



ALAN WILSON
ATTORNEY GENERAL

August 2, 2022

The Honorable Frank Jones
Town of Sellers
PO Box 116
Sellers, SC 29592

Dear Mayor Jones:

You have requested an opinion of this Office regarding the authority of the Town of Sellers Mayor. You have presented us with several questions and we will address each question in turn.

LAW/ANALYSIS

Question 1:

Does the Town of Sellers Mayor have the authority to override the State of South Carolina (Dual offices Laws) dated back to (1895) and section (5-7-180) prohibits a person from holding two offices of (HONOR OR PROFIT) at the same time?

Your question involves dual office holding. The South Carolina Constitution provides:

[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. . . . The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1A. Section 5-7-180 of the South Carolina Code of Laws states “[e]xcept where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected.” S.C. Ann. § 5-7-180 (1976 Code, as amended).

We will begin with a discussion of the powers of municipalities. Our Office has previously stated that “it is settled law that counties and municipal corporations have only such powers as are granted to them by legislative enactment.” Op. S.C. Atty. Gen., 1988 WL 383501 (Feb. 25,

1988) (quoting Williams, et al. v. Wylie, et al., 217 S.C. 247, 60 S.E.2d 586 (1950); 56 Am.Jur.2d, Municipal Corporations, etc., Section 193)). This stems from the State Constitution's provision that "[t]he structure and organization, powers, duties, functions, and responsibilities of the municipalities shall be established by general law . . ." S.C. Const, art. VIII, § 9.

The Legislature granted powers to municipalities through section 5-7-30:

[e]ach municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State. . . .

S.C. Code Ann. § 5-7-30 (1976 Code, as amended).

The Town of Sellers has a mayor-council form of government, according to the Municipal Association of South Carolina. See www.masc.sc/search/?k=form%20of%20government. Section 5-9-10 states 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," which includes section 5-7-30. S.C. Code Ann. § 5-9-10 (1976 Code, as amended).

Section 5-9-30 provides the powers and duties of the mayor in this form of government:

The mayor shall be the chief administrative officer of the municipality. He shall be responsible to the council for the administration of all city affairs placed in his charge by or under Chapters 1 through 17. He shall have the following powers and duties:

(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, 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 Ann. § 5-9-30 (1976 Code, as amended).

A mayor does not have the authority to override the South Carolina Constitution or South Carolina Code of Laws. A municipality's powers are derived from both, and the Legislature expressly provides in section 5-7-30 that a municipality's regulations, resolutions, and ordinances are subject to the State Constitution and general laws.

Section 5-9-10 emphasizes that Chapter 7, which includes section 5-7-30, is applicable to a municipal government with a mayor-council form of government. The mayor in this form of government is required to act to insure that all laws, provisions of Chapters 1 through 17 and town ordinances, subject to enforcement by him or by officers under his direction and control are faithfully executed. Therefore, the Town of Sellers Mayor must submit to and comply with the State Constitution and State Code of Laws, including those sections pertaining to dual office holding.

Question 2:

Does the Town of Sellers, Mayor have the authority to appoint or allow his/her family members related by blood or marriage to serve on committees or do labor for the Town of Sellers (NEPOTISM)?

We suggest that you contact the State Ethics Commission, because your question involves ethics. Our Office defers to the Ethics Commission since it was given authority by the Legislature to interpret and issue opinions regarding the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended). We draw your attention, however, to section 8-13-750 of the Ethics Act, which states:

- (A) No public official . . . may cause the employment, appointment, . . . or advancement of a family member to a state or local office or position in which the public official . . . supervises or manages.

S.C. Code Ann. § 8-13-750(A) (1976 Code, as amended).

You should also review the Town of Sellers Ordinances for guidance. To the best of our knowledge, the ordinances are not published, and are therefore not available for our review.

Question 3:

Does the Town of Sellers Mayor have the authority to appoint his/her friends who do not live in the city limits to certain committees over the voting citizens that live within the city limits?

Pursuant to section 5-9-30, the mayor in a mayor-council form of government has the power to appoint all municipal employees and appointive administrative officers, except as otherwise provided by law or personnel rules. You appear to be asking if there is a residency requirement for appointment to municipal committees. As we have not been provided with any information regarding the committees, we will provide you with the general law.

The qualifications for a particular position must be reviewed in order to determine if there is a residency requirement. The South Carolina Constitution provides qualifications for public offices in the State and its political subdivisions. A public officer is described as:

“One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907), “In considering whether a particular position is an office in

the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority ...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010).

In determining whether a position is a public office, some factors to be considered are:

whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

The South Carolina Constitution requires that “[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector” S.C. Const, art. XVII § 1. This Office has previously determined that “Article XVII, section 1 of the South Carolina Constitution (1976) specifically imposes a residency requirement on all officers.” Op. S.C. Atty. Gen., 2007 WL 1651338 at 2 (May 21, 2007). We explained:

Section 7-5-120 of the South Carolina Code (Supp. 2006) provides the requirements of a qualified elector. Among these is the requirement that the elector be “a resident in the county and in the polling precinct in which the elector offers to vote.” S.C. Code Ann. § 7-5-120. This constitutional provision not only reiterates the residency requirement set forth in statutory provisions specifically mandating residency as a qualification for office, but our Supreme Court interpreted article XVII, section 1 to imply a residency requirement even when one is not specified by the Legislature. McLure v. McElroy, 211 S.C. 106, 120, 44 S.E.2d 101, 108 (1947), overruled on other grounds by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997).

Id. Therefore, there is a residency requirement for public officers of municipalities.

Some appointed positions do not constitute public offices and other resources must be reviewed for a residency requirement. The South Carolina Code of Laws contains qualifications for certain municipal positions. McQuillin, Municipal Corporations, §10:32 explains:

The state may, and sometimes does, prescribe in what mode or manner a municipal corporation shall exercise its powers. It is generally within the legislative province to direct in what way, through what board of municipal officers or agents, or by what municipal officers the powers given shall be exercised.

Municipal ordinances can also provide qualifications for a municipal position. As explained by a legal treatise, “[m]unicipalities have the legislative authority articulated in state constitution to enact qualifications and standards for appointive employee positions” 56 Am. Jur. 2d Municipal Corporations § 208 (quoting Kane v. City of Albuquerque, 358 P.3d 249 (N.M. 2015)). Municipal ordinances can further add qualifications to a municipal position that has been created by the State Constitution or by statute:

The qualifications prescribed by constitution or statute are usually sufficient, but charters and ordinances sometimes name additional qualifications which are not to be inconsistent with the constitution or statute unless by virtue of constitutional grant.

McQuillin, Municipal Corporations, § 12:97.

Additionally, municipal personnel rules must be examined for a residency requirement, as section 5-9-30 specifically provides that the appointment powers of a mayor in a mayor-council form of government are subject to both the law and any adopted personnel rules. A municipal board, commission, or committee may also have its own qualifications for membership. Therefore, each appointment by the Town of Sellers Mayor must be analyzed on an individual basis to determine if it has a residency requirement.

CONCLUSION

In conclusion, the Town of Sellers Mayor must submit to and comply with the State Constitution and State Code of Laws, including those sections pertaining to dual office holding. We suggest that you contact the State Ethics Commission and review the Town of Sellers Ordinances regarding the Sellers Mayor’s authority to appoint and to hire family members for municipal positions. Each appointment by the Sellers Mayor to a municipal position must be analyzed on an individual basis to determine if it has a residency requirement.

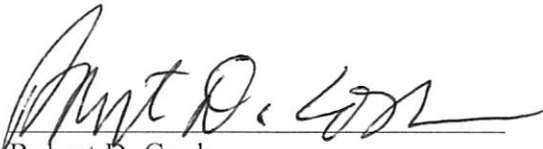
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Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General