



ALAN WILSON
ATTORNEY GENERAL

June 7, 2013

The Honorable Kent M. Williams
Senator, District 30
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Williams,

You seek an opinion of our Office concerning a city councilmember who is also a licensed bail bondsman. By way of background, you explain that Emerson Hunt is a licensed bondsman was recently elected to Council for the City of Marion. Shortly after taking office, an issue was raised by the South Carolina Department of Insurance (DOI) concerning Mr. Hunt's profession and simultaneous service as a City Councilman. We have been provided with a letter Mr. Hunt received from a member of the DOI's Office of Special Services dated May 2, 2013. That letter expresses the opinion that Mr. Hunt's position on City Council conflicts with S.C. Code § 38-53-190. That section sets forth certain persons who are prohibited from becoming a surety on a bail bond, including "public employees assigned to duties relating to the administration of the court." Specifically, the letter states that "Code Section 38-53-190 precludes you from acting in the capacity of a surety and as a member of City Council." The letter also cites several City ordinances indicating the City Council appoints the municipal court judge and clerk of court, and also sets the judge's compensation. Furthermore, the letter notifies Mr. Hunt as follows: "At this time, you must chose [sic] to either surrender your seat as city council person or your surety/runner bondsman licenses."

Your letter takes the position that the DOI's interpretation of § 38-53-190 is incorrect. You indicate the DOI's position is Mr. Hunt is in violation of § 38-53-190 because his position as a member of City Council allegedly involves the administration of the municipal court in Marion. Noting that the municipal courts are administratively controlled by the South Carolina Supreme Court and Court Administration as part of the unified judicial system, you argue the City Council has no part in, or any power over, the administration of the municipal court. Your question, then, is whether the DOI's letter informing Mr. Hunt that he must forfeit either his position on the City Council or his license as a bondsman is correct.

Law/Analysis

The statutory section the DOI's letter relies on in support of its position states, in its entirety:

No sheriff, deputy sheriff, other law enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, employee of any court of this State, **or other public employee assigned to duties relating to the administration of the court** may become a surety on a bail bond for any person.

No person covered by this section may act as agent for any bonding company or professional bondsman, nor may he have an interest, directly or indirectly, in the financial affairs of any firm or corporation whose principal business is acting as bondsmen. Nothing in this section prohibits any person designated above from being a surety upon the bond of his spouse, parent, brother, sister, child, or descendant.

S.C. Code § 38-53-190 (emphasis added).

Without any detailed explanation, legal analysis, application of the rules of statutory construction, or citation to any supporting authority, the DOI's letter summarily concludes that § 38-53-190 precludes one from acting as a surety and serving as a member of a city council. In determining whether § 38-53-190 precludes a city councilmember from becoming a surety on a bail bond, several rules of statutory construction are applicable. "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000). "[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009). Like a court, this Office "generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulations." Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003). However, a court will reject an agency's interpretation that is contrary to the plain language of the statute, erroneous, or controlled by an error of law. See State v. Sweat, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct. App. 2008) ("where the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation") (citations and quotations omitted); Savannah Riverkeeper v. S.C. Dep't of Health & Envtl. Control, 400 S.C. 196, 206, 733 S.E.2d 903, 908 (2012) ("An agency's interpretation of a statute or regulation that is erroneous or controlled by an error of law presents a compelling reason not to defer to the agency's interpretation").

We need look no further than the plain language of § 38-53-190 to conclude that it has no application to a city council member. A city councilmember is undoubtedly not a "sheriff, deputy sheriff, other law enforcement officer, judicial official, attorney, parole officer, probation officer, jailer, assistant jailer, [or] employee of any court of this State." Nor could a city councilmember be considered a "public employee assigned to duties relating to the administration of the court." A city councilmember is a public officer, not a public employee.¹ If the Legislature intended for all public or elected officials to be among those prohibited under § 38-53-190 from becoming a surety on a bond, it would have expressly done so.

Nor is a city councilmember a person "assigned to duties relating to the administration of the court" for purposes of § 38-53-190. Although a city council has the authority to appoint municipal judges and set their compensation,² the council's members have no duties or powers related to the administration

¹ See Op. S.C. Att'y Gen., 2013 WL 1695513 (March 7, 2013) (noting this Office has advised on numerous occasions that a city councilmember holds a public office for purposes of the constitutional prohibition against dual office holding under Article XVII, § 1A); § 8-13-100(27) ("Public official" means an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof").

² See § 5-7-230 ("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"); § 14-25-15(A) (stating the compensation of each municipal judge must be set by the city council).

of the municipal court. As you indicate in your letter, our Legislature has expressly provided that municipal courts are part of the unified judicial system of this state. See § 14-25-5(a) (“The council of each municipality in this State may, by ordinance, establish a municipal court, which shall be a part of the unified judicial system of this State”). Under Article V, § 4 of the South Carolina Constitution, the Chief Justice of the Supreme Court is designated the “administrative head of the unified judicial system” with the power to appoint personnel “necessary to aid in the administration of the courts” This constitutional provision states that the Supreme Court has the power to “make rules governing the administration of all courts of the State....” Id. Moreover, Article VIII, § 14 expressly prohibits a local government from enacting ordinances which set aside, *inter alia*, “the structure for and the administration of the State’s judicial system” (Emphasis added); see also Douglas v. McLeod, 277 S.C. 76, 80, 282 S.E.2d 604, 606 (1981) (“Article VIII effectively withdraws administration of the State judicial system from the field of local concern”). Therefore, while it is true that city council appoints municipal judges, a city council has no power or responsibility with regards to the administration of a municipal court, a matter which rests solely with the Supreme Court and the Chief Justice. See Op. S.C. Att’y Gen., 1996 WL 549582 (Aug. 27, 1996) (“the Supreme Court maintains oversight over the Municipal Court and its judges as it does any other court in the unified judicial system”).

Accordingly, it is the opinion of this Office that the plain language of § 38-53-190 does not encompass, and has no application to, a person holding office as a member of a city council. Thus, we believe the statute does not preclude a member of a city council from becoming a surety on a bail bond. For the reasons previously stated herein, we believe the DOI’s interpretation of § 38-53-190 as expressed in its letter is erroneous and contrary to the plain language of the statute; therefore, we decline to take this opportunity to defer to the agency’s interpretation.

Furthermore, we also note the fact that the DOI’s letter informs Mr. Hunt that, as a matter of law, he is precluded from continuing to hold office as a member of City Council and must forfeit either that office or his license. This is incorrect. It is well recognized the DOI possesses no authority to declare an elected official ineligible to continue holding office. We have consistently advised that only a court can oust or remove a person holding public office from such position. See Ops. S.C. Att’y Gen., 2004 WL 3058236 (Dec. 16, 2004); 1987 WL 342503 (July 27, 1987). Furthermore, we have repeatedly advised that an action to contest one’s right to hold office is properly brought before a court through the commencement of a quo warranto³ or declaratory judgment action. See Ops. S.C. Att’y Gen., 2007 WL 1031442 (March 28, 2007); 2007 WL 419410 (Jan. 17, 2007). Unless and until a court decides Mr. Hunt

³ A quo warranto action may be brought pursuant to § 15-63-60 which states, in part:

An action may be brought by the Attorney General in the name of the State upon his own information or upon the complaint of any private party or by a private party interested on leave granted by a circuit judge against the parties offending in the following cases:

- (1) When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, civil or military, or any franchise within this State or any office in a corporation, created by the authority of this State; [or]
- (2) When any public officer, civil or military, shall have done or suffered an act which, by the provisions of law, shall make a forfeiture of his office

is prohibited from continuing to hold office, he is entitled under the law to continue serving as a member of the City Council.

With that being said, the DOI's authority in this situation is limited to the regulation of licensed bail bondsmen. The DOI has the authority to determine whether an applicant meets the qualifications set forth in § 38-52-90 required to obtain a license as a professional bondsman, and the power to suspend or revoke such a license for any of the specific reasons enumerated in § 38-53-150(A). However, prior to the revocation or suspension the licensee must be afforded "reasonable notice and opportunity to be heard" § 38-53-160. Any bondsman whose license has been suspended or revoked "has the right of appeal from the final order of the director or his designee to the Administrative Law Judge Division as provided by law." *Id.* Accordingly, if the DOI believes it has cause to suspend or revoke Mr. Hunt's license for one of the reasons enumerated in § 38-53-150(A), it has the discretion to do so in accordance with the procedures mandated by § 38-53-160. If the DOI ultimately issues an order suspending or revoking Mr. Hunt's license, the matter can be appealed and resolved by the Administrative Law Court.

We conclude by noting, without deciding the issue, the argument could be made that a potential conflict of interest may arise if Mr. Hunt appears as a surety before a municipal court in the city where he is a councilmember by virtue of his authority to vote on the appointment and compensation of the municipal judge. See § 8-13-700 (concerning conflicts of interest of public officials, members, and employees). However, the law is not violated where a public official abstains from voting on a particular matter in which he has a potential conflict of interest and otherwise complies with the requirements of § 8-13-700(B). Thus, even assuming the preceding facts are sufficient to create a conflict of interest in this case, any concerns as to the conflict would be alleviated if Mr. Hunt simply abstains from voting on matters concerning the appointment and compensation of any municipal judge he is likely to appear before as a surety. The law does not require a public officer to forfeit his office as a result of any such potential conflict. Any further guidance regarding the application of the State Ethics Act should be sought from the State Ethics Commission.

Conclusion

It is the opinion of this Office that the plain language of § 38-53-190 does not prohibit a person holding office as a member of a city council from becoming a surety on a bail bond. Although, like a court, we generally defer to administrative agency's interpretation of a statute it is charged with enforcing, the DOI's interpretation of § 38-53-190 as expressed in the letter is erroneous and contrary to the plain language of the statute. Thus, we decline to afford it deference in this case.

Furthermore, it is incorrect for the DOI to effectively declare a person ineligible to continue holding office in the absence of any legal authority to do so. Only a court can oust or remove a person holding public office from such position after the commencement of an appropriate action to try title to office pursuant to a quo warranto or declaratory judgment action. Even if § 38-53-190 was applicable here, it is not a disability upon one's right to hold office. Unless and until a court decides Mr. Hunt is prohibited from continuing to hold office, he is entitled under the law to continue serving as a member of the City Council. The DOI's authority in this case is limited to regulation of licensed bail bondsmen, including the power to suspend or revoke a person's license for one of the reasons set forth in 38-53-150(A). If the DOI believes it has cause to suspend or revoke Mr. Hunt's license, it may do so after first providing him reasonable notice and an opportunity to be heard on the matter. Any final order of the DOI

The Honorable Kent M. Williams

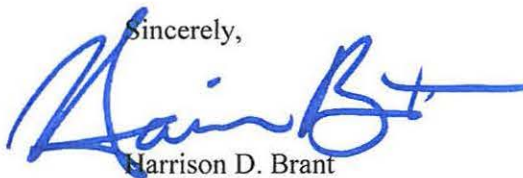
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suspending or revoking Mr. Hunt's license could then be appealed and resolved by the Administrative Law Court.

Finally, we note it could be argued that a potential conflict of interest may arise if a city councilmember appears as a surety in municipal court before a judge the city council is empowered to appoint and set the compensation of. However, the mere existence of a potential conflict of interest does not render a person ineligible to continue holding office. Such a potential conflict could otherwise be alleviated or handled in accordance with the State Ethics Act, S.C. Code §§ 8-13-100 et seq. Any further guidance as to the application of the State Ethics Act should be sought from the State Ethics Commission.

Sincerely,



Harrison D. Brant
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REVIEWED AND APPROVED BY:



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