mayor-commissioner is allowed $5 per day for each regular meeting and $3 per day for each special meeting. Furthermore, in communities over 2,000 population he may be paid a salary of not over $1,200 annually in lieu of the per diem; and in cities and towns under 2,000 population he may receive not over $600 annually.[12] As a matter of practice none of the salaries actually paid exceed the maximum statutory limit, although there are a number of general law cities paying but nominal salaries to their mayors. Many of the charter commission cities pay their mayors $1,200 yearly, but the amounts range from $60 monthly for part-time work to $8,000 annually in one of the larger cities for full-time employment.

The mayors in city manager cities do not find their position remunerative, as many cities in this group do not pay their mayors at all, and some pay only $10 or $20 monthly, the work commonly being part-time.

Customary practice apparently frowns upon provisions requiring the mayor to be placed under bond, and most general law aldermanic communities do not require it. Some of the home rule aldermanic cities, however, require bonds ranging from $1,000 to $5,000. The general laws governing commission cities require that the mayor and commissioners enter into a bond in the sum of

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[11]The Revised Civil Statutes (1925), art. 1010, requires the city council to fix the salary of the mayor on or before January 1 preceding an election. This statute has been held merely directory in regard to date. City of Uvalde v. Burney, 145 S.W. 311 (Tex.Civ.App. 1912).

[12]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 1164.

$3,000, conditioned for the faithful performance of the duties of the office,[13] and the majority of the cities within this group follow the statutory requirement, although in others the amount varies from $1,000 to $5,000. The bonds in home rule commission cities are usually in the amount of $5,000 and often as low as $2,000.

Powers and Duties

Administrative

The city council today is probably not as vital a force in urban community life as it was fifty years ago. At the expense of the governing body the administrative aspect of municipal government is continually gaining in ascendency. This development and adjustment is resulting in the council assuming its true status as a legislative body.

The administrative power of the mayor extends to all phases of city government, and by means of this influence he is able to make all municipal activity feel the force of his position. There are three aspects of the mayor's administrative relationship to the other municipal officials: the mayor may advise, supervise, or actually participate in the particular activity.[14] For instance, he has the power to appoint and remove certain officials and employees, investigate departmental records and acts of various officials, and become a member of influential boards and commissions. The appointive power is probably the most important administrative power possessed by the mayor, because he is able to strengthen his own position and to better manage and supervise the city administration by its exercise.

The power of appointment and removal in the cities and towns is actually the "big stick" of local politics, due to the fact that under favorable circumstances one faction is enabled to gain strength at the expense of another. Such a status is to be regretted, but cannot be corrected until conflicting elements are withdrawn from the maelstrom surrounding the appointive power, leaving the

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[13] *Id.* Art. 1162.

[14] Story, Russell M., The American Municipal Executive (University of Illinois Studies in the Social Sciences, v. 7, no. 3, Sept. 1918) 74–76.

ultimate selection and determination in the hands of competent individuals.

In the aldermanic city generally it is customary for the mayor to nominate his candidate for appointment, and the city council confirms or ratifies that choice.[15] In practice, the necessity of confirmation by the governing body has a tendency to weaken the mayor's control over administration, as it places a very effective weapon in the hands of the council, often allowing it to dictate to the mayor. The procedure is largely the same in commission-governed cities, but here there is some justification for the weakening of the mayor's power, since the theory of the commission government installs the mayor as merely the first among equals. Some charters, regardless of the form of government, allow the mayor to nominate the same individual but twice, and if confirmation is refused both times he must nominate another candidate. And in other charters provision is made to the effect that if the commission fails to confirm by a majority vote, then any member of the commission may nominate some other person for the position under consideration. Although not a prevalent practice in aldermanic cities, in many commission cities, by statute and charter, the governing board is allowed to appoint some of the city officials,[16] and in other commission cities the mayor alone appoints certain officials, and the commission others. This actual participation by the mayor is unusual as the theoretical practice allows the mayor supervisory powers only. In the cities with a manager, that official is usually given the appointive power, although usually confirmation by the governing body is required.

Various isolated instances of the appointive power may be found in the general laws. For instance, under an emergency power the mayor may form a special police force when he deems it necessary

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[15]Under a special charter provision requiring vacancies in elective offices to be filled by a majority vote of the aldermen, on the mayor's nomination, the power to fill vacancies is in the council, consisting of the mayor and the board of aldermen; and the mayor has no power to fill a vacancy by his individual appointment, although the council is not in session. Brumby v. Boyd, 28 Tex.Civ.App. 164, 66 S.W. 874 (1902).

[16]The commissioners should be allowed to nominate the employees in their own departments. See Black v. Lambert, 235 S.W. 704 (Tex.Civ.App. 1921, writ of error refused).

to enforce the law, or in case of riot or other disturbance.[17] This force is subject to the orders of the mayor, and while on duty it possesses the same powers as the ordinary police force of the city.[18] Likewise, the mayor may appoint, subject to the council's consent, three resident citizens to constitute a board of examiners of the finances of the city. This is done at the first meeting of the governing body in January of each year.[19]

The mayor in the general law aldermanic and commission cities has virtually no power of removal. But the city council may remove any city official for incompetency, corruption, misconduct, or malfeasance in office, after notice and hearing, and it may also remove any officer "elected" by it by passing a resolution declaratory of its want of confidence.[20]

In home rule aldermanic cities the mayor is sometimes allowed to dismiss the individuals employed by him and suspend those appointed by the council, but it is unusual in either the aldermanic or the commission cities for the mayor to be given uncontrolled power of removal,[21] and usually the council or commission is given the power.[22] As many city leaders will testify, such a method allows free rein to politics within the city, and consequently many an incompetent person is allowed to remain in office. Notice and hearing are frequently required for the benefit of an employee removed by the mayor, in order that hasty and ill-advised action may be avoided. Such well-meaning provisions, however, often make the removing agent hesitate before taking action, thus again leaving many an incompetent in office.[23] It has been said, however,

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[17]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 995.

[18]*Ibid.*

[19]*Id.* art. 1022. The council also fixes the compensation of the board.

[20]*Id.* art. 1006. See note 162, Chapter II.

[21]The mayor's preference for a political friend is not cause for removal of civil service employees. Ellis v. Holcombe, 69 S.W.(2d) 449 (Tex.Civ.App. 1934, writ of error refused).

[22]The charter of the city of Victoria (1915), §64, reads as follows: ". . . [the mayor] shall have the right and authority, at any time, to remove any officer or employe of the city subject to the provisions of this act; provided, however, he shall not have the right to remove any of the elective officers of the City, except by acting in concert with the Board of Aldermen, as in this charter provided for removal from office."

[23]MACDONALD, AUSTIN F., AMERICAN CITY GOVERNMENT AND ADMINISTRATION (Rev.Ed. 1936) 181.

that the publicity attendant upon the power of removal is the best guarantee of its proper exercise.[24]

As an additional means of control designed to insure efficient operation of the city government, a power of investigation is frequently lodged in the chief executive, the governing body, or committees appointed by either.[25] When the investigatory power is granted by charter, the virtually universal rule will allow the initiating agent to compel the attendance of witnesses and the production of books and papers. Furthermore, most charters expressly allow the same officials to administer oaths to these witnesses. If a witness fails to appear he may be adjudged in contempt of court, and in most instances be subject to specific penalties. He may be fined from $25 to $200 in various cities and in addition a jail sentence may be imposed. The jail sentence is administered in some cities only if the fine is not paid, and in other communities it may be levied in addition to the fine. This power, however, is rarely enforced, and even on such occasions it is used as a threat rather than as an actual, direct, method of control.

In general law cities, the mayor is empowered to inspect the conduct of all subordinate officers in the city and to cause all violations of duty to be punished.[26] This grant of power is apparently stronger than that usually found in charters. The duty to inspect does not impose any burden upon the mayor to "snoop," but it does give him an adequate means of control over recalcitrant elements in the administration.

Another control or form of supervision exercisable by the mayor is the conference between departmental heads and supervisors. A round-table discussion demonstrates the value of the adage that two heads are better than one. Conducted upon an informal level, such a discussion may lead to definite and concrete results. Employees have an opportunity to state their grievances and the executive is enabled to suggest reforms within the departments under his control. The mayor may expect better coöperation from his employees and subordinates by utilizing the conference method, and such action should be encouraged as much more can be gained

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[24]Story, The American Municipal Executive 92.

[25]It is interesting to note that in the majority of home rule cities this power is lodged in the governing body, and this is true even in the cities operating under the city manager form of government.

[26]Tex. Vernon's Ann. Civ. Stat. (1925) art. 994.

through personal contact than may be obtained through the use of the currently popular interdepartmental communication or memorandum.[27]

Similarly the mayor should require reports from various officials in the city concerning the status of business within the particular departments. In this manner the mayor may maintain a broad outlook upon the *modus operandi* of the whole unit. A series of communications, without any system or order, however, is no better than a total lack of informational sources; there must be a specialized and functional organization in the manner of reporting, which will depend upon the initiative, foresight, and creative ability of the executive and his subordinates.

Many mayors discover that excessive time must be devoted to various boards and committees. Civic groups frequently seek the support of the mayor by making him a member of committees. This type of activity may become so burdensome as to interfere with other, and more important, municipal functions. Some cities, as Victoria, have charters providing that the mayor shall be ex officio chairman of the committees of the council. Such provisions place the mayor in a salient position whereby he may exercise tremendous pressure upon the legislative body of the city and thus to a great degree influence the policy-forming group. Russell Story has suggested that the same beneficial results may be obtained by giving the executive more complete appointive power, because in that manner he may give needed expert supervision to a particular committee, and at the same time maintain his own control over it.[28]

Doubt exists as to whether judicial duties are properly a part of administration, but the fact cannot be overlooked that the statutes of Texas provide that in cities not operating under a special charter the mayor is to serve as "recorder," unless the governing body authorizes the election of another.[29] The mayor, or recorder, is also designated a magistrate, and as such it is his duty to preserve peace within his jurisdiction by the use of all lawful means. He

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[27]Some cities have installed an interdepartmental communication system, more commonly used in private business offices, and have found its use to be adequate for the needs of the present-day city hall.

[28]STORY, THE AMERICAN MUNICIPAL EXECUTIVE 100.

[29]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1197. The judicial powers of the mayor may be better understood by a perusal of the chapter concerning the judge of the corporation court.

may issue all processes intended to aid in the prevention and suppression of crime and to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.[30] Charters often confer upon him the power to sign processes to compel the attendance of witnesses. Many charters permit the mayor to remit fines and grant pardons for all offenses arising under the city ordinances. An allied power to administer oaths is granted to the mayor by the general law and many charters.[31]

The power of the mayor to approve numerous forms, measures and activities constitutes another check over administration. On many occasions his signature is required upon such instruments as bonds, notes, warrants, and the like. Again, his approval may be necessary in connection with legislation, when he must acquiesce in certain measures.[32]

One of the most difficult charter provisions to analyze, and in some cities one of the most meaningless, is the requirement that the mayor is to enforce the laws of the state and the ordinances of the city. The general laws provide that the mayor "shall be active at all times in causing the laws and ordinances of said city to be duly executed and put into force."[33] Furthermore, he may close any theater, ballroom, or other public place in case of riot or any unlawful assemblage, and may order the arrest of anyone violating the laws of the state or ordinances of the city in his presence.[34] As the mayor may institute traffic safety campaigns, public health campaigns, and the like, in practice he has much to do in determining when, where, and to what degree the pressure of law enforcement is to be applied.

The field of finance offers the mayor another opportunity for the exercise of administrative supervision and control. In the cities not employing a manager, the mayor has the power to arrange and submit an itemized budget to the governing body each year.[35]

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[30]TEX. CODE CRIM. PROC. (1925) arts. 33, 34. Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926).

[31]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 996.

[32]See the section on legislative powers.

[33]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 994.

[34]*Id.* art. 996.

[35]The mayor or city manager is designated the chief budget officer and is under a duty to prepare the budget. TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 689a-13.

The procedure utilized in preparation of the budget undoubtedly varies in use, but many charters provide that the heads of departments must make reports to the mayor showing the expenses for the past year and/or the estimated expenses for the new year. The statutes allow the mayor to require necessary information from city officials,[36] although in some of the smaller communities the mayor may not find it necessary to obtain estimates from subordinates. The mayor usually submits these figures in addition to his own estimate to the governing body.

In some communities the mayor is also required to make monthly financial reports to the governing body in order that the receipts and disbursements for the preceding month may be studied by the council or commission. Outside of the budget-making power, however, the mayor does not have very extensive financial powers, and this is true in both the aldermanic and commission cities generally.

When properly authorized the mayor may bind the city by his action. Thus he may contract to pay for land which an adjoining owner claimed was abandoned as a highway, because by resolution the council placed the matter in his hands for adjustment.[37] But an ordinance authorizing him to sell a lot belonging to the city does not give him power to sell land not laid off in blocks.[38] The mayor is required frequently by charter provisions to sign all contracts,[39] but the city is not bound on a contract executed in its behalf by the mayor acting without authority.[40] Nor may the mayor bind the city by renewing a note given the city, without being authorized to do so by the council.[41] Likewise, though the mayor is authorized to contract for paving, he cannot include in the contract

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[36]*Id.* art. 689a–16.

[37]City of Longview v. Capps, 123 S.W. 160 (Tex.Civ.App. 1910).

[38]City of Laredo v. Macdonnell, 52 Tex. 511 (1880).

[39]In addition, many charters require a countersignature of some other official. See City of Houston v. Dupree, 103 Tex. 292, 126 S.W. 1115 (1910), *answers to certified questions*, 61 Tex.Civ.App. 22, 129 S.W. 173 (1910).

[40]Penn v. City of Laredo, 26 S.W. 636 (Tex.Civ.App. 1894); Indiana Road-Mach. Co. v. City of Sulphur Springs, 63 S.W. 908 (Tex.Civ.App. 1901).

[41]City of Tyler v. Adams, 62 S.W. 119 (Tex.Civ.App. 1901).

an arbitration agreement.[42] And in a case arising in a commission-governed city, it was held that the mayor was without authority to accept an oral report of arbitrators contrary to an agreement requiring a written report.[43]

Ordinances often give the mayor and other officials the power to remove dilapidated buildings.[44] Similarly, the mayor, it has been held, has the power to revoke a building permit which had been issued the preceding day by the building inspector, who did not know there would have been an invasion of a residential district near a school.[45]

The miscellaneous duties of the mayor, such as certifying charter amendments to the Secretary of State,[46] issuing permits for parades, routing parades of dignitaries, lending his name to various enterprises, call for the dexterity of a funambulist. The mayor, as titular head of the city, must answer for all shortcomings, as well as receive acclaim for benefits conferred; so it may readily be understood that public opinion influences his daily work.

Legislative

There is no doubt that the mayor may possess a great amount of influence in the legislative processes. He may actually participate in the enactment of legislation, or he may exert extralegal power to persuade or influence the governing body in its deliberations. In the actual participation or enactment of measures, the mayor-commissioner probably possesses more apparent power than the aldermanic mayor. In both instances, however, it is reasonable to believe that the mayor has a much greater legislative power

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[42]City of San Antonio v. Reed, 192 S.W. 549 (Tex.Civ.App. 1917, writ of error refused). Somewhat similar to this situation, it might be noted that a compromise of litigation by the mayor and a council committee on behalf of the city is not valid unless ratified by the council. The adoption of an ordinance carrying out the terms of the compromise is ratification. City of San Antonio v. San Antonio St. Ry., 22 Tex.Civ.App. 148, 54 S.W. 281 (1899, writ of error refused).

[43]Wilke v. City of Ballinger, 31 S.W.(2d) 1102 (Tex.Civ.App. 1930).

[44]Deffari v. City of Galveston, 208 S.W. 188 (Tex.Civ.App. 1919, writ of error refused).

[45]City of San Antonio v. Robert Thompson & Co., Inc., 30 S.W.(2d) 339 (Tex.Civ.App. 1930), *dism'd as moot question*, 44 S.W.(2d) 972 (Tex.Comm. App. 1932).

[46]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1173.

than is ordinarily imagined.

In aldermanic cities operating under the general laws, the mayor possesses the power to summon meetings of the city council, if within his judgment the welfare of the city requires such action.[47] In the commission-governed general law cities, the mayor or two commissioners may summon a special meeting.[48] Virtually the same procedure is followed in the cities incorporated under the home rule amendment, although not all charters provide for the calling of special meetings of the governing body.

The general laws state that the mayor must preside at all council meetings, and he is given a casting, or deciding, vote in all matters except elections.[49] Most charters, in aldermanic, commission, and city manager cities, make a similar provision for the presiding officer, but the situation in regard to the voting power of the mayor varies. Some cities allow him to vote, whereas others withhold this power except in the event of a tie. A few of the cities adopting the latter view withhold the casting vote when an appointment by the mayor is up for confirmation.

Under the general law the mayor is given the express power to communicate to the council such information and recommend such measures as may tend to improve "the finances, the police, health security, cleanliness, comfort, ornament, and good government" of the city.[50] Most charters are not so broad in scope, and merely allow the mayor to recommend upon financial matters. In practice, however, there is no doubt that the mayor enjoys a position of some importance and acts as adviser to the council on a great many more matters than are enumerated in the statutes of the state and in the charters of the home rule cities. This is effected in a few cities by making the mayor ex officio chairman of all council committees, and in some charters provision is made that the city governing body may not act unless it has asked for and received the mayor's opinion upon the subject under discussion.

A very effective control over legislation and the legislative processes is the veto power lodged in the executive. Not only is

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[47]*Id.* art. 994.

[48]*Id.* art. 1164.

[49]*Id.* art. 1007. It has been held by a Court of Civil Appeals that he may vote only in the event that the council casts a tie vote. Robinson v. Hays, 62 S.W.(2d) 1007 (Tex.Civ.App. 1933).

[50]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 994.

the actual exercise effective, but the mere threat of the exercise is often sufficient to thwart the passage of certain measures. Not all mayors, however, possess the veto power, and especially is this true in the cities with a city manager form of government.

There are many types and forms of veto power, but the most familiar forms in Texas are the qualified veto, which usually requires two-thirds or three-fourths of the councilmen to override, and the suspensive veto, which requires but a bare majority to overcome. In the larger councils and commissions, the qualified veto is a powerful and strategic weapon in the mayor's hands, and is an excellent method of welding relations between the executive and the council.[51] The suspensive veto, however, is apparently the most popular form in Texas.[52] It is found in many commission-governed cities, and thus conforms to the theory of the commission type of government, which removes power from the mayor. Under any circumstances, the mayor possessing only a suspensive veto approaches near to what is commonly termed the "weak" mayor.

The Texas statutes provide that all ordinances and resolutions are to be signed by the mayors of the cities operating under the general laws.[53] Those not signed by him are returned to the city council with his objections. If a majority of the whole number of councilmen agree to pass the ordinance, it shall be in force. If the mayor neglects to approve or to reject for a period longer than three days after it has been placed in the city secretary's office, it then goes into effect.[54] Most charters contain virtually the same provisions as the general laws. Although some home rule communities do not designate any time in which the mayor may act, the majority set a specific period ranging from two to ten days, and some merely specify the time between passage of the measure and the next regular meeting of the governing body. A few cities

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[51]STORY, THE AMERICAN MUNICIPAL EXECUTIVE 135.

[52]*Id.* 134.

[53]This problem of approval is considered in c. II. Some charters require the mayor's signature, but make no provision for a veto.

[54]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 997. The mayor's veto power does not apply to an act of the council sitting as a judicial body in determination of election contests. Robinson v. Hays, 62 S.W.(2d) 1007 (Tex.Civ. App. 1933). The statute limits the veto to ordinances and resolutions; yet some charters allow the veto of an ordinance and not of a resolution. 30 TEX. JUR., *Municipal Corporations* §159.

allow a pocket veto, but more commonly if the mayor does not act upon the measure within the prescribed time it becomes effective, the mayor's inaction constituting silent approval. Usually the veto may be overridden by a majority vote of the council or commission, although in some instances all the members must vote to override it. The latter requirement is often necessary when the mayor vetoes an appropriation measure. In some instances exercise of the veto power operates to suspend council action for a specified period of time, such as a week.

Many charters provide that although a majority vote of the governing body may override a veto, the mayor cannot be deprived of his right to vote on account of the veto. If the veto is sustained, many charters require that the measure be lapsed or suspended for a period of six months, and at the end of that time the mayor is allowed to vote. Some cities allow the rule requiring suspension to be set aside if the mayor and all the commissioners desire to reconsider the measure before that time.

In most cities the mayor has the express power to veto items in appropriation measures, and the charters of such cities state that "such veto shall not extend to the items not vetoed, and those which he approves shall become effective and those which he disapproves shall not become effective, unless passed over his veto. . . ."[55] Some charters also state that each item of the budget may be altered or omitted by the governing body, "subject to the veto power of the Mayor,"[56] although the general laws do not make a similar provision.

In the relationship between the mayor and the members of the legislative body of the city, the human element is of great importance and cannot be neglected. The mayor, as a matter of personal concern, must gain the respect of his enemies as well as of his friends, so that in communities where party lines are drawn he should be the recognized party leader. This is not necessarily true in Texas cities, but even here the factions within the party are usually very clear-cut and well-defined. This factor of leadership depends upon the personality of the mayor, his social position, and his ability to influence people. He must know at all times how to meet various situations, as well as possess enough social

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[55]Charter of the City of San Antonio, §26.

[56]Charter of the City of Houston, Art. VIa, §2.

consciousness and intelligence to solve problems so as to benefit all concerned. Briefly, the relationship of the mayor and the members of the governing body depends largely upon the ability of the mayor to meet and mingle with people.

The mayor also takes a part in state and national legislation in many instances, especially if he is mayor of a large town, such as Houston or San Antonio. Frequently the mayor can cause or prevent the passage of a measure which will affect his city by appearing before legislative committees and other legislative bodies in the state and national capitals. He may persuade the Governor to exercise the veto power in behalf of the particular city. Such action tends to give the mayor considerable influence and power over legislation emanating from sources other than his own city council or commission.

Social Activity

A new mayor, when he first enters office, sometimes approaches the task with an idealistic fervor comparable to that of a schoolboy who is entering school for the first time. He firmly believes that he will be able to start work immediately and clear his desk within a few days. Despite his convictions, his intentions, and his beliefs, the well-meaning mayor soon discovers that a great deal of his time is utilized to fill social obligations and to take part in similar civic activities. Regardless of his personal desires, he is virtually forced to take part in all fraternal organizations possible, greeting friend and foe alike. He must develop whatever talent he possesses to make speeches, as he is constantly called upon to address clubs, organizations, and informal discussion groups. This activity on the part of the mayor is just as much a part of his daily routine as the signing of contracts on behalf of the city. If the continuance of his position did not depend upon the vote of the people this would not be true; however, as long as his position depends upon personal advertising, the successful mayor cannot afford to avoid such activities for fear of offending his supporters or of affording his opponents arguments against his reëlection. Critics of an administration in office commonly find strong arguments for a change in government by stressing the reticence of a mayor or some other important city official as an antisocial attitude and demonstrating a lack of interest in city problems and the welfare of the inhabitants.

Disregarding the part played by local welfare organizations

and civic groups, in the past the mayor has had difficulty in enlarging his reputation and consequently his sphere of influence, but today the socially-minded mayor is finding more adequate means for self-publicity through the medium of national professional organizations whereby he may have his name placed before the general public. This personal aggrandizement is very essential to the politically aggressive mayor who intends to prolong his career in the public service, although the trait, it must be admitted, is usually retained at the expense of other, more important, qualifications. Although there will be many times when he cannot avoid neglecting his office, the successful mayor must not neglect his administrative and executive duties for any period of time, especially if he has any consideration for the welfare of the city. As the median between social activities and the requirements of his office is not capable of easy definition, the average mayor is too often "between the devil and the deep blue sea."

In addition to his administrative duties and the demands of his social activities, the mayor must also retain some of the elements and characteristics of the scholar, because only by doing so does he maintain the intellectual level so essential to the leader of the community. Constant study and a maintenance of an intellectual curiosity will keep the mayor alive to methods by which he can improve the government of his city.

By a careful nurturing and development of his personality—and this involves a considerable amount of insight, critical analysis, and character reading—the mayor may carry his administration to extreme heights by influencing the opinion of the public. At times he may wield the public opinion as a part of his power in order to influence some other branch of the city administration, and he can also mold public opinion in order to obtain benefits for the community.[57] Mayors often realize the necessity of a certain improvement within the city, whereas the governing body might be definitely opposed to such an improvement. At this stage in the procedure, the mayor may take his case to the public, or he can formulate an educational campaign which is designed to bring pressure upon the members of the council or commission. Such

[57]Hoan, Daniel W., *The Powers of a Mayor* (1918) 3 MARQ. L. REV. 40.

action can be carried out only by a master of the psychology of human behavior.[58]

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[58]This manner of activity on the part of the mayor in a city manager city will oftentimes cause the mayor to become a considerable force in the community. His power, although extralegal, is very active and tangible, and comprises a force to be considered by his opponents.

CHAPTER IV

THE CITY MANAGER

To persons unfamiliar with council-manager government, mere mention of a city manager evokes the bugaboo of dictatorship and absolute control and creates an aura of apprehension which obscures all attempts at education. The attention of the public is not focused on the fact that the city manager is a technician, a professional man whose training and experience qualify him to guide the destinies of municipal activities. He is an expert in public administration, accepting responsibility for all that he does and remaining under the control of the city governing body at all times. Some authorities refer to the city manager as "controlled executive," subject to the will of the council.

His power is akin to that of the president of a private corporation. It is true, however, that the powers of the city manager have been acquired at the expense of other city officials, such as the mayor and members of the city councils or commissions. Particularly is this true in the instance of the mayor, whose administrative powers have to a great degree been conferred upon the manager and who has no control over him other than as a member of the governing body. However, this transfer of power was effected because the other, older forms of government could not meet the necessities of present-day governmental life. As the mayor-aldermanic form of government was so interlocked with politics, and as both it and the mayor-commission form did not centralize authority sufficiently, the manager-council form was devised, and its effectiveness has been conclusively demonstrated. The manager is given wide administrative powers; he possesses the power to appoint and remove certain key officials, and his position is necessarily intimately connected with the financial activities of the city. Customarily, the city manager is expressly designated in charters as the chief administrative and executive officer of the city.

According to the *Municipal Yearbook* for 1939 there are thirty-six cities in Texas with a city manager. The fact must be borne in mind, however, that there are a few cities and towns with a manager which are not included in such a compilation due to the fact that

the manager does not possess the usual powers or devotes only a part of his time to the position.

The city manager in Texas is not ordinarily required to be a resident, although some cities require that the resident be given preference when the qualifications of all candidates are equal. A few cities expressly require that the city manager become a resident of the city immediately upon his appointment. He is sometimes required to be a citizen of the United States, but not necessarily a qualified elector. One charter was found to require the applicant to be a resident of Texas for twelve months immediately preceding his appointment. Due to the highly technical nature of the work, perhaps no emphasis should be put upon the requirement of residence, although the argument is frequently made that a local man is better acquainted with local conditions. In addition to these, other requirements are frequently placed upon candidates; for instance, they must be "suitable," they must have executive and administrative qualifications, and they must be chosen without any regard to political influences.[1] Many small towns prefer an engineer to act as city manager, but the larger cities are less insistent that this office be occupied by one with engineering training and experience. Negative qualifications are not unusual; for example, the managers are ofttimes forbidden to be members of the governing body of the city.

All city managers are appointed, the term of office usually being indefinite, as they hold office at the will of the appointing body. It is rather surprising that city managers have held office for such short terms. In a recent survey of certain Texas cities it was discovered that the average manager has remained in office slightly less than three years, whereas the nation-wide average of 468 city managers at the end of 1938 was seven years and six months.[2]

As a rule, the salaries of city managers are proportionately higher than the salaries of mayors in cities of the same population

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[1]In this connection it is interesting to note how much experience the present city managers of various cities have had. Slightly less than one-half of the city managers in the cities studied had no city manager experience at all prior to obtaining their present positions. However, the others had had from three to eighteen years' experience as city managers prior to obtaining their present positions.

[2](1939) 21 PUBLIC MANAGEMENT 90.

groups (see Figure I). Of all the cities studied above 5,000 population, the lowest paid full-time mayor received $1,680 per annum, whereas the lowest paid city manager received $2,400. The highest paid mayor received $8,000 and the highest paid city manager $10,000. As the pay is frequently not enough to attract the really capable and qualified man, tendencies to higher salaries should be encouraged rather than discouraged.[3]

Although many city managers neither hold another position with the city nor perform duties which could just as well be transferred to another person, most of the cities studied place various duties upon their managers. In a myriad of instances he may be found to serve as purchasing agent, finance officer, director of finance, park manager, city engineer, superintendent of waterworks and water department, or director of the local housing authority. Such conditions only emphasize the necessity of lightening the burden of most city managers, who have so many duties imposed upon them that they are unable properly to perform the more important functions and activities. Care in the selection and imposition of such duties will increase many times the value of the manager as an administrator.

As the city manager is given such a great amount of control over city finances, it is necessary in most instances to place him under bond. All of the cities studied placed their managers under bonds which varied in amount from $500 in Longview to $50,000 in Fort Worth.[4]

Usually charters of city manager cities merely state that the manager is to hold office at the will of the council, but some go into more detail. For instance, if he is dismissed after serving six months he may demand written charges and have a hearing, but pending such hearing he may be suspended.

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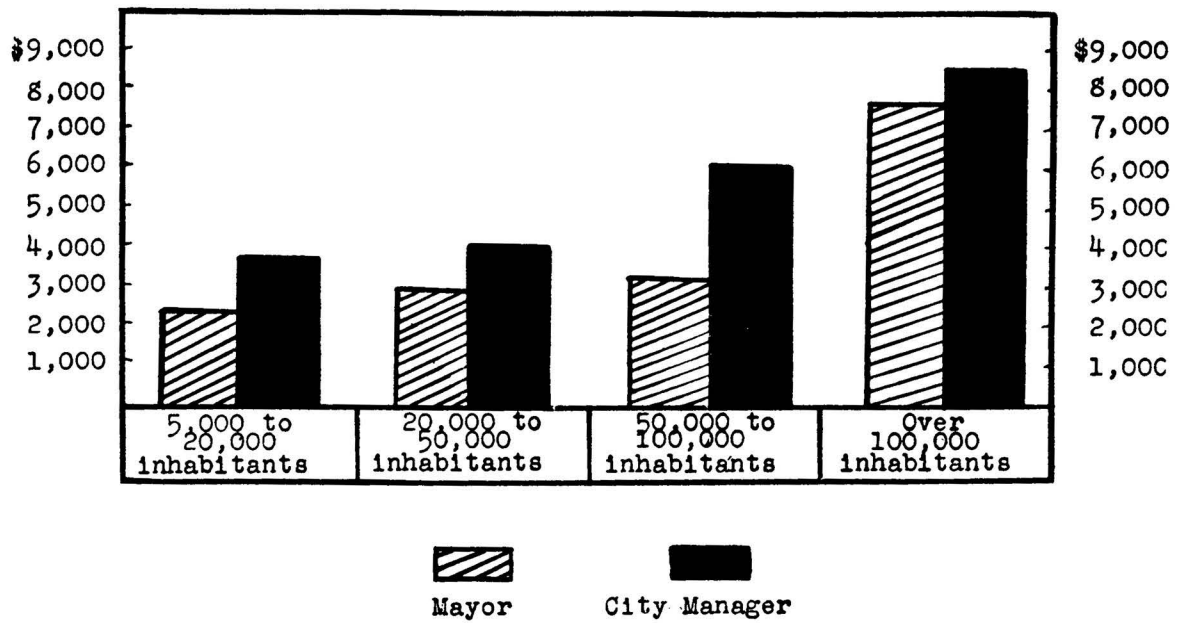
[3]Unlike some of the mayors, no city manager receives any fees for his work.

[4]The bonds required are as follows:

Fort Worth	$50,000	Brownsville	$ 5,000
Beaumont	25,000	Goose Creek	5,000
Dallas	25,000	Harlingen	5,000
Port Arthur	25,000	San Angelo	5,000
Austin	10,000	Wichita Falls	2,000
Tyler	10,000	Marshall	1,000
Amarillo	5,000	Longview	500

FIGURE I
Comparative Average Annual Salaries of Full-Time Mayors and City Managers
1938



The recommendations concerning the administrative powers of the strong mayor apply likewise to the city manager, although in most instances the managers have already adopted and placed into use many of these practices. The city manager is forced to accept membership on many boards and committees in order that administrative efficiency be assured, but such should not be made a burden upon him, nor force him to neglect his major duties. As suggested in the preceding chapter, the problem of avoiding membership on these committees may be solved by allowing the executive or administrator greater scope in his appointive power.

All cities using council-manager government make it possible for the manager to appoint a few officials, but in about half of those communities studied the confirmation of the council is necessary in order that the appointment be considered valid. In a few cities the city governing body is also given the power to appoint some of the city officials, as for example the city attorney. In these cases the probability is that the power of removal is in the same agency. Likewise, in a few cases, when the appointment is placed in the hands of the city manager who recommends a particular officer subject to the approval of the council, the power of removal operates in the same fashion. However, in most instances the manager has the power to remove, regardless of the method of appointment, without action on the part of the governing body. In Tyler the action of the city manager in appointing or removing certain officers may be overruled by a three-fifths vote of the city commission. In connection with the appointment and removal of city officials, most charters give due regard to the subject of nepotism.

The most flagrant defect in the commission form of government is the lack of centralization of responsibility, and when this was discovered the council-manager government was created as a means of correcting the defect. As a step in the corrective process, most city managers are strong exponents of the conference and the interview method, believing that the personal contact with city employees is much more effective and efficient than the use of written memoranda.[5] An excess of this type of activity may be avoided through a wise and fortunate choice of departmental heads who

[5]One city manager suggests that personal interviews be used for morale and memoranda for accuracy.

are capable of taking care of all problems and difficulties arising within their respective departments. In this manner, office routine will allow only the very important and a comparatively few problems to reach the city manager's desk, permitting him more free time in which to devote himself to the broader aspects of administration. Incidentally, it might be noted that this furnishes additional proof of the fact that the power of appointment and removal is a vital feature of council-manager government.

There seems to be a conflict of opinion among managers as to whether they should go to the office of the departmental head or whether that officer should come to the manager. No doubt the solution of this problem will depend upon the personal make-up of the particular city manager. If he wishes to remain aloof from the other city officials and maintain a certain degree of dignity, then he may request the other officials in the city hall to visit his office. But on the other hand, if the city manager believes that comradeship and mutual understanding are necessary, he will not hesitate to visit the offices of his official family. It is this type of relationship that is frequently carried over into the manager's relationships with the members of the city governing board.

The fact must be remembered that in all his relations with other officials and employees in the city, the manager is the chief executive. By virtue of this position it is only logical that he be given the investigatory power which was formerly held by the mayor, as a check over administration. The manager is responsible to the council for successful operation of the city government, for the betterment of personnel, and for an economical administration; consequently an investigatory power is essential.

Like the mayor in other cities, the manager is by statute the chief budget officer in council-manager cities[6] and is required to file a copy of the budget annually with the city clerk,[7] the county clerk, and the State Comptroller.[8] Through the exercise of this power he is capable of exerting such control that more effective and efficient government may be guaranteed. Most city charters not only expressly place the power of preparing the budget upon

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[6]TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 689a-13.

[7]*Id.* art. 689a-14.

[8]*Id.* art. 689a-15.

the manager, but they burden him with the duty of seeing that the city keeps within the budget adopted. It is in connection with the financial affairs that the city manager's approval plays an important part. He is required to sign or countersign all orders or payments of money, and he is continually called upon for recommendations in regard to the outlay of municipal funds. His advisory powers are virtually unlimited and should be given consideration by the city governing board.

There are many miscellaneous powers and duties conferred upon the various city managers. They must see that all laws and ordinances of the city are enforced, attend or empower some person to attend tax sales in order to bid on behalf of the city, see that all terms of the public utility franchises in favor of the city are enforced and kept, and answer within their discretion any writ of garnishment against the city. In some cities the managers may make contracts on behalf of the city, and in most of the communities they sign all such agreements. Somewhat like the mayor in aldermanic cities, they are frequently smothered under an avalanche of odds and ends such as granting permits for various activities and approving minor items and details.

The mayor exercises no control over the city manager, except as a member of the governing body. The manager is privileged to call special meetings of the council; he attends their meetings; and he advises the council on all matters, financial or otherwise. But it is important to note that the council remains independent in its considerations, as the city manager is not allowed a vote or a veto. The charter of the city of Austin expressly forbids the city council to give orders to subordinates of the city manager and requires the council to deal with the administrative service solely through the manager.[9]

The relationship existing between the manager and the governing body is extremely interesting, and one which demonstrates great variation among the cities. In some cities the council is the governing unit, in theory and in practice, maintaining its own accepted integrity and also encroaching with increasing rapaciousness upon

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[9]Charter of the City of Austin, Art. XIX, Sec. 3. See also Charter of the City of Dallas, Sec. 28. Either by express grant or by implication this is true in all city manager cities.

the jurisdiction of the city manager. Thus, it is not rare to find city councils determining what individuals the manager is to appoint. Infrequently some political faction, having control of the legislative portion of the city government, will absolutely designate the appointees of the city manager, whereas in other cities such a proposed procedure is fixed as a condition precedent to the offer of an appointment to the city manager. When the council usurps power in this fashion, council-manager government may no longer be said to exist. Tactfulness, however, is essential to any manager and through a judicious use of diplomacy he is often enabled to obtain even more than he may have originally wished, and without placing his job in jeopardy. It is only human nature for the council occasionally to bring pressure upon the manager, and it is indeed a wily person who can avoid this pressure and do so without offending the individual members of the governing board.

On the other hand, a city manager may be just as grasping and tyrannical as any ancient monarch. It is the nature of some individuals to "ride in the whirlwind and direct the storm." They are unable to tolerate the thought of another individual participating in their arrogant absolutism. If the members of the council are of negative personality, the manager will have his way. This regrettable situation may also occur when the council is inactive or when it is merely disinterested. The manager, however, may possess much power under more favorable conditions. If he is a qualified, capable individual, with a reliable judgment, and has proven his worth to the satisfaction of the members of the council, they may trust all of his decisions, without inquiring into the advisability of proposed action or without questioning his advice.

A city governing body must maintain its jurisdiction in order to maintain its integrity, just as the city manager must also be careful of encroachments upon his powers; otherwise one of the agencies will become as silent and ineffective as some of the mayors. The council has, in practice and in theory, a very definite place in the city manager government as the manager's actions ultimately depend to a great extent upon its approval. The council represents the people, the employer of the technician who is hired to do a certain job, which redounds to the benefit of the community at large.

Some managers remain aloof from their councils socially, appar-

ently acting upon the assumption that there will be less likelihood of political "pull" or personal influence playing an active part in municipal relations and activities. On the other hand there are managers who firmly believe that more can be gained through a more social approach and outlook. Thus, such an individual might invite the members of his council to dinner or he might visit them in their homes. Such an attitude may result in a broader interpretation of social problems in the city and enable the city manager and the council to work in harmony towards the common good of the city. Too much emphasis cannot be put upon the personal interview, whether it takes place in the office, in the home, or across a restaurant table, because it does allow the presentation of personal views without the discord usually found in the city halls of this country.

Whether or not harmony will reign at the city hall will depend to quite a degree upon the personality and make-up of the manager. He must exert every effort to remain aloof from local politics and avoid the limelight of publicity.[10] One of the criticisms often directed at city manager government is that it does not afford the very essential element of political leadership, but this lack is frequently indirectly filled by the city manager, either alone or in conjunction with the ceremonial head of the city, the mayor.

The manager should avoid all publicity designed to give him credit for any undertaking of the city which he serves, but he must frequently meet the representatives of the press. In his relations with the newspapers, as in his relations with the council, the fairness of his activities and purposes must be apparent and he must readily divulge all necessary information. Furthermore, as a "public relations counselor" for the council, the manager must give all credit to that body.

At no time should the manager forget that he is rendering a service to the inhabitants of the city. Once this fact is lost sight of, the productiveness and adequacy of the manager approach the infinitesimal. First of all, the manager has to instill a certain amount of curiosity concerning city government in the people of

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[10]Childs, Richard S., *The Best Practice under the City Manager Plan* (1933) 22 NATIONAL MUNICIPAL REVIEW, *Supplement* (Reprinted January, 1937).

the city in order that they may better appreciate good government. Many managers attempt to carry on an educational campaign of their own, forcing their personality to the fore and partaking of the advantages of publicity afforded to them. Other managers resist this type of education and prefer the information to be disclosed through others. The latter method is preferable.

After the public has developed an interest in the local government, there will be an increasing number of visitors, job-seekers, complaints, and telephone calls to the city manager. In the small cities and towns the manager will be able to meet all callers and individually consider complaints, but in the larger places this will be impossible. But whether the manager or his subordinates handle such business, all visitors must be treated alike, without partiality or favor, but with tact and judgment. Especially is this true in the case of complaints, which are continually coming to the manager's office. Careful phrasing of replies and questions in dealing with an irate taxpayer aids the establishment of better city services. When a complaint is made, immediate action should be taken upon the subject matter in order that a still deeper appreciation of the city government will be developed.

At times the unreasonableness of the public produces a deep distrust in the mind of the administrator. When this occurs he will believe that the collective individuals in the city are a well-developed group of morons, without initiative, reasoning power, or courtesy. Nevertheless, regardless of his trials and tribulations, the manager must remember that it his duty to remain courteous at all times, giving due regard to all problems, whether they arise in the back yard of a department store clerk or on a paved boulevard in front of the home of the richest man in the city. To state his relation in another manner, his door must always be open to all comers.

A well-trained city manager has a wonderful opportunity to better city government. As he is a technical operator, he should and must introduce efficiency in operation. This includes a multitude of activities, such as the introduction of widespread economies and of trained personnel. The closer a city approaches to a cash operation basis, the more successful a city manager is considered. However, economy does not necessarily mean penny-pinching de-

vices, as economy may be effected by spending rather than saving. This fact is frequently lost sight of by the mass of municipal inhabitants, who ordinarily believe that economy is synonymous with parsimony.

The city manager has the power to introduce trained personnel into the city government, and through judicious use of his appointing and removing power he is enabled to inject a certain degree of efficiency into operation. There can be no doubt that a trained operator is of more value to the city than the vote-getting, ward-heeling, political subordinate, who knows nothing of his job and received it only through political connections.

CHAPTER V

THE CITY SECRETARY[1]

In the smaller communities of Texas, when a visitor approaches the door of the city hall, after wending his way through the town loafers and idlers, he will frequently be met at the entrance by an individual who pauses first to straighten his glasses and then to push his eye-shade back upon his forehead for the purpose of eyeing his caller more carefully. This person will undertake to answer any question that the visitor cares to ask, and usually with a remarkable degree of accuracy. And if the visitor cares to engage in over-the-back-fence gossip he will find in the city secretary a most interesting conversationalist. This fact, however, is not to be regarded as an indictment of the secretary but is further evidence of the many talents he possesses. This individual must of necessity know much about the city, its operations, and its records, and this knowledge should not be limited to present-day happenings. He must have at his fingertips information concerning events which occurred ten, fifteen, and twenty years in the past. In fact, what has been said of the town clerk in England might likewise be applied to the average American city secretary:

> Some of the duties of the Town Clerk are imposed on him by law, others by custom. Others again he comes to assume, or has thrust upon him, by reason of his experience. For while Mayors come and Councils go, the Town Clerk goes on forever. And after being in office for a few years he comes to be recognized as the repository and fountain-head of all knowledge relating to his town and its affairs, and is consulted daily, sometimes hourly, by the councillors he serves.[2]

The secretary's accumulation of knowledge results from the multitude of duties placed upon him for the successful performance of which he receives no acclaim but for failure in which he assumes complete responsibility. He performs so many duties and possesses

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[1]This office was in existence two thousand years ago. *Two Ancient Offices: Town Clerk and Borough Treasurer* (May 16, 1936) 100 JUST. P. 325. The terms "secretary" and "clerk" are used synonymously in this chapter.

[2]NATIONAL ASSOCIATION OF LOCAL GOVERNMENT OFFICERS, BEHIND THE MAYOR'S CHAIR: WORK OF THE TOWN CLERK (London, no date) 2.

so many powers, conferred by statute, ordinance, and custom, that it is extremely difficult to classify his office under any particular heading. In addition to being the city secretary, he is commonly the city treasurer, or the tax assessor and collector. Less frequently he performs the duties of one or more of the following: assistant assessor and collector, judge of the corporation court,[3] corporation court clerk, manager of waterworks, assistant to the waterworks manager, purchasing agent, registrar of vital statistics, plumbing or electrical inspector, sanitary sewer revenue collector, auditor, fire marshal, city manager, and/or water receipts collector.

Combinations of duties and powers in the office of the city secretary are more prevalent in commission-governed cities than in other forms of government. One reason for this is that the general laws governing commission cities require the city secretary to perform the duties of the treasurer, assessor and collector. He is invested with all the power, rights, and duties conferred by the general laws upon the offices of clerk, treasurer, assessor and collector, of cities, towns, and villages.[4] The combination of the duties of these three offices is not peculiar to the commission cities, as some aldermanic cities likewise combine them. On the other hand, the practice is not universal in the commission cities, and combinations of the duties of secretary and treasurer, or of the secretary and assessor and collector, are frequently found. Some variance in the duties of this office is also noticeable in the charter cities, where many combinations of positions are permissible. For instance, in Houston the city secretary is also treasurer and director of the civil service, and in Corpus Christi he serves as tax assessor and collector. In such instances the combination of duties is often a matter of nomenclature, as subordinates usually perform the duties of the particular offices.

A definite tendency exists among Texas cities to select the city secretary or clerk, as he is sometimes spoken of, by appointment,

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[3]It has been held that the fact a city by election has chosen a man to be secretary does not preclude the city council from appointing him recorder, though such appointment, when accepted, in effect abrogates the prior action of the people. State *ex rel.* Kingsbury v. Brinkerhoff, 66 Tex. 45, 17 S.W. 109 (1886).

[4]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1161.

as distinguished from election. As noted above, the general laws governing commission cities require the appointment of a city clerk who is also treasurer and assessor and collector, while the charters governing home rule cities frequently fill the position by appointment. The general laws governing aldermanic cities and towns, however, require the election of the secretary,[5] but in these communities the statutory mandates are not strictly observed, and in many instances the officer is appointed without regard for the legality of the action. The eligibility requirements pertaining to this office, when stated by charters, are limited in scope, commonly requiring the prospective city clerk to be a qualified voter and a resident of the city. The mayors and/or the governing bodies making the appointment usually take into account the ability to take dictation and use a typewriter. Furthermore, the nature of the work in the particular city frequently makes other qualifications necessary, such as ability to meet people without antagonizing them, to appease irate taxpayers, and to "sell" the city government to all inhabitants.

The term of office may not exceed two years under the constitutional restriction,[6] but in practice many city secretaries remain in office term after term without formal reappointment. This oversight on the part of the councils and commissions is not uncommon and apparently no step has been taken to rectify the situation. This lack of action on the part of the governing body has a tendency to make of the city secretary a "career man," who holds office for many years, and consequently may be able to institute reforms not only in his own office but for the city at large. The salary offered often does not attract and hold the most desirable individuals.

Salaries of city secretaries, regardless of the form of government, range from $100 to $200 per month, and it is possible for this official in a city of 2,500 inhabitants to receive as large a salary as the secretary in a city of 100,000 population. The

[5] *Id.* art. 977.

[6] The Texas Constitution, Art. XVI, §17, which provides that officers shall continue in office until their successors are qualified, does not authorize legislation extending the term of a city clerk to four years. It was intended to meet such emergencies as might occur under the laws requiring elections or appointments to be made every two years. State *ex rel.* Bovee v. Catlin, 84 Tex. 48, 19 S.W. 302 (1892).

reason lies in the fact that the secretary is a virtual city manager in the smaller communities, whereas in the larger cities and towns he is no more than a clerk and a custodian of records for the city governing body. Very few secretaries have an opportunity to obtain fees for their work, although a few do so in connection with their duties as registrars of vital statistics.

The bonds of city secretaries in aldermanic cities are usually $1,000 or $2,000 in amount, but all cities do not require a bond. The general laws require the secretary of commission-governed cities to give a bond double the amount of the estimated annual revenues of his city or town, the estimate to be made by the board of commissioners.[7] The average bond of the city secretary who also serves as treasurer and assessor and collector amounts in the general law commission-governed cities to $6,500, whereas in the home rule cities it is $10,000. In the commission-governed home rule cities where the secretary does not have a combination of duties, the amounts of the bonds range from $2,500 to $5,000. Among the city manager cities there is no consistency in the requirement of a bond or in the amounts where they are required.

Unlike the offices of treasurer, assessor and collector, city attorney, and city engineer, there is no statutory provision permitting the office of city secretary to be abolished in general law cities.[8] Although home rule charters oftentimes adopt provisions similar to the general laws, many charters vary therefrom by allowing the abolition of the office. It is true, however, that in general law cities provision is made for the removal of the city secretary. The law states that he may be removed by the city council for incompetency, corruption, misconduct, or malfeasance in office, after notice and hearing.[9] Charter provisions outlining the grounds and methods of removal of city officials in cities and towns operating under the home rule amendment vary to a small degree between communities. The grounds for removal stated in charters, however, do not vary greatly from the general laws of the state, although a few specify that habitual drunkenness and inability or willful neglect in the performance of the secretary's duties are adequate

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[7]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1161.

[8]*Id.* art. 977.

[9]*Id.* art. 1006.

reasons. In virtually all home rule cities, notice and hearing are essential steps in the procedure attendant upon removal.

Due to the size of the communities, city secretaries in cities and towns incorporated under the general laws do not possess as many duties as those in the charter cities, but in most instances the sphere of their activity is much broader as there is more variety in their work. For instance, in the smaller cities in Texas the secretary performs a number of duties which ordinarily are conferred upon other officials in the larger communities.

The duties of the city secretaries in the general law cities are briefly and succinctly stated in the Revised Civil Statutes of the state in the following manner:

> The city secretary shall attend every meeting of the city council, and keep accurate minutes of the proceedings thereof in a book to be provided for that purpose, and engross and enroll all laws, resolutions and ordinances of the city council, keep the corporate seal, take charge of and preserve and keep in order all the books, records, papers, documents and files of said council, countersign all commissions issued to city officers, and licenses issued by the mayor, and keep a record or register thereof, and make out all notices required under any regulation or ordinance of the city. He shall draw all the warrants on the treasurer and countersign the same and keep an accurate account thereof in a book provided for the purpose. He shall be the general accountant of the corporation, and shall keep in books regular accounts of the receipts and disbursements for the city, and separately, under proper heads, each cause of receipt and disbursement, and also accounts with each person including officers who have money transactions with the city, crediting accounts allowed by proper authority and specifying the particular transaction to which such entries apply. He shall keep a register of bonds and bills issued by the city, and all evidence of debt due and payable to it, noting the particulars thereof, and all facts connected therewith, as they occur. He shall carefully keep all contracts made by the city council; and he shall perform all such other duties as may be required of him by law, ordinance, resolution or order of the city council. He shall receive for his services an annual salary payable at stated periods, and such additional fees as the city council may allow.[10]

To compile a complete and extensive list of the express and implied powers and duties of city secretaries would be virtually impossible, as the daily details involved in their work are so

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[10] *Id.* art. 1000. For a list of the powers of city clerks in Wisconsin, see Leuch, Peter C., *Duties of the City Clerk and Powers of the Common Council* (1919) 3 MARQ. L. REV. 126.

numerous and so varied. City charters usually reiterate the duties set forth in the statutes governing general law cities. In addition to those duties, however, charters often contain other provisions. For instance, the secretary is frequently required to attest various processes and instruments and administer oaths and affirmations and give certificates thereof; to examine petitions, whenever such a step is necessary for any procedure; to make up ballots for elections, handling the absentee ballots and keeping the returns; and to make a complete and detailed statement to the governing body for the preceding month of all money received by the city and all expenditures. He acts as depository for various instruments and writings, such as specifications for contracts, and acts as ex officio secretary of many commissions and boards, and gives notices for them. As secretary, he is required to call special meetings of the governing body when requested to do so by the proper authority.

The duties of the secretary are thus divided into two broad classes, the ministerial activities connected with the operations of the city council or the commission, and the supervisory powers exercised as depository of city papers, documents, and contracts. Within this latter classification are found the financial activities of the secretary which are common in many cities. As stated above, these duties comprise the keeping of accounts and the making of reports, work which although not controlling in nature is of vital importance as an informative aid.

As was mentioned above, of all the powers conferred upon secretaries of our cities, regardless of the form of government, the most important is the power to record action of the city governing body. And yet it is in this respect that the city secretary is frequently most lax. A casually interested person would be completely and utterly lost if he were to attempt to find a particular ordinance or resolution in the books of some of our city offices. One desiring to discover whether or not a particular ordinance is in effect finds it necessary to go through book after book, page after page, and line after line. What order exists in many of our municipal records is more akin to chaos than to regularity.

In order to expedite these matters the city secretary should take time to arrange a system for his records. In conjunction with this, he should always attempt to administer the details of council meet-

ings with efficiency. Before each meeting there is the calendar to prepare and during the meetings he must act as parliamentarian in many cases. Often he aids the councilmen or commissioners in drafting ordinances and resolutions.[11] A small amount of preparation before a council meeting will save time during the meeting, and in many instances will be of the same effect as "pouring oil on troubled waters." During council meeting, by having all necessary information and documents at hand, the city clerk can contribute much to the expedition of council business.

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[11]See NOLTING, ORIN F., and HOLLINGSWORTH, JOSEPHINE B., RECORDING COUNCIL ACTION IN THE CITY CLERK'S OFFICE (Published by the International City Managers' Association, Chicago, 1938).

CHAPTER VI

THE FINANCIAL OFFICERS

Among the numerous problems of municipal finance there is the one of organizing and coördinating the duties and powers of the various financial officials. However, this can scarcely be considered a problem in the smaller cities and towns where the city secretary or the city clerk frequently serves as the sole financial officer. All too frequently he performs the duties of tax assessor, tax collector, and treasurer. In the larger communities there is an increasing amount of specialization, and consequently more officials take part in the financial activities of the city. Some of the larger cities possess a coördinated department of finance, with all financial aspects of the city government incorporated into one unit under the supervision of a director of finance. This official retains general control over the administration of the financial affairs of the city, including the assessment and collection of all taxes and special assessments, the issuance of licenses and the collection of license fees, the keeping and supervision of all accounts, the custody and disbursement of city funds and moneys, and the purchasing of supplies.

In Dallas and Fort Worth there are the following divisions in this office: purchases and supplies; assessments, licenses, and taxes; and treasury. Lyndon Abbott, however, in 1935 recommended the following organization for the larger cities in Texas:

> His [director of finance] department would be divided into bureaus, each having a direct and important bearing upon finance. These would be the Bureau of Control and Accounts (headed by the comptroller), the Treasury Bureau, the Purchasing Bureau, and perhaps a fourth, the Bureau of Taxation. The place of the treasurer-collector in this arrangement is apparent. As head of the Treasury Bureau, he would be appointed by the chief executive of the city upon the recommendation of the finance director.[1]

Consideration will now be given to the powers and duties of the more common financial officers.

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[1] ABBOTT, LYNDON E., A MANUAL OF TAX COLLECTION PROCEDURE FOR TEXAS CITIES (1935) 14.

City Treasurer

The office of the city treasurer has gradually disappeared from the center of the stage of municipal affairs. In the past this office held a key position in the city, but today it has deteriorated to such an extent that it is of little importance. Consequently a very important city financial officer has become no more than a custodian or a depository for city funds.

The general laws of the state create the position of city treasurer,[2] but the office may be abolished by ordinance and the duties conferred upon some other person.[3] Although this same provision requires the election of the treasurer every two years, not all cities follow the letter of the law, as several appoint the incumbent. The same inconsistency exists in regard to the length of term, some cities setting a definite period, such as two years, and others merely stating that the official is to hold office for an indefinite time. In commission cities incorporated under the general laws the city clerk possesses the duties of the treasurer.[4]

All treasurers in the general law cities studied serve only part time and do not receive compensation. This is fresh evidence of the relative unimportance of the office in many cities of this group. Furthermore, in only a few instances is the treasurer bonded.

Treasurers, like other officers in general law communities, may be removed by the governing body for incompentency, corruption, misconduct, or malfeasance in office.[5] The officer, however, is protected from arbitrary action by the requirement of notice and hearing. On the other hand, two-thirds of the members of the city council have the power to remove any officer which it appoints, by resolution declaratory of its want of confidence in the officer.[6] The question immediately arises as to whether the council may remove by resolution a treasurer who is appointed in violation of the statute requiring selection by popular election. Apparently this question has never been answered.

The apparent tendency in home rule cities is to elect the treas-

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[2]Tex. Vernon's Ann. Civ. Stat. (1925) art. 977.

[3]*Ibid.*

[4]*Id.* art. 1161. For a development of this organization see the chapter on the secretary.

[5]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1006.

[6]*Ibid.*

urer, as distinguished from appointment, and a few cities possess charters which provide that the office shall be let to the highest and best bidder. It is possible that no doubt would ever have been cast upon this latter provision if only individuals were eligible to bid, and not banks or other corporations. Corporations should not be permitted to bid for this office, as one corporation cannot hold an office in another.[7] It is generally accepted, however, that a charter provision allowing the selection of a treasurer by bidding refers to the city depository rather than to the office of treasurer.[8]

Virtually all home rule cities choose their treasurers for a two-year or an indefinite term, but in most instances the incumbent works only part time. When he is paid any salary at all, it is usually a very nominal sum of from $1 to $5 annually, although in some cities it is $50 monthly. When the position requires the full energies of the incumbent, he is paid from $100 to $250 monthly. In no city studied were there fees paid to the treasurer. As a matter of practice, the smaller salaries may be explained by

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[7]City of Corpus Christi v. Mireur, 214 S.W. 528 (Tex.Civ.App. 1919, writ of error refused).

[8]See *ibid;* City National Bank of Corpus Christi v. City of Corpus Christi, 233 S.W. 375 (Tex.Civ.App. 1921).

The statutes governing city depositories, however, have not been as vague as the charter provisions. Until 1937 every city, town, and village in the State of Texas was authorized by statute to accept "sealed proposals" from banks and their bankers for the custody of city funds. However, in 1937 this law was amended to state that the governing body of every city, town, and village is authorized to receive applications for the custody of city funds from any banking concern or banker. TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 2559. Notice that such applications will be received by the city are published by the city secretary in some newspaper in the city not less than one nor more than four weeks before the meeting of the council to consider the applications. *Ibid.* As soon as the required bond is approved, the council is required to make an order designating the particular organization or banker the depository of the city funds. Immediately thereafter the city treasurer is required to transfer all city funds in his hands to the depository. *Id.* art. 2561.

the fact that a prominent banker is usually appointed treasurer and his bank is selected as depository for the city.

Duties

The following duties are imposed upon the treasurer in general law cities by statutory enactments:

1. The treasurer receives and securely keeps all moneys belonging to the city.[9]

2. He makes payments for city funds upon the order of the mayor, attested by the secretary, under the seal of the corporation. No order may be paid unless it shows on its face that the council has directed its issuance, and the purpose for which it is being issued.

3. He renders a full and correct statement of receipts and payments to the city council, at their first regular meeting in every quarter and at any other times he may be required to do so.

4. At the end of every half-year he has published at the city's expense a statement showing the amount of receipts and expenditures for the preceding six months, and the general condition of the treasury.

5. The treasurer must do such other acts and perform such duties as the city council may require.

It must be remembered that the duties of a treasurer in a general law city are frequently conferred upon other offices, which are discussed elsewhere in this study.[10] In one city an alderman was found to be serving as city treasurer, and in another the city manager performed the duties of that office. On the other hand, the nominal treasurer may perform the duties of such officers as the city assessor or auditor. In this manner the duties of the office are multiplied many times.

The duties of the treasurer in cities operating under the home rule amendment do not vary greatly from those in cities operating under the general laws. The treasurer's daily work and the ministerial duties attendant upon such an office, however, are multiplied many times over those found in general law cities and towns. For

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[9]Express mention of this duty is made in connection with the custody of funds for seawall purposes. *Id.* art. 6838. TEX. PEN. CODE (1925) art. 90.

[10]See the chapter on the city secretary.

instance, charters frequently go into detail in specifying the necessity of duplicate receipts for money received, and in the matter of deposits. The treasurer is often required to make daily deposits of funds received by him in a bank selected by the governing body, and he is to collect interest on such balances when it is paid.

By statute the treasurer in every city in the state is required to report to the council on or before its first regular meeting in July of each year the amount of receipts and expenditures of the treasury, the amount of money on hand in each fund, and the amount of bonds falling due for redemption, and also the amount of interest to be paid during the next fiscal year.[11] He also is required to report to the State Comptroller annually on the condition of interest and sinking fund for each set of bonds, warrants, and amounts due banks.[12]

Liability

The Revised Civil Statutes of Texas provide that the treasurer shall give a bond in favor of the city in such amount and in such form as the city council may require, with sufficient security to be approved by the council, conditioned for the faithful discharge of his duties.[13] Peculiarly enough, the treasurer in some general law and home rule cities is not bonded, although when a bond is imposed it is of a large amount. The bonds of treasurers in the aldermanic home rule cities surveyed vary from $25,000 to $50,000, whereas in the home rule commission cities they vary from $100,000 to $600,000. These figures are not quoted to demonstrate any variations in practice between aldermanic and commission-governed cities, as they may be easily explained. There are no large aldermanic cities in Texas, whereas there are a number of large commission-governed cities, and consequently larger sums of money are handled in the latter.

By express provision in the statutes, the city treasurer is not responsible for any loss of the city funds through negligence, failure, or wrongful act of the depository, but nothing in the statutes

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[11]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 2565. Any treasurer who fails to make a report required by law is to be fined not less than $50 nor more than $500. Tex. Pen. Code (1925) art. 424.

[12]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 838.

[13]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1001.

releases the treasurer from responsibility for any loss resulting from his own official misconduct. Nor is he released from any responsibility for the city funds, when there is no city depository, nor for his misappropriation of such funds.[14] But in one case where the failure of a bank, which was not duly designated as city depository, precluded the city treasurer from accounting for the money on deposit in the bank, the treasurer and his surety were held liable.[15] In a somewhat similar case, an effort to designate a depository failed, as the bank pledged securities instead of giving a bond, but it was held that the treasurer could deposit at his own risk.[16] When the city agrees, without authority, to appropriate money, as from a special fund, the bondsmen of the city treasurer may secure an injunction to restrain him from executing the agreement.[17]

By statute, any officer who has been entrusted with the collection or custody of funds belonging to the city and who is in default to the city, cannot hold office therein until the amount of his defalcation is fully paid with 10 per cent interest.[18] Under this statute, the outgoing city treasurer is required to turn over funds belonging to the city, and he is liable in a civil suit for failure to do so, as well as to other penalties.[19]

The Auditor[20]

In some Texas cities and towns will be found auditors or con-

[14]Tex. Vernon's Ann. Civ. Stat. (Supp. 1938) art. 2564.

[15]City of Dalhart v. Childers, 18 F.Supp. 903 (N.D.Tex. 1937).

[16]City of Fort Worth v. McCamey, 93 F.(2d) 964 (C.C.A.5th 1937), *cert. denied*, 304 U.S. 571 (1938). See Bolton v. City of DeLeon, 283 S.W. 213 (Tex.Civ.App. 1926).

[17]City of Bonham v. Taylor, 81 Tex. 59, 16 S.W. 555 (1891).

[18]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1004.

[19]Brown v. City of Amarillo, 180 S.W. 654 (Tex.Civ.App. 1915, writ of error refused). Ferrell v. Town of Mountain View, 260 Pac. 470 (Okla. 1927) held the town treasurer was under a duty to turn over to his successor, when qualified, all the money in his possession belonging to the municipality.

[20]"The typical auditor is a man past middle age, spare, wrinkled, intelligent, cold, passive, non-commital, with eyes like a cod-fish; polite in contact, but unresponsive, cold, calm and damnably composed as a concrete post or plaster-of-paris cast; a human petrification with a heart of feldspar, and without charm; minus bowels, passion or a sense of humor. Happily they seldom reproduce and all of them finally go to Hell." Elbert Hubbard, quoted in (Jan. 1939) 15 Western City 38.

trollers.[21] Although categorical definitions separate the two positions and divide the duties, in practice there is no such separation, and auditors frequently act as controllers and vice versa. There is much laxity in the naming of these officials, and the commingling of duties makes it impossible to determine which official actually exists.[22]

The controller exercises control, whereas the auditor audits or verifies. The controller keeps the general and the budget control accounts, supervises accounts kept by the individual departments, installs accounting systems, checks revenues and receipts at the time of collection, and examines and approves claims before payment. This is a pre-audit, as distinguished from a post-audit.[23] The auditor examines and verifies past transactions, especially as to legality, and should report his conclusions to the legislative body. The combination of these duties results in the controller or the auditor, as he may be termed, checking his own accounts,[24] and if an independent audit is not made this procedure may prove dangerous. A city auditor, however, must not be confused with the independent auditor frequently employed by many governing bodies. The controller should have certain discretionary and executive duties which are not possessed by the true auditor, but as stated above, apparently there is little or no distinction in the duties in Texas cities, regardless of the terminology used.

Duties

The powers and duties of an auditor or controller are virtually

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[21]The terms "controller" and "comptroller" are synonymous. The word "comptroller" is undoubtedly an erroneous spelling which has become proper through usage.

[22]These officials are usually appointed. Sec. 41 of the charter of the city of Dallas provides as follows: ". . . The presidents of the several banks in the City of Dallas which are members of the Clearing House Association . . . shall be and are hereby constituted a nominating board which, by a majority vote of its acting members, shall nominate an auditor." After this the city governing body acts upon the nomination.

[23]There are four kinds of audit: pre-, current, post-, and work-. WALKER, HARVEY, PUBLIC ADMINISTRATION IN THE UNITED STATES (1937) 254. See PFIFFNER, JOHN M., PUBLIC ADMINISTRATION (1935) 267. See also McLarty, A. D,. *Salaries and Duties of City Comptrollers* (1938) 17 ILLINOIS MUNICIPAL REVIEW 211.

[24]PFIFFNER, PUBLIC ADMINISTRATION 321-22.

the same in most cities, towns, and villages of Texas. The statutes governing the general law cities do not prescribe the activities of the office, but the following list represents a cumulative grouping of such powers and duties of these officials as are set forth in various city charters, the terms "auditor" and "controller" being used synonymously:

1. The auditor or controller is frequently required to attend meetings of the governing body.

2. He is required to make certain financial reports at various intervals to the executive head of the city and to the governing body. In some instances he is responsible for the publication of certain notices and also of the financial statement of the city.

3. It is often necessary that the auditor certify the correctness of various financial reports, such as the monthly report of the city depository.

4. He is the receiving agent for receipts and statements, which other officials must present to him. An illustration of this duty is the acceptance of duplicate receipts from the city treasurer for moneys received by that official.

5. In some cases he must have on file the assessment rolls and tax receipts.

6. The auditor or controller is the chief accounting officer for the city, keeping all books of accounts, including accounts of all city property and all receipts and disbursements of money. In some cities he is responsible for the establishment of an accounting system.

7. One of the most important duties is the investigation of accounts. In some cities, upon the death, resignation, removal, or expiration of the term of any other officer, he causes an audit and investigation of the accounts of the officer to be made, and reports thereon. Furthermore, he often examines the accounts of all officers periodically.

As this official is to approve all bills and claims made against the city, he may pay warrants only when he has audited and examined the claim and found it legally due and payable. Thus he is under a duty to examine all pay rolls, bills, and other claims against the city. In order to successfully perform this duty he

may summon any officer, agent, or person and examine that individual upon oath or affirmation administered by the auditor.

Before a contract may be entered into or an obligation authorized, the auditor or controller must certify that the funds are on hand, or will be before they are needed. Often he ascertains whether any expenditure, executed or proposed, is excessive, and if so he reports to the city manager or some similar executive officer.

8. He signs or countersigns bonds, contracts,[25] warrants, and other orders on the treasurer.[26] Often he makes out deposit warrants for money to be placed in the depository.

9. He delivers warrants to proper individuals.

10. He performs such other services as the governing body may require of him.

Tax Assessor and Collector

In order that a city may guarantee efficient management and capable control of its tax assessing and collecting functions, it must demand and receive the best trained and the best qualified personnel for the office of tax assessor and collector. To obtain an assessor who is conversant with current trends in assessment procedure and who possesses a thorough knowledge of the inner operations of equitable assessment systems is impossible in many

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[25]If the city abandons a proposed public improvement, the contractor can recover damages sustained from the city's refusal to perform the contract therefor, even though the contract is not countersigned by the auditor. Superior Incinerator Co. v. Tompkins, 59 S.W.(2d) 102 (Tex.Comm.App. 1933). This court said: "The charter provision requiring contracts of this nature to be countersigned by the auditor was designed to prevent the city entering into contracts for public improvements when sufficient funds were not available to pay the cost thereof. Since the city has declared its purpose to expend no funds whatever on the enterprise, the countersigning of this contract by the auditor could serve no useful purpose and would be but an idle ceremony." *Ibid.* The lower court stated that upon finding the expense of such a contract has been charged to the proper appropriation and that the contract does not exceed the amount of the appropriation, the auditor is to countersign it, and this is a ministerial act. 37 S.W.(2d) 391 (Tex.Civ. App. 1931).

[26]Such action must be legal, of course. The case of Tompkins v. Williams, 62 S.W.(2d) 70 (Tex.Comm.App. 1933) stated that "there is no legal obligation on the part of the auditor, even if a ministerial officer, a question we do not decide, to act on a void order."

localities, and consequently some assessors and collectors possess only such experience and training as they have gained from their present position. The practice in many cities and towns in Texas and elsewhere is to combine the functions of assessing and collecting into one office, and it is with the incumbents of these combined offices that this study is concerned. Proponents of the combined office are numerous and influential, and have many strong arguments in support of their proposition. These authorities insist that the functions of the two divisions are so closely related, and particularly in regard to the time sequence, that there is no need of separating the duties into two departments. Furthermore, in the interests of better administration the functions should be coördinated under one official, who, if he does not possess sufficient technical information concerning assessing procedures and techniques, can employ an assistant to handle such matters, himself retaining control of the broader aspects of administration and collection.[27] If the city is unable to obtain such an assistant, particular attention must be paid to the individual's knowledge of assessment, and the city should hire the man technically trained for the purpose of assessing. Some authorities argue that this would be advantageous in that the collection technique is ministerial and can be performed by the assessor without undermining the assessment procedures. But experience has demonstrated that in such situations the incumbent has a tendency to place emphasis upon the collection feature rather than upon the assessing aspect, and consequently the latter suffers, since the official has a tendency to look upon the amount of taxes collected as an indication of his success. Furthermore, if he cannot collect taxes upon property, he will neglect assessing it with any degree of certainty. If the city is unable to hire a trained assistant, it may periodically employ professional assessors. In addition to these possibilities, it is permissible for the city to use the assessments placed upon city property by the county assessor and collector.[28]

On the other hand, there will be found many public administration experts who advise that the assessing and collecting functions be divided, as they are so widely separated in nature. The assess-

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[27]Abbott, A Manual of Tax Collection Procedure 15–16.

[28]See *ibid.*

ment of property is a highly specialized procedure, making the work highly complicated and arduous, whereas the collection of taxes is merely clerical and routinized.[29]

A few Texas cities have separated the functions of assessing and collecting, but even these apparently regress to the coördinated office by making the assessor the deputy of the collector and vice versa. This apparent regression may be explained by the fact that making each officer the deputy of the other is primarily a matter of expediency and enables one officer to act for the other when either is unable to act.

Some authorities recommend the joining of the functions in the tax collector's office with those in the treasurer's office, placing all the financial and money matters under one supervisor. Thus the collection, custody, and disbursement of funds would be allocated to one authority, alleviating the decentralization of authority so often found in Texas cities.

Although many authorities argue that the division of the assessing and collecting functions is desirable, many small Texas cities find it financially impossible, as well as legally impossible in the cities and towns under 5,000 population.[30] In the cities under 5,000 population incorporated under the general laws, apparently there can be but one official to perform both the assessing and the collecting functions. This conclusion is based upon cumulative implications derived from the Revised Civil Statutes, which in all instances provide for the assessor and collector as a single officer. However, the office may be abolished and the duties conferred upon another official.[31]

City charters and state statutes are usually silent concerning the qualifications of the city tax assessor and collector. Even in the communities where he is elected, the qualification requirements for the office are not strict, as in most instances a minimum age is required and he must be a resident of the city for a prescribed period of time, which varies from city to city. Some cities, however, go so far as to place the same restrictions upon these individuals as are

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[29]*Id.* 14.

[30]See TEX. VERNON'S ANN. CIV. STAT. (1925) arts. 977, 1044.

[31]*Id.* art. 977. In general law commission cities the city clerk acts as assessor and collector. *Id.* art. 1161.

placed upon the councilmen or commissioners. In regard to the residence requirement, many authorities emphasize the necessity of allowing the city to employ nonresidents in order that the city may obtain the best qualified person for the position. These experts meet the argument that familiarity with local conditions is essential by emphasizing the fact that the development and use of modern assessment techniques displaces such a requirement.[32] It is believed by some authorities, however, that although residence is not to be considered determinative of who receives the position of assessor and collector, it should be considered of cumulative effect.

The city assessor and collector in cities operating under the general laws ordinarily is elected for a two-year term. In the home rule cities there is a variation in the method of selection, most cities depending upon appointment by some agency in the city, such as the mayor and/or the governing body. Many cities, home rule and general law, have an elective official who is ex officio tax assessor and collector, and some communities elect an individual to perform only the duties of assessor and collector. In one small general law city the assessor and collector is a member of the city council, the members of which fill various other city posts through mutual agreement and employ a paid assistant to perform the actual work. Similarly, in one of the larger home rule cities the commissioner of taxation acts as assessor and collector, although the actual detailed work is done by deputies. Regardless of the complexity of duties, there is little variation in the terms of office, all cities studied having either a two-year or an indefinite term. Omitting the city manager cities, which uniformly appoint for an indefinite term, this position serves as an excellect illustration of the short term of office with all of its cumulative faults; of course, at the present time no definite action can be taken otherwise, due to the constitutional provision limiting terms of office to two years.

Some cities pay their assessors and collectors by salary while others pay by fee. Figures are not available for all cities, but those that are accessible demonstrate that the assessor and collector is not the lowest paid city official. In the home rule com-

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[32]National Association of Assessing Officers, Assessment Principles (1937) 22.

mission-governed cities studied[33] the salaries range from $125 monthly to $375 per month, the average being $240.[34] In the city manager cities, ranging in size from cities of 20,000 inhabitants to the city of Dallas, the average salary is slightly over $285 a month. All of the positions studied in home rule cities require the full time of the incumbent. A fixed annual salary is preferable to payment by fees, because this method of compensation assures the city of a better qualified personnel. The commission method of payment is conducive to hasty and careless work.[35] Furthermore, it is recommended that under no circumstances should the assessor and collector be compelled to pay a portion of the expenses of his office.[36]

Article 1044 of the Revised Civil Statutes[37] requires the assessor and collector in general law cities to give a bond in such amount as may be required by the city council. In the two home rule aldermanic cities studied the average bond was $25,000,[38] whereas the average bond in the commission-governed cities amounted to $42,500,[39] and in city manager cities $36,000.

The statutes of Texas provide that the council of the general law city may remove this officer for incompetency, corruption, misconduct, or malfeasance in office, but only after affording him due notice and an opportunity to be heard in his defense.[40] Home rule charters contain similar provisions.

Duties

The state statutes governing cities incorporated under the general laws of the state are explicit and concise in defining and explaining the duties of the city assessor and collector, but they are

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[33]The cities studied within this classification were Abilene, Corsicana, Galveston, and Houston.

[34]None receive fees.

[35]National Association of Assessing Officers, Assessment Principles 25.

[36]*Id.* 26.

[37]Tex. Vernon's Ann. Civ. Stat. (1925).

[38]Both cities were under 20,000 population.

[39]Corsicana, the smallest city in this group, required the highest bond—$100,000.

[40]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1006.

not a comprehensive list of his activities. These general law duties are as follows:

First, the assessor and collector "makes up the assessment" of all taxable property, making duplicate rolls thereof and giving one to the city secretary.[41]

Second, he must require property owners to render a correct statement of their property under oath, which he may administer.[42] Furthermore, he has the duty to institute penal proceedings when a property owner fails to render property.[43]

Third, he must prepare the following lists of property to be presented to the board of equalization for valuation: unrendered personal property,[44] unrendered real property the owners of which are known, unrendered real property the owners of which are unknown, and property which has not been assessed for a previous year.[45] These classes of property are to be entered by the assessor and collector in the various supplements to the assessment roll, although in practice the differentiation between the rolls is not strictly observed.

Fourth, the assessor and collector must bring the assessment lists and books before the board of equalization.[46] He is required to furnish a certified list of all persons who either refuse to swear or qualify or to sign the rendition oath as required by law.[47]

Fifth, the state statutes further provide that the assessor and collector has the power to levy upon any personal property to satisfy any tax imposed by Title 28 of the Revised Civil Statutes.[48] In the event any property levied upon is about to be removed from the city, the assessor and collector is to take as much of it as is necessary to pay the taxes assessed and the costs of collection.

Sixth, the assessor and collector is to collect taxes, and if unable

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[41]*Id.* art. 1044.

[42]*Ibid.*

[43]*Id.* art. 7217.

[44]*Id.* art. 1045.

[45]The assessor and collector is under a duty to assess property listed for previous years at the same rate at which it should have been assessed for such years. *Id.* art. 1047.

[46]*Id.* art. 1050. The assessor and collector may testify before the board on behalf of the city.

[47]*Id.* art. 1052.

[48]*Id.* art. 1060.

to do so may institute proceedings to sell the property.[49] He also makes deeds for the sale of property which has been acquired by the city at tax sales.[50]

Seventh, at the end of every week the assessor and collector is to pay to the treasurer all money he has received.[51] In actual practice the period varies, as usually the collector gives the treasurer all money collected at the end of each business day. The period is often set by agreement in the particular city.[52]

Eighth, he must report to the governing body of the city at the first meeting each month, reporting the amount of money collected.[53] In practice this report shows, by years, the amount of current and back taxes collected.

Ninth, many charters require the tax assessor and collector to issue licenses and determine whether all businesses pay their fees or occupation taxes.[54] In addition he collects special assessments for public improvements. In some communities the duty of collecting fees and occupation taxes is placed upon some other city official.

Finally, the tax assessor and collector must perform such other duties as may be required by the city council.[55]

Charters commonly confer similar powers upon the assessors and collectors in cities operating under the home rule amendment. Variations, however, sometimes appear. For instance, in regard to the first duty above, it is entirely possible that some official other than the secretary will be required to accept the duplicate roll when it is made, although in many towns the requirement of making duplicates is not strictly observed. When the assessor

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[49]*Id.* arts. 1044, 1057, 1058. *Id.* art. 1034 provides for the collection of occupation tax.

[50]*Id.* art. 1059. Under such a provision the tax collector may employ a notary to take acknowledgments to tax deeds, and the city is liable for such fees. City of Dallas v. Martyn, 29 Tex.Civ.App. 201, 68 S.W. 710 (1902, writ of error dism'd).

[51]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1044.

[52]All tax collectors are required by statute to pay money they receive to the city treasurer as often as they may be required, and they have ten days within which to comply. *Id.* art. 7295.

[53]*Id.* art. 1044.

[54]See *id.* art. 1034.

[55]*Id.* art. 1044.

places unrendered property upon supplementary rolls, his task is often simplified by a charter provision allowing the rolls to be combined. Not all cities require the assessor and collector to bring his books and records before the board of equalization, as some other agency, such as the governing body, may have this responsibility.

The secretary of the board of equalization usually gives notice to property owners of any changes in the rendered valuation, but some charters expressly require the assessor and collector to give this notice. Reports to the governing body are made at different times according to the particular charter provision.

A new assessor and collector upon entering office is sometimes undecided what type of payment must be made by the taxpayer, whether scrip, cash, or check. In 1894 it was held that a city tax collector could accept one-fourth of the taxes in city scrip, when authorized to do so by the city council.[56] The rule is generally stated that the tax collector is unauthorized to receive anything but cash in payment of taxes.[57] Private arrangements for payment, made between the collector and the taxpayer and differing from the statutory methods, are at the risk of the parties concerned.[58] Credit on the collector's account,[59] payment by draft,[60] and payment by check[61] fall within this rule.

When a charter provides that payment of taxes is to be made in current money or funds of the United States, the tax collector is limited, and a long-continued custom of receiving payment in an unauthorized manner is not valid, though acquiesced in by the city governing body.[62] However, if a check is given to the collector,

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[56]City of Ysleta v. Lowenstein, 25 S.W. 444 (Tex.Civ.App. 1894).

[57]Austin v. Fox, 1 S.W.(2d) 601 (Tex.Comm.App. 1928); City of San Angelo v. Deutsch, 126 Tex. 532, 91 S.W.(2d) 308 (1936). The Texas Constitution, Art. XI, §4, provides that cities under 5,000 can accept only current money in payment of taxes.

[58]Austin v. Fox, 1 S.W.(2d) 601 (Tex.Comm.App. 1928).

[59]Figures v. State, 99 S.W. 412 (Tex.Civ.App. 1907).

[60]City of San Angelo v. Deutsch, 126 Tex. 532, 91 S.W.(2d) 308 (1936).

[61]Scisson v. State, 121 Tex.Crim.Rep. 71, 51 S.W.(2d) 703 (1932).

[62]City of El Paso v. Two Republics Life Ins. Co.; 278 S.W. 231 (Tex.Civ. App. 1925, writ of error refused).

for which there are sufficient funds deposited in a bank, and the check is honored, lawful payment is established.[63]

It is interesting to note that the collection of taxes is a governmental function, and cities are not liable for an officer's unauthorized or negligent acts in performing a governmental function.[64]

The charter provisions do not vary from the general laws except in very minute details. As was pointed out, a comprehensive list of the duties and powers of assessing and collecting officers cannot be compiled with any degree of accuracy. The National Association of Assessing Officers recommends that the powers of the assessors remain commensurate with their duties, so that they may adequately perform those duties, and if the assessors are not permitted sufficient power to enforce tax laws then the proper authority should exempt property disclosable only at the volition of its owners.[65]

Assessing and Collecting for More than One Unit

Not only does the tax assessor and collector perform many duties, such as those pertaining to the office of secretary, treasurer, engineer, and the like,[66] but frequently he also is required to assess property and collect taxes for other governmental jurisdictions.

In some communities the county tax assessor and collector acts as assessor and collector for the city. This procedure is authorized by a statute which reads as follows:

> Any incorporated city, town or village in this state is hereby authorized by ordinance to authorize the county tax assessor and county tax collector of the county in which said city, town or village is situated, to act as tax assessor and tax collector respectively for said city, town, or village. . . .[67]

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[63]*Ibid.*

[64]City of San Angelo v. Deutsch, 126 Tex. 532, 91 S.W.(2d) 308 (1936).

[65]NATIONAL ASSOCIATION OF ASSESSING OFFICERS, ASSESSMENT PRINCIPLES 39.

[66]In towns and villages the city marshal has the express power to assess property and collect the corporate tax. TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1147.

[67]*Id.* art. 7359. See also H.B. 1032 passed by the Forty-sixth Legislature, Regular Session, which became effective May 18, 1939. Where this occurs the county tax assessor and collector receives a percentage of the city collections as his compensation. TEX. VERNON'S ANN. CIV. STAT. (1925) art. 7359.

Art. VIII, §14 of the Texas Constitution combines assessing and collecting into one office.

A city assessor and collector of any municipality cannot act as assessor and collector for a school district which has no connection with the city and has never been a part of the city government.[68] Such independent school districts have the power to select an assessor and collector; so a city assessor and collector would be holding two jobs if he accepted such a position with the school district. Furthermore, provision is made for a certain compensation to be paid to this school district assessor and collector. Many cities, however, do, without authority, allow their assessors and collectors to accept a position with the school district. The question arises as to whether a school district may legally pay the city a certain percentage of collections for the services of the city assessor and collector rather than give the officer additional compensation for these further duties. When the school district pays the city on this basis there is reason for contending that the city assessor and collector might act for the independent school district.

The city or town may acquire the exclusive control of the public free schools within its limits,[69] and in such case each city or town shall constitute a separate school district.[70] In an independent school district constituted of a city or town having a city assessor and collector of taxes, the latter is required to assess and collect the taxes for school purposes.[71] Provision is made that he shall receive no other compensation than that paid him for assessing and collecting city taxes.[72]

Whenever a city has taken charge of its schools, it may subsequently extend its limits for school purposes.[73] When this has been done, the statute provides as follows:

> The officers whose duty it is to assess and collect school taxes within the city limits shall also assess and collect school taxes within the territory added for school purposes. . . .[74]

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[68]See the section on incompatibility of offices, c. I.

[69]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 2768.

[70]*Id.* art. 2771.

[71]*Id.* art. 2802.

[72]*Ibid.* As the city cannot pay such compensation from the school taxes, neither can it pay the compensation out of its general fund. McCalla v. City of Rockdale, 112 Tex. 209, 246 S.W. 654 (Tex.Comm.App. 1922).

[73]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 2803. See City of Houston v. Little, 244 S.W. 247 (Tex.Civ.App. 1922, writ of error refused).

[74]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 2803.

In a city or town under 30,000 inhabitants constituting a separate and independent school district, the school district may separate from municipal control. In this situation the school district may then provide for the assessment of property by the city assessor and collector or it may appoint an assesssor and collector.[75] In cities of 10,000 or less population which have extended their limits for school purposes only, the school district may be separated from municipal control. The taxes may be assessed and collected, likewise, by the city tax assessor and collector or by a tax assessor and collector to be appointed by the trustees of the school district.[76]

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[75]TEX. VERNON'S ANN. CIV. STAT. (Supp. 1938) art. 2783b.

[76]*Id.* art. 2783c.

CHAPTER VII

THE JUDICIAL AND LEGAL OFFICERS

Judge of the Corporation Court

The judge of the corporation court[1] is one of the most harassed of city officials and ordinarily he is not accorded the respect common to the judiciary. One judge stated the situation in this manner:

> The court convenes at 9 A.M., current matters being disposed of first. Then the judge goes to his personal office near the City Hall, where he is visited constantly by law violators wanting to be "excused," to "explain," and to "criticize." At his home he is constantly called upon over the phone for the same reasons, or he is visited there at night, and at times before breakfast. He is often called out of bed late at night. In short, his day is 24 hours long and full of trouble.[2]

In order to remedy these conditions additional respect for the corporation court must be instilled in the public mind. The public should be made to realize that a corporation court is a tribunal which administers justice, and is not merely a place where fines are levied.

As the judge of the court must pass judgment upon all types of humanity, frequently he is afforded a glimpse of the petty and shallow side of human nature; and as he, too, may become subject to those faults, he must retain his faith in human nature and never let his sense of humor falter. He must know, as a layman, what is occurring around him, and at the same time, as a judge, maintain himself as a disinterested and impartial spectator. Many of the judges contacted apparently have gained a wide insight into human nature which enables them to observe the "passing throng" with acumen.

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[1]The judge of a city court is an officer. Franklin v. Westfall, 112 N.E. 974 (Ill. 1916). Judges are peace officers, and peace officers are exempt from the prohibition of carrying guns. The judge of the corporation court is a peace officer and thus may carry a gun, even when not in the actual discharge of his duties. Tippitt v. State, 80 Tex.Crim.Rep. 373, 189 S.W. 485 (1916).

[2]Comment on a questionnaire returned to the author by a Texas corporation court judge.

In Texas, by act of the Legislature, a corporation court has been created in every incorporated city, town, and village,[3] although not all cities have taken advantage of this provision. The court has jurisdiction of all criminal cases arising under the ordinances of the city and has concurrent jurisdiction with any justice of the peace in any precinct in which the city is situated, in all criminal cases arising under the criminal laws of this state, in which punishment is by a fine only, which does not exceed $200.[4]

The Texas statutes do not state any qualifications for the judge of the corporation court, and most charters disregard the question. Although a few charters merely specify a "suitable person," others impose more stringent and specific qualifications upon the applicant and name several requirements. He may be required to be a qualified voter, a resident of the city (usually for a specified period of time), a practicing or a licensed attorney, or a person learned in the law. Furthermore, he must have paid his taxes, and may not be indebted to the city. Minor requirements, such as age limits, should be avoided by the appointing agent or by the electorate, but the ability of the man to handle, control, and supervise the work must be carefully scrutinized.

The method of selection of judges of the corporation or city courts is a momentous question in the United States. Usually the judge is elected by popular vote, but when that method is employed the type of man chosen depends largely upon the ability to ballyhoo his talents. Due to this fact, appointment is considered a better method of selection, but even here political influence is often too strong a factor to insure a capable judge. Various methods of appointment have been suggested, but no one has designated an infallible system. Some authorities have suggested that the governor of the state appoint municipal judges, whereas others have suggested that in cities possessing several units the chief judge of the court be elected and that he in turn appoint his associates.[5] Out

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[3]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1194. On March 15, 1939, H.B. 554 went into effect, thus allowing cities of over 285,000 population to establish two or more corporation courts. Art. 1200a.

[4]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1195.

[5]KNEIER, CHARLES M., CITY GOVERNMENT IN THE UNITED STATES (1934) 415. For an exhaustive criticism of the municipal court of Cleveland, Ohio, see *The Municipal Court Needs Reorganization* (March 24, 1938) 13 GREATER CLEVELAND 125.

of the problem arises the fact that political factors bear too much weight in the selection of our judges. Removing this political aspect is one method by which the confidence of the public in the corporation court may be built up and maintained at a higher level.

In Texas the Revised Civil Statutes provide that the provisions of a special charter will govern in determining the selection of a judge or recorder,[6] but in cities, towns, and villages not incorporated under special charter the mayor is ex officio recorder, unless the governing body by ordinance authorizes the election of a recorder. In the latter event, the recorder is elected in the same manner and for the same term as the mayor.[7] In practice, most communities which maintain a corporation court allow their mayor to act as judge; but many towns allow other city officials, such as the secretary and treasurer, to serve as judge.[8] In these communities the duties of the judge are incidental to the other duties which the particular individual performs; therefore, emphasis is here placed upon the judge who performs no other duties for the city.

In all cities studied which operated under the general laws, the procedure followed in selecting judges is identical with that specified by statute. Here the judges are elected for two-year terms; in the charter cities the term of office varies, being usually of indefinite length or for one or two years.

Approximately 50 per cent of the judges studied in the cities over 5,000 population devote their full time to their office. In these cities the average monthly salary for the full-time judge is slightly over $200, while that of the part-time judge is $71.[9] Some of the judges in general law cities devote their entire time to the duties of office, but undoubtedly due to the financial condition of most of these cities, the salaries are small. Nevertheless, in cities of this group where fees were permissible the income range was higher but did not average over a maximum of $100 per month.

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[6]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1196. Charters customarily provide that the judge be appointed, either by the council or by the executive head of the city, subject to the council's confirmation.

[7]*Id.* art. 1197.

[8]See *infra*, p. 122.

[9]None of the judges studied within this group received any fees from their office.

When the mayor or some other official acts as judge, that individual is sometimes paid additional compensation for his augmented duties.

Infrequently a general law city requires a bond of the judge, but the amount rarely exceeds $1,000. When the bonds are required of judges in charter cities, the amounts vary from $1,000 to $10,000.

In the cities under 5,000 population the city council may remove any officer for incompetency, corruption, misconduct, or malfeasance in office, after notice and hearing.[10] In the cities incorporated under the home rule amendment, charters usually make no express provision concerning removal of the judge. A few charters, however, state that the judge may be removed for unsatisfactory service, or for some other "specific charge." The general laws provide that a vacancy in the position of recorder can be filled by the governing body for the unexpired term only.[11]

At times when the regularly constituted judge is unable to act and it becomes necessary to appoint a temporary one, the following procedures are common:

1. The mayor may act, and if he is unable to do so, one of the following steps ensues:
   a. Mayor *pro tem* or a
   b. Commissioner performs the duties, or
   c. The mayor appoints someone.
2. The mayor nominates another with or without the council's approval.
3. The mayor *pro tem* acts, and if he is unable to do so, a commissioner performs the duties of the office.
4. The city attorney acts as judge.

The powers and duties of the corporation court judge are varied, and no exact list may be made with any degree of accuracy. Although the general laws of Texas do not state the duties of the judge of the court, the following duties, obtained from numerous charters, apply to all cities:

1. The judge presides over the corporation court and hears and determines all causes brought before him.

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[10]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1006.

[11]*Id.* art. 1199.

2. He renders an appropriate judgment and enforces it by proper writs and procedure.

3. He enforces all processes of the court.

4. The judge issues subpoenas, writs of capias, search warrants, executions, and other processes which a justice court may issue.

5. He punishes witnesses for failure to obey subpoenas, and compels attendance by process of attachment.

6. He requires bonds for appearance.

7. He may perform the clerk's duties in ordinary proceedings, and issue certified copies of judgments and records of his court as well as make up transcript in cases of appeal.

8. He administers official oaths and affirmations.

Probably the largest number of cases arising before the judge of the corporation court involve traffic law violators. The manner in which these individuals are punished or the attitude of the judge toward them will have considerable effect upon the number of violations. The most common form of punishment in Texas is to levy a fine, but in the various states the judge may send the violators to traffic schools, require them to visit morgues, or place a sticker on the individual's automobile denoting the fact that the driver is a violator. In Los Angeles it was decided that although automobiles could not be impounded by the court, the judge could impose the heaviest possible punishment and then suspend sentence upon the condition that the offender give the court his car keys, his driver's license, and his license plates.[12] It is extremely doubtful if this action would be upheld in Texas. In any event, however, the judge should temper justice with mercy.

Prevention is often better than punishment; consequently the judge may institute educational campaigns and take a prominent part in their development and continuance. "Ticket fixing" by municipal officials must be rigidly opposed by the judge of the corporation court. In all of his aims and objectives the judge will find it necessary to obtain the support of the public and of the press. He should not, however, adopt the suggestion of some laymen that the proceedings before the judge should be broadcast,

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[12]Brand, Edward R., *Getting Results in Municipal Traffic Court* (May 1935) 11 WESTERN CITY 13.

because this allows an invasion of the sanctity of the court, placing it on the same level as a theater.

As an adjunct of the court the statutes provide for the election of a clerk for the court at the same time that the recorder is elected.[13] By ordinance, however, the city secretary may be designated ex officio clerk of the court, and he may appoint a deputy with the same power as the secretary. If the clerk is elected, the term is for two years, but if the secretary is ex officio clerk of the court his term as clerk of the court is for the duration of his term as secretary. In charter cities, however, the clerk is usually appointed by the governing body, although some charters confer upon the council the power to appoint a city employee to act as clerk without added compensation.

The powers and duties of the clerk are stereotyped. He keeps the minutes of the proceedings of the court, administers oaths and takes affidavits, makes certificates, prepares instruments, affixes the seal of the court, issues processes and writs, and otherwise performs the same duties as the clerks of the county courts.[14] Furthermore, he may appoint a deputy when such action is necessary. The charters usually reserve to the council the power to require such additional duties as it may prescribe by resolution or ordinance.

The City Attorney[15]

As a matter of public service to citizens, this is a warning to those who envision the pleasures of a soft job on the public pay roll to steer clear of the city attorney's office. For if there was ever a city job that will throw a man into hard work and keep him headed into the wind at lightning speed, the city attorney's job is it.[16]

The general laws provide for a city attorney in the aldermanic[17] and the commission-governed[18] cities and towns, but the office may be abolished by the governing body and the duties conferred upon

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[13]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1200.

[14]See *ibid.*

[15]A city attorney is an officer and not an employee. State Consol. Pub. Co. v. Hill, 3 P.(2d) 525 (Ariz. 1931), *rehearing denied and modified*, 4 P.(2d) 668 (Ariz. 1931).

[16]The Houston Chronicle, Feb. 20, 1938.

[17]Tex. Vernon's Ann. Civ. Stat. (1925) art. 977.

[18]*Id.* art. 1161.

another official. The statutes place no emphasis upon the officer's qualifications and the charter requirements are not as exacting and stringent as the eligibility requirements applicable to city elective offices. The city attorney is usually required to be a voter or a qualified elector, and to have resided in the city for a given period of time, as, for example, five years in Austin. He must neither be interested in any contracts or works of the city nor be indebted to the municipality. He is forbidden to hold any other position with the city. Furthermore, the attorney must have attained an age specified by charter, as well as be a licensed, practicing lawyer and one possessing a certain amount of experience at the practice of law. He is usually known as the city attorney, although he may be designated the corporation counsel[19] or the director of the department of law.[20]

Although statutory provisions require that the city attorney be elected in the general law aldermanic cities, this requirement is not rigidly observed. The general laws governing commission cities require that he be appointed, and this is the procedure commonly adopted in the home rule cities and towns.[21] The method of appointment usually takes one of four forms: first, the governing body may appoint him; second, the mayor may appoint him subject to the approval of the governing body; third, in city manager cities the manager may appoint the attorney subject to the approval of the governing body; and finally, the city manager alone may make the appointment. His term of office varies, but similar to all appointive officials, frequently the period is indefinite in duration, although many communities limit it to one or two years.

As cities increase in population, there is a corresponding increase in the amount of time that the city attorney must devote to his official duties. All attorneys in the general law cities studied work on a part-time basis, receiving salaries ranging from $10 to $165 monthly. Of the home rule cities studied the attorneys in the cities under 20,000 population serve only part time and receive an average salary of slightly more than $70 per month. Attorneys employed by cities of 20,000 to 50,000 population receive an average of $147

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[19]Abilene.

[20]Tyler.

[21]Election as a means of selection is used in Corsicana, Laredo, and Victoria.

monthly for part-time effort and $200 monthly for devoting their full time to the office. In cities of 50,000 to 100,000 population they receive an average of $238 a month for part-time employment and $370 monthly for full-time work. All cities over 100,000 population studied pay their city attorneys an average of $496 monthly and require them to devote their full time to the office. Instead of the retainers or salaries paid by some cities, attorneys in other communities merely bill the city for their efforts, and some work on a fee basis. In Eagle Pass the attorney receives 10 per cent of all delinquent taxes collected, and this amounted to $654 over a period of nine months in 1937–1938. In Galveston the attorney and tax assistant receive 5 per cent of delinquent taxes collected by the tax assistant. In Victoria the fees received by the city attorney usually amount to approximately $600 annually. It has been held that a city attorney paid by commission is entitled to a share of the commissions on taxes collected by the city in suits brought by him, but not decided at the expiration of his term of office. Similarly, when he has obtained a judgment he is entitled to commissions on taxes paid to the city after he went out of office.[22]

Although many city attorneys have not been in office for any appreciable time, it is interesting to note the periods that some have held office. In San Benito the city attorney has held office for fifteen years, in Marshall sixteen, in Galveston and Hillsboro fourteen, and in Fort Worth seventeen years. The average periods of time may be shown in this manner:

LENGTH OF SERVICE OF FORTY CITY ATTORNEYS IN YEARS

	POPULATION				
Type of Government	Under 5,000	5,000-20,000	20,000-50,000	50,000-100,000	Over 100,000
Mayor-aldermanic	2.7	6.4	3.0	0.0	0.0
Commission	5.8	4.5	0.8	7.5	7.5
City Manager	0.0	5.4	5.9	3.5	10.5

In a few home rule and general law cities a bond is required of the city attorneys. The amounts range from $500 to $5,000.

Powers and Duties

The general laws of Texas do not contain any express provisions

[22]City of Houston v. Stewart, 40 Tex.Civ.App. 499, 90 S.W. 49 (1905).

governing the duties of the city attorney; consequently any explanation or listing of his powers and duties must be based upon charter provisions. The powers and duties of city attorneys, however, are the same in all municipalities. He is to:

1. Represent the city in all litigation, including suits against delinquent taxpayers,[23] and cases in corporation court.[24] In many instances provision is made for an assistant to handle corporation court cases just as a tax attorney is often provided for the tax assessor and collector.[25]

2. Represent the city in all other legal matters.

3. Advise the governing body. The city attorney extends legal advise to heads of departments and other persons serving the city in a supervisory capacity.[26]

4. Attend meetings of the governing body; take part in discussion, but without voting on any measure.

5. Prepare ordinances.

6. Examine and prepare all contracts.

7. Endorse all ordinances, contracts, bonds, and other instruments. In some communities, if the city attorney disapproves a proposed ordinance of a particular type, such as granting a franchise, he is required to file his objections with the city council.

8. Recommend to the governing body when to compromise litigation.

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[23]Tex. Vernon's Ann. Civ. Stat. (1925) art. 7343.

[24]Tex. Code Crim. Proc. (1925) art. 869.

[25]Attorneys may bind cities just as it is possible for them to bind private litigants. Thus, if a city attorney procures a judgment in favor of the city foreclosing a lien by the city upon certain property and ordering the sale of it without any reservation in favor of any pre-existing incumbrance, and then procures the sale of that property under the judgment, his acts must be considered the acts of the city. City of Houston v. Bartlett, 68 S.W. 730 (Tex.Civ.App. 1902, writ of error refused). And the city is bound by a consent judgment agreed to by its attorneys compromising a suit attacking the validity of special assessments and paving contract. Clark v. W. L. Pearson & Co., 26 S.W.(2d) 382 (Tex.Civ.App. 1930), *aff'd*, 121 Tex. 34, 39 S.W. (2d) 27 (1931). However, city attorneys have no more power to bind the city by agreement than is the case with an individual.

[26]See Chrestman v. Tompkins, 5 S.W.(2d) 257 (Tex.Civ.App. 1928, writ of error refused).

9. Administer oaths in matters pertaining to his duties or to the filing of complaints in the corporation court.[27]

10. Appoint his own assistants. When this action is allowed, in some instances it is subject to confirmation by the council or commission.

11. Apply in the name of the city for an injunction to restrain any misapplication of city funds, or abuse of its powers, or execution of a contract made in contravention of law.

12. Apply for a forfeiture of specific performance, when a contract granting a right or an easement is being evaded or violated.

13. Apply for a writ of mandamus when necessary to compel an officer to act.

14. See that all penal ordinances of the city are enforced, and that all franchises and privileges are being complied with.

15. Collect any indebtedness that an officer may owe the city.

In addition there are a multitude of duties, unofficial in nature, which devolve upon the city attorney and his associates by virtue of his official duties. Some city attorneys have undertaken to give a detailed analysis of new ordinances to departmental heads so that such legislation may be enforced without difficulty. The attorneys frequently act as the personal counselors of city officials and employees, advising them upon individual difficulties.

The city attorneys often are forbidden by charter to hold any other official position with the city; so it is unusual to find one occupying two capacities within the city. Some aid the tax collector and in one instance a city attorney serves on the board of city development of the city. Some cities maintain special attorneys for the tax department.[28] In some charters the city attorney is required to perform any other duties that the governing body of the city may request of him.

The city attorney holds what might be termed a position of trust, not a financial trust but rather a trust which amounts to paternalism. He is the traffic light of the governmental set-up; it

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[27]Tex. Code Crim. Proc. (1925) art. 867. It has been held that a city attorney is not authorized to take an affidavit to a complaint for use before any other court than the corporation court. Johnson v. State, 47 Tex.Crim. Rep. 580, 85 S.W. 274 (1905).

[28]See *infra*, p. 131.

is the city attorney who turns on the green light or the red light, as the case may be, when a certain move is proposed. It is impossible to determine the percentage of business transacted by the city council which the city attorney is asked to pass upon, but it may be stated that a majority of all council business comes to the city attorney at one time or another. Even when the attorney advises against a particular step, his advice is too often disregarded; and when this occurs he cannot say "I told you so," but must then undertake to remedy the situation. Due to this condition he frequently has to take two sides at different times and also perform the duties of a referee. Furthermore, the statement has been made that:

> Because of the political nature of the set-up, council is usually divided into at least two factions. When these factions come to a deadlock it is often "referred to the legal department" for an opinion. No matter how he rules, one faction is not going to be satisfied. That means more work for him.[29]

The office held by the city attorney in the larger cities is the "hot spot" of municipal affairs. In the larger towns he can no longer devote his mornings to city cases and spend the afternoons engaging in private practice. In some cities the city attorney cannot handle all the law business of the city by devoting his entire time to it; and furthermore, as municipal law becomes more complex, a legal training will be insufficient to cope with many city problems.[30]

As duties increase the city attorney frequently must ask the city council for an assistant to help him. The number of assistants varies proportionately with the size of the city. While the city attorney in Austin, Texas, has one assistant, the corporation counsel of Chicago has a staff of nearly ninety individuals.

There are various methods by which an assistant city attorney may be chosen. Either the city attorney or the executive head of the city or the governing body may choose him, or the governing body may confirm a nomination made by the city attorney. A city also has the power to employ other counsel to assist the city attorney, but when this power is exercised the city attorney may not be deprived of any fees to which he may be entitled.[31] Further-

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[29]The Houston Chronicle, Feb. 20, 1938.

[30]HODES, BARNET, LAW AND THE MODERN CITY (1937) 82.

[31]Jones v. City of Uvalde, 57 S.W.(2d) 1129 (Tex.Civ.App. 1933, writ of error dism'd).

more, the city may employ such counsel regardless of the duties that may have been assigned to the city attorney.[32] Private practitioners are frequently employed for a particular purpose. For instance, under charter power to establish a ferry, a city may employ counsel to represent it in such establishment in order that its interests may be protected.[33] In like manner, if by charter the city may "create any office or agent deemed necessary for the good government and interest of the city," it is authorized to employ attorneys to pass upon the validity of a bond issue, and in such case the judgment of the city council as to the necessity of such action is final, unless it is fraudulent or unreasonable.[34] The power of a city to make a contract for the services of an attorney in connection with a sewerage system project is incidental to the power of the city to construct a sewerage system.[35] A city also has implied power to employ an attorney to prosecute the slayer of a policeman who was killed in the exercise of his duties.[36]

Liability of the City for Legal Services

The question often arises as to the liability of a city upon an implied contract for the value of services rendered by an attorney. A city may employ an attorney independent of the city attorney,[37] and if an ordinance is necessary in order to consummate the employment, a resolution or any other method would be insufficient.[38] The case of *City of Bryan v. Page & Sims*[39] held that a contract would not be implied even though the services of the attorney were

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[32]Sutherland v. City of Winnsboro, 225 S.W. 63 (Tex.Civ.App. 1920).

[33]L. Waterbury & Co. v. City of Laredo, 60 Tex. 519 (1883).

[34]Davis v. City of San Antonio, 160 S.W. 1161 (Tex.Civ.App. 1913).

[35]City of Kirbyville v. Smith, 104 S.W.(2d) 564 (Tex.Civ.App. 1937).

[36]City of Corsicana v. Babb, 290 S.W. 736 (Tex.Comm.App. 1927), *rev'g* 266 S.W. 196 (Tex.Civ.App. 1924).

[37]In Mississippi, however, it was recently held that as the state code provided for an assessor and a collector the city was unable to hire another assessor than the one already in office. Fitzgerald v. Town of Magnolia, 184 So. 59 (Miss. 1938).

[38]City of Bryan v. Page & Sims, 51 Tex. 532, 32 Am.Rep. 637 (1879); Brand v. City of San Antonio, 37 S.W. 340 (Tex.Civ.App. 1896).

[39]51 Tex. 532, 32 Am.Rep. 637 (1879).

utilized by the city.[40] However, this case was believed to be too strong; so the case of *City of San Antonio v. French*[41] held that when a city accepts the benefits of a contract which it had the power to make but which was not entered into legally, the city is liable. It was also subsequently held that the city is liable for a reasonable value of the services of an attorney even though the contract between the city and the attorney is invalid.[42] When the city council knows, at the time, of the services rendered to the city, it is estopped to deny liability even though the attorney is employed by the mayor without authority.[43] The city of San Antonio is forbidden to make contracts or to appropriate money other than by ordinance, and any debt contracted by an officer of the city is void if payment is not previously provided by ordinance. The leading case of *Sluder v. City of San Antonio*[44] held that where legal services were performed at the request of the mayor and accepted by the city and liability was denied under those provisions, the attorney could not recover upon the contract, but that he could recover upon an implied contract for a reasonable value of his services.

Modernizing the Legal Department

Nowhere is decentralization more rampant than in the modern municipal legal departments, and only recently has there been any attempt to remedy this unfortunate condition. A city's legal affairs are not being operated efficiently or economically where there are a number of attorneys within the governmental structure with the same status and frequently with overlapping functions. For instance, it is not advisable for a city to have a delinquent tax attorney, a corporation court prosecutor, or any other attorney limited in the scope of his duties but supreme, sacred, and inviolate within his own jurisdiction. The desirable organization comprehends a unified, coördinated, single department of law which in-

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[40]Tharp v. Blake, 171 S.W. 549 (Tex.Civ.App. 1914), held that a city was without power to contest an election to abolish the corporation, and an attorney, suing for $150 agreed upon as payment for his services in connection therewith, was denied recovery.

[41]80 Tex. 575, 16 S.W. 440 (1891).

[42]Brand v. City of San Antonio, 37 S.W. 340 (Tex.Civ.App. 1896).

[43]City of Denison v. Foster, 28 S.W. 1052 (Tex.Civ.App. 1894).

[44]2 S.W.(2d) 841 (Tex.Comm.App. 1928), *motion for rehearing overruled*, 9 S.W.(2d) 1032 (1928).

corporates the elements and factions ordinarily scattered through several departments. Within this single department the lines of control branch out from a single director to the leader of each section, and in turn from that leader to his subordinates.

Inefficient decentralization caused much trouble in Chicago, but in 1935 the situation was squarely faced and soon remedied. In modernizing the administration an attack was made upon five fronts: first, the burden of the office was spread by the development of an organization plan, as shown by the accompanying chart; second, techniques of administrative control were developed in order to give the executive head of the department the status of all work and litigation at any particular time; third, the acquisition of a high degree of morale in personnel was sought; fourth, emphasis was placed upon fact-finding and research in the economic and social phases of all problems; and finally, the interest of the citizen in the department was recognized and stressed.[45] A critical analysis of these factors discloses the fact that the social approach to legal preblems is given prominence over the purely technical phases of municipal law, and that emphasis is placed upon modern private business efficiency.

The taxpayer demands that as a part of the administrative policy of the department there be a dynamic rather than a static attitude toward departmental *modus operandi* and functions.[46] This demand cannot be evaded, because in the final analysis the taxpayer is the financier of city government and the employer of those who operate it. A critical attitude in the law office must be created and developed, and as a result the principle of *stare decisis* must be as completely ignored in this connection as it is highly regarded in connection with the legal phase.[47]

Administration of the legal department may be improved through the installation of a system of internal reporting between units of the department. Internal reporting has been defined as having "to do with the transfer of information from one person or unit, within

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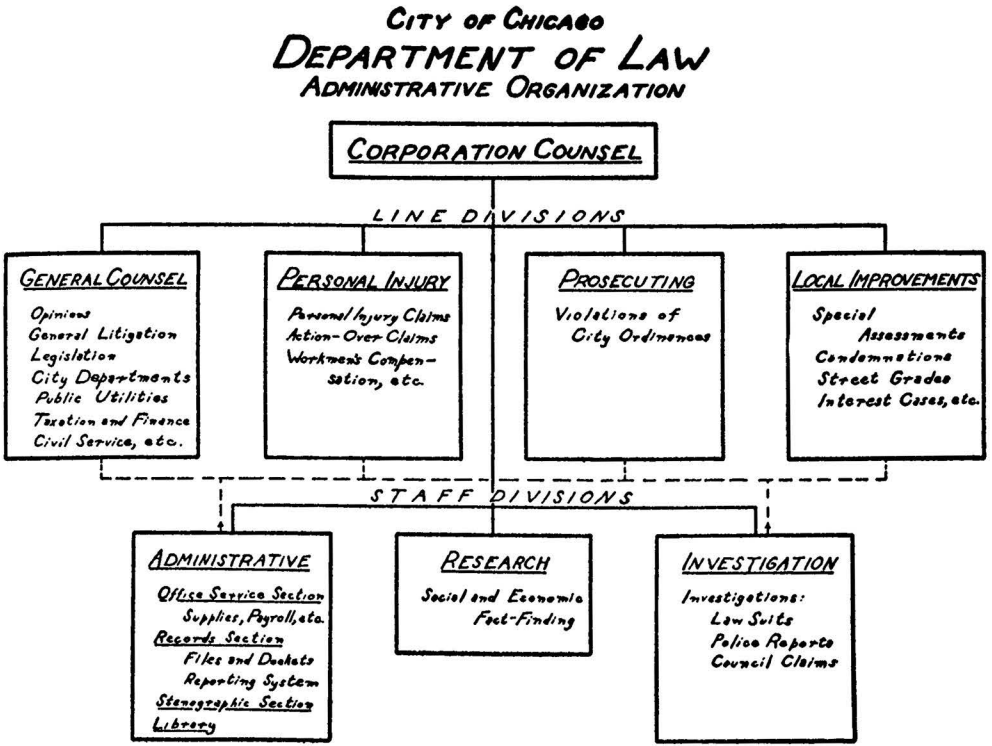
[45]HODES, LAW AND THE MODERN CITY 85. See also Hodes, Barnet, *Administration of a Municipal Law Office* (1937) 3 LEGAL NOTES ON LOCAL GOVERNMENT 73.

[46]HODES, LAW AND THE MODERN CITY 87.

[47]*Ibid.*



This chart appears in *Report of the Department of Law, City of Chicago, for the Year 1938*, p. 12.

the city government, to another. This transfer is necessary for executive, administrative, and legislative purposes and is so important that complex sets of records are kept expressly for the purpose of furnishing data for the reports."[48] The method of reporting by subordinates in the larger municipal law offices may be reformed in some instances, in order that the director or other interested city official may determine and watch each step of litigation, as well as observe the status of all opinion and correspondence assignments. A concise, yet comprehensive, system of reports will allow the city attorney to direct future action on a particular matter without having to delve into the past history of each transaction. Experience has demonstrated that these reports are not a burden upon the assistants but are welcomed because each individual is given credit for his efforts. The reports not only furnish an administrative control for the city attorney, but they provide him with a complete picture of all work in the department.[49] The most effective reports are those composing the "litigation progress system," which may be described in this manner:

> It comprises two forms. On a master card, the city attorney inscribes an opening statement, setting forth the facts and his original ideas of defense. Bear in mind these are not the familiar docket entries, but rather pertinent comments and discussion of the case. This master card goes to the division chief and then to the corporation counsel for examination. As each successive step is taken in the case, the attorney fills out the second form. On this form, he relates what occurred in the courtroom and other specific information indicating the course the case is taking—again more than docket entries. With each step the information on the second form is transcribed on the master card so that the entries on the master card give a running account—play-by-play, if you will—of the case in hand. At the end of each business day, the master cards of all live cases in the office come to the desk of the chief executive. In a few minutes—it really is as simple as that—he can obtain a complete view of the department's litigation as it progresses.[50]

The morale of the personnel in the law office contributes to the efficiency of that department. In Los Angeles a high degree of vigor and resoluteness has apparently resulted from allowing staff

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[48]BARTON, J. T., MUNICIPAL PUBLIC REPORTING IN TEXAS (1936) 9.

[49]HODES, LAW AND THE MODERN CITY 90.

[50]Hodes, *Administration of a Municipal Law Office* (1937) 3 LEGAL NOTES ON LOCAL GOVERNMENT 73.

members great discretion and initiative in cases.[51] Another method of developing morale is through the system of promotion. Thus, if appointments are made to the positions of lowest grade and promotions are from the bottom up, each member of the staff will better appreciate each advancement he makes.[52]

An excellent reform in the municipal law office is the institution of a research division which does legal work involving fact-finding in the socio-economic fields. This division furnishes background material, applying the business approach to the public law office.[53]

This discussion has been devoted to the situation in the larger communities, without regard to the conditions in smaller cities and towns; and yet an important problem in public administration is concerned with the availability of legal talent in such localities. Smaller cities are unable to pay a full-time lawyer and do not have enough legal business to warrant the employment of an attorney on such a basis; and practicing attorneys employed on a part-time basis frequently find they cannot give proper consideration to city affairs. In order to remedy this situation, and whenever such action is permissible, the smaller communities surrounding the larger centers of population should employ a lawyer in the larger city to act for them. In this fashion the attorney chosen would be able to specialize in municipal law, and a corresponding benefit would accrue to the smallest cities and towns through the exchange of information and the increased experience available.[54]

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[51]Chesebro, R. L., *Organization and Administration of a Municipal Law Office* (1937) 3 LEGAL NOTES ON LOCAL GOVERNMENT 128.

[52]*Ibid.*

[53]Hodes, *Administration of a Municipal Law Office* (1937) 3 LEGAL NOTES ON LOCAL GOVERNMENT 73.

[54]See Chesebro, *Organization and Administration of a Municipal Law Office* (1937) 3 LEGAL NOTES ON LOCAL GOVERNMENT 128.

CHAPTER VIII

THE CITY ENGINEER

Considerable emphasis must be placed upon the position of city engineer since the taxpayer continually comes in contact with his work. The engineer deals with practical problems, which actually may be perceived and comprehended by the citizens and which may be solved in their presence. As a city grows in size and its trade increases, it will be confronted by a constantly increasing number of problems concerned with public improvements and everyday necessities, all of which concern the city engineer.[1]

In most cities the city engineer is overburdened with a multitude of duties. For instance, he might be superintendent of public works, of streets, of garbage removal, and/or of waterworks. Due to conflicting interests it is extremely difficult to determine how much time is devoted to engineering duties in the particular case or how salary may be allocated between duties. These problems should be borne in mind by the reader.

Cities incorporated under the general laws possess the power to create the office of city engineer, the incumbent to be elected for a two-year term,[2] but the office may be abolished by ordinance and the duties conferred upon other officials by the city council.[3] And not unlike other officials within the category of general law cities, the engineer may be removed by the governing body for incompetency, corruption, misconduct, or malfeasance in office. This may be done, however, only after notice and hearing.[4]

City charters, as a rule, are silent on the position of city engineer, and consequently only a few state any qualifications. In a few cities he must be a professional civil engineer, and in others he is required to have had some training and experience in municipal engineering. In some instances the city engineer is expressly ex-

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[1]See MARTIN, ROSCOE C., URBAN LOCAL GOVERNMENT IN TEXAS (1935) 305.
[2]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 977.
[3]*Ibid.*
[4]*Id.* art. 1006.

empt from the residence requirement set up in the charter for other officials, thus enlarging the field of applicants.

Regardless of formal charter provisions, a requirement specifying a degree in engineering as a prerequisite to a position as city engineer is essential. A civil engineer, with four or five years' work in college as a background, is of untold value to the city for which he works. Although experience and training in the municipal field is not essential, the applicant for such a position should possess a knowledge of everyday business affairs, which can be gained through actual work in the engineering field.

Although a rule of universal application cannot be stated, virtually all home rule cities and towns appoint the city engineer. The predominant practice is to appoint him for an indefinite period, although not infrequently he is expressly limited to a one- or two-year term. In virtually every city studied the city engineer works full-time, and it is also true that he is relatively well paid in most cases.[5] The salaries paid to the incumbents of this position increase in direct proportion to the population of the town and there is but very little variation in salaries when classified according to the form of government used by the particular city.

In the group of cities with a population ranging from 5,000 to 20,000 the average monthly salary is $169, whereas in the group within the classification of 20,000 to 50,000 population the salary is $250 a month. In the next larger group of 50,000 to 100,000 inhabitants the average monthly salary is $316. In the four cities over 100,000 population, the average salary is $542 a month.

A majority of the cities studied require that the city engineer be bonded, but in most instances the bonds are small, the average being between $3,000 and $4,000.

Duties and Functions

Although the general laws of Texas do not specify the duties of the city engineer, his powers are somewhat stereotyped. The activities of the office readily divide into two classifications. First there are the duties which pertain to construction and maintenance, in-

[5]Two reasons may be advanced for this: first, the position requires a person with some technical training, and second, the office is of considerable importance in some cities. See COOPER, R. WELDON, THE TEXAS MUNICIPAL CIVIL SERVICE (1936) 56–57.

cluding both public and private construction; and second there are certain duties connected with office routine. These activities will now be considered in the order mentioned.

One of the most important functions of the city engineer is to supervise all construction in the city. After making the preliminary plans and maps he supervises the construction and maintenance of streets, alleys, sidewalks, culverts, bridges, and drains. He also supervises the construction of larger projects, such as housing units and the laying of railroad tracks. Furthermore, he is often responsible for the maintenance of street lights and traffic signals. His duties in connection with streets are closely allied to his sanitary duties. For instance, many city engineers are required to supervise the cleaning and flushing of streets, as well as garbage and trash collection. The upkeep and repair of the sanitary sewer system and the sewage disposal plant are frequently within his jurisdiction, as are other types of public property.

The governing bodies in some cities place the engineer in charge of the maintenance of public buildings, making him responsible for their cleanliness as well as for safety. In the larger cities a garage is maintained for the upkeep of city vehicles, especially those utilized by the street department, and usually the engineer is given complete control over this activity.

The city engineer is often required to investigate complaints concerning governmental services and to correct faults when they are found to exist. His work, partially remedial in nature, is also preventative. Thus he must make surveys in order that problems may be met with foresight. For instance, he may be required to supervise a traffic count or a count of street signals and signs in order to lessen traffic congestion or to increase the flow of traffic. His powers of investigation and inspection are often broadened to include tests performed at the municipal sewage disposal plant or at the water plant.

As pointed out above, a great portion of the engineer's time is occupied with office routines and techniques, and as a part of this official service he must meet the public, aid in the solution of their problems, and assist them in every way possible. He must issue permits for construction, wiring, plumbing, and the like, as well as

keep a record of the various activities of his office.[6] He is generally designated the custodian of various plats and maps, and when necessary he must make new plans or maps. In order that this may be effectively executed, frequently he must ascertain the established monuments of the city and locate, establish, and survey all private property, streets, and alleys.

Many miscellaneous duties are placed upon the engineer. He makes an estimate[7] of the cost of proposed public improvements, calls for and accepts bids from contractors, and keeps a record of such transactions. After the contracts are made he must see that all parties faithfully perform their obligations.

Due to the technical aspect of the engineer's work, however, it is improbable that he will be burdened with appointments to committees and boards. He is, however, a member of the examining and supervising board of plumbers.[8] Furthermore, if the governing body sees fit to do so, it may appoint him the inspector of plumbing.[9]

Associated with the city engineer are a multitude of municipal officials in charge of various parts of the physical plant. In a few cities will be found street superintendents and park superintendents who are classed as local officials, although in the majority of instances they are no more than employees of the city. The duties of these officials are concerned largely with the aspects of their specific field. For example, the street superintendent is placed in charge of the maintenance of streets, alleys, and bridges, whereas the park superintendent is responsible for the maintenance of city parks. In the latter connection, however, there is considerable variance in duties, as some park superintendents are placed in control of other property owned by the city, such as the municipal cemeteries, recreation fields, and airports. If the city supports a

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[6]Charters often require him to make a complete set of water system records.

[7]Art 1083 of the Revised Civil Statutes (1925) provides that the city engineer must make an estimate of street and alley improvements, and he is to place one-third of the estimated expense of the work adjoining or fronting each lot upon that property. This power may be conferred upon other officers instead of the city engineer.

[8]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1078.

[9]*Id.* art. 1077.

zoo, then the park superintendent is given extensive control over its operation and maintenance.

The individuals in charge of the various municipal utility plants occupy positions somewhat similar to street and park superintendents due to the technical nature of their work. Probably the most common type is the superintendent of waterworks,[10] who is usually placed in charge of the entire water system, the mains, filtration plants, reservoirs, and other facilities connected with the operation of the department. In rare instances other duties are placed upon these officials, duties relating to the sewer lines and gas mains.

Not many Texas cities have utility plant managers. Some emphasis, however, should be placed upon the type of man best suited for this work. The city contemplating an addition to or change in the personnel of its utility plant must be careful to select a technically trained man who has previously demonstrated administrative ability. The training does not necessarily have to arise out of attendance upon a technical school, but practical experience in similar work is essential. The actual administrative ability is best demonstrated by the method of exercise of control over subordinates. As is true of the city engineer, the question of ability to supervise labor and direct subordinates is too important a problem to avoid in the selection of an official, because upon the success of the outcome of the labor relations depends the success of the operation of the plant. The plant manager, in other words, must possess the inherent quality of leadership, retaining the respect of his subordinates at all times.

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[10]In some cities in this country the water department is a distinct separate corporate entity, but usually it is merely an agency or department of the municipal government and hence all its acts and contracts made by the governing body are the acts and contracts of the municipality. 2 McQUILLIN, MUNICIPAL CORPORATIONS §452. The somewhat similar position of superintendent of public utilities, created by ordinance, has been held to be an employment. Moore v. Logan, 10 S.W.(2d) 428 (Tex.Civ.App. 1928, writ of error dism'd). The waterworks superintendent of Lowell, Massachusetts, has been held to be a subordinate officer subject to discharge only under civil service rules. Reynolds v. McDermott, 162 N.E. 1 (Mass. 1928). In St. Paul the position of general superintendent and engineer of the water department is an employment and not an office. Oehler v. City of St. Paul, 219 N.W. 760 (Minn. 1928).

CHAPTER IX

THE CHIEF OF POLICE

In theory a municipal policeman may be termed a public officer[1] or a state officer,[2] but in practice he enforces local regulations and is paid with funds from the local treasury. This office was unknown to the common law; consequently it is created by statute, and depends upon the legislature for an expression of the pertinent powers and duties.[3]

The general laws governing cities and towns adopting the mayor-aldermanic form of government provide for the election of a city marshal,[4] but by ordinance these communities may provide for the appointment, term of office, and qualifications of such additional police officers as may be necessary. These additional officers possess the power and the authority vested in the city marshal.[5] In cities under 3,000 population the office of marshal may be dispensed with by ordinance and the duties conferred upon the proper county officers.[6] It has been held also that the statutes authorize the city council to dispense with the position of marshal and allow it to appoint a chief of police with the duties and powers of the marshal.[7] Some cities have abolished the office of marshal merely by not providing for a salary. Statutory provision is made for the election of a marshal in towns and villages incorporated under

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[1]*Ex parte* Preston, 72 Tex.Crim.Rep. 77, 161 S.W. 115 (1913).

[2]Yett v. Cook, 115 Tex. 205, 281 S.W. 837 (1926). He is also an officer within the meaning of TEX. PEN. CODE (1925) art. 1147 defining aggravated assault upon an officer. Sanner v. State, 2 Tex.App. 458 (Tex.Crim.App. 1877). See 2 MCQUILLIN, MUNICIPAL CORPORATIONS §453.

[3]1 DILLON, JOHN F., COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (1911) §390. See 6 MCQUILLIN, MUNICIPAL CORPORATIONS §2574.

[4]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 977. The office of deputy marshal is authorized by law. Pitts v. State, 97 Tex.Crim.Rep. 634, 263 S.W. 1061; 97 Tex.Crim.Rep. 642, 263 S.W. 1059 (1924). By TEX. VERNON'S ANN. CIV. STAT. (1925) art. 999 the marshal is ex officio chief of police. These terms are usually used synonymously, although in the larger communities "chief of police" is more popular.

[5]*Id.* art. 998.

[6]*Id.* art. 999.

[7]Alexander v. City of Lampasas, 275 S.W. 614 (Tex.Civ.App. 1925).

Chapter 11 of Title 28,[8] and a police force may be appointed by the board of commissioners in the general law cities operating with a commission plan of government.[9]

In some of the smaller communities of Texas, there is no regularly constituted police officer or police force. In these cities provision is made for a night watchman, who is customarily paid by the town, the property owners, and the merchants. This is an informal arrangement between all parties concerned. The official is ordinarily selected by the city governing body.

The statutes governing cities incorporated under Chapters 1 to 10 of Title 28 do not make any provision or set any standard governing the qualifications of the marshal. In towns and villages, however, the marshal must (1) be twenty-one years of age, (2) have resided in the town for six months preceding the election, and (3) be a qualified elector under the laws of the state.[10] In many cities incorporated under the general laws, the eligibility requirements are fixed by the ordinance creating the position. The most common formal qualifications required by charters are: (1) the official must be a qualified voter of the city, and (2) he must have attained twenty-five years of age. In addition, some charters provide that he must own property and he must pay all taxes and debts due the city.

In many general law aldermanic cities the chief of police is appointed, although the state statutes require his selection by means of popular election. The governing body of general law commission cities possess express authority to appoint such an official and no city studied violated this provision. In the charter cities there is a tendency to make the chief an appointive official, although popular election is still used in many aldermanic cities operating under the home rule amendment. The practice, however, is grad-

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[8]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1141. Under Revised Civil Statutes art. 1146 allowing the aldermen to appoint such officers as deemed necessary, they have authority to appoint a policeman. Early v. State, 50 Tex. Crim.Rep. 344, 97 S.W. 82 (1906).

[9]Tex. Vernon's Ann. Civ. Stat. (1925) art. 1161. Under this such a city might discharge at will a constable who was employed under an alleged contract for two years. City of Mart v. Richards, 235 S.W. 352 (Tex.Civ.App. 1921).

[10]Tex. Vernon's Ann. Civ. Stat. (1925) arts. 1141, 1137.

ually disappearing in the home rule commission-governed localities. When appointment is used as a form of selection, the mayor, the governing body, and the city manager may be active, acting singly or in conjunction with one another.[11]

Whenever a temporary vacancy occurs in the office of chief of police in some commission cities, the charters provide that the police and fire commissioner is to appoint someone from the force to perform the duties of chief. The common procedure, however, is for the governing body to make the appointment.

In general law cities statutory authority permits the council to remove any city official, elected or appointed, including the chief of police, for incompetency, corruption, misconduct, or malfeasance in office, but only after due notice and an opportunity for the officer to be heard in his own defense.[12] Charters usually include various combinations of the following items as reasons or grounds for dismissal: drunkenness, misconduct, inability to perform or willful neglect in the performance of duties, incompetency, inefficiency, corruption, malconduct, malfeasance or nonfeasance in office, and gross immorality.[13] In several instances charters provide that if the

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[11]It is often recommended that a director of public safety should not be placed between the appointing agent and the police or fire chief, as executive responsibility is weakened and new problems created. *To Whom Should Polic and Fire Chiefs Be Responsible?* (1939) 21 PUBLIC MANAGEMENT 13.

[12]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1006. *Id.* art. 1161 provides the board of commissioners may discharge any officer which it appoints; so apparently this may be done without restriction in commission-governed cities.

[13]One charter gave the city commission the power to determine all charges against police officers for incompetency or inefficiency. The inability of a police officer to read or write the English language was held to be a ground for removal within the meaning of the terms "incompetency or inefficiency." Steinback v. City of Galveston, 41 S.W. 822 (Tex.Civ.App. 1897). In another instance, a charter, after listing the city officials, provided that they "may be removed by a . . . majority vote of the said city commission at the pleasure of said board of city commissioners." Under this the city commissioners were held to be empowered to remove the chief of police and fire marshal without giving a reason. City of Electra v. Taylor, 297 S.W. 496 (Tex.Civ.App. 1927). However, a provision that prohibits the discharge of policemen except after trial and for cause is valid. City of Houston v. Mahoney, 36 Tex.Civ.App. 45, 80 S.W. 1142 (1904). See City of Houston v. Floeck, 80 S.W. 1198 (Tex.Civ.App. 1904, writ of error refused).

officer is not dismissed from the service the grade and rank held prior to becoming chief are to be restored to him.

A two-year term is prescribed for the chief of police in the general law aldermanic cities; not all communities, however, observe this requirement, as some appoint the chief for an indefinite period of time. This same tendency is noticeable in the general law commission-governed cities and in many charter cities which appoint a chief. As a policeman of an incorporated city or town is an officer, his term cannot legally continue for a longer period than two years.[14] Thus, a case arose in this state involving a charter which provided that all employees of the police department were to hold office during efficient service and good behavior, even though the Constitution provides that the term of office shall not exceed two years.[15] The court held that upon the expiration of two years from the date of appointment, in the absence of a reappointment, the policeman ceased to be an officer *de jure*, after which time the city was liable only for services actually rendered and accepted by it.[16] Furthermore, one case has held that a charter provision stating that policemen are to hold office during good behavior is unconstitutional.[17] If no definite period is fixed for the term of office, then it is two years.[18]

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[14]McDonald v. City of Dallas, 69 S.W.(2d) 175 (Tex.Civ.App. 1934), *aff'd*, 98 S.W.(2d) 167 (S.Ct. 1936), *opinion withdrawn and rev'd*, 130 Tex. 299, 103 S.W.(2d) 725 (1937), *motion for rehearing overruled*, 130 Tex. 299, 107 S.W.(2d) 987 (1937).

[15]Tex. Const., Art. XVI, §30.

[16]City of Houston v. Albers, 32 Tex.Civ.App. 70, 73 S.W. 1084 (1903).

[17]City of Houston v. Mahoney, 36 Tex.Civ.App. 45, 80 S.W. 1142 (1904). See City of Houston v. Smith, 36 Tex.Civ.App. 43, 80 S.W. 1144 (1904, writ of error refused); City of Houston v. Floeck, 80 S.W. 1198 (Tex.Civ.App. 1904, writ of error refused). It has also been said that the constitutional limitation of two years is read into a charter provision declaring that appointees shall hold office during good behavior, and thus it is not invalid. Callaghan v. McGown, 90 S.W. 319 (Tex.Civ.App. 1905, writ of error refused); Callaghan v. Tobin, 40 Tex.Civ.App. 441, 90 S.W. 328 (1905, writ of error refused); Callaghan v. Irvin, 40 Tex.Civ.App. 453, 90 S.W. 335 (1905, writ of error refused).

[18]City of Houston v. Estes, 35 Tex.Civ.App. 99, 79 S.W. 848 (1904, writ of error refused). See City of Houston v. Lubbock, 35 Tex.Civ.App. 106, 79 S.W. 851, (1904, writ of error refused); City of Houston v. Johnson, 35 Tex.Civ.App. 105, 79 S.W. 1199 (1904, writ of error refused); City of

Whether reappointment occurs or is ignored, the average length of service of incumbent chiefs of police in all general law cities studied is only 3.4 years, but when the cities are classified by form of government the average length of service in the mayor-aldermanic cities is nearly four times as great as in the commission cities. In the charter cities studied the amount of time that the chief remains in office declines without variation from the smallest to the largest population group. Thus, in cities which ranged in population from 5,000 to 20,000, the average chief was found to have been in office over six years, whereas in the group ranging from 20,000 to 50,000 population he had remained in office slightly less than five years. But in the group of cities ranging from 50,000 to 100,000 inhabitants the time spent in office was only 4.3 years, while in the four largest cities studied the average length of service of the incumbent was 3.34 years.[19]

Approximately one-half of the general law aldermanic cities studied require the chief of police or marshal to devote only a part of his time to the office. When the part-time chiefs are paid for their efforts, they receive only small or nominal compensation, although in some of these instances the police chief has another official position with the city, such as tax assessor and collector,[20]

Houston v. Clark, 80 S.W. 1198 (Tex.Civ.App. 1904); City of Houston v. Fraser, 80 S.W. 1198 (Tex.Civ.App. 1904). In 1940 an election will be held to determine whether Art. XVI, §30 of the Constitution of Texas shall be amended to allow appointive municipal offices which are under the terms of the civil service to be exempt from the two-year limitation. H.J.R. No. 8.

[19]In a recent study it was said, "Inasmuch as many of the ills of police administration are attributed to impermanence of tenure of the police executive, a study was made of the number of individuals occupying this office in 212 cities over a twenty-year period ending in 1937. The average tenure of the chief of police during this period by population groups was: cities over 100,000, 2.9 years; 40,000 to 100,000, 3.5 years; 10,000 to 40,000, 5.5 years; 3,500 to 10,000, 4.2 years; 1,000 to 3,500, 4.2 years; and under 1,000, 4.5 years. The general average tenure for all cities was 4.4 years." COOPER, R. WELDON, MUNICIPAL POLICE ADMINISTRATION IN TEXAS (1938) 95. See Bellman, R. A., *Police Administration and Organization* (Paper in Political Science, University of California, typewritten, no date), c. 7, part 6.

[20]Apparently the customary practice in these cities is to avoid placing too many duties upon the police chiefs, but not only do some cities allow the police chief to serve as assessor and collector, but some communities require him to be pound master, fire chief, or fire marshal. General law commission

and in that capacity he receives a salary which compares favorably with the salaries of other city officials. The full-time chiefs in general law aldermanic cities receive salaries ranging from $50 to $240 monthly, the average amount being $138. A few of these officers receive fees. All police chiefs in the general law commission cities devote their full time to their office, receiving salaries ranging from $125 to $200 a month.

The charter cities studied are to be commended because they employ only full-time chiefs of police, thus allowing that official to devote his full time and energies to law enforcement and crime prevention. The salaries of the chiefs in the charter cities are not as large as the duties of the position would warrant, but they compare favorably with the salaries of other officials in Texas cities. The average salary progresses from $140.33 in the home rule cities under 20,000 population to $190.33 in the group of cities and towns with a population of 20,000 to 50,000. In the next largest group—50,000 to 100,00 inhabitants—the average salary amounts to $234 and in the four cities studied over 100,000 population it is $354.[21]

The Revised Civil Statutes, Article 999, require a bond of the marshal in all general law aldermanic cities. Not all of the general law commission cities studied require a bond of the chief, and those communities that protect themselves in this fashion set the amount at either $1,000 or $2,000. A majority of the cities operating under the home rule amendment require a bond, the amounts ranging from $1,000 to $10,000. Of the cities surveyed, however, approximately one-half place the chief of police under a bond, and in no community is the amount over $1,000. This bond is usually executed in favor of the city, and affords no protection to a citizen who may be injured as a result of the conduct of the marshal.

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cities and charter cities are not unlike the general law aldermanic cities in this regard.

[21]One city allowed its chief of police certain fees, but these were not included in the above compilations. Generally fees of city officers may be fixed by resolution as well as by an ordinance. But an ordinance may be repealed by an ordinance only; so a resolution fixing the salary of a marshal is ineffective where a prior ordinance provided the marshal should receive fees, but no salary. City of Panhandle v. Bickle, 31 S.W.(2d) 843 (Tex.Civ. App. 1930, writ of error dism'd). See Bickle v. City of Panhandle, 43 S.W (2d) 640 (Tex.Civ.App. 1931, writ of error refused).

Of course, a city is not liable for the acts of its officers who are engaged in the exercise of its police powers; nor is it liable for the officer's acts outside of the scope of his employment unless the city expressly directs him to perform such an act.[22]

Duties

The duties of a chief of police are not only varied and colorful, but are exacting to an extreme degree. If the position demands his efforts in the field, not only must he be young and vigorous enough to perform his duties effectively, but he must make himself available for duty at all hours. The chief must be informed on modern advancements in crime detection and prevention if he desires to maintain a high degree of operating efficiency in the department. In addition to these bases of an efficient performance of the chief's duties, certain intangible individual qualifications must be considered. The chief should be intelligent and possess emotional stability, allowing him not only to accept responsibility but to plan, organize, and lead the department. Leadership is one of the most important qualifications in the police department, because the chief cannot ask his subordinates to perform duties which he personally would be unable to exercise.[23]

The statute designating the duties of the city marshal in cities and towns incorporated under the general laws reads as follows:

> The marshal of the city shall be ex-officio chief of police, and may appoint one or more deputies which appointment shall only be valid upon the approval of the city council. Said marshal shall, in person or by deputy, attend upon the corporation court while in session, and shall promptly and faithfully execute all writs and process issued from said court. He shall have like power, with the sheriff of the county, to execute warrants; he shall be active in quelling riots, disorder and disturbance of the peace within the city limits and shall take into custody all persons so offending against the peace of the city and shall have authority to take suitable and sufficient bail for the appearance before the corporation court of any person charged with an offense against the ordinance or laws of the city. It shall be his duty to arrest, without warrant, all violators of the public peace, and all who obstruct or interfere with him in the execution of the duties of his office or who shall be guilty of any disorderly conduct or disturbance whatever; to prevent a breach of the peace or preserve quiet and good order, he shall have author-

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[22] (1936) 23 TEXAS MUNICIPALITIES 69.

[23] COOPER, MUNICIPAL POLICE ADMINISTRATION IN TEXAS 105–06.

ity to close any theatre, ballroom or other place or buildng of public resort. In the prevention and suppression of crime and arrest of offenders, he shall have, possess and execute like power, authority and jurisdiction as the sheriff. He shall perform such other duties and possess such other powers and authority as the city council may by ordinance require and confer, not inconsistent with the Constitution and laws of this State. The marshal shall give such bond for the faithful performance of his duties as the city council may require. He shall receive a salary or fees of office, or both, to be fixed by the city council.[24]

The activities, duties, and powers of the chief of police of all cities, general law and home rule, readily fall into three broad groups: First, the actual police work, involving the protection of the city's inhabitants; second, the control and custody of equipment; and finally, the office routine, personnel problems, and the broader aspects of police administration. In the smaller communities routine matters and actual police work compose a major portion of the chief's duties, and consequently he is not concerned with the broader administrative aspects of a smoothly operating organization. On the other hand, in the larger communities the chief forsakes the routine matters, which may be delegated to subordinates, for the long-range planning of departmental activities, the solving of personnel problems, educational campaigns, and all related problems. When expedient the actual law enforcement and investigatory phases of police work should be placed on subordinates, and the attention of the chief centered upon the administrative details of the department.

1. Actual law enforcement. The chief is under a duty to quell all riots and disturbances, and he may arrest without warrant all violators of the public peace. Furthermore, he may arrest all persons interfering with him in the execution of the duties of his office. In order that he may prevent a breach of the peace, he is given the power to close any theater, ballroom, or other public place.

Some duties which devolve upon the chief of police emanate from the local corporation court. Not only does he execute writs and processes issued from the court, but he must also collect the fines and costs imposed by it. He is also empowered to take suitable and sufficient bail for the appearance before the corporation court

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[24]Tex. Vernon's Ann. Civ. Stat. (1925) art. 999.

of any person charged with an offense against the ordinances and laws of the city.

Crime prevention is an important aspect of police work, and the chief should analyze criminal and police conditions in order to plan a crime prevention program. In furtherance of this aim he must maintain contact with law enforcement agencies and professional organizations of police officials, conferring with other officers and seeking their advice. As leader of the department the chief must take an active part in traffic safety and crime prevention campaigns, instilling confidence in members of the public and educating them on all phases of police work.

2. Supervision of the physical plant. The chief of police is frequently designated the custodian of a portion or all of the equipment of the department, and he also is often placed in control of units allied with his actual police duties. Thus he is sometimes required to prescribe uniforms and badges, and frequently he controls and manages the city jail. The chief is often required to conduct all surveys of the physical equipment belonging to the department, so that an accurate check on all necessary items may be kept.

3. Office management, routines, and practices. Office administration is of importance and occupies a great portion of the chief's time in the larger cities. As a part of the administration of this department someone—and usually this duty devolves upon the chief of police—must shape the department's policy toward different individuals. The department must establish a definite attitude with reference to the public and the press. Furthermore, the department must adopt a definite policy toward municipal officials.

Periodic reports must be made to the mayor or city manager of the city, and this includes the preparation of the annual report which is so essential to proper functioning and development of the department. The chief, in turn, may install a system of reports to be used by his subordinates. The head of the police department must review these reports and must maintain supervision over the acts of his subordinates in order that discipline may be maintained.

The chief must promulgate all orders and rules for the government of the force. Modern activities and changes in public administration forbid such regulations remaining static; consequently

revision must be a constantly recurring act—a continuous operation. Furthermore, the chief must necessarily devote some time to monthly preparation of schedules of beats and also other assignments for the members of his force.

In order that the efficiency of the department may be maintained at the highest possible level, and to aid in administration, the chief must possess an investigatory power. Not only may he be required to make personal inspections of beats, but he must investigate all charges concerning inadequacies of the organization or inquiries relating to the efficiency of the department. Furthermore, he must institute careful studies to eliminate obstacles hindering the effective functioning of the department.

Personnel problems worry most chiefs of police, but these questions are so important that they cannot avoid meeting the issue. When an emergency presents itself, the chief has the power to appoint special policemen. And in cities where the chief appoints all members of the force, he must be a good judge of men. If a civil service commission fulfills this need the chief must undertake to aid the commission in every possible way. Furthermore, in many communities he possesses the power to suspend members of the department.[25] Except in cities with formal merit systems, he

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[25]A charter may provide that the only lawful way to remove a policeman is by an act of the mayor with the approval of a majority of the council. City of San Antonio v. Serna, 45 Tex.Civ.App. 341, 99 S.W. 875 (1907, writ of error refused). In the early days of this century the city of Paris contracted with a policeman, in consideration of his appointment, to the effect that either the marshal or the city council could discharge him without notice or cause at any time. This was held to be against public policy and void under the Constitution, Art. XVI, §30, which fixes a term of office of two years, this having been construed to fix such terms subject to removal for cause. City of Paris v. Cabiness, 44 Tex.Civ.App. 587, 98 S.W. 925 (1906). The discharge of a policeman without cause by one having no authority to oust him, in direct contravention of a charter provision, is a nullity; and he is entitled to his salary. This is true even though he performed no duties of office and engaged in other pursuits, as he was prevented from performing the duties of a policeman by the marshal. City of Houston v. Estes, 35 Tex.Civ.App. 99, 79 S.W. 848 (1904, writ of error refused). See City of Houston v. Lubbock, 35 Tex.Civ.App. 106, 79 S.W. 851 (1904, writ of error refused); City of Houston v. Johnson, 35 Tex.Civ.App. 105, 79 S.W. 1199 (1904, writ of error refused); City of Houston v. Clark, 80 S.W. 1198 (Tex.Civ.App. 1904); City of Houston v. Fraser, 80 S.W. 1198 (Tex.Civ. App. 1904).

should develop standards for entrance into the department; and to carry this procedure a step further, he should install a system of promotions. An organization chart, demonstrating the relations within the department and showing the functions of each unit or agency, will prove invaluable.

There are many duties which are minor in nature but burdensome in execution. The chief must handle large amounts of correspondence, although in larger cities it may be delegated to capable assistants. He must advise other city officials on a variety of matters and frequently he is required to attend meetings of the governing body. As mentioned above, he must prescribe uniforms and badges, and also the manner in which the policemen are armed. In towns and villages he assesses and collects taxes[26]—and so on, *ad infinitum*.[27]

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[26]TEX. VERNON'S ANN. CIV. STAT. (1925), arts. 1147, 1148.

[27]This discussion is based on comments by various Texas chiefs of police, TEX. VERNON'S ANN. CIV. STAT. (1925) art. 999, and COOPER, MUNICIPAL POLICE ADMINISTRATION IN TEXAS, 102–06.

CHAPTER X

THE FIRE CHIEF

The average city dweller will never perceive and appreciate the value of the municipal fire department until some evening, perhaps while reading his daily paper, his senses warn him that something is burning. Upon turning in his chair, he notices flames racing up the draperies in the front room and licking at the ceiling. When this moment arrives the urbanite is utterly dependent upon the fire department and its all-encompassing help.

Volunteer fire companies are common in the smaller cities and towns in Texas, but as they are not an essential part of the framework of local government, they will not be emphasized in this chapter. In the majority of instances the volunteer company elects one of its members as chief and the city governing body accepts that person as the fire chief. Some cities do not contribute to the volunteer company in any way, but most communities pay the salaries of one or two men who devote their full time to their duties.[1] Additional means of compensation are frequently utilized. For instance, the city may defray the expenses of some of the firemen to training schools, it may buy uniforms for the force, and it may pay premiums on insurance policies. Perhaps the most efficient method of payment would be to set aside a certain sum each year for the volunteer firemen and divide it among the volunteers according to the number of fires to which they respond. Such a procedure would lessen the possibility of incendiarism, as the pay would become proportionately smaller as the number of fires increased.[2]

In twenty-two of the forty-five cities studied a full-time paid chief of the fire department was found to exist,[3] and it is this group of cities that serves as the subject matter of this discussion. In

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[1]"It is quite important that there be enough full-time paid men in a volunteer department to get the apparatus to the fire and get into operation." Nolting, DeWayne E., *Method of Paying Volunteer Firemen* (1936) 18 PUBLIC MANAGEMENT 17.

[2]*Ibid.*

[3]Gladewater is the only general law city in this category. All the cities studied over 20,000 population have a full-time fire chief.

choosing a chief for a fire department, a residence requirement should be unnecessary, as it unreasonably restricts the field of applicants.[4] The age restriction should vary with the size of the city and the type of duties placed upon the chief. In the larger cities, where the duties are concerned largely with administration and operation, the chief could very well be an older man than would be found in a smaller city where he would be called upon for more actual duty in the field.

Educational qualifications of firemen are not important, as these individuals can be trained while they work. Many authorities agree that a high school education or less is sufficient,[5] whereas others believe that a college education is desirable. In the case of the fire chief the apparent tendency is to stress previous experience rather than education. He should have a comprehensive knowledge of the operation and administration of the fire department, and usually this may be gained only through experience in the department. Experience is essential and some cities have met this requirement by specifying a minimum number of years of experience as an assistant fire chief.

Intangible qualifications, such as the ability to lead the men in the department, are of the utmost importance. The chief must be a man to whom the departmental members look for direction and supervision, and consequently it is often advisable that he be able to do personally in the fact of danger what he might be called upon to require of the men. Leadership is desirable in order that discipline may be maintained without decreasing coöperation.

The qualifications of a chief of a volunteer company are not as strict or as comprehensive as those required of a full-time paid fire chief. He must be a public-spirited citizen with a capacity for leadership. He should be available for service at all times and

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[4]See *A Local or an Out-of-Town Fire Chief?* (1935) 17 PUBLIC MANAGEMENT 112.

[5]Hyde, Warren C., *Suggested Procedure in Selecting Firemen* (1936) 18 PUBLIC MANAGEMENT 170.

possess a knowledge of fire-fighting, which may be acquired in a course in an established firemen's training school.[6]

The twenty-two full-time paid fire chiefs were appointed, commonly by the chief executive of the city.[7] Their terms of office were found to vary, some chiefs being appointed for an indefinite period and others for a two-year term. One city was found to appoint its fire chief yearly.

The average length of service of the incumbent chiefs of the fire departments in the twenty-two cities under consideration was found to be 9.7 years, which is a relatively long period of time. There is no explanation for the lengthy duration of terms in office, although lack of interest and indifference on the part of local politicians is a possible reason. Whereas the police department is often a prize political football, and much interest is centered upon its operation and supervision, just the contrary is true of the fire department. This is a very definite advantage to the city, as a qualified chief is able to improve the department's efficiency without the recurrent fear of losing his position. While the department is functioning in a capable and competent manner, the incumbent should be left in office.

Due to the long periods of service of the fire chiefs in Texas cities, apparently the question of removal is not important. In the general law cities, however, if the fire chief is an appointive officer, two-thirds of the governing body may remove him by a resolution declaratory of their want of confidence.[8] Similarly in the home

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[6]Florin, J. E., *Volunteer Fire Departments* (1935) 29 THE MUNICIPALITY 235. In Texas the State Volunteer Firemen's Association secured the coöperation of A. & M. College and established an annual short course. This was so successful that the training program was made year-round and a full-time itinerant instructor has been provided. He spends several days at a time in a town and gives intensive training to many fire departments. BOND, HORATIO, FIREMEN'S TRAINING (Reprint by the National Fire Protection Association of a speech delivered in 1936) 3.

[7]It has been held that when the fire chief was appointed by the only legally constituted authority, the police and fire commissioner, the city council had no power to refuse to accept his services or to endeavor to prevent performance of such services, or to pass on his appointment. City of San Antonio v. Tobin, 101 S.W. 269 (Tex.Civ.App. 1907), *writ of error dism'd*, 100 Tex. 589, 102 S.W. 403 (1907).

[8]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1006.

rule cities, where the fire chief is appointed, he is customarily removable at the will of the appointing body. Some charters provide that if the removal does not amount to a dismissal from the service, the incumbent is given the rank and position he held prior to becoming chief.

In the twenty-two cities mentioned above the average annual salaries of the incumbent chiefs of police range from $1,380 in Gladewater to $5,000 in Dallas. The average for the four cities over 100,000 population studied was $4,101 per year, which is 22.7 per cent greater than it was in 1936.[9] The nation-wide average for 379 cities over 25,000 population, however, in 1934 amounted to $3,023 annually, the range being from $1,000 to $11,000.[10]

Only five of the cities surveyed reported that a bond was required of the chief of the fire department, the average amount being $3,400.

Duties

The chiefs of the fire departments in the twenty-two cities studied are not only fire fighters but are also directors of public relations. This is due to the fact that they must invite confidence and coöperation from the public and other officials, and at the same time build up the public's respect for the department as a unit of the city government.[11] Their duties are diversified, but may be classified under six general headings.

First, protection of life and property. The fundamental basis of any fireman's job is to protect life and property. The chief of the department is the executive head, and thus is in command at all fires. Furthermore, he determines the order in which the fire

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[9]See MARTIN, ROSCOE C., URBAN LOCAL GOVERNMENT IN TEXAS (1936) 210. The average in 1936 was $264.25.

[10]BUREAU OF LABOR STATISTICS, SALARIES AND WORKING CONDITIONS OF FIRE DEPARTMENT EMPLOYEES, 1934 (Serial No. R.305) 1.

[11]The chief, as a fireman, has various moral duties, including the avoidance of all undesirable characters such as gamblers and prostitutes, and prohibiting their loitering near fire stations.

companies in each district respond to alarms. He may destroy property to prevent the spread of fire.[12]

Second, fire prevention. This is the most comprehensive job that the fire chief has to undertake, and usually his success in it determines his success as fire chief. He must obtain the wholehearted coöperation of the community and seek a reasonable amount of publicity for any educational campaigns he might undertake. He is given the right of entry to inspect buildings and premises susceptible to fire, as well as to investigate hazardous occupancies and to correct faulty conditions. He recommends fire prevention methods when necessary, approving the types of fires used by factories and industries. He investigates the adequacy of entrances and exits in places where people congregate; he controls the storage of inflammables; and he sees that fire escapes are properly maintained and regulated.[13] The chief is in charge of the fire alarm system and it is his duty to familiarize himself with the water supply of the city or town. In communities possessing a bureau of fire prevention he is in control.

Third, custody and maintenance of property. The fire chief usually has custody and control of all buildings, engines, hose, ladders, and other equipment belonging to the department. He is required to examine it periodically and to file an inventory with the city secretary or city clerk at various times. He decides what type of equipment is required by the department, and he sees that

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[12]See TEX. VERNON'S ANN. CIV. STAT. (1925) art. 1070. Where an officer is carrying out an order for the public benefit, no damage can be recovered against the city on account of his negligence or careless performance of the duty. Keller v. City of Corpus Christi, 50 Tex. 614, 32 Am.Rep. 613 (1879). The city is not liable at common law or under the Constitution of the State for the destruction of a house by the fire department to prevent the spread of fire; and if the statutes provide for a mode of compensation in such cases the mode must be pursued as pointed out. *Ibid.* It is interesting to note that it has been held that a fireman entering premises to extinguish a fire is a licensee in respect to the duty of the owner of the premises to keep the same in a safe condition. Houston Belt & Terminal Ry. v. O'Leary, 136 S.W. 601 (Tex.Civ.App. 1911, writ of error refused).

[13]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 3971. He sometimes is called upon to witness tests of fire escapes. See *id.* art. 3969.

all equipment is maintained properly. As he is in charge of the fire alarm telegraph he requires it to be kept in good condition.

Fourth, personnel. In many instances, after the chief selects men and appoints supernumerary officers as substitutes for absent members of the department he trains and instructs the individuals on the force, safeguarding them in their work. Not only are the men to be placed in the most advantageous positions, but some individuals must be detailed for inspection work. At all times the chief must see that discipline is maintained. He controls assignments[14] and transfers, and he can suspend members. Permission for absences issue from his office. The chief often specifies the uniforms to be worn by the members of the department. He issues all instructions concerning departmental functions and operations. In addition to prescribing rules and regulations, some charters require him to classify the fire service.

Fifth, reports. The chief of the fire department must keep records of the department's work, and he must also make various reports to officials within the city, as for example the fire commissioner. He is often called upon to prepare an estimate of the cost of operating the department and submit it to the chief executive. Sometimes he is required to prepare the forms for these reports.

Sixth, the chief of the fire department is required to perform such other duties as may be required of him or such other duties that he thinks should be performed to protect property and life in the city. Above all, he must see that the department is operating efficiently.[15]

The duties of the chief of a volunteer fire company are largely the same as those of paid full-time chiefs in the larger cities and towns. Concerning the administration of a volunteer fire company, the chief:

1. Is the head of the department, subject to the laws of the state, ordinances of the city, and rules and regulations adopted.

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[14]In some cities he is under a statutory duty to arrange working hours so that employees may work an equal number of hours each month. TEX. PEN. CODE (Supp. 1938) art. 1583a.

[15]All of this material is compiled from ordinances of various Texas cities, as well as from DIAMOND, THOMAS, and DALTON, FRANK, FIRE FIGHTERS' MANUAL (*School of Education, University of Michigan*, 1935) 52–54.

2. Is held responsible for the general condition and efficient operation of the department, the training of members, and the performance of all other duties imposed upon him.

3. Inspects or causes to be inspected by members of the department the fire hydrants, cisterns, and other sources of water supply, at least twice each year.

4. Maintains a library or file of publications on fire prevention and fire protection and makes use of it to the best advantage of all members.

5. Makes every effort to attend all fires and direct the officers and members in the performance of their duties.

6. Sees that the citizens are kept informed on fire hazards in the community and on the activities of the department.

7. Sees that each fire is carefully investigated to determine its cause, and in case of suspicion of incendiarism secures and preserves all possible evidence for future use in the case.[16]

The Fire Marshal

Some consideration must be given to the office of fire marshal, as many fire chiefs perform the duties of this position. The fire marshal in Texas cities is comparatively insignificant, as commonly he is no more than a political appointee holding office for whatever honor may be derived from it. Usually he is appointed by the mayor or the mayor and governing body, the position being created in order that the city may obtain a lower key rate.[17] The office may be improved by calling to the attention of the marshal his real worth to the community when he is active, educating him to the possibilities of the position, and arousing his interest in the work by establishing regional meetings, and like aids. He must possess

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[16]National Fire P8otection Association, Suggested Ordinance and Regulations for Volunteer Fire Departments (1937) 7.

[17]"Texas cities are graded for their fire defenses by the engineers of the Texas Fire Insurance Department rather than by the engineers of the National Board of Fire Underwriters. . . . Under the Texas plan, key rates or basic insurance rates are directly determined. These key rates, in addition to being the city's base rate, represent the city's classification, taking the place of the one set by the National Board outside of Texas. These rates are a measure of the city's ability to cope with the fire problem." Stone, Harold A., *An Answer to a Fire Chief's Prayer* (1936) 18 Public Management 8.

the ability to interpret the duties of the office as set forth in the ordinance creating his office, and he should know the value of safety precautions and their relation to fire prevention. Furthermore, he should be able to sell the idea of fire prevention to the public and secure public coöperation without having to use force, except in extreme cases, obtaining at the same time the coöperation of the city and county officials.[18]

The fire marshals, state and local, are not concerned with actual fire-fighting techniques, but are intensely interested in fire prevention. The State Fire Marshal has the power to enter a building to investigate the possibility of conflagration.[19] He is given extensive investigatory powers and may exercise them when asked to do so by local officials.[20] In order to fully investigate a fire the marshal has the power to call witnesses, examine them, file complaints, and assist in the prosecution of law violators.[21] Whenever the State Fire Marshal is unable to act he may designate the local fire marshal or some other suitable person to act in his place, with the same authority.[22]

Local ordinances creating and defining the duties of the office of city fire marshal commonly set up the same standards as those fixed by the statutes governing the State Fire Marshal. For instance, the city fire marshal is required to investigate fires within a certain time to determine if the fire resulted from carelessness or negligence, and he is under a duty to keep a record of all fires, their circumstances, origin, and amount of loss. Usually the duty is imposed upon him to take testimony concerning a particular fire if such further investigation is necessary. Furthermore, he has the authority at all times of day or night to enter upon and examine any building or premises where a fire has occurred. If the office of chief of the fire department is held by another individual, that person will ordinarily assist the fire marshal in his investigations, although such a relationship is conducted in an informal manner.

The local fire marshal has the authority, by ordinance, to enter

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[18]Sanders, Eugene, *Qualifications of a Good Fire Marshal* (1937) 24 TEXAS MUNICIPALITIES 143.

[19]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4897.

[20]*Id.* art. 4896.

[21]*Ibid.*

[22]*Id.* art. 4898.

certain buildings, such as mercantile or manufacturing buildings, and examine them. When he discovers that such locations are especially liable to fire and may endanger other property, or that there is an improper arrangement of inflammable materials or stoves, or an improper storage of dangerous chemicals, he may order the same to be removed or remedied. Penalties are imposed upon property owners not complying with such orders.

CHAPTER XI

THE CITY HEALTH OFFICER

The post of city health officer is designed primarily to aid the city in the administration of one of its most important functions, the protection and furtherance of the public health. Without this protection the very life of our cities would be threatened. The virility of the governmental structure, depending upon the human factor, cannot function with any degree of efficiency unless the health of the public reflects the farsightedness of the individuals in charge of such functions. In effect, the public health constitutes an integral portion of government; consequently due care must be taken to choose a competent, well-trained health personnel.

In order to benefit unincorporated towns or villages, the commissioners' court of the county has the power to designate the town limits and appoint a board of health.[1] This board of health consists of three persons, two of whom must be practicing physicians. A presiding officer is elected by the members, and he possesses the power to make citizens correct any unclean or unhealthful conditions existing upon their premises.[2] In each incorporated city and town, however, the health officer is to be appointed by the governing body,[3] or by whatever means may be prescribed by the local charter, and if the authorities fail to select this officer, the State Board of Health has the power to appoint an individual to hold office until the city officials act.[4] Not all cities in Texas, however, have a health officer, and some communities merely let the county unit serve the city. This is especially true of the smaller municipalities in the state.

Whenever he deems it necessary, the Governor may declare quar-

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[1] TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4435.

[2] *Ibid.*

[3] *Id.* arts. 4425, 1071. However, in cities operating under a charter providing for a different method of selecting a city physician, the office of city health officer is filled as it is now filled by the city physician. In no instance can the office of city health officer be abolished. *Id.* art. 4425. By *id.* art. 4424 the office of city physician has been abolished, and the office of city health officer created. Cities incorporated under the home rule amendment have the power to provide for a health department. *Id.* art. 1175 (28).

[4] *Id.* art. 4426.

antine anywhere in the state,[5] and each city or town authority is under a duty to set up quarantine stations and appoint a health officer at such stations, subject to the approval of the Governor.[6] When the local authority fails to do this, the Governor has the power to appoint a health officer for it.[7] Since this power is not resorted to today, the law is believed to be a dead-letter. This situation has resulted because modern public health techniques in most instances forestall the necessity of creating quarantine stations.

Gregg County and the three cities located therein[8] instituted a novel practice by entering into an informal arrangement, subject to cancellation at the will of the participants. Under this agreement the county handles all health activities, such as inspection of dairies, food handlers, and the like, and in return for this service the city pays the county a certain sum. Other cities and counties have taken advantage of a more formal arrangement commonly referred to as the city-county health unit, one of the best examples being the El Paso-El Paso County set-up. Apparently the latter type of organization functions with greatest ease and efficiency where there is at least one large city in the county.

The only statutory requirement placed on an applicant for the position of health officer is that he be a competent physician, legally qualified to practice medicine within this state, and of reputable professional standing.[9] Most charters have similar provisions,[10] and some impose residential and age restrictions. As this position is no longer regarded as a political post, it is important that the applicant have a broad background; consequently the educational qualifications are of the utmost importance. Even though a few universities now offer a degree of doctor of public health, the field is too new to offer a specially trained personnel to the public, and further-

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[5]*Id.* art. 4448.

[6]*Id.* art. 4454.

[7]*Id.* art. 4455.

[8]These cities are Longview, Gladewater, and Kilgore.

[9]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4424. As he is an appointive official, the statutes governing general law cities require him to be an elector resident of the city. *Id.* art. 1003.

[10]See the Charter of the City of Galveston, §19f; Charter of the City of Dallas, §86.

more it must be remembered that there are many capable men in this work who were trained in the school of practical experience.[11] In 1935 the Texas State Department of Health promulgated certain basic qualifications for health officers, which should prove efficacious in the selection of such individuals in the future. The basic educational requirements are two in number: first, the degree of doctor of medicine, and second, at least one year of clinical experience with preference given to those individuals who have had three months' hospital work in pediatrics and a similar period in infectious diseases.

The State Department of Health also recommends that until specially trained men become available, in cities under 50,000 population the health officer should not be over thirty-five years of age when he first specializes in public health, and preference should be given to those men who have had one or more years' experience in the general practice of medicine. Prospective appointees should agree to take three months of special training in public health, of which two months shall be organized instruction in an approved academic institution and one month in field apprenticeship in an approved local health organization.

For communities with a population of over 50,000 inhabitants the Department of Health advises that the health officer should have had not less than one year in residence at a recognized university school of public health, should have completed satisfactorily a course of study in the fundamental subjects in preventive medicine, and must have had not less than six weeks of field experience under proper supervision in a suitable health organization. The health officer should have a knowledge or sufficient familiarity with biostatics, epidemology, health administration, water purification and sewage disposal, clinical aspects of tuberculosis, venereal diseases, principles of nutrition, occupational diseases and their control. He should have a sufficient knowledge of public health bacteriology and immunology to permit the performance personally of the simple diagnostic procedures and the interpretation of laboratory reports. A certain familiarity with the dangers of diseases transmitted by foods, and also with the clinical aspects of all the commoner communicable diseases is essential, to serve as a basis

[11] McCombs, Carl E., City Health Administration (1927) 50.

for developing skill in differential diagnosis and advising as to treatment.[12]

In all cities studied, including cities operating under the home rule amendment, the health officer is appointed, usually by the governing body. The term of office of this position varies from city to city, but is commonly two years in duration.[13] In all the cities studied under 50,000 population the work is part-time only, but of the cities over 50,000 population which were surveyed, seven cities required the full efforts of the incumbents.

Normally the health officer does not occupy any other position with the city, but in a few municipalities he is director of public health and welfare, and sometimes serves upon the censor or hospital board.[14] Since city manager government has a tendency to avoid a large number of special boards and commissions, in cities operating under this form of government health and welfare services are frequently centralized into a department of public welfare.

A bond is rarely required of the health officer, and when it is the amount is small, ranging from $1,000 to $5,000.[15]

The city health officer is supervised by the State Board of Health. In case the local health officer does not perform his duties properly he is guilty of malfeasance in office and thus becomes subject to removal by the State Board of Health.[16] Furthermore, if the city health officer fails or refuses to discharge his duties properly the State Board of Health may file charges against him with the governing body of the city, at the same time filing a protest with the city secretary and city treasurer against the payment of further

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[12]TEXAS STATE DEPARTMENT OF HEALTH, PRESENT AND PROPOSED OUTLINE AND PROGRAM (mimeographed, July, 1935). These qualifications were taken from regulations adopted by the Conference of State and Territorial Health Officers with the United States Public Health Service.

[13]The city of Palestine, when operating under the general laws, created the position of health and sanitary officer and made the term of office of the appointee concurrent with that of the mayor unless removed sooner. This ordinance was repealed during the term of office of the health and sanitary officer. The court held that the officer was not entitled to any compensation for the remainder of the term. City of Palestine v. West, 37 S.W. 783 (Tex. Civ.App. 1896).

[14]See the section on holding two offices, in c. I.

[15]See TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4461.

[16]*Id.* art. 4431.

fees or salary. After five days' notice in writing, the charges are heard before the mayor and governing body, from whose decision either the city health officer or the State Board of Health may appeal to the county court.[17]

Duties

Practical considerations force a division of duties into those appertaining to the part-time position and those requiring full time. While the full-time health officer is able to devote his efforts to the broader aspects of public health, the part-time officer is necessarily more restricted.[18]

It is believed, however, that a cumulative list of powers and duties compiled from statutes and charters will present a better view of the office, but under no circumstances should this list be considered as restrictive or expansive of the powers of any particular official.

The health officer has a very technical and complicated office routine to perfect and execute, and especially is this true in the matter of reports, records, and conferences. He must be notified of contagious diseases[19] and venereal diseases.[20] In turn, he is required to report to the State Board of Health at various times,[21] as well as make reports to the executive head of the city or to the council or commission periodically or when asked to do so. Some city charters require him to attend all meetings of the governing body.[22] The power that the health officer wields over the city council will naturally depend to some extent upon the personalities

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[17]*Id.* art. 4432. Upon a similar question, a court of civil appeals has held a private citizen cannot enjoin an appointee from discharging the duties of the health officer of a city on the ground that the appointment is illegal, as the matter is one affecting the public and not the individual. Brumby v. Boyd, 28 Tex.Civ.App. 164, 66 S.W. 874 (1902).

[18]The duties of the health officer are of two main types: first, the direction of various overhead duties common to all branches of public service, such as management of personnel, reporting, and the like; and second, the direction of the special technical activities peculiar to the health service, such as prevention of disease, sanitary inspection, and the like. McCombs, City Health Administration 52. Under a coördinated set-up the officer would more than likely be free of the overhead duties. *Id.* 53.

[19]Tex. Vernon's Ann. Civ. Stat. (1925) arts. 1073, 1074, 4477.

[20]*Id.* art. 4445.

[21]*Id.* art. 4430.

[22]See the Charter of the City of Galveston, §26.

of the members of the council and also of the health officer. The council should listen with an attentive ear to all recommendations of the health officer, particularly those of a technical nature. The city doctor should at all times take an active part in the formation of policy in regard to health matters, presenting a militant attitude if such becomes necessary. He will obtain better results by disregarding all personal prejudices and insisting upon his convictions.

The doctor is under a duty to keep a record of all cases of contagious disease reported by individuals in the city.[23] This provision is of vital importance, but furthermore it is absolutely essential that the doctor be able to interpret the material that he gains from reports. He must be able to determine any tendencies or probabilities of diseases from the statistics that he maintains in his office. Such a requirement merely lends credence to the adage that to be forewarned is to be forearmed.

The health officer necessarily possesses extensive investigatory and enforcement powers. He may use all means to ascertain the existence of and to investigate all cases of syphillis, gonorrhea, and chancroid in his jurisdiction.[24] He has the power to enter premises and examine buildings in order to check them for sanitary conditions or to maintain a sanitary condition. The health officer may perform such duties of the chief of police as the council directs.[25] In addition to this he is often given the right and the power to arrest anyone who violates the rules of the health department or the ordinances and general laws governing protection of the public health.

Whenever the doctor suspects a reportable disease he has the power to examine into the facts.[26] Upon the report of cases of syphilis, gonorrhea, and chancroid within his jurisdiction, the health officer should institute measures for the protection of other persons from infection by such diseased persons.[27] Naturally he has the power to quarantine or isolate an individual with a contagious disease, and he is under a duty to place a card on any house

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[23]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4477 (4).

[24]*Id.* art. 4445.

[25]*Id.* art. 1075. Only one city out of the forty-five studied reported that this had ever been necessary.

[26]*Id.* art. 4477 (18).

[27]*Id.* art. 4445.

where there are such diseases quarantined.[28] He also has the power to disinfect houses, apartments,[29] and schools.[30]

When a death occurs without medical attendance, if the health officer believes it was due to an unlawful act or to neglect he is required to refer the case to the coroner or other proper officer for investigation and certification.[31]

There are many miscellaneous duties incurred by the health officer. He tests or supervises the testing of water of some cities.[32] He often supervises theatrical entertainments, weights and measures, inspection of food and drink of eating establishments. Furthermore, he is frequently given control and management of various city property, such as municipal cemeteries; he can order the destruction of diseased animals; and he can cause nuisances to be abated. By some charters the health officer is under a duty to keep the streets, alleys, and sidewalks clean.[33]

Not only is the health officer under such other duties as may be prescribed by the city council,[34] the general law,[35] the mayor,[36] or the State Board of Health,[37] but he may perform all necessary deeds and make all regulations necessary or expedient for the promotion of health or the suppression of disease.

Many of the duties of the health officer arise from the requirements placed upon him to coöperate with other agencies and individuals, but these requirements are definitely a benefit to the community rather than a detriment. He may coöperate with the proper officials in the repression of prostitution.[38] This type of coöperation

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[28]*Id.* art. 4477 (7).

[29]*Id.* art. 4477 (20).

[30]*Id.* art. 4477 (27).

[31]*Id.* art. 4477 (41a).

[32]TEX. PEN. CODE (1925) art. 699.

[33]See the Charter of the City of Galveston, §19f.

[34]TEX. VERNON'S ANN. CIV. STAT. (1925) arts. 1071, 4430. Under the city charter, in an ordinance regulating barbers, the city commissioners could delegate the power of deciding what may be an "infectious, contagious or communicable disease" to the health officer. Hanzal v. City of San Antonio, 221 S.W. 237 (Tex.Civ.App. 1920, writ of error refused).

[35]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4430.

[36]*Ibid.*

[37]*Ibid.*; see p. 164, *supra.*

[38]TEX. VERNON'S ANN. CIV. STAT. (1925) art. 4445.

or activity attains great importance in the larger cities in the state, where prostitution is a social vice of cyclopean proportions, and venereal diseases are widespread. Cities vary in their control of venereal diseases among prostitutes, some isolating the women until they are cured, others releasing them upon the condition that they return for periodic treatments. In any event, the health officer is laboring under the duty to care for these women, and thus care for the public at large. He must also aid and assist the State Health Board in all matters of quarantine, vital statistics collection, enforcement of sanitary laws, disease suppression, and such other duties as the Board shall direct.[39] Additional evidence that the health officer has to rely upon state and national coöperation is furnished by the fact that he is given statutory permission to attend an annual conference of county and city health officers.[40] By statute he may be a member of the examining and supervising board of plumbers in the city.[41]

In addition to this type of coöperation, there exists a form of coöperation which has been created through the exigencies of our present-day society. In all cities, select and interested groups of citizens take an active part in rehabilitation and reform work, and the health officer is often made a part of such bodies. Whenever his activity is negligible, and he is a member because of social pressure alone, the system must be inexorably opposed, but when he is enabled to carry forward an educational campaign or to act as an advisory force for the good of the community, his membership on such committees is commendable. Contacts similar to this must always be enlarged and encouraged, as public education is just as vital a part of disease suppression as are clinical methods.

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[39] *Id.* art. 4430.
[40] *Id.* art. 4433.
[41] *Id.* art. 1078.

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