



ALAN WILSON
ATTORNEY GENERAL

January 14, 2025

Peter M. Balthazor, Esq.
Riley Pope & Laney, LLC
2838 Devine Street
Columbia, SC 29205

Dear Mr. Balthazor:

We received your letter requesting an opinion on behalf of the Town of Bythewood (the "Town"). We understand you are the attorney for the Town, which has a mayor-council form of government. In your letter, you informed us that the Town currently employs a town administrator and several other administrative positions. The mayor also recently appointed a deputy/assistant town administrator without any input from the Town's council. The Town's council then began the process of amending the Town's budget which, as you describe, "would effectively strip the budget of the appropriation for the appointment of additional administrative positions by the mayor." As such, you request an opinion addressing the following two questions:

1. Can a strong-mayor appoint a deputy/assistant town administrator without seeking the input and/or approval of the town council?
2. Can a town council lawfully amend a municipality's budget in the manner described herein to usurp a strong mayor's responsibility and duty to appoint municipal employees.

Law/Analysis

As you mentioned in your letter, chapter 9 of title 5 of the South Carolina Code establishes the mayor-council form of municipal government. Under this form of government, the mayor is the chief administrative officer for the town. S.C. Code Ann. § 5-9-30 (2004). Section 5-9-30 of the South Carolina Code sets forth the mayor's responsibilities, including:

- (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

S.C. Code Ann. § 5-9-30(1). Moreover, while a town council may establish departments, offices, and agencies “[a]ll 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.” S.C. Code Ann. § 5-9-40 (2004). Therefore, aside from another statute providing for the appointment of a municipal employee, the mayor in a mayor-council form of government has plenary power to appoint municipal employees as he or she deems necessary. Our courts have recognized this authority finding that in a mayor-council form of government, the mayor has the authority under section 5-9-30 to discharge volunteer firefighters and municipal police chiefs. Miller v. Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979); Morris v. Town of Moncks Corner, No. 90-CP-08-1498, 1992 WL 354206, at *1 (S.C. Com. Pl. Jan. 13, 1992).

This Office has consistently held a council cannot usurp duties that are specifically granted via statute to a mayor. Ops. Att’y Gen., 2013 WL 1695514 (S.C.A.G. Mar. 28, 2013); 2012 WL 440544 (S.C.A.G. Jan. 13, 2012); 1979 WL 43108 (S.C.A.G. Oct. 12, 1979). In a 2008 opinion, we were asked to advise on whether the Town could require the mayor to consult with the Town’s council prior to suspending or removing municipal employees and appointed administrative officers. Op. Att’y Gen., 2008 WL 903980 (S.C.A.G. Mar. 3, 2008). Citing two South Carolina Supreme Court cases, we concluded:

For the same reasons expressed in *Pechilis* and *Green*, we deem a requirement that the Mayor “consult” with Town Council prior to suspending or removing municipal employees and appointive administrative officers “chills” the discretion bestowed upon a mayor to make such decisions exclusively under the mayor-council form of government. As stated in your letter, § 5-9-30(1) bestows upon the mayor the power “to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers.” Nothing in this provision states that the mayor must “consult” with Council prior to suspending or removing an employee. An ordinance establishing such a requirement would, in our opinion, impose conditions upon the mayor’s discretion which state law does not authorize.

Id. (citing State v. Pechilis, 273 S.C. 628, 258 S.E.2d 433 (1979); State v. Green, 220 S.C. 315, 67 S.E.2d 509 (1951)). In a subsequent opinion, we opined the same was true for an ordinance requiring a council to approve both appointments and dismissals of municipal department heads. Op. Att’y Gen., 2010 WL 9502817 (S.C.A.G. Mar. 30, 2010). As such, it continues to be the position of this Office that any ordinance that has the potential to usurp the authority of a mayor to appoint or remove municipal employees in a mayor-council form of government is likely invalid.

In your letter, you inquire as to whether the mayor must seek input from the council prior to appointing a deputy/assistant town administrator. Initially, in a 2006 opinion, we considered a mayor’s authority regarding the appointment and removal of a town administrator. Op. Att’y Gen.,

2006 WL 1207275 (S.C.A.G. Apr. 27, 2006). Relying on the portion of section 5-9-40 of the South Carolina Code stating: "The mayor and council may employ an administrator to assist the mayor in his office," we concluded the Legislature intended for the mayor and the council to appoint the town administrator; with the mayor's role in the appointment being consistent with his position as a member of council and not requiring separate approval in his role as mayor. Id. Thus, we recognized the appointment of a city administrator as a statutory exception to the mayor's general authority to appoint and remove municipal employees. Nonetheless, we find no statutory authority for the appointment of a deputy/assistant town administrator. Thus, we presume this position would fall under the mayor's general authority to appoint municipal employees. As such and consistent with our prior opinions, we believe the mayor has the authority to create such a position if he deems it necessary for the good of the municipality and may appoint someone to fill this position without the approval of the council.

Next, you inquire about the ability of the council to amend the Town's budget to eliminate funding for particular municipal positions like the deputy/assistant town administrator. While the Legislature tasks the mayor with preparing and submitting the annual budget to council, it clearly placed responsibility for the budget with council in section 5-9-40 stating, "The council shall adopt an annual budget for the operation of the municipality and capital improvements." Moreover, we concluded that mayors cannot expend funds which are not appropriated by the municipal council. Op. Att'y Gen., 1979 WL 43207 (S.C.A.G. Dec. 17, 1979). Nonetheless, we have also determined:

While it is true that the council exercises totally the budgetary authority of the municipal government and, consequently, can increase, decrease or otherwise alter appropriations for specific municipal officers and functions [§ 5-7-216], nevertheless, it cannot so decrease the appropriations of an elected official's office as to prevent its proper functioning and, thus, indirectly, to abolish that official's office. *See generally*, 20 CJS Counties §§ 100(a), (b) and (b); 56 AM.JUR.2d Municipal Corporations §§ 237 through 239; 3 McQUILLIN MUNICIPAL CORPORATIONS § 12.118.

Op. Att'y Gen., 1979 WL 43108 (S.C.A.G. Oct. 12, 1979). Because the mayor likely established the deputy/assistant town administrator position pursuant to his authority in section 5-9-30(1), we do not believe this position amounts to a municipal officer as referenced in our 1979 opinion. Nonetheless, the council cannot use the budget in such a way that the mayor, who most certainly is a municipal officer, cannot perform his statutorily required duties. Whether the council's actions regarding the Town's budget as described in your letter infringe upon the duties and responsibilities of the mayor is a question of fact. As we stated in numerous opinions, this Office is without authority and ability to make factual determinations for purposes of an opinion. Op. Att'y Gen., 2010 WL 928445 (S.C.A.G. Feb. 18, 2010) ("This office has repeatedly stated that an opinion of this office cannot determine facts noting that the determination of facts is beyond the scope of an opinion of this office."). As such, you may need to seek judicial clarification as to whether the council's actions regarding budget amendments exceed its authority.

Conclusion

Barring a conflicting statute, section 5-9-30(1) of the South Carolina Code clearly gives the mayor in a mayor-council form of municipal government the authority to appoint and remove municipal employees as he or she deems necessary. Consistent with prior opinions of this Office, we believe the Town's council may not attempt to usurp a mayor's authority in this regard by requiring approval of those municipal employees the mayor is charged with appointing. While it is our belief that pursuant to section 5-9-40 of the South Carolina Code both the council and mayor are charged with appointing town administrators, we do not find a statute pertaining to the appointment of deputy/assistant town administrators. As such, it is our understanding that this position was created by the mayor in accordance with his authority to appoint municipal employees under section 5-9-30(1). Therefore, we do not believe the mayor can be required to seek the input or approval of the council prior to appointing someone to this position.

Regarding the Town's ability to amend its budget to effectively prevent the appointment of additional administrative positions by the mayor, section 5-9-40 places the responsibility of adopting a municipal budget with the council. Moreover, the mayor is prohibited from expending funds not appropriated by the council. However, we do not believe the council may reduce the budget in such a way that frustrates the mayor's ability to perform his statutory duties including hiring necessary employees.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General