



ALAN WILSON
ATTORNEY GENERAL

March 28, 2013

The Honorable Tim Goodwin
Mayor, City of Folly Beach
P. O. Box 48
Folly Beach, South Carolina 29439

Dear Mayor Goodwin:

Attorney General Alan Wilson has referred your letter of January 23, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issues: In a mayor-council form of municipal government pursuant to S.C. Code of Laws Section 5-9-10 (1976 Code, as amended), does the mayor have the authority to suspend or remove the:

- 1) city administrator;
- 2) municipal clerk;
- 3) city attorney; or
- 4) municipal judges?

You also expressed concern in your letter over city council rather than the mayor having authority to suspend or remove certain employees of the municipality and the possible embarrassment to the employees. As quoted from your letter:

"Investing the power and responsibility to suspend or remove an employee in an elected body rather than in the chief administrative officer would be unprecedented. Furthermore, it would not be prudent or practical. The mayor can act quickly when necessary to suspend or remove someone, which council cannot. It would create many practical problems if the law required a majority vote of the council to remove or suspend someone. For example, if an appointive administrative officer or the city administrator engaged in misconduct that warranted immediate suspension or removal, the council could not act immediately to suspend that person. Even if the council was willing to hold an emergency meeting to consider the matter, it would have to convene a noticed meeting or conference call and take a public vote at some point to suspend or remove the person. This process would publically embarrass the person in question, and any delay in taking action would give the person time to delete emails, destroy documents, and otherwise engage in conduct that would disrupt the administration of the city..."

Law/Analysis:

By way of background, in South Carolina municipal governments have no inherent powers other than what the legislature has given statutorily to a municipality, and any questions of power will be construed against the municipality. *Ops. S.C. Atty. Gen.*, 1967 WL 8693 (December 19, 1967); 1968 WL 8878 (July 26, 1968); 1987 WL 245451 (May 7, 1987) (all citing *Lomax v. City of Greenville*, 225 S.C. 289, 82 S.E.2d 191 (1954)). South Carolina law specifies three different forms of municipal government:

- 1) Mayor-council (§ 5-9-10ff),
- 2) Council (§ 5-11-10ff), and
- 3) Council-manager (§ 5-13-10ff).

Every municipality must choose one of the three forms of government to form under South Carolina law. S.C. Code §5-5-10 (1976 Code, as amended). Based on the information provided in your letter, this Office understands that the City of Folly Beach is operating under a mayor-council form of government and therefore would be subject to Title 5 Chapter 9 of the South Carolina Code of Laws. South Carolina Code § 5-9-10 provides that “[e]xcept as specifically provided for in this chapter, the structure, organization, powers, duties, functions and responsibilities of municipal government under the mayor-council form shall be as prescribed in Chapter 7.” Under a mayor-council form of government, “the council may establish municipal departments, offices, and agencies in addition to those created by Chapters 1 through 17 and may prescribe the functions of all departments, offices and agencies, except that no function assigned by law to a particular department, office or agency may be discontinued or assigned to any other agency. The mayor and council may employ an administrator to assist the mayor in his office. All departments, offices and agencies under the direction and supervision of the mayor shall be administered by an officer appointed by and subject to the direction and supervision of the mayor. The council shall adopt an annual budget for the operation of the municipality and capital improvements.” S.C. Code § 5-9-40 (1976 Code, as amended) (emphasis added).

Under a mayor-council form of government, a mayor is the chief administrative officer. S.C. Code § 5-9-30. He is responsible to city council for the administration of all the city affairs placed in his charge, which include:

- (1) to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers provided for by or under Chapters 1 through 17 [of Title 5], except as otherwise provided by law, or personnel rules adopted pursuant to Chapters 1 through 17. He may authorize any administrative officer who is subject to his direction and supervision to exercise these powers with respect to subordinates in that officer's department, office or agency;
- (2) to direct and supervise the administration of all departments, offices and agencies of the municipality except as otherwise provided by Chapters 1 through 17;
- (3) to preside at meetings of the council and vote as other councilmen;
- (4) to act to insure that all laws, provisions of Chapters 1 through 17 and ordinances of the council, subject to enforcement by him or by officers subject to his direction and supervision, are faithfully executed;

- (5) to prepare and submit the annual budget and capital program to the council;
- (6) to submit to the council and make available to the public a complete report on the finances and administrative activities of the municipality as of the end of each fiscal year; and
- (7) to make such other reports as the council may require concerning the operations of municipal departments, offices and agencies subject to his direction and supervision.

S.C. Code § 5-9-30 (1976 Code, as amended). As you stated in your letter, “[o]n the one hand, this seems clear enough, and it makes common sense that the mayor should be able to suspend or remove the city administrator, municipal clerk, city attorney, and municipal judges, as well as other employees of the city. The mayor works with them on a daily basis and is in a much better position than members of the council to evaluate their performance. Without the power to suspend or remove them, the mayor would be hindered in his ability to meet the responsibility imposed by Section 5-9-30(2) ‘to direct and supervise the administration of all departments, offices, and agency of the municipality....’”

A few other principles should be noted. The mayor of a municipality has the authority to hire and fire all municipal employees unless provided otherwise by law. Op. S.C. Atty. Gen., 2009 WL 6326948 (March 30, 2009). A city council should not delegate legislative or policy-making powers but may delegate administrative and ministerial powers. See Op. S.C. Atty. Gen., 1985 WL 259106 (January 7, 1985). Under South Carolina law, all municipal powers not otherwise proscribed statutorily belong to the municipal council. S.C. Code § 5-7-160 (1976 Code, as amended). This Office has consistently held a council cannot usurp duties that are specifically granted statutorily to a mayor. Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing Op. S.C. Atty. Gen., 1979 WL 43108 (October 12, 1979)). Additionally, “departmental powers conferred by statute cannot be overridden by local ordinance, taken away or limited by the municipal council or governing body, or overridden by an officer acting beyond his or her authority...” Op. S.C. Atty. Gen., 2012 WL 440544 (January 13, 2012) (citing 62 C.J.S. Municipal Corporations § 568).

1) No, a mayor in a mayor-council form of municipal government probably may not suspend or remove a municipal administrator without council’s approval.

The question of a mayor’s removal of an administrator came up in a previous opinion, which said:

“Accordingly, we refer to section 5-7-160 of the South Carolina Code (2004) to understand the powers vested in a council:

‘All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations imposed on the municipality by law. A majority of the total membership of the council shall constitute a quorum for the purpose of transacting council business.’

In regard to a mayor's authority under the mayor-council form of government, section 5-9-30 of the South Carolina Code (2004) deems a mayor the “chief administrator of the municipality” and specifies the powers and responsibilities specifically afforded to a mayor in a mayor-council form of government. Section 5-

9-30 gives a mayor the specific power to appoint, suspend, and remove all municipal employees and appointive administrative officers, **'except as otherwise provided by law.'** In prior opinions of this Office, we interpreted the phrase "except as otherwise provided by law to mean 'if an appointive office is provided for by statute, the appointment of the official who occupies that office must be made pursuant thereto.' *Op. S.C. Atty. Gen.*, December 17, 1976. See also, *Op. S.C. Atty. Gen.*, September 27, 1996; *Op. S.C. Atty. Gen.*, January 6, 1977. With regard to the employment of a city administrator, section 5-9-40 of the South Carolina Code (2004), provides:

'The council may establish municipal departments, offices, and agencies in addition to those created by Chapters 1 through 17 and may prescribe the functions of all departments, offices and agencies, except that no function assigned by law to a particular department, office or agency may be discontinued or assigned to any other agency. The mayor and council may employ an administrator to assist the mayor in his office.

All departments, offices and agencies under the direction and supervision of the mayor shall be administered by an officer appointed by and subject to the direction and supervision of the mayor.

The council shall adopt an annual budget for the operation of the municipality and capital improvements.'

(emphasis added). In light of our prior opinions, we find the position of the city administrator is 'otherwise provided by law' pursuant to section 5-9-40 and therefore, is not under the purview of a mayor's sole authority.

*Because the power of removal is incidental to the power to appoint, we analyze who has the authority to remove a city administrator based on who has the power to appoint a city administrator. *State ex rel. Williamson v. Wannamaker*, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) (stating the power to terminate or remove is incidental to the power to appoint); *Op. S.C. Atty. Gen.*, November 26, 1984 (same). Section 5-9-40, as cited above, states in pertinent part: 'The mayor and council may employ an administrator to assist the mayor in his office.' Based on the requesters' letter, we gather they interpret this provision as allowing authorizing the Council, with the Mayor as a member, to appoint a city administrator, but not affording the Mayor separate authority to determine whether to appoint a particular individual as city administrator. Additionally, based on our conversations with a representative of the South Carolina Municipal Association, the Association also interprets this provision as not affording a mayor with a vote separate from the council, but simply references the mayor as a member of council.*

In conducting our analysis, we were unable to locate any opinion of our courts interpreting section 5-9-40. Thus, we employ the rules of statutory interpretation to determine whether the Mayor's authority to appoint a city administrator solely consists of his ability to vote as a member of council, or whether the Mayor has authority separate and equal to the collective authority of the Council in making this determination.

'The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.' Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003).

'All technical rules of construction are subservient to this paramount consideration. In determining the legislative intent, the Court will, if necessary, reject the literal import of words used in a statute. It has been said that 'words ought to be subservient to the intent, and not the intent to the words.' Arkwright Mills v. Murph. 219 S.C. 438, 443-44, 65 S.E.2d 665, 667 (1951) (quoting Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942)).

Admittedly, the authority given by the portion of section 5-9-40 in question is not clear. Section 5-9-20 of the South Carolina Code, under the provisions pertaining to the mayor-council form of government, includes the mayor as a member of council, and pursuant to section 5-9-30(3), the mayor is 'to preside at meetings of the council and vote as other councilmen.' Thus, one could argue because the mayor is already a voting member of council, the Legislature's inclusions of '[t]he mayor' separate from 'council' in section 5-9-40 indicates an intent to give the mayor separate and equal authority to that of the council in deciding to employ a city administrator. Furthermore, one could argue this interpretation comports with other provisions in the statutes governing the mayor-council form of government indicating the Legislature's intent to vest administrative authority in the mayor. See e.g., S.C. Code Ann. § 5-9-30(2) (granting the mayor authority to appoint and supervise all city employees and administrative officers); S.C. Code Ann. § 5-9-30(4) (giving the mayor the power to direct and supervise administration of all departments, offices, and agencies); S.C. Code Ann. § 5-9-40 (conferring authority to appoint and supervise any officer to supervise the departments, offices, and agencies under direction and supervision of the mayor to the mayor). However, we are inclined to follow the interpretation as understood by the requesting members of the Council and the South Carolina Municipal Association.

To read section 5-9-40 to provide the mayor with separate and equal authority in the appointment of a city administrator, would in effect, as the request letter suggests, give the Mayor the power to veto the appointment or removal of the City Administrator. Based on our reading of the statute, we do not believe the Legislature intended to grant a mayor such authority. Generally, courts recognize 'the mayor has a veto power only when and to the extent that is given by law, and the power cannot be enlarged by construction.' 5 McQuillin Mun. Corp. § 16.42 (1996). Furthermore, in an opinion of this Office dated November 13, 1987, considering the powers given to a mayor under the mayor-council form of government, we determined the Legislature did not give the mayor veto powers. Op. S.C. Atty. Gen., November 13, 1987. Additionally, finding the Legislature did not expressly reserve the authority to select a bookkeeping system in the mayor by including such power in the mayor's enumerated powers under section 5-9-30, we concluded such power rests with the council.

*With regard to a mayor's veto power over the council in appointing a city administrator, the Legislature did not expressly provide for such a power pursuant to section 5-9-30, in which the Legislature specifically listed other powers afforded to mayors, or any other provision contained in the Code applicable to the mayor-council form of municipal government. Therefore, we presume the Legislature did not intend for a mayor to hold such a power. Furthermore, we believe the better reading of the phrase "mayor and council," in the context of section 5-9-40, is that of a single collective body. Nebraska Tel. Co. v. City of Fremont, 99 N.W. 811, 812 (Neb. 1904) (interpreting the phrase "mayor and council" in an ordinance requiring "the consent of the mayor and council" as to "constitute a single collective and deliberative body."). Thus, we believe the phrase "mayor and council" refers to the mayor with respect to his authority as a member of council and affording him or her the right to act as a member of council, but not affording the mayor any additional authority. Alternatively, section 5-4-90 may be read as giving a municipality, acting through its council, which includes the mayor, the authority to employ a city administrator, not as giving the mayor and the council individual the authority to appoint a city administrator. **Therefore, we opine section 5-9-40 gives the Council, and the Mayor solely as a member of Council, the authority to appoint a city administrator. Accordingly, we conclude the Council holds the incidental power to remove a city administrator.** See State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) (stating the power to terminate or remove is incidental to the power to appoint).*

Nevertheless, we recognize one could arguably read section 5-9-40 another way, and only a court may make a final determination as to its interpretation. Thus, we suggest the Council either seek clarification from the courts on the interpretation of statute or legislative action to make the statute more clear."

Op. S.C. Atty. Gen., 2006 WL 1207275 (April 27, 2006) (emphasis added). This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984). Furthermore, "[t]he absence of any legislative amendment following the issuance of an opinion of the Attorney General strongly suggests that the views suppressed therein were consistent with the legislative intent." Op. S.C. Atty. Gen., 2005 WL 2250210 (September 8, 2005) (citing Scheff v. Township of Maple Shade, 149 N.J.Super. 448, 374 A.2d 43 (1977)).

In regards to any suspension power, this Office is aware that the power to suspend does not equal the power to remove. McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912). However, the power to remove may implicitly include the power to suspend temporarily as long as it is a step on the path connected to a removal. St. ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956). This Office issued a previous opinion supporting that same principal as long as the suspension is not arbitrary but is a part of the disciplinary process to remove. See Op. S.C. Atty. Gen., 2001 WL 564575 (March 15, 2001). Under that same reasoning, the council would likely have the same power to suspend as a part of a removal process. As far as the mayor's individual ability to suspend the administrator pursuant to South Carolina Code Section 5-9-30(1), it may likely fall under the same reasoning as the removal power (that it is already provided otherwise by law). If that is not the finding of a court, then a mayor may be authorized to suspend the administrator pursuant to South Carolina Code Section 5-9-30(1).

2) No, a mayor in a mayor-council form of municipal government probably may not suspend or remove a municipal clerk without approval first by the municipal council.

"The council under the council and mayor-council forms of government or city manager under the council-manager form shall appoint an officer of the municipality who shall have the title of municipal clerk. The municipal clerk shall give notice of council meetings to its members and the public, keep the minutes of its proceedings and perform such other duties as are assigned by council." S.C. Code § 5-7-220 (1976 Code, as amended). Since a municipal clerk would be appointed by the municipal council, which the mayor is a part of, it follows the same reasoning as listed above that the power to hire is the power to fire, or put in this context, the power to appoint is the power to remove. Op. S.C. Atty. Gen., 2006 WL 1207275 (April 27, 2006) (citing State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) and Op. S.C. Atty. Gen., 1994 WL 159941 (November 26, 1984)).

As stated above, in regards to any suspension power, this Office is aware that the power to suspend does not equal the power to remove. McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912). However, the power to remove may implicitly include the power to suspend temporarily as long as it is a step on the path connected to a removal. St. ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956). This Office issued a previous opinion supporting that same principal as long as the suspension is not arbitrary but is a part of the disciplinary process to remove. See Op. S.C. Atty. Gen., 2001 WL 564575 (March 15, 2001). Under that same reasoning, the council would likely have the same power to suspend as a part of a removal process. As far as the mayor's individual ability to suspend the clerk pursuant to South Carolina Code Section 5-9-30(1), it may likely fall under the same reasoning as the removal power (that it is already provided otherwise by law). If that is not the finding of a court, then a mayor may be authorized to suspend the clerk pursuant to South Carolina Code Section 5-9-30(1).

3) & 4) No, a mayor in a mayor-council form of municipal government probably may not suspend or remove a municipal attorney or municipal judge without approval first by the municipal council.

"The city council may elect or appoint a municipal attorney and a judge or judges of the municipal court, whose duties shall be as prescribed by law. No mayor or councilman shall be so elected or appointed to serve as municipal judge during his term of office. The provisions of this section do not apply to a mayor who presides over a mayor's court in his capacity as mayor as authorized in Section 5-7-90." S.C. Code § 5-7-230 (1976 Code, as amended). Since a municipal clerk would be appointed by the municipal council, which the mayor is a part of, it follows the same reasoning as listed above in #1 that the power to hire is the power to fire, or put in this context, the power to appoint is the power to remove. Op. S.C. Atty. Gen., 2006 WL 1207275 (April 27, 2006) (citing State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) and Op. S.C. Atty. Gen., 1994 WL 159941 (November 26, 1984)).

However, it should be noted that the Supreme Court in South Carolina has previously answered a similar question concerning a controversy between a supervisor and a county council concerning who had the right to hire and fire the county attorney. Poore v. Gerrard, 271 S.C. 1, 244 S.E.2d 510 (1978). In that case the Supreme Court held concerning S.C. Code § 4-9-430 "under [S.C. Code §] 4-9-30(7) county council has the duty and responsibility to provide for personnel to operate the county functions over which it is granted control and to appropriate funds for the employment of such personnel. Section 4-9-420(12), dealing specifically with the county supervisor form of government, makes the county supervisor 'responsible for the employment and discharge of personnel subject to the provisions of subsection 7 of Section 4-9-30' and for which council has appropriated funds, i.e., county council is empowered to create and fund positions for the operation of county government, but personnel to fill such

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positions shall be appointed by the county supervisor. This conclusion is reinforced by further provisions of Section 4-9-430... such power to employee personnel [under S.C. Code § 4-9-420(12)] is limited, first, by the existence of a position to fill and, second, by the appropriation of funds with which to pay the employee." *Id.* The supervisor has the power to hire and fire county personnel coming within the jurisdiction of the county council, but that power is limited by county council creating a position and funding such a position. *Id.* Nevertheless, the language in S.C. Code § 5-7-230 concerning municipal attorneys and judges is very clear in stating a city council is in charge of choosing legal counsel and judges and therefore this Office follows the distinction as such.

As stated above, in regards to any suspension power, this Office is aware that the power to suspend does not equal the power to remove. *McDowell v. Burnett*, 92 S.C. 469, 75 S.E. 873 (1912). However, the power to remove may implicitly include the power to suspend temporarily as long as it is a step on the path connected to a removal. *St. ex rel. Thompson v. Seigler*, 230 S.C. 115, 94 S.E.2d 231 (1956). This Office issued a previous opinion supporting that same principal as long as the suspension is not arbitrary but is a part of the disciplinary process to remove. See *Op. S.C. Atty. Gen.*, 2001 WL 564575 (March 15, 2001). Under that same reasoning, the council would likely have the same power to suspend as a part of a removal process. As far as the mayor's individual ability to suspend the attorney or judge pursuant to South Carolina Code Section 5-9-30(1), it may likely fall under the same reasoning as the removal power (that it is already provided otherwise by law). If that is not the finding of a court, then a mayor may be authorized to suspend the attorney or judge pursuant to South Carolina Code Section 5-9-30(1).

As far as your concern over council taking a public vote to consider the matter of an employee, public bodies may hold closed meetings to discussion employment, demotion, etc. pursuant to S. C. Code § 30-4-70(a)(1) (1976 Code, as amended). The employee has the option of demanding a public hearing, but only if he or she so chooses. S.C. Code 30-4-70(a)(1) (1976 Code, as amended).

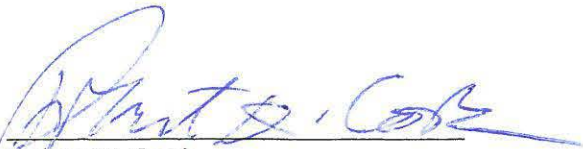
Conclusion: We hope this answers your questions. Please note this office is only issuing a legal opinion in regards to your questions. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General