



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 28, 2020

The Honorable Andrew Lucas
Somervell County Attorney
Post Office Box 1335
Glen Rose, Texas 76043

Opinion No. KP-0334

Re: Whether article II, section 1 of the Texas Constitution, relating to the separation of powers, applies to municipal government and the management of personnel (RQ-0343-KP)

Dear Mr. Lucas:

You ask on behalf of the mayor of the City of Glen Rose (the “City”) whether article II, section 1 of the Texas Constitution, relating to the separation of powers, applies to municipal government and the management of personnel.¹ You tell us the City is a Type A general-law municipality. *See* Request Letter at 1. You further inform us that the City adopted a personnel policy by ordinance, which authorizes appeal to the city council from management’s response to workplace grievances and disciplinary actions. *Id.* You explain the concern that

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

Id. at 1–2. In light of these concerns, you first ask whether the separation of powers provisions of article II, section 1 of the Texas Constitution apply to municipal government. *Id.* at 1. You also ask whether the law confines management of municipal personnel to the executive branch of municipal government of a Type A general-law municipality. *Id.* Finally, you ask whether a city council of a Type A general-law municipality may adopt ordinances or policies assigning itself a role in “day-to-day personnel matters such as hearing appeals of disciplinary action and hearing workplace grievances.” *Id.*

¹See Letter from Honorable Andrew Lucas, Somervell Cty. Att’y, to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Apr. 1, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0343KP.pdf>.

Article II, section 1 of the Texas Constitution provides:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1. A Texas Supreme Court opinion directly answers your first question, holding that the separation of powers doctrine in article II, section 1 of the Constitution “only guarantees the separation of the *state* legislative, executive, and judicial branches of government.” *City of Fort Worth v. Zimlich*, 29 S.W.3d 62, 72 (Tex. 2000) (emphasis added). Thus, the separation of powers provisions of article II, section 1 of the Texas Constitution do not apply to municipal government. See *City of El Paso v. Arditti*, 378 S.W.3d 661, 666–67 (Tex. App.—El Paso 2012, no pet.) (holding city ordinance merging city clerk and municipal court clerk positions did not violate state constitutional separation of powers provision); *A.H.D. Houston, Inc. v. City of Houston*, 316 S.W.3d 212, 222 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding municipal ordinance did not present a separation of powers issue).

We turn to your remaining two questions concerning management of municipal personnel in a Type A general-law municipality. The Constitution authorizes the Legislature to provide general law for governing municipalities, although home-rule municipalities may enact their own charters. See TEX. CONST. art. XI, §§ 4 (providing “Cities and towns having a population of five thousand or less may be chartered alone by general law.”), 5 (authorizing home-rule municipalities to adopt charters and ordinances consistent with the “general laws enacted by the Legislature of this State”). The Local Government Code establishes three categories of general-law municipalities—Type A, Type B, or Type C. TEX. LOC. GOV’T CODE §§ 5.001–.003. A Type A municipality operates with either a regular aldermanic form of government or a city manager form of government.² *Id.* §§ 22.001–.077, 25.001–.072.

In an aldermanic form of government, the governing body consists of a mayor and a certain number of aldermen depending on whether the city is divided into wards. *Id.* § 22.031. The mayor presides at meetings of the municipal governing body and generally may vote only in instances of a tie. *Id.* § 22.037(a). Section 22.042 designates the mayor as “the chief executive officer of the municipality” who must “actively ensure that the laws and ordinances of the municipality are properly carried out.” *Id.* § 22.042(a). That section provides for the mayor to “inspect the conduct of each subordinate municipal *officer*,” but chapter 22 does not specifically address the management of municipal employees. *Id.* § 22.042(b) (emphasis added). Section 22.042 also

²An aldermanic form of government contrasts with the commission form of government, applicable only to a Type C general-law municipality. Compare TEX. LOC. GOV’T CODE §§ 22.001–.077 (“Aldermanic Form of Government in Type A General-Law Municipality”), with *id.* §§ 24.001–.071 (“Commission Form of Government in General-Law Municipality”).

requires the mayor to “perform the duties and exercise the powers prescribed by the governing body of the municipality,” consistent with the statutes. *Id.* § 22.042(a). Further, the governing body may appoint other officers and prescribe their powers and duties, which therefore could include certain managerial responsibility. *See id.* §§ 22.071(a) (providing that municipal officers include “any other officers or agents authorized by the governing body”), 22.072(b) (providing that the “governing body may prescribe the powers and duties of a municipal officer appointed or elected to an office under this code whose duties are not specified by this code”), 25.051(b) (recognizing “the authority of the governing body of a general-law municipality to appoint and prescribe the powers and duties of a municipal officer or employee”).

A Type A municipality may also adopt the city manager form of government under chapter 25 by an election held for that purpose. *See id.* §§ 25.001–.072. Under the city manager form of government, the city manager possesses the authority to “administer the municipal business” as well as “any additional powers or duties the governing body considers proper for the efficient administration of municipal affairs.” *Id.* §§ 25.029(a)–(b). You do not tell us the City’s form of government. But neither chapter 22 nor 25 addresses the management of municipal employees generally or appeals from employee discipline or grievances decisions specifically.

Regardless of its form of government, a Type A municipality generally may regulate its affairs by adopting ordinances that are consistent with state law. *See id.* § 51.012 (authorizing municipality to “adopt an ordinance, act, law, or regulation [that is] not inconsistent with state law”). A governing body of a municipality may adopt an ordinance that “(1) is for the good government, peace, or order of the municipality or for the trade and commerce of the municipality; and (2) is necessary or proper for carrying out a power granted by law to the municipality or to an office or department of the municipality.” *Id.* § 51.001. You have a code of ordinances, and you inform us that the city council adopted a personnel policy by ordinance.³ However, this office does not advise municipal officials about how to comply with their own ordinances. *See Tex. Att’y Gen. Op. No. KP-0026 (2015)* at 1. Thus, we do not address your remaining questions except to reiterate that article II, section 1 of the Texas Constitution does not control how the City’s ordinances allocate management authority.

³*See* Request Letter at 1; City of Glen Rose Code of Ordinances, *available at* <https://z2codes.franklinlegal.net/franklin/Z2Browser2.html?showset=glenroseset>.

S U M M A R Y

The separation of powers provisions of article II, section 1 of the Texas Constitution do not apply to municipal government.

Chapters 22 and 25 of the Local Government Code, which provide for possible forms of government of a Type A general-law municipality, do not address the appeal of municipal employee discipline or grievance decisions or employee management generally.

A Type A municipality generally may regulate its affairs by adopting ordinances that are consistent with state law. This office does not advise municipal officials about how to comply with their own ordinances.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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