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OPINION	:	No. 80-803
	:	
of	:	<u>JANUARY 21, 1981</u>
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The Honorable Frank Vicencia, Assemblyman, Fifty-Fourth District, has requested an opinion on the following question:

Does the suspension from the practice of law of an elected city attorney of a charter city cause a vacancy in the office?

CONCLUSION

The suspension from the practice of law of an elected city attorney of a charter city may cause a vacancy in the office.

ANALYSIS

We are informed that the elected city attorney of a charter city has been suspended from the practice of law by the Supreme Court for a period of six months due

to his commingling of trust funds in his private practice. His four year term of office as city attorney will not expire during the six months suspension.

The city charter in question specifies that “to become eligible for City Attorney, the person elected or appointed shall have been admitted to practice before the Supreme Court of the State of California and shall have engaged in the practice of law for at least three years prior to his election or appointment.” The duties specified in the charter for the city attorney constitute the practice of law. The charter is silent, however, as to whether the office becomes vacant upon the incumbent’s temporary inability to discharge his official responsibilities.

If a vacancy has arisen by reason of the suspension, the charter requires that the city council appoint a successor under the following provisions:

“A vacancy in any elective office, from whatever cause arising, shall be filled by appointment by the City Council, such appointee to hold office until the first Tuesday following the next general school district election, as to a member of the Board of Education, and the next general municipal election, as to any other elective officer, and until his successor is elected and qualified.”

We are asked whether the city attorney’s suspension has caused a vacancy in the office necessitating action on the part of the city council. We conclude that the matter is governed solely by the city’s charter, and in this case, we believe that a court would uphold a determination by the city council that the six month suspension has created a vacancy in the office.

Preliminarily, we note that suspension from the practice of law by the Supreme Court may result from a violation of the Rules of Professional Conduct or any other laws providing for such discipline. (See Bus. & Prof. Code §§ 6078, 6100, 6177.) Practicing law while suspended is a misdemeanor. (Bus. & Prof. Code § 6126; *Hill v. State Bar of California* (1939) 14 Cal. 2d 732, 733; 63 Ops. Cal. Atty. Gen. 260, 263 (1980).)

Whether the temporary inability to discharge the duties of the office of city attorney creates a vacancy in the office is dependent upon the construction of the city’s charter. Section 5 of article XI of the Constitution states:

“(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be

subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

“(b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) *plenary authority is hereby granted, subject only to the restrictions of this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees.*” (Emphasis added.)¹

Although the Legislature has provided for the general manner in which a public office becomes vacant,² such state law is inapplicable where the Constitution invests

¹ The ‘restrictions of this article’ are not relevant to the particular subject matter herein. (See Cal. Const., art. XI, § 10.)

² Government Code section 1770 states:

An office becomes vacant on the happening of any of the following events before the expiration of the term:

“(a) The death of the incumbent.

“(b) An adjudication pursuant to a quo warranto proceeding declaring that the incumbent is physically or mentally incapacitated due to disease, illness or accident and that there is reasonable cause to believe that he will not be able to perform the duties of his office for the remainder of his term. This subdivision shall not apply to offices created by the Constitution nor to federal or state legislators.

“(c) His resignation.

“(d) His removal from office.

“(e) His ceasing to be an inhabitant of the state, or if the office be local and one for which local residence is required by law, of the district, county, or city for which he was chosen or appointed, or within which the duties of his office are required to be discharged; provided, however, that the office of judge of a municipal or justice court shall not become vacant when as a result of a change in the boundaries of a judicial district during an incumbent’s term, said incumbent ceases to be an inhabitant of the district for which he was elected or appointed to serve.

“(f) His absence from the state without the permission required by law beyond the period allowed by law.

“plenary authority” in a city’s charter to deal with the specific circumstances. (See *Ector v. City of Torrance* (1973) 10 Cal. 3d 129, 132–133; see also 3 McQuillin, *Municipal Corporations* (3d ed. rev. 1973) § 12.65, pp. 285–288.³)

In interpreting the charter provision at issue, the same principles of construction are applicable as are applied in interpreting the Constitution or general laws. (See *Diamond International Corp. v. Boas* (1979) 92 Cal. App. 3d 1015, 1030–1031.) Accordingly, the ordinary and usual import of the language used must be given effect (*Rockwell v. Superior Court* (1976) 18 Cal. 3d 420, 442; *Leroy T v. Workmen’s Comp. Appeals Bd.* (1974) 12 Cal. 3d 434, 438), with consideration given to the document as a whole in order to ascertain the intent and purposes of its individual provisions. (*California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844; *Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

Unfortunately, whether a six-month suspension from office causes the office to be “vacant” is not easily determined from an examination of dictionary definitions. “Vacancy” means “the state or fact of being free from occupation,” while “vacant” merely means “not filled or occupied by an incumbent.” (Webster’s New Internat. Dict. (3d ed. 1966) p. 2527.)

“(g) His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state with the permission required by law.

“(h) His conviction of a felony or of any offense involving a violation of his official duties. An officer shall be deemed to have been convicted under this subdivision when trial court judgment is entered.

“(i) His refusal or neglect to file his required oath or bond within the time prescribed.

“(j) The decision of a competent tribunal declaring void his election or appointment.

“(k) The making of an order vacating his office or declaring his office vacant when he fails to furnish an additional or supplemental bond.

“(l) His commitment to a hospital or sanitarium by a court of competent jurisdiction as a drug addict, dipsomaniac, inebriate or stimulant addict; but in that event the office shall not be deemed vacant until the order of commitment has become final.”

³ We are thus not concerned here with whether the “municipal affairs” doctrine is applicable where a charter is silent with respect to the subject matter of a general law. (See *Bishop v. City of San Jose* (1969) 1 Cal. 3d 56, 61; *Pipoly v. Benson* (1942) 20 Cal. 2d 366, 369; *City of Pasadena v. Charleville* (1932) 215 Cal. 384, 391–392; *Simons v. City of Los Angeles* (1976) 63 Cal.App. 3d 455, 467–468; Sato, “*Municipal Affairs*” in *California* (1972) 60 Cal. L. Rev. 1055, 1056–1058.)

The numerous cases interpreting the word “vacancy” in other contexts are similarly not dispositive. (See *Fields v. Eu* (1976) 18 Cal. 3d 322, 327 [“a vacancy is simply a state of being empty, unoccupied, or unfilled, without regard to when or how the condition arose”]; *Weinberger v. Riley* (1943) 23 Cal. 2d 499, 500 [“office was vacant in the sense that it was not being exercised or held during’ the incumbent’s recall to active military duty”]; *People ex rel. Happel v. Sischo* (1943) 23 Cal. 2d 478, 496 [“this court has recognized that a temporary, as distinguished from a permanent or complete, vacancy in an office may exist”]; *Wallace v. Payne* (1925) 197 Cal. 539, 549 [vacancy “means with relation to an office, a state of being unoccupied”]; *People v. Chaves* (1898) 122 Cal. 134, 138 [“an office is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent”]; *People v. Rodgers* (1897) 118 Cal. 393, 395 [“a vacancy exists when there is no person lawfully authorized to assume and exercise at present the duties of the office”]; *People v. Edwards* (1892) 93 Cal. 153, 157 [“The word ‘vacancy,’ as applied to an office, has no technical meaning”]; *People v. Wells* (1852) 2 Cal. 198, 204 [“vacancy in office can only be said to exist, when the office or place has no legal incumbent to discharge the duties of the office”]; *People ex rel. Bagshaw v. Thompson* (1942) 55 Cal. App. 2d 147, 154 [“vacancy in office may occur by failure to comply with charter provisions or statutes”].

Looking at public policy considerations that may affect our conclusion, we note first that it is in the interests of the city’s residents to have a city attorney capable of discharging his official duties at all times. Second, we perceive a difference between the temporary inability to perform because of a loss of qualifications and being ill or on vacation. In the latter situations, for example, the incumbent’s name may still be placed upon court documents, with appearances made by subordinate attorneys. Third, the city attorney in question has received a formal “adjudication” after notice and hearing and is not being barred from office based upon unfounded charges. (See *McEvers v. Boyle*, *supra*, 25 Cal. App. 476, 480–483; *Bergerow v. Parker*, *supra*, 4 Cal. App. 169, 172–175.)

On the one hand, we would have no hesitancy in concluding that a five-year suspension would create a vacancy in a four-year term office. On the other hand, it is doubtful that a one-day suspension could reasonably be interpreted in the instant matter as causing the office to become vacant, thereby requiring the appointment of a successor by the city council.⁴

⁴ We reiterate that we are interpreting solely the word “vacancy” in the charter in question. Removal of the city attorney from office by the city council (see 4 McQuillin, *supra*, § 12.2334, pp. 250-251), the electors of the city (see Elec. Code § 27000), or a court (see Gov. Code § 30742; Penal Code § 661) is not before us.

We believe that the meaning of the word “vacancy” in the charter provision in question includes the inability to perform the duties of the office for a substantial period of time due to a loss of qualifications. It is for the city council to determine what period of suspension would have only an insignificant effect upon city government. The council should bear in mind that the suspended city attorney cannot perform the duties of the office either directly or through deputies. (See Code of Civ. Proc. § 286; 63 Ops. Cal. Atty. Gen. 710, 714 (1980); 63 Ops. Cal. Atty. Gen. 260, 263 (1980).) It is our conclusion that a court would uphold the appointment of a replacement should the council determine that a six month suspension creates a vacancy in the office.
