

2010 WL 2320802 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 7, 2010

*1 The Honorable K. Allen Deaton

Mayor

Surfside Beach

115 US Highway 17 North

Surfside Beach, South Carolina 29575-6034

Dear Mayor Deaton:

We received your letter requesting an opinion of this Office concerning the council form of government and the Town Administrator. You asked “whether the council has authority over the town administrator to hire and fire department heads if the town administrator chose to reprimand a department head.” You also asked whether “the council has authority to directly instruct the administrator on administering certain personnel policies.” This opinion will address prior opinions, relevant statutes and caselaw to clarify the duties of the council and administrator in a council form of government.

Law/Analysis

South Carolina Code § 5-5-10 lists the various forms of municipal government in this State. The Town of Surfside Beach has complied with S.C. Code § 5-5-10(b) and established a council form of government.

Under the council form of government, “there shall be a municipal council composed of five, seven, or nine members including the mayor.” S.C. Code § 5-11-20. “All legislative and administrative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council. Each member of the council, including the mayor, shall have one vote.” S.C. Code § 5-11-30.

S.C. Code § 5-11-40 explains the various powers of the council in a council form of government:

(a) The council may establish municipal departments, offices or agencies . . . and may prescribe the functions of all departments, offices, and agencies. **The council may hire an administrator to assist the council.**

(b) All departments, offices and agencies may be administered by an officer appointed by and subject to the direction and supervision of the council.

(c) The municipal council shall adopt annually, prior to the beginning of the fiscal year, operating and capital budgets for the operation of city revenue including taxes necessary to meet the financial requirements of the budgets adopted. . . .

S.C. Code § 5-11-40 (emphasis added).

As permitted by S.C. Code § 5-11-40(a), the Town of Surfside Beach adopted by ordinance to appoint and hire a Town Administrator.

Section 2-113 of the Town Code of Ordinances describes the authority and duties of the Administrator as follows:

(3) appoint and remove department heads for cause **with approval of town council**;

- (4) appoint and remove other town employees for cause, after consulting employee's department head;
- (5) Administer personnel policies, classification, compensation and evaluation of all town employees . . .
- (6) Prepare the budget annually, submit it to the town council . . .
- (7) Prepare and submit to the town council at the end of each fiscal year a complete annual report on the finances and administrative activities . . .
- (11) Perform such other duties as may be required of him by the town council.

*2 Surfside Beach's Town Code of Ordinances, Sec. 2-113 (emphasis added).

As indicated in your letter to this Office, the duties and responsibilities given to the administrator are similar to the duties given to the manager in the council-manager form of government. The council-manager form of government is described in Title 5, Chapter 13 of the South Carolina Code of Laws of 1976.

The responsibilities of the manager in a council-manager form of government are explained in S.C. Code § 5-13-90 as follows:

The manager shall be the chief executive officer and head of the administrative branch of the municipal government. He shall be responsible to the municipal council for the proper administration of all affairs of the municipality and to that end, subject to the provisions of this chapter, he shall:

- (1) Appoint and . . . remove any appointive officer or employee of the municipality . . . except as otherwise provided . . .
- (2) Prepare the budget annually, submit it to the municipal council . .
- (3) Prepare and submit to the municipal council at the end of each fiscal year a complete annual report on the finances and administrative activities . . .
- (4) Keep the municipal council advised of the financial condition and future needs of the municipality and make such recommendations . . .
- (5) Perform such other duties as may be prescribed by law or required of him by the municipal council . . .

The Town Administrator of Surfside Beach contacted the McGougan Law Firm to advise him on the respective duties and scope of authority of the elected Town Council and the Town Administrator in relation to staff discipline and other personnel issues. The law firm concluded that the "Town Council does not have the authority to initiate any disciplinary action, nor to alter a disciplinary decision of the administrator amounting to less than removal from office of a department head. Town Council does not have the unfettered authority to review individual personnel file data."¹

An opinion of this Office dated January 20, 2010 regarding the duties of a town administrator was written at your request. We stated as follows:

[A]s we concluded in a 1988 opinion of this Office, the duties, oath, salary, and tenure of a town administrator is left to the discretion of the council. Op. S.C. Atty. Gen., October 18, 1988. See also, Op. S.C. Atty. Gen., March 30, 1998. Therefore, we are of the opinion that so long as the duties proscribed by the council do not conflict with State law, they are permissible.

In an opinion of this Office dated March 30, 1998, we stated as follows:

[S]tate law merely provides that council may hire an administrator to assist council. It does not set forth the powers and duties of the administrator. Therefore, determination of such duties is left to the discretion of council. Op. S.C. Atty. Gen., October 18, 1988. . . .

The powers of the city administrator under the council form of government are determined by council and the city administrator operates pursuant to council's discretion. The city administrator's powers and duties are not derived from state law but from council's determination.

*3 Therefore, to determine the town administrator's role, one must reference the Town Code of Ordinances above in which the Surfside Beach Town Council describes the authority and duties of the administrator.

In the October 18, 1988 opinion, this Office was answering a question of dual office holding. However, in doing so, this Office discussed the role of an administrator in a council form of government as follows:

Section 5-11-40 of the Code, in subsection (a) provides that “[t]he council may hire an administrator to assist the council.” No duties, qualifications, oath, salary, or tenure are provided for by statute and thus are left to the discretion of Lexington Town Council. Because the Town Council is vested with all legislative and administrative powers needed to operate town government and the determination of policy is vested in council, it would appear that all of the sovereign power is most probably being exercised by council instead of the administrator. Thus, it must be concluded that the administrator contemplated by Section 5-11-40(a) of the Code is most probably not an office for dual office holding purposes.

Similar to the Lexington Town Council, the Surfside Beach Town Council has the discretion to determine the administrator's duties, so long as the delegation of responsibilities does not conflict with any other statute.

Conclusion

The council form of government is designed to give the municipal council significant authority. S.C. Code § 5-11-10, et seq. Consistent with other opinions of this Office, the Surfside Beach Town Council is able to determine the duties of the administrator.² The fact that the duties delegated to the administrator are similar to the duties given the manager in the council-manager form of government is immaterial.³ Surfside Beach's Town Code of Ordinances, Sec. 2-113 will control the authority and duties of the administrator so long as the powers given do not conflict with State law. Such responsibilities include appointing and removing department heads and administering personnel policies and evaluation of all town employees. The ordinance is not in conflict with state law so long as it is read in light of S.C. Code § 5-11-40(b) which expressly states that “[a]ll departments, offices and agencies may be administered by an officer appointed by and **subject to the direction and supervision of the council.**” S.C. Code § 5-11-40(b) (emphasis added).

A court would likely find that the town council has authority over the town administrator to hire and fire department heads because the town administrator can only “appoint and remove department heads **with the approval of town council.**” Town Code of Ordinances, Sec. 2-113(3) (emphasis added). Under the ordinance, the town administrator has the authority to *reprimand* a department head. However, the town administrator may not *remove* the department head without the town council's approval.

*4 Although the role of an administrator is to “assist the council,” a court would likely find that the council does not have authority to directly instruct the administrator on administering certain personnel policies because, under the Town Code of Ordinances, Sec. 2-113(5), the Town Council has given the administrator the authority to “administer personnel policies, classification, compensation and evacuation of all town employees.” The ordinance does not appear to conflict

with State law; therefore, unless the ordinance is changed, the administrator may act within the authority given in the town ordinance.

Sincerely,

Henry McMaster
Attorney General
By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General

Footnotes

- 1 Letter regarding Staff Personnel Issues, from Michael T. Smith of The McGougan Law Firm to Ed Booth, Town Administrator, dated January 5, 2010.
- 2 See, Ops. S.C. Atty. Gen., March 30, 1998; October 18, 1988.
- 3 One should note that although the duties given to the town administrator in Surfside Beach's Town Code of Ordinances, Sec. 2-113 are similar to the duties given to the manager in S.C. Code § 5-13-90, the town administrator can only "appoint and remove department heads for cause **with approval of town council.**" The manager in a council-manager form of government may "appoint and . . . remove any appointive officer or employee" unless otherwise prohibited by statute or delegation of authority.

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