September 3, 2009

Dear Sir:

You have the following questions:

1. What is the difference between an officer and an employee?

2. What is a "ministerial officer" within the meaning of the city charter?

2. What does the term "general supervision" mean with respect to a mayor's right to exercise general supervision over certain city officers or employees?

The answers (to the extent there are answers) are laid out below in each section dealing with the question at issue.

However, I have not reviewed the City's charter to determine what those answers would be with particular respect to the city. I will be glad to do that upon your request. But the material below will give you and an idea of how to apply the charter to those questions.

The Officer/Employee Distinction

What is an "officer" as opposed to an "employee"? It is not always easy to answer that question. A county attorney in Ross v. Fleming, 364 S.W.2d 892 (1963) and the director of law
for the Nashville-Davidson County Metropolitan Government in Sitton v. Fulton, 566 S.W.2d 887 (1978) were declared to be officers. In the former case, the Tennessee Supreme Court, citing Glass v. Sloan, 282 S.W.2d 397, said:

> In deciding whether a particular employment is an office within the meaning of the Constitution or statutory provisions, it is necessary that each case be determined by a consideration of the particular facts and circumstances involved; the intention and subject matter of the enactment, the nature of the duties, the method by which they are to be executed, the end to be obtained, etc.
>
> The line between the public office and public employment is sometimes not too clearly marked by judicial decisions. One of the criteria of public office is the right of the officer to claim the

> emolument of said office attached to it by law. Another one of the criteria of public office is the oath required by law of the public officials,...another the bond required by law of certain public officials. But in determining the question of whether or not this Act under consideration creates an office or employment it is not necessary that all the criteria be present, however, it has been held on good authority that tenure, oath, bond, official designation, compensation and dignity of position may be considered along with many other things. [At 894]

In the latter case, the Tennessee Court of Appeals, citing 67 C.J.S., ' 2 Officers, defined "public officer" as:

> ...an incumbent to a public office; an individual who has been appointed to or elected in a manner prescribed by law, who has a designation or title given him by law, and who exercises functions concerning the public assigned to him by law. [At 889]

Then citing 63 Am. Jur.2d Public Officers and Employees, ' 10, the same Court said: "A public office embraces the idea of tenure, duration and continuity, and the duties connected therewith are generally continuing and permanent." [At 889]

It was not necessary that the charter specifically declare the law director to be an "officer," said the Court. The charter established the position of law director, prescribed the performance of certain duties on behalf of the public for a fixed period of time, set salary, etc.

The county attorney and the law director in Ross and Sitton were elected or appointed for a definite term. Those cases also involved the question of whether those positions were public officials within the meaning of Art. 11, ' 9 of the Tennessee Constitution prohibiting shortening of the term of office, or alteration of the salary, of a local government officer by private act.

In Wise v. City of Knoxville, 250 S.W.2d 29 (Tenn. 1952), the Tennessee Supreme Court considered the question of whether a policeman was an officer or an employee. The policeman was suspended and terminated, and subsequently reinstated to the position of police officer. He sued for full back salary as a police officer, claiming that the city was not entitled to deduct the money he had earned during the period of his suspension and termination. The Court held that while a public officer would have been entitled to his full salary for the period he had been wrongfully excluded from office, that rule did not apply to the plaintiff because a policeman was not a public officer. The Court reasoned that:

> An "officer" when used in the sense of one who holds an "office" which entitles him to the salary for the entire term, carries with it the idea of tenure for definite duration, definite emoluments and definite duties which are fixed by statute. [Citations omitted.]
>
> The charter of the City of Knoxville from beginning to end refers to policemen as employees. Charter, secs 121, 123 and 124. In these charter provisions, policemen and firemen are referred to together. Certainly it cannot be said that a fireman is an officer.
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> If a policeman is injured in the line of duty, he receives employee benefits as a railroad employee would. If the mayor, who is an officer, is injured in the line of duty, he does not receive employee benefits in such a manner.
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> A City Director, under the charter of Knoxville can retire a policeman or any other employee but cannot retire an official.
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> The city policeman is paid a salary like a railroad engineer or a brakeman. He must report at a certain hour and goes off duty at a certain hour. He does the work assigned to him like a secretary or a nurse at a municipal hospital.
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> *A policeman is not an officer, but a mayor, a sheriff or a judge is an officer*. [At 31]

However, in Gamelin v. Town of Bruceton, 803 S.W.2d 690 (Tenn. App. 1990), the Court, citing the first paragraph of Sitton quoted above, held that an appointed recorder who did not have a definite term was an officer under the charter. That case indicates that the threshold for being an officer under a municipal charter is quite low in Tennessee. There the recorder argued he was an employee covered by the city's personnel policies regulating termination. Citing its definition of "officer" in Sitton v. Fulton, the Court rejected that claim, pointing to Section 3.04 of the Bruceton City Charter, which provided that:

> Section 3.04. Town recorder: appointment and duties. The board shall appoint a town recorder who shall have the following powers and duties as may be provided by ordinance not inconsistent with this Charter:.... [At 692]

Without even outlining those powers and duties, the Court pointed to Gamblin's appointment by the board of mayor and aldermen and declared that, "It is clear that Gamblin is a

public officer or official and not an employee." [At 693]

Although the Court did not outline them, the Bruceton City Charter prescribed the following duties for the recorder in Gamblin:

> (a) To keep and preserve the town seal and all official records not required by law or ordinance to be filled [filed?] elsewhere.
> (b) To attend all meetings of the council and to maintain a journal showing the proceedings of all such meetings, the councilmen present and absent, each motion considered, the title of each resolution and ordinance considered, and the vote of each councilman on each question. This journal shall be open to the public during regular office hours of the town subject to reasonable restrictions exercised by the town recorder.
> (c) To prepare and certify copies of official records in his office....
> (d) to serve as head of the Department of Finance.
> (e) to serve as town judge if appointed by the council.
> (f) To coordinate under the supervision of the mayor, the activities of all administrative divisions or line departments, serve as special liaison between the Mayor and divisions, departments, boards, commissions and other bodies, and perform such administrative and executive duties as may from time to time be assigned to him by the mayor.

The meaning of "ministerial officer"

Section 4 of the City Charter provides that the mayor "may make pro tem. appointments by and with the consent of the board, to supply the place of ministerial officers in cases of sickness, absence or other temporary disability, under such restrictions as the board may direct." What is a "ministerial officer"?

In City of Memphis v. Shelby County Election Commission, 146 S.W.3d 532 (Tenn. 2004), the Tennessee Supreme Court held that the county election coordinator and the commission were "ministerial officers," on the ground that they had "limited discretion," and said this about "ministerial officers":

> Black's Law Dictionary defines a "ministerial officer" as "[o]ne who performs specified legal duties when the appropriate conditions have been met, but who does not exercise personal judgment or discretion in performing those duties." Black's Law Dictionary 1113 (7th ed. 1999). A strictly "ministerial duty" is defined as "A duty that is absolute and imperative, requiring

> neither the exercise of official discretion or judgement." Id at 522. [At 535]

But even limited experience in municipal or any government informs one that many governmental officers perform both ministerial and discretionary duties, and that it is the act in question that is ministerial or discretionary. That fact appears to be recognized in City of Memphis v Shelby County Election Commission, in its reference to the election commission haveing "limited discretion," rather than no discretion. The same point is recognized in Lamb v. State ex rel. Kisabeth, in which the Tennessee Supreme Court held that after a school bond referendum had passed, the county court had a ministerial duty to issue the bonds, but declared that, AIt is a universally recognized rule that mandamus will lie to enforce a ministerial act or duty and will not lie to control a legislative or discretionary duty. [At 586] [Citation omitted by me.] The county court undoubtedly had many legislative and discretionary duties, and for that reason it would have been misleading to describe the members of that body as "ministerial officers," even though their issuance of bonds in that case was a ministerial duty.

The last sentence of 63 Am.Jur.2d Public Officers and Employees, ' 21 seems to help clear up the "mystery" of who are "ministerial officers," (besides members of county election commissions): "The word 'ministerial' is frequently used as synonymous with 'administrative,' and therefore an administrative officer may be classified as a ministerial officer and vice versa." It cites for support State v. Ohio, 184 N.E.2d 921 (Ohio App. 2nd Dist. 1961). There it is said that:

> The powers of government are divided among three departments, the legislative, the executive and the judicial. The officers who exercise such powers are classified as executive, legislative and judicial officers. 42 American Jurisprudence, 898, Section 24; 44 Ohio Jurisprudence (2d), 508, Section 20. In addition to these three classes of public officers, the law recognizes a fourth classification known as ministerial officers.
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> * * * They are sometimes called executive officers, sometimes administrative and sometimes ministerial, and with slight shades of distinction. What characterizes a ministerial officer is that he has no power to judge the matter to be done, and usually must obey some superior. His duties, in other words are of a ministerial character. And a ministerial act may be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate or legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done. There is scarcely a ministerial officer who does not, in the performance of some act required to be done, exercise a discretion

> quasi-judicial in nature, regarding which the act itself cannot rightly be called ministerial. There is a marked distinction between a ministerial act or function when considered as an independent transaction, and the general nature of the office and the functions to be performed therein, which, when considered together make the incumbent a ministerial officer. Whether, therefore, a person is or is not a ministerial officer depends not so much on the character of the particular act which he may be called upon to perform, or whether he exercises a judgement or discretion with reference to such act, as upon the general nature and scope of the duties devolving upon him. If these are of a ministerial character, then the person charged is undoubtedly a ministerial officer. [At 923]

The court then declared that:

> 'An administrative officer is sometimes classed as a ministerial officer and vice versa. The world 'ministerial' is not infrequently used as anonymous with 'administrative,' and it seems that the two words are so closely allied in meaning that they may be employed interchangeably [sic.] Administrative officers may be regarded as in the nature of a subdivision of that class of officers which in a general way belongs to the executive branch of the government.' 42 American Jurisprudence, 900, Section 29. [At 923]

By that standard, it seems likely that most, if not all, the city's administrative officers fall within the "ministerial officer" category. There are few, if any, such officers who are not required to respond to a superior and few, if any, who, when their positions are looked at closely, are not bound by a generally elaborate set of rules and regulations in statutes and case law, that bind them to certain conduct similar to the way the members of the election commission were bound in City of Memphis v. Shelby County Election Commission, above. Of course, it is clear that the question of whether a particular act of a ministerial officer is a ministerial or discretionary act depends upon the character of the act itself.

The Meaning of "general supervision"

As far as I can determine, the courts in Tennessee have not defined the meaning of "general supervision" in any context, let alone in the context of a mayor. However the courts in other jurisdictions have taken on that task.

In Great Northern Ry. Co. v. Snohomish County, 93 P. 924 (Wash. 1908), the Court asked and answered the question of what powers were contemplated in the state board of tax

commissioner's powers of "general supervision" over assessors and county boards of equalization:

> What is meant by "general supervision"? Counsel for respondents contend that it means to confer with, to advise, and that the board acts in an advisory capacity only. We cannot believe that the Legislature went through the idle formality of creating a board thus impotent. Defining the term "general supervision" in Vantongeren v. Hefferman, 5 Dak. 180, 38 N.W. 52, the Court said: "The Secretary of the Interior, and under his direction, the Commissioner of the General Land Office, has a general 'supervision over all public business relating to the public lands." What is meant by 'supervision'? Webster says supervision means 'to oversee for direction; to superintend; to inspect; as to supervise the press for correction.' And, used in its general and accepted meaning, the Secretary has the power to oversee all the acts of the local officers for their direction, or, as illustrated by Mr. Webster, he has the power to supervise their acts for the purpose of correcting the same; and the same power is exercised by the Commissioner under the Secretary of the Interior. It is clear, then, that a fair construction of the statute gives the Secretary of the Interior, and, under his direction, the Commissioner of the General Land Office, the power to review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them. Any less power than this would make the 'supervision' and idle act: a mere overlooking without power of correction or suggestion. Defining the like term in State v. F.E. & M. V.R.R. Co., 22 Neb. 313, 35 N.W. 118, the court said: "Webster defines the word 'supervision' to be the 'act of overseeing; inspection, superintending.' The board therefore is clothed with the power of overseeing, inspecting, and superintending the railways within the state, for the purpose of carrying into effect the provisions of this act, and they are clothed with the power to prevent unjust discrimination against either persons or places." It seems to us that the term "general supervision" is correctly defined in these cases. Certainly a person or officer who can only advise or suggest to another has no general supervision over him, his acts or his conduct....[At 927.]

The Kansas Supreme Court in State ex rel. Miller v. Board of Ed. of U. Sch. D. No. 398, 511 P.2d 705 (Kan. 1973) puzzled over the meaning of a Kansas statute that gave the state board of education the power of "general supervision" over local school boards. First, it declared:

> We find little legal authority to assist us in determining what is

> comprised within the term "supervision." In common parlance we suppose the term would mean to oversee, to direct, to inspect the performance of, to superintend. (See Webster's International Dictionary, Third Edition; American Heritage Dictionary.) It is difficult to be exact as to the legal meaning of the term, for much depends on the context in which it is said out.
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> In Continental Casualty Company v. Borthwick, 177 So.2d 687, 689 (Fla. App.), the court stated: "A reference to recognized lexicographies reveals that the word 'supervision' is capable of definitionBthat is, by the use of general comprehensive words. For example, in Webster's Collegiate Dictionary, the definition of supervision is two-fold: namely, as 'Act of supervising' and as 'The direction and critical evaluation of instruction, esp. in public schools.'"
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> In Commonwealth of Pennsylvania v. Brown, 260 F. Supp. 323, 348, the federal court speaks of supervision as importing regulation. [At 712-13.]

Here the Court turns to, and cites in full, the definition of "general supervision" in Great Northern, above, declaring that case "Perhaps the most helpful in getting at the problem." [At 713.]

Applying those definitions, the Court makes an important conclusion about the relative authority of the state board of education and local boards of education:

> Considering the fame of reference in which the term [general supervision] appears both in the constitution and the statutes, we believe "supervision" means something more than to advise but something less than to control. The board of regents has such control over institutions of higher learning as the legislature shall ordain, but not so the board of education over public schools; its authority is to supervise. While the line of demarcation lies somewhere between advise and control, we cannot draw the line with fine precision at this point; we merely conclude that the regulation which is the one of contention between the state and district boards in this case falls within the supervisory power of the state board of education. [At 713]

Although both Great Northern and State ex rel. Miller relate to the relative authority of state and local boards where the former have the power of "general supervision" over the latter,

they appear highly instructive as to the relative authority of the mayor and the city council where the same term is at issue. Indeed, the definition of that term in those cases point to the meaning of the term with respect to individuals: there the Secretary of the Interior, and under his direction, the Commissioner of the General Land office. Those officers generally had the power "to oversee for direction; to superintend; to inspect...." They had the more specific power to "review all the acts of the local officers, and to correct, or direct a correction of, any errors committed by them."

The cases dealing specifically with a mayor's power of "general supervision" and terms similar to it, appear to be in agreement with Great Northern and State ex rel. Miller, but are more instructive about what the power to oversee, superintend, inspect and to review and correct the actions of employees and officers means.

In Kayfield Construction Corp. v. Morris, 225 N.Y.2d 507 (S.C. App. Div. First Dept. 1962), the New York City Mayor, by executive memoranda, directed all mayoral agencies not to award contracts to certain named firms from whom city employees had illegally accepted gifts in violation of a provision of the city's charter. The same provision of the city's charter also authorized the comptroller to void such contracts after work had begun. The Copies of the memoranda were sent to both mayoral and non-mayoral agencies, including the Board of Estimates, a nonBmayoral agency which had the authority to let the bids at issue in this case.

Under the New York City Charter, the mayor as the "chief executive officer" of the city, was "responsible for its guidance and the welfare of its people," had the duty "To keep himself informed of the doings of the several agencies of the city and to see to the proper administration of its affairs and the efficient conduct of its business," and "To be vigilant and acting in causing all provisions of law to be executed and enforced." The Court declared that:

> Under and by virtue of such powers he may properly call the attention of the city officials, and the departments of the City, to any situation which he deems actually or potentially inimical to the City's well-being. This he did. In doing so the Mayor did not deprive the board or the Commissioner of their freedom of action or usurp their functions. [At 513.]

In addition, reasoned the Court:

> Obviously, if the Comptroller may void a contract for a violation where work has been undertaken, he may certainly recommend a denial of the contract at its inception where a violation is discovered prior to the letting. Clearly the Mayor, acting through his Budget Director, has analogous powers in this respect. [At 513.]

In this case the mayor's executive memoranda directed to all "mayoral agencies," was based on a policy contained in the city's charter governing the award of city contracts; in that respect he had attempted to insure that the law was executed as he was empowered to do under the charter. But the Court took care to point out that while the mayor could point out problems, his power did not authorize him to reject the contract, declaring that, "It must be recognized that it was the Board [of Estimates] which had the power to act and give weight to or reject the recommendation." [At 514.] The mayor was bound by the provisions of the charter distributing power among the various branches and agencies of the government.

A statute in State v. McCombs, 262 P. 579 (Kan. 1928), gave the mayor "a general supervision and control over all the officers, departments and affairs of the city...." He refused to sign a contract for the purchase of coal, even though the contract was approved by the city commission, relying on the argument that those powers gave the mayor the right to control the actions of the city commission, and on the additional argument that the bid for the coal accepted by the city commission did not reflect the lowest and best bid.

Pointing to various statutes giving the commissioners collective and individual authority over city departments, the Court rejected the mayor's argument, reasoning that:

> From these it will be readily seen that it was the undoubted intention of the Legislature, as well as the people who by their votes placed themselves under the provisions of this act, that the board of commissioners should be the governing body, and have the general control of the affairs and business, of the city, and that *the general supervision given to the mayor does not imply a superior right on his part to negative or undo the things that have been done or enacted by the board of commissioners* of which he is a member. Kansas is not without precedent in this connection and a construction placed upon similar provisions under the old act of city government by the mayor and council. The old act provided that the mayor "shall have the superintending control of all the officers and affairs of the city," and "shall be active and vigilant in enforcing all laws and ordinances for the government of the city." [Citation omitted.] A construction was placed upon these provisions by this court in the case of Metsker v. Neally, 41 Kan. 122, 21 P. 206, 13 Am. St. Rep. 269, in which the closing paragraph of the opinion is as follows:
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> "We are of the opinion that the power to amove [Writer's note: The word "amove," according to Webster's Third International Dictionary, Unabridged, means to remove an officer or employee.] is lodged in the corporation itself, and must be exercised by it at large, unless such power has been delegated to

> some officer or officers thereof by statute or ordinance. The governing and controlling power of a city is lodged in the mayor and council ordinarily, and therefore the power to amove rests with them jointly, there being no such authority given to the mayor in express terms, in inferentially even, as we understand and interpret the statute. Dill. Mun. Corp. sections 241-243, and authorities there cited. In the absence of such provision, the mayor alone, being only a part of the governing body of the city, could neither remove nor suspend the city engineer; therefore his order suspending the plaintiff on the 3rd of July from the office of city engineer was void." [At 582.]

The statute in this case specifically gave the mayor the power of *control* as well as general supervision over "all the officers, departments and affairs of the city...." But the court still refused to read that statute broadly enough to permit him to override the decisions of the city council even if he thought their decisions had been unwise or illegal. The Court's reliance on an earlier case in coming to that conclusion also pointed to the same principle with respect to city officers and employees: the power to remove them rested in the city council, unless the mayor had been given the express power to make such removals. The same thing would undoubtedly have been true in regard to any kind of discipline of city officers or employees.

In a left-handed manner Kearns v. Nute, 50 A.2d 426 (N.H. 1946) defines what is meant by the mayor's power of "general supervision." There the question was whether the finance commission of the city has the authority to review the grant of pensions by the board of registers. A statute provided that, "The finance commission shall have general supervision and control over the expenditure of money appropriated by said city, and shall make such rules and regulations to govern purchases, sales, payments, fixing of salaries and wages, the letting of contracts by all city departments, committees, boards, trustees, officials or agents as they may deem necessary to insure economy and efficiency." But the statute authorizing the board of registers gave the board the power to "grant" pensions, and did not provide for a review of such grants by the finance commission.

Conceding that the line of demarcation with respect to the powers of the board of registers and of the finance commission's power of general supervision was not clear cut, the Court pointed out that the finance commission's general supervisory powers over the city's finances were the same as formerly belonged to the mayor, and turned to Eaton v. Burke, 66 N.H. 306, 313, 22 A. 452, "which relates to the City of Nashua, [and] shows how the phrase 'general supervision' has been construed":

> The duties of the mayor as chief executive officer of the city [charter citation omitted.], in their relation to the city, are similar to those of the governor in relation to the state....His power of

> supervision over the conduct of subordinate officers does not include the right to dictate to the city clerk what he shall record; to the inspectors of elections what names they shall place upon the lists, to the overseers of the poor what persons shall be relieved; to the school committee what teachers shall be employed or studies pursued; or, generally, to officers whose duties are defined by law, how they shall perform them. *The supervision which he is required to exercise is performed by causing the laws and regulations to be executed by the several city officers performing their respective duties, and, in case of their willful neglect of duty, but his setting on foot the proper proceedings for their punishment*. [Citation omitted.] 90At 428.] [Emphasis is mine.]

Here the Court made several important points: first, the mayor could not give instruction to city officers and employees with respect to their duties that were prescribed by law; second, the mayor's power of supervision was limited to seeing that laws and regulations (passed by legislative bodies) were enforced; third, where an officer or employee neglected his duties such power was limited to "his setting on foot the *proper proceedings* for their punishment." The mayor had no independent power to punish; his power to punish was limited to invoking the "proper proceedings" prescribed by law.

In Frederickson v. Albertsen, 161 N.W.2d 712 (Neb. 1968), the mayor under a statute had "the superintendency and control of all the officers and affairs of the city," and the chief of police under another statute had "the immediate superintendency of the police." The mayor ordered the chief of police to assign a lieutenant to the midnight shift to insure that there were ranking police officers on duty on each shift. The chief of police refused to obey the order and the mayor "ordered" him fired for insubordination. Following an investigation, the civil service commission affirmed the discharge. The question was whether the mayor exceeded his authority in making the order the chief of police refused to obey. The Court impliedly held that the mayor was within his authority to issue the order, reasoning that, "The *city's civil service commission* possesses broad discretion in ruling on orders of discharge by appointing powers." The only issue, said the Court was whether the commission's order was made in good faith for cause, and concluded that it was because, "Assignments of policemen with officer rank to scheduled periods of duty in a department that numbers only three officers may express major policy." [At 713.]

In this case, the mayor had more than the power of general supervision over the affairs of the city; one of the statutes in question expressly gave him the power of "the superintendency and *control* of all the *officers* and affairs of the city." This case apparently turned, in part at least, on the fact that the police department was a small one with a limited number of officers per shift. Decisions that affected the assignment of police officers in such a situation had the weight of policy. However, under the statutes in question, the civil service commission had the final say over the power to dismiss police officers.

In a similar dispute the civil service commission and the mayor disagreed over which had the authority to direct and control the manner in which police officers did their duties, in Mayor & Council of City of Athens v. Wansley, 78 S.E.2d 478 (Ga. 1953). The civil service commission argued that a statute provided that "the Civil Service Commission shall have complete control over the police department and the personnel of the same, subject only to the provisions of the act." However, the Court rejected that argument in favor of the mayor because the city's charter,

> ... confers exclusive power on the Mayor and Council of the City of Athens to prescribe the duties of its police officers, and this provision of the 1872 act is not altered, expressly or by implication by the provisions of the Civil Service Act of 1918. And, as we read and construe it, the latter act contains no provision which divests the mayor of his official duty to execute faithfully the ordinances of the city and see that its officers properly perform their respective duties. Hence, we hold that the mayor of Athens and not the members of the Athens Civil Service Commission, has jurisdiction and authority to direct and control the city's police officers in the performance of those official duties which the mayor and council are required to prescribe. And strength is added to this ruling by the legislature's act of 1946, which in part provides: "the Mayor of the City of Athens, is hereby declared to be and is made the Chief Executive Officer of the City of Athens." [Citation omitted.] [At 481.]

At first glance this case appears to hold that the mayor had carte blanche to issue orders and directions to the police department, but that conclusion does not survive a second glance. The charter provisions to which the Court pointed in supporting its decision "confers exclusive authority on the *Mayor and Council* of the City of Athens to prescribe the duties of its police officers..." They made the mayor the chief executive officer of the city, and gave him the "authority to direct and control the city's police officers..." However, the mayor's authority to direct and control the city's police officers was "in the performance of those official duties [of the police officers] which *the mayor and council are required to prescribe*."

Alsop v. Pierce, 19 So.2d 799 (Fla. 1944), is one of the most instructive cases on the question of the meaning of the power of general supervision. There the court considered whether the mayor or the city commission had the power to make personnel assignments in the police department. The city commission promulgated the following rules:

Rule 69: "The Chief of Police shall be the chief executive officer of the police department. He shall, as the Chief Executive Officer of the Police Department, enforce the

directions of the Mayor under such rules and regulations as the City Commission may prescribe... It shall be the sole duty and responsibility of the Chief of Police to assign the various officers of the police Department, and prescribe and fix their particular places of duty...."

Rule 71: "The Mayor, in directing and controlling the Police Department, enforcing laws, and preserving the peace within the City, shall issue his order to the Chief of Police * * * and in accordance with the rules and regulations for the government of the Department as prescribed by the City Commission."

Rule 73: "The mayor may suspend any member of the Police Force * * * [but that in the event of such action he] shall submit such suspension to the City Commission for approval or disapproval within 3 days after such suspension, and at the same time submit to the City Commission in writing the reason or reasons for such suspension. In acting upon such suspension the City Commission may approve the same and fix the time of suspension, whether with or without pay, or may reduce such officer in work or rank, if in the opinion of the City Commission the Charges are of sufficient gravity, may try him for removal from office in the manner provided by the city charter."

The mayor's powers under the charter included:

> The Mayor shall have the power [1] to preserve the peace within the city * * * [2]direct and control the police force under such rules and regulations as the City Commission may prescribe; * * * [3] to suspend any city officer for misconduct in office or neglect of duty, reporting his action with reasons therefor in writing to the next meeting of the City Council for its approval or rejection; but he shall not have the power to suspend a member of the City Commission or of the City Council, or any officers under them, except members of the police department * * * [4] He shall take care that all laws and ordinances concerning the city are duly respected. [At 803.]

The mayor, relying upon those charter provisions, directed the chief of police to increase the number of police officers on the vice squad and to replace a certain member of the homicide squad with another member. The chief of police refused to comply with the mayor's order, and the mayor suspended him from office for 30 days without pay on the charges of insubordination, misconduct in office and neglect of duty. At a subsequent hearing on the charges, the city commission found the mayor not guilty of the charges and returned him to duty.

The question, said the Court, "is whether the rules [69, 71 and 73] as framed transcend the city commission's power to make them under *the city charter; for only from such law do the municipal officers of the city derive their power and authority*." [Emphasis is mine.]

The city commission had such power, held the Court, pointing to several powers given the city council under the charter: (1) power to organize a police force; (2) regulate and control the organization, number and compensation of members of the police office; (3) appointment and confirmation of members of the police force; (4) establish general provisions and requirements for the control and suspension of members of the police department; (5) prescribe rules and regulations under which the mayor shall "direct and control the police force."

The Court reasoned that:

> We cannot believe that in conferring the general power upon the mayor "to direct and control the police force" the Legislature intended that the power should be exercised in complete subservience or subordination to the city commission, for if such had been the legislative intent there would have been no reason in conferring the power upon the mayor at all. *On the other hand, it manifestly was not the intent of the Legislature that the mayor's power to direct and control the police force was to be unfettered und uncontrollable. If such had been the intent the Legislature would not have curtailed the powers (undoubtedly it has) by subjecting it to the elimination that it should be exercised only under rules and regulations prescribed by the city commission.* [Emphasis is mine.]
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> The charter of the City of Jacksonville has placed in the mayor the power "to preserve the peace within the city" and to "take care that all laws and ordinances concerning the city are duly respected." It is our considered opinion that when the Legislature conferred upon the mayor the power of direction and control over the police force it did so with the one end in view, that as chief executive of the city the mayor should have at hand the means by which to preserve the peace to demand from the public obedience to the law. But we hardly think that by conferring such power upon him it was the intent of the Legislature that the power conferred should extend to every small detail of operation within the department, or that it should, in general, be exercised directly upon the individual members of the police force, as distinguished from the department as a whole. Such exercise of authority would hardly be necessary for the broader purposes of the general power conferred, and, if pursued too far, could undoubtedly breed such confusion and disorder as to ultimately destroy the efficiency of the department, and, perhaps, defeat the very purpose for which the department was

> established by the Legislature. *It is our conclusion, therefore, that by the power conferred upon the mayor "to direct and control the police force under such rules and regulations as the city commission may prescribe," is meant a general supervisory direction and control by the mayor to be subject to such reasonable rules and regulations for the governance of the department as the rule-making body in its considered judgment may lay down, in recognition of the general power conferred upon the mayor.* [Emphasis is mine.]
>
> Under such construction of the city charter neither the mayor's office nor the city commission is wholly superior or subordinate to the other; each has its lawful sphere of operation. On the one hand, *the mayor, as chief executive officer of the city, has the authority by virtue of the grant of executive power to him to "take care that all laws and ordinances concerning the city are duly respected", to guide the police department in the construction to be placed upon the statutes and ordinances of the city pertaining to the exercise of the police power conferred upon the city by the Legislature, in order to secure uniform execution of the laws. By virtue of his executive power the mayor has the power of direction and control over the activities of the police force, as such, in preserving the peace and enforcing the laws. As chief executive officer of the city the mayor may require of the department and the members thereof full, faithful, honest and diligent execution of the laws in the exercise of the police power of the city; being ever vigilant, himself, to observe the manner in which the members of the department discharge their proper duties. If an officer, or member of the police force, fails to act, or acts improperly, in the performance of his official duties, the mayor has authority to suspend him, prefer charges for his removal, or pursue such other disciplinary course as the prevailing law may permit or require*. [At 803-04] [Emphasis is mine.]

Specifically addressing the mayor's objections to Rules 69, 71 and 73, the Court declared that it could not agree that Rules 69 and 71 usurped his power under the charter:

> The city commission, by the formulation and adoption of Rules 69 and 71, has placed the chief of police at the head of the police department as its executive officer. The rules have vested him with some responsibility and authority for the internal management of the department. They have reposed in some measure of discretion

> in disciplining members of the police force and assigning them to places of duty. In full recognition of the charter power vested in the mayor to preserve the peace and enforce the laws, the rules require that orders given to the police department for that purpose shall pass through the office of the chief of police. These rules seem to be entirely consistent with the charter power conferred on the city commission to make rules and regulations subject to which the mayor may exercise his discretion and control over the police force.... [At 805.]

However, the Court did agree with the mayor that Rule 73 was illegal. Rule 73 provided that the city commission would hear appeals from suspensions of police officers. However, under the charter, that power was vested in the *city council*.

The main principle in this case is the same as in the other cases above, but the court made it with considerably more elaboration: the mayor as chief executive officer had a general power of oversight to see that the laws were faithfully executed, but his specific executive powers depended upon, and were limited by, the policies and procedures prescribed by the city council. The mayor lost on Rules 69 and 71, because under the charter it was within the power of the city council to prescribe what officer would directly administer the police department and give orders to subordinate police officers. The mayor won on Rule 73 for the same reason he lost on Rules 69 and 71: under the charter the city council heard appeals from suspensions of police officers, but Rule 69 had given that power to the city commission.

Finally, in City of Brighton v. Gibson, 501 So.2d 1239 (Ala. Civ. App. 1987), a statute provided that "The mayor shall be the chief executive officer, *and shall have general supervision and control of* all other officers and *the affairs of the city or town*..." [The court's emphasis.] The Court held that the statute authorized the mayor to hire a personal secretary without permission of the city council. The Court cited no law defining the term "general supervision" or any other law to support its holding. It simply reasoned that another statute gave the city council the authority to hire *officers*, determine their salaries, the manner of their office, and their terms of office, did not prohibit the mayor from hiring administrative personnel to help her in carrying out the administrative functions of her office.

However, City of Brighton, is highly questionable in Tennessee. Our Courts have made it clear that the mayor has neither legislative nor administrative powers except where they have been granted to him under the charter or general law. Generally, unless a Tennessee mayor has the express power to hire employees, he would not have the authority to hire them without the approval of the city council.

Some general principles can be gleaned from the above cases, and conclusions drawn as to the powers of a mayor who has power of "general supervision":

1. The mayor may require such reports from the officers and employees as he may reasonably deem necessary to carry out his executive responsibilities. The power of general supervision apparently means the power to do more than advise, but less than the power to control.

2. Bring problems involving the city to the attention of city officers and the city council, and press them for correction, make recommendations to them on any municipal matters, and in those connections inspect all facilities and operations of the city.

3. Enforce policies and procedures prescribed by the city council. However, he cannot change those policies or substitute his own policies, because all legislative *and* administrative powers of the city not otherwise given to him under the charter or ordinance rest entirely in the city council.

4. Give specific directions to the employees of the city related to their jobs, provided that the direction does not conflict with their duties and responsibilities prescribed under the general laws of the United States, the State of Tennessee, and the charter or the municipal code or other policies and procedures prescribed by the city council. It is the law in Tennessee that the mayor has those powers, and only those powers expressly granted to him in the city charter or in other statutes. [Weil, Roth & Co. v. Mayor and Aldermen of Newbern, 148 S.W. 680 (1912); Reeder v. Trotter, 215 S.W. 400 (1919); Anderson v. Town of Gainesboro, 17 TAM 12-27 (1992)]. Unless otherwise provided in the charter, the personnel powers of the city generally reside in the city council. For that reason, unless the city council has delegated its powers to discipline city officers and employees to him, the mayor's only recourse if any officer or employee fails or refuses to follow his specific direction is to bring that problem to the city council; he has no independent power to discipline city employees.

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Sincerely,

Sidney D. Hemsley
Senior Law Consultant

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