

5050 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 31, 2005

Greg W. Anderson, Esquire
Johnston Town Attorney
Post Office Box 507
Edgefield, South Carolina 29824

Dear Mr. Anderson:

In a letter to this office you indicated that one of the members of the Johnston Town Council was recently deployed to Iraq and will be gone approximately eighteen months. The councilman was elected in the general election of 2004 with his term expiring in 2008. You have referenced the provisions of S.C. Code Ann. §§ 8-7-10 et seq. and questioned whether the Town is required to fill the vacancy for the period of time the councilman serves in Iraq. You also questioned whether if the town fills the vacancy, does the Town stop salary payments to the councilman and pay the replacement instead.

Pursuant to Section 8-7-30,

The absence of any officer from his office or position caused by his being in the military service shall not create a forfeiture of or vacancy in the office or position to which such officer was elected or appointed but shall be construed merely to create a temporary vacancy. Wherever the terms "forfeiture of office" or "vacancy in office" or other words of similar import are used in any law of this State in relation to an officer they shall be construed in accordance with the provisions of §§ 8-7-10 to 8-7-80 and shall not be construed to apply to any absence of such officer who is absent from his office or position by reason of his being in the military service. An officer who is present at and able to perform the duties of his office shall not be considered absent within the meaning of this section.

Section 8-7-40 provides that

In case a temporary vacancy is created in any office or position by reason of the absence of the officer in the military service the appointive authority shall appoint some person to fill temporarily the office or position to which such officer was

Respectfully,
Henry McMaster

elected or appointed. All such appointees shall hold the office or position which they are temporarily to fill during the absence of the officer in the military service or until the expiration of the term for which such officer in the military service was elected or appointed, whichever period of time is the shorter. (emphasis added).

Pursuant to Section 8-7-50,

The person appointed in accordance with the provisions of §§ 8-7-10 to 8-7-80 to fill temporarily any office or position shall have and may exercise all the rights, powers, authority and jurisdiction and shall perform the duties vested in or required by law of the officer whose office or position such person is so appointed to fill temporarily and shall receive the same salary, fees, expenses or other compensation as such officer would be entitled to receive. (emphasis added).

As stated in Section 8-7-90,

All officers and employees of this State or a political subdivision of this State who are either enlisted or commissioned members of the South Carolina National Guard, the United States Army Reserve, the United States Air Force Reserve, the United States Naval Reserve, the United States Marine Corps Reserve, or the United States Coast Guard Reserve are entitled to leaves of absence from their respective duties without loss of pay, time, or efficiency rating for one or more periods not exceeding an aggregate of fifteen regularly scheduled work days¹ in any one year during which they may engage in training or any other duties ordered by the Governor, the Department of Defense, the Department of the Army, the Department of the Air Force, the Department of the Navy, the Department of the Treasury, or any other department or agency of the government of the United States having authority to issue lawful orders requiring military service. Saturdays, Sundays, and state holidays may not be included in the fifteen-day aggregate unless the particular Saturday, Sunday, or holiday to be included is a regularly scheduled work day for the officer or employee involved. In the event any such person is called upon to serve during an emergency he is entitled to such leave of absence for not exceeding thirty additional days.

As used in this section, "in any one year" means either a calendar year or, in the case of members required to perform active duty for training or other duties within or on a fiscal year basis, the fiscal year of the National Guard or reserve component issuing the orders. (emphasis added).

¹A "work day" should be construed as a calendar day. Op. Atty. Gen. dated August 26, 2002.

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The provisions of this section must be construed liberally to encourage and allow full participation in all aspects of the National Guard and reserve programs of the armed forces of the United States and to allow state officers and employees who are enlisted or commissioned members of the National Guard or reserve components to excel in military and emergency preparedness and service by taking full advantage of all career-enhancing assignments and training opportunities. (emphasis added).²

In reviewing your questions, several principles of statutory construction are relevant. Generally, when interpreting the meaning of a statute, certain basic principles must be observed. The cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Insurance Company, 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984). Courts must apply the clear and unambiguous terms of a statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed therein. Jones v. South Carolina State Highway Department, 247 S.C. 132, 146 S.E.2d 166 (1966).

Consistent with the above, in my opinion, pursuant to Section 8-7-30 and 8-7-40 an individual should be appointed to fill the vacancy for the time the regular councilman serves in Iraq. As stated in Section 8-7-40, in the case of a temporary vacancy in an office, "...the appointive authority shall appoint some person to fill temporarily the office..." The word "shall" typically is defined as mandatory and therefore the action referred to is mandatory. Ops. Atty. Gen. dated August 17, 2004 and October 26, 1987. Pursuant to that same provision, the appointee holds the position during the absence of the officer in military service or until the regular expiration of the term of office for that position, whichever term is shorter. Moreover, consistent with Section 8-7-50, the appointee shall receive the same salary as the regular officer would have received during the period of temporary appointment. Pursuant to Section 8-7-90, as to the councilman serving in the military consistent with that provision in a National Guard or Reserve unit, that individual would receive pay

²As to any perceived inconsistency with the provisions of Section 8-7-80 which states that "an officer who shall be absent from his office or position in the military service shall not be entitled to any compensation as such officer during his absence...", in my opinion Section 8-7-90 should be read as controlling. Generally, different statutes in pari materia, though enacted at different times, and not referring to each other must be construed together as one system and as explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934). If an irreconcilable conflict exists, the statute later in time will prevail as the later expression of legislative will. See: Feldman v. S.C. Tax Commission, 203 S.C. 49, 26 S.E.2d 22 (1943); See also Op. S.C. Atty. Gen., dated April 30, 1999. As Section 8-7-90 is the later expression of legislative will, such provision must be given effect.

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not exceeding that of fifteen work days in each year of military service. As specified by such statute, its provisions must be construed liberally in support of the individual serving in the military.

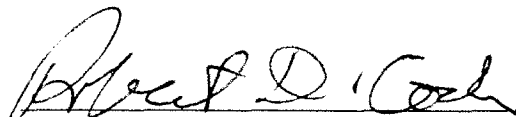
If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General