



HENRY McMASTER  
ATTORNEY GENERAL

March 30, 2010

Elise F. Crosby, Esquire  
City Attorney, City of Georgetown  
P.O. Box 939  
Georgetown, South Carolina 29442

Dear Ms. Crosby:

We received your letter and amended email requesting an opinion of this Office concerning the City of Georgetown's Mayor-Council form of government. You asked whether the "city ordinance giving power to the council to approve appointment or dismissal of department heads [is] consistent with state law regarding the mayor-council form of government." You also asked whether the council alone may reinstate an "employee or department head" who resigned (hereinafter "municipal employee"). Several prior opinions of this Office have addressed questions of what authority is given to the mayor and the council under a mayor-council form of government. This opinion will address those prior opinions, relevant statutes and caselaw.

#### **Law/Analysis**

S.C. Code Ann. § 5-5-10 lists the various forms of municipal government in this State. The City of Georgetown has complied with S.C. Code Ann. § 5-5-10 and adopted the mayor-council form of municipal government.

Under the mayor-council form of government, it is clear that the "mayor shall be the chief administrative officer of the municipality" and that the mayor has the power and duty to "appoint, and when he deems it necessary for the good of the municipality, suspend or remove all municipal employees . . . except as otherwise provided by law."<sup>1</sup> S.C. Code Ann. § 5-9-30.

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<sup>1</sup> The council in a mayor-council form of government has more powers when appointing and approving the city administrator than it has for other municipal employees. S.C. Code § 5-9-40 "authorizes a city council to appoint, and thus remove, a city administrator. Additionally, we conclude it does not grant a mayor separate authority to approve or disapprove the appointment or removal of a city administrator." *Op. S.C. Atty. Gen.*, April 27, 2006. This opinion will not address the council's power regarding the city administrator because the question posed regards other municipal employees.

In an opinion of this Office dated March 3, 2008, we concluded that “a municipal ordinance may not vary state law,”<sup>2</sup> but we recognized that an “ordinance is entitled to a presumption of validity. Thus, only a court may set an ordinance aside.” We analyzed that position as follows:

[A]n ordinance requiring the mayor – who is given exclusive authority to suspend or remove municipal employees under the mayor-council form of government – to “consult” with council before taking such removal or suspension action pursuant to § 5-9-30(1), is invalid. . . . the requirement to “consult” . . . unnecessarily “chills” the discretion given the mayor pursuant to state law.

In the March 3, 2008 opinion, two Supreme Court decisions - State v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979) and State v. Green, 220 S.C. 315, 67 S.E.2d 509 (1951) - were referenced to explain the chilling effect that could take place:

In Pechilis[,] the Court concluded that the procedure whereby nominations for the office of magistrate through advisory elections impermissibly chilled the appointment power of the Governor and Senate. . . .

In Green, the trial court, after a guilty verdict was rendered, requested the jury to . . . make a recommendation as to the sentence to be imposed on the defendant. [The Court concluded that] while we have no doubt that the course pursued by the trial judge was prompted by the best motives . . . we feel bound to regard it as highly irregular if not a dangerous innovation upon well settled principles. . . .

“An ordinance establishing such a requirement would, in our opinion, impose conditions upon the mayor’s discretion which state law does not authorize.” Op. S.C. Atty. Gen., March 3, 2008.

Georgetown’s City Ordinance § 2-85 explains that the mayor and council shall approve appointments or dismissals of department heads. However, in the South Carolina Code of Laws 1976, authority to approve appointments and dismissals is not given to the council under the mayor-council form of government. On numerous occasions, we have opined that the mayor has the authority to hire and fire all municipal employees. See e.g., Ops. S.C. Atty. Gen., May 3, 1977; March 27, 1981; March 3, 2008.

The South Carolina Administrative Law Court explained that the mayor has the “sole authority to

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<sup>2</sup> Op. S.C. Atty. Gen., March 3, 2008 (citing City of North Chas. V. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991)).

terminate employment of an individual employee.<sup>3</sup> SC Dep't of Labor, Licensing, & Regulation v. Town of Hollywood, 2005 WL 643877.<sup>4</sup> See also § 5-9-30.

In SC Dep't of Labor, Licensing, & Regulation v. Town of Hollywood, the Administrative Law Court held that "the statutes do not extend to council the executive authority of dismissing individual employees." The court cites Miller v Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979), where the South Carolina Supreme Court held "that the mayor is 'vested' under § 5-9-30 with the power to remove municipal employees." Town of Hollywood, 2005 WL 643877.

### Conclusion

A court would likely conclude that Georgetown's City Ordinance § 2-85 is inconsistent with state law and "unnecessarily chills"<sup>5</sup> the mayor's discretion. S.C. Code § 5-9-30 establishes that the "mayor shall be the chief administrative officer of the municipality," and shall have the power to "appoint . . . suspend or remove all municipal employees." Georgetown's City Ordinance authorizing the council to approve appointments gives the council authority that it does not have under the mayor-council form of government. While the council has authority under S.C. Code § 5-9-40 to establish municipal departments, offices, and agencies, the council does not have authority to approve the mayor's decisions regarding municipal employee appointments or dismissals. The mayor has sole authority to appoint or dismiss all municipal employees, except for the city administrator; therefore, the council's approval authority is unnecessary and a court would likely conclude that such approval authority as provided in the ordinance is invalid.

Under title 5, chapter 9 of the South Carolina Code of Laws 1976, there is no indication that council

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<sup>3</sup> S.C. Code § 5-9-30 goes on to explain that the mayor "shall be responsible to the council for the administration of all city affairs." Councils may have incorrectly interpreted this clause as giving the council approval power. However, it is the opinion of this Office that the clause is instructing the mayor that he shall operate within the processes determined by the council.

<sup>4</sup> In SC Dep't of Labor, Licensing, & Regulation v. Town of Hollywood, the mayor appointed and the council approved an individual for the position of Town Planning and Zoning Administrator. The Town of Hollywood is organized under the mayor-council form of government. Even though the council does not have authority to approve, no issue was raised regarding the council's ability to approve the appointment. The issue arose when the council attempted to terminate the individual's employment. After speaking with the Municipal Association of South Carolina, this Office is aware that many councils exercise some sort of approval power; in other words, many councils operate under municipal ordinances that are in conflict with state law.

<sup>5</sup> Op. S.C. Atty. Gen., March 3, 2008 (discussion of State v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979) and State v. Green, 220 S.C. 315, 67 S.E.2d 509 (1951)).

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alone may reinstate or hire an employee. Black's Law Dictionary defines "reinstate" as "to reinstall; to reestablish; to place again in a former state, condition, or office; to restore to a state or position from which the object or person has been removed." Black's Law Dictionary. As mentioned above, in the March 3, 2008 opinion, this Office found that there was no need for the mayor to consult the council for removal or suspension of an employee. Inherently within the power to remove or suspend is the power to reinstate. Since the mayor has exclusive authority to suspend – and therefore authority to reinstate – without consulting the council, then the council alone could not logically have the authority to reinstate an employee.

Sincerely,

Henry McMaster  
Attorney General



By: Leigha Blackwell  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
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