



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 8, 2004

William E. Whitney, Jr., Esquire
Union City Attorney
P. O. Box 266
Union, South Carolina 29379

Dear Mr. Whitney:

In your recent letter, you note that "the referendum to change the form of government [for the City of Union] from the weak mayor form to the strong mayor form passed by an overwhelming majority." The margin was almost 3 to 1 to change the form. You further indicate that "[w]e are waiting [on] a decision from the Justice Department at this point regarding pre-clearance." As you state, "[i]f we receive the pre-clearance then we will enact an ordinance adopting the change in the form of government and file it with the Secretary of State."

Consideration may be given under the new form of government to assign the duties of full-time Administrator to the mayor. Your question is as follows: "[s]ince a new form of government will be established, can the council set a salary for that position after the ordinance adopting the form of government is approved?"

Law / Analysis

By way of background, we note that mayor-council form of government ("strong mayor") is set forth in S.C. Code Ann. Section 5-9-10 et seq. Pursuant thereto, Section 5-9-30 provides in pertinent part that

[t]he 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:

... (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.

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In addition, § 5-9-40 further provides the following:

[t]he 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.

(emphasis added).

Further, § 5-7-170 provides:

[t]he council may determine the annual salary of its members by ordinance; provided, that an ordinance establishing or increasing such salaries shall not become effective until the commencement date of the terms of two or more members elected at the next general election following the adoption of the ordinance, at which time it will become effective for all members whether or not they were elected in such election. The mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.

Thus, the question raised by your request is whether § 5-7-170 or any other provision of law prohibits the Union Town Council from now assigning the duties of Town Administrator to the Mayor and setting "a salary for that position after the ordinance adopting the form of government is approved?" It is our opinion that such action by council is not prohibited.

Authorities from other jurisdictions have concluded that statutes such as § 5-7-170 are inapplicable "... where the duties added or taken away are extrinsic to the office and not incidental or germane thereto" 67 C.J.S. Officers, § 235. Moreover, other authorities have concluded that where a new form of government is created, the council may fix the salary of new officers, such as the mayor, notwithstanding a prohibition against increasing the mayor's salary during the term for which he is elected. Rockwood v. City of Cambridge, 228 Mass. 249, 117 N.E. 312 (1917). In Rockwood, the Court, in rejecting the argument that the new city council was prevented from setting a new salary, concluded that

[w]hen in November, 1915, the defendant city adopted the second of the four plans of government set forth in part 3, St. 1915, c. 267, a new system of government came into effect, Cunningham v. Cambridge, 222 Mass. 574, 577, 111 N.E. 409, Am. Cas. 1917C, 1100; and the office of mayor under the new system of government (which came into effect then) though called by the same name was a new office, Donaghy

v. Macy, 167 Mass. 178, 45 N.E. 87. In that new office the old city council had a passing interest at the most. It was the intention of the Legislature in enacting section 7, part 3, to provide that the salary for services to be performed by the incumbent of the new office should be determined by the new city council and that the salary so established should not be increased or diminished during the term for which the incumbent had been elected. It is plain that in enacting section 4, part 1, it was not the intention of the Legislature to modify in any way the authority given to the new city council by section 7, part 3.

117 N.E. at 313.

Similarly, the Court in State ex rel. Whalen v. Player, Comptroller, 280 Mo. 496, 218 S.W. 859 (1919) held that a constitutional provision prohibiting the increase of compensation of an officer during his term of office was inapplicable to a newly created office. There, the Supreme Court of Missouri stated:

[i]nasmuch as we have held that the office of member of the house of delegates was abolished by the new charter, and that relator, since its adoption and taking effect, has occupied the new office of alderman, we must rule that this section of the Constitution has no application because it is not contended that relator's salary, as alderman, has been increased during his term of office. The creation of a new office, with a higher salary, and the holding thereof by relator, since his election as member of the house of delegates, which was abolished by the new charter, is not prohibited by the Constitution.

218 S.W. at 861.

The reasoning of these cases is in accord with § 5-9-40 which authorizes the mayor and council to "employ an administrator to assist the mayor in his office." In our view, the authority to "employ" an administrator would necessarily include the authority to assign the administrator's duties to the newly created office of "strong mayor" in the Town of Union. Thus §§ 5-9-40 and 5-7-170 must be read together and in harmony with one another. When read in conjunction, the assignment by Town Council of additional duties to the newly created office of mayor in the mayor-council form of government with a commensurate salary attached thereto would not, in our opinion, contravene § 5-7-170 or any other provision of law.

Moreover, the fact that the General Assembly created the separate position of Administrator in § 5-9-40 is also instructive. Such would indicate that the assignment of such duties to the mayor in a "strong mayor" form of government would constitute an example of duties which are "extrinsic ... and not incidental or germane thereto." 67 C.J.S. Officers, supra at § 235. As we understand your letter, any additional compensation for the mayor would be compensation for additional duties of

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Administrator imposed by Union City Council. As such, we do not believe such would contravene state law.

Very truly yours,

A handwritten signature in black ink, appearing to be 'RDC', with a long horizontal stroke extending to the right.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an