



ALAN WILSON
ATTORNEY GENERAL

September 12, 2023

Mr. Danny C. Crowe, Esq.
Attorney
City of Sumter
2019 Park St.
Columbia, SC 29201

Dear Mr. Crowe:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter states the following:

I serve as the General Counsel of the City of Sumter, and I have been asked by the City Manager to request a formal opinion from your office on the issue of whether retroactive pay could be made by the City to a newly elected Councilmember whose swearing-in as a Councilmember was delayed until the final judicial determination of an appeal of the election.

The Councilmember was elected in November 2023 to fill an open seat representing the City's Ward One. The incumbent Councilmember for the Ward was not a candidate for the election and died shortly before the election, so that the seat was open and vacant at the time of the election with no possibility of a holdover Councilmember. Under Sumter City Code section 30-5, newly elected City officers can take office within seven days after the time for election protests has passed with the date for a swearing-in ceremony set by the Council at a time convenient for the newly elected members.

The November election result for this Councilmember was challenged by an appeal in State circuit court with a further appeal by the challenger to the State Supreme Court. Due to the operation of S.C. Code sections 5-15-120 and 5-15-140, the swearing-in of the Councilmember elect was delayed until August 2023 following the dismissal of the appeal lawsuit, and the denial of rehearing, by the State Supreme Court.

In the interim between the election and the swearing-in, the Councilmember-elect did not sit on the dais at meetings as a Councilmember, but he did attend Council meetings seated in the audience, attended the executive session portion of Council meetings at the request of the Council, attended training and education activities of the Municipal Association as an invited guest of the City, conveyed requests and inquiries to the City on behalf of constituents of Ward One, and made appearances at public events as a Councilmember-elect.

Unlike other situations considered by previous opinions of your office and decisions of the State Supreme Court concerning councilmember compensation, this plainly is not a situation in which the Councilmember was accused of a crime or suspended from office. It also presents the situation in which the Councilmember, following election, performed certain services and functions that ordinarily are involved in the duties of the office to which he was elected.

Law/Analysis

It is this Office's opinion that a court would likely hold a municipality is not authorized to compensate a council member with retroactive compensation for services rendered prior to qualification and being sworn into office. As noted in your letter, when there is a contest challenging the results of a municipal election, sections 5-15-120 and 5-15-140 operate to stay qualification of newly elected officers until the contest and appeals from the decision of the municipal election commission are resolved.¹ In Matter of Ferguson, 304 S.C. 216, 219, 403 S.E.2d 628, 630–31 (1991), the South Carolina Supreme Court explained, "The salary pertaining to an office is an incident to the office itself and not to the person discharging the duties of the office. Consistent with this proposition is the common law rule that the officer's right to compensation arises out of his performance of his duties." (citations omitted). While the circumstances described here do not include an indictment and suspension from office as in Matter of Ferguson, the reasoning is equally applicable. Matter of Ferguson cites De Marco v. Bd. of Chosen Freeholders of Bergen Cnty., 21 N.J. 136, 140–41, 121 A.2d 396, 398 (1956) as support

¹ See S.C. Code § 5-15-120 ("Newly elected officers shall not be qualified until at least forty-eight hours after the closing of the polls and in the case a contest is finally filed the incumbents shall hold over until the contest is finally determined."); S.C. Code § 5-15-140 ("Within ten days after notice of the decision of the municipal election commission, any party aggrieved thereby may appeal from such decision to the court of common pleas. ... The notice of appeal shall act as a stay of further proceedings pending the appeal."); see also Op. S.C. Att'y Gen., 2005 WL 2652385 (September 19, 2005) ("[U]ntil the time period of appealing the decision of the municipal election commission has expired or if an appeal is filed until the appeal is resolved, it would be inappropriate for the newly-elected officers to be qualified and the incumbent shall hold over.") (emphasis added).

for the proposition that a public officer's right to compensation flows from the performance of his duties. Therein, the De Marco Court discussed an example of a police officer who "was appointed for two years but actually served for less than a year because the police force was disbanded." Id. The officer's claim for salary owed over the remainder of the two-year period in which he did not perform services was rejected.

[H]is appointment to public office was "neither a contract between the public and the officer that the service shall continue during the designated term, nor that the salary shall not be changed during the term of office"; and that his right to compensation grew "out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him."

Id. (emphasis added). These authorities counsel that when a term of office is interrupted, whether by a suspension from office or, as here, a statutorily imposed delay to assuming office, the period of time an officer is entitled to compensation may not fully align with a term of office.

Section 5-15-120 presupposes an incumbent council member will continue to serve during the pendency of such a contest. Of course, when an incumbent member dies, holding over is not possible. It is admirable that the councilmember-elect remained apprised of issues facing the city, relayed communications from constituents to council, and went to trainings to lessen the obvious impacts to the electors who lacked an official representative on the council. Nonetheless, this Office is unaware of authority that would permit a municipality to compensate an officeholder-elect for services rendered prior to taking office.

"As respects compensation, an office is taken *cum onere*, and public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law. The duties of a public officer may be exacted without specific compensation, and, when no compensation is provided, the rendition of services is deemed to be gratuitous." 67 C.J.S., Officers, § 83; Ridgill v. Clarendon County, et al., 188 S.C. 460, 199 S.E. 683.

1963 S.C. Op. Att'y Gen. 94 (1963). If a service is rendered without a legal obligation to be compensated, the State and its political subdivisions are prohibited from providing compensation after the fact.

Our Supreme Court has defined "extra compensation" for purposes of Article III, § 30 as "any compensation over and above that fixed by law or contract at the time the service was rendered." State ex rel. McLeod v. McLeod, 270 S.C. 557, 559, 243 S.E.2d 446, 447-48 (1978). This Office has repeatedly advised that the "[u]se of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public employees is unconstitutional if it is

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greater than that which the State [or political subdivision] has a contractual or legal obligation to provide.” Op. S.C. Att’y Gen., 2012 WL 6218333 (Dec. 4, 2012); see also Op. S.C. Att’y Gen., 1999 WL 397927 (Feb. 17, 1999). In addition, we have consistently advised that municipal corporations are generally prohibited by law from bestowing a gratuity on an officer or employee. Ops. S.C. Att’y Gen., 2012 WL 6218333 (Dec. 4, 2012); 1997 WL 205801 (Feb. 3, 1997).

Op. S.C. Att’y Gen., 2013 WL 3762704, at 1 (July 8, 2013).

Conclusion

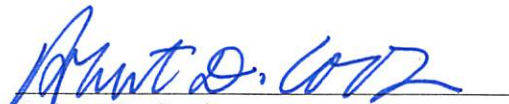
As is discussed more fully above, it is this Office’s opinion that a court would likely hold a municipality is not authorized to compensate a council member with retroactive compensation for services rendered prior to qualification and being sworn into office.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General