FOURTH CLASS CITIES:
EXPENSE ACCOUNTS:
CHARTER CITIES:

1. The City of Berkeley, as a city of the fourth class, was authorized to provide by ordinance a flat $50.00 monthly automobile allowance for the city engineer.

2. If the successor to the city engineer has not been selected and qualified or the duties of such officer have not been otherwise provided for under the provisions of the 1957 Charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.

FILED
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January 21, 1959

Honorable Haskell Holman
State Auditor
Capitol Building
Jefferson City, Missouri

Dear Mr. Holman:

This is in response to your request for an opinion, January 12, 1959, which we quote as follows:

> "In an audit of the records of the City of Berkeley, St. Louis County, Missouri, it was found that an ordinance, enacted by the board of aldermen, has given rise to questions upon which the opinion of your office is desired. The questions arise by reason of the following circumstances:
>
> > The City of Berkeley, while operating as a city of the fourth class, enacted an ordinance establishing the office of city engineer. By ordinance enacted in June, 1956, the board of aldermen appointed an individual to the position, and by the same ordinance fixed his compensation at $7,200 per year 'plus $50 monthly automobile expense allowance.' The person appointed by the board of aldermen assumed the office and received the compensation provided by ordinance, including the automobile expense allowance of $50 per month.

> "In 1957, the City of Berkeley, pursuant to Section 19 of Article VI of the Constitution of Missouri, 1945, adopted a charter. Such charter provided for the office of director of public works who should serve as city engineer. The charter became effective in April, 1957, but the previously appointed city engineer continued to hold his office and to receive the $50 monthly automobile expense allowance provided by the ordinance enacted in June, 1956, and previously referred to. Our questions are as follows:
>
> 1. Was the City of Berkeley, as a city of the fourth class, authorized to provide by such ordinance a flat $50 monthly automobile allowance for the city engineer?
>
> 2. Did the adoption of a constitutional charter by the City of Berkeley affect the validity of the foregoing ordinance insofar as it provided for the payment of such $50 monthly automobile expense allowance to the city engineer?
>
> "A copy of the ordinance in question and of the charter adopted by the City of Berkeley is enclosed for your information."

It is the opinion of this office in answer to your first question that the City of Berkeley as a city of the fourth class was authorized to provide by ordinance a flat $50.00 monthly automobile allowance for the city engineer.

Article VI, Section 15, of the Missouri Constitution of 1945, authorizes the provision for the organization and classification of cities and towns into classes by general law. We quote that section:

> "The general assembly shall provide by general laws, for the organization and classification of cities and towns. The number of such classes shall not exceed four; and the powers of each class shall be defined by general laws so that all

> such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The general assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

You will then observe that Chapter 79 of the Revised Statutes of Missouri, 1949, is the statutory chapter providing for the organization of cities of the fourth class. We wish to quote Section 79.230:

> "The mayor, with the consent and approval of the majority of the members of the board of aldermen, shall have power to appoint a treasurer, city attorney, city assessor, street commissioner and night watchman, and such other officers as he may be authorized by ordinance to appoint, and if deemed for the best interests of the city, the mayor and board of aldermen may, by ordinance, employ special counsel to represent the city, either in a case of a vacancy in the office of city attorney or to assist the city attorney, and pay reasonable compensation therefor, and the person elected marshal may be appointed to and hold the office of street commissioner."

It would appear obvious that the city may provide for a city engineer, as did the City of Berkeley, in its Ordinance Number 847, Bill No. 861.

We now direct your attention to Section 79.270, authorizing the board of aldermen to fix the compensation of all the officers and members of the city by ordinance.

> "The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

Section 79.270 does not specifically refer to the term "expense account," but it is our belief that such an expense account would be within the term, "compensation," which the aldermen may provide. We believe that a part of the compensation may be denominated "automobile expense allowance," whether or not that denomination would be accurate when other financial and tax laws are brought to bear upon the sum so labeled.

We think that it is of little significance that a sum of money provided for by the ordinances of a city of the fourth class is labeled an expense account. Whether for income tax or other purposes the money provided for is to be considered, in fact, expense money, or just an additional sum of income, is not a subject of inquiry herein. It is not the label, such as "salary," or "expense account" which is given to the sum which has a bearing upon the authority for the enactment or provision for that sum, but it is solely a question of the authority for the city to provide for the city officials.

With respect to your second question, it is the opinion of this office that if the successor to the city engineer has not been selected and qualified under the provisions of the 1957 charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.

Article VI, Section 19, of the Constitution of Missouri of 1945, provides for city government by constitutional charter with authority to enact ordinances so long as they be consistent with and subject to the constitution and laws of the State of Missouri. We quote Article VI, Section 19, in part:

> "Any city having more than 10,000 inhabitants may frame and adopt a charter for its own government, consistent with and subject to the Constitution and laws of the state, in the following manner. * * *"
>
> * * *

To amplify somewhat the constitutional provision, we wish to bring to your attention some cases. In the case of Kansas City v. Frogge, 176 S.W. 2d 501, Division No. 1 of the Supreme Court of Missouri stated:

> "By the grant to plaintiff city of the right to frame and adopt a charter, the

> people of the state transferred or granted part of the legislative power of the state (subject to constitutional limitation in the grant, Section 16, Article IX) to the people of plaintiff city. The power so granted to the people of plaintiff city was the legislative power to frame and adopt a charter for its own government. Morrow v. Kansas City, supra. The people of a city which has been granted the right by the people of the state to frame and adopt a charter may not deem it desirable or needful to delegate under the charter of their city all of those powers which may be delegated by the legislature to cities organized under general law. So the powers which plaintiff city may exercise, through the constitutional grant of the right to frame and adopt a charter, are those powers which the people of the city delegate to it under its charter, if unrestrained by constitutional limitation."

Having established the authority for the charter for the City of Berkeley, we wish to study the provisions of the charter itself to the extent that they may affect Ordinance Number 847 as it was enacted prior to the adoption of the charter. Article V, Section 1, of the charter for the City of Berkeley, Missouri, effective April 4, 1957 is as follows:

> "There shall be the following administrative departments: Finance, Police, Fire, Public Works, and such other departments as may be created by ordinance."

You will observe that this creates a department of public works. Section 6 of Article V, we quote in part:

> "The Director of Public Works shall be a professional engineer, registered under the laws of the State of Missouri and qualified to perform the duties required of him by this Charter. He shall serve as City Engineer and shall have charge of: * * *."

From this Section 6, we find that the director of public works shall serve as city engineer. This would appear to abolish the office of city engineer in form as it was provided for in Ordinance Number 847.

Section 5 of the Schedule of the charter, page 45, is as follows:

> "The Municipal Court Judge, City Clerk, Collector, all department heads, including the Chief of Police, Fire Chief, and City Engineer, and all members of administrative or advisory boards holding office at the time of the adoption of this Charter shall continue in office and in the performance of their duties until their successors shall be selected and qualified, or until the duties of their office shall be otherwise provided for in accordance with the provisions of this Charter."

We see that the city engineer is one of the officers who shall continue in office and in the performance of his duties until his successor shall be selected and qualified, or until the duties of his office shall be otherwise provided for in accordance with the provisions of this charter. Article XII, Section 1, would also permit Ordinance Number 847 to remain in force and effect so long as it is not inconsistent with the provisions of this charter.

> "All ordinances, regulations and resolutions in force at the time this Charter takes effect which are not inconsistent with the provisions of this Charter, shall remain and be in force until altered, modified, or repealed by the Council."

If the office of the director of public works were to be created and the officer appointed as of the date of the adoption of the charter, we would believe it obvious that the office of city engineer, as created by Ordinance Number 847, would be inconsistent with the provisions of Article V creating the department of public works. However, Section 2 of Article V provides that the city manager shall appoint, supervise and control the directors of the administrative departments. This section provides no date before which the director

of these departments must be appointed.

> "Each administrative department shall be under the supervision and control of a director appointed by the City Manager. Two or more departments may be headed by the same individual, and the City Manager may himself serve as director of one or more departments."

Therefore, it is the opinion of this office that, if the director of the department of public works has not been appointed Ordinance Number 847 remains in force, and the city engineer has properly continued in the performance of his duties, and the compensation provided for the city engineer is not invalid.

CONCLUSION

It is the opinion of this office that:

1. The City of Berkeley, as a city of the fourth class, was authorized to provide by ordinance a flat $50.00 monthly automobile allowance for the city engineer.

2. If the successor to the city engineer has not been selected and qualified or the duties of such officer have not been otherwise provided for under the provisions of the 1957 Charter of the City of Berkeley, Ordinance Number 847 of the City of Berkeley remains in effect.

The foregoing opinion which I hereby approve was prepared by my Assistant, James B. Slusher.

Yours very truly,

JOHN M. DALTON
Attorney General

JBS:mc