8151 Library

HENRY MCMASTER
ATTORNEY GENERAL

April 27, 2006

Lake City City Council
P.O. Box 1329
202 Kelly Street
Lake City, South Carolina 29560

Dear Councilmembers:

We received a letter from councilmembers Lovith Anderson, Jr., Sondra Fleming-Crosby, Franklin McAlister, and Jean Lee requesting an opinion of this Office concerning an employment contract the Mayor of Lake City (the "Mayor") entered into with the City Administrator. According to the letter, at the January 14, 2003 Lake City (the "City") City Council (the "Council") meeting, the Council "approved for the Mayor to enter into a contract with the City Administrator . . . but did not give the Mayor . . . the authority to write a contract granting him Veto powers." Attached to the letter, we found a copy of the January 14, 2003 Council meeting minutes, which provides with regard to the City Administrator's contract:

> A motion was made by Councilmember Kenneth Feagins and seconded by Mayor Pro Tem Joseph Singletary to authorize the Mayor to enter into a four year contract with the City Administrator, George Simmons to run concurrent with the Mayor's term. The motion was carried with Councilmember Russ Martin abstaining.

Also attached to the letter, we found a portion of the City Administrator's employment contract, dated January 14, 2003, which contains the following provision:

> In the event the City Administrator is terminated by the Mayor and the majority of council before expiration of the aforesaid term of employment, and during such time that City Administrator is willing and able to perform his duties under this Agreement, then in that event, the City agrees to pay the City Administrator salary and benefits for a (6) six month period as severance pay.

Request Letter

The City Administrator's employment contract appears to have become an issue in light of the February 14, 2006 Council meeting. The requesting members of the Council included a copy of those minutes with their request. These minutes indicate a councilmember made a motion to terminate the City Administrator's employment contract, which was seconded by another councilmember. Apparently, four of the councilmembers were interested in terminating the contract, while the Mayor and two other councilmembers were not.

Based on the above, the requesting councilmembers asked us to address whether the Mayor has the authority to include the above provision in the City Administrator's employment contract, which they indicate grants the Mayor veto power over the Council in determining whether or not to terminate the City Administrator's contract. In addition, the requesting councilmembers asked whether a contract is mandatory for an appointed position.

Based on our review of the municipal code governing a mayor-council form of government, section 5-9-40 of the South Carolina Code authorizes a city council to appoint, and thus remove, a city administrator. Additionally, we conclude it does not grant a mayor separate authority to approve or disapprove the appointment or removal of a city administrator. Because a mayor does not have such authority and if he or she is not given such authority by council, a mayor may not bind the municipality to such a term by including it in a city administrator's contract. Finally, we find no statute requiring municipalities to enter into written contracts with their appointed officials.

Law/Analysis

Authority to Appoint and Remove a City Administrator

We understand the City operates under a mayor-council form of government. Chapter 9 of title 5 of the South Carolina Code sets forth this form of municipal government and calls for the council to be composed of a mayor and at least four council members. S.C. Code Ann. § 5-9-20 (2004). Section 5-9-10 of the South Carolina Code (2004), however, refers to chapter 7 of title 5 to supplement the provisions contained in chapter 9. This section states:

> Except 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.

Id. Accordingly, we refer to section 5-7-160 of the South Carolina Code (2004) to understand the powers vested in a council:

> All powers of the municipality are vested in the council, except as otherwise provided by law, and the council shall provide for the exercise thereof and for the performance of all duties and obligations

> imposed on the municipality by law. A majority of the total membership of the council shall constitute a quorum for the purpose of transacting council business.

In regard to a mayor's authority under the mayor-council form of government, section 5-9-30 of the South Carolina Code (2004) deems a mayor the "chief administrator of the municipality" and specifies the powers and responsibilities specifically afforded to a mayor in a mayor-council form of government. Section 5-9-30 gives a mayor the specific power to appoint, suspend, and remove all municipal employees and appointive administrative officers, "except as otherwise provided by law." In prior opinions of this Office, we interpreted the phrase "except as otherwise provided by law to mean "if an appointive office is provided for by statute, the appointment of the official who occupies that office must be made pursuant thereto." Op. S.C. Atty. Gen., December 17, 1976. See also, Op. S.C. Atty. Gen., September 27, 1996; Op. S.C. Atty. Gen., January 6, 1977. With regard to the employment of a city administrator, section 5-9-40 of the South Carolina Code (2004), provides:

> The 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.
>
> All 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.
>
> The council shall adopt an annual budget for the operation of the municipality and capital improvements.

(emphasis added). In light of our prior opinions, we find the position of the city administrator is "otherwise provided by law" pursuant to section 5-9-40 and therefore, is not under the purview of a mayor's sole authority.

Because the power of removal is incidental to the power to appoint, we analyze who has the authority to remove a city administrator based on who has the power to appoint a city administrator. State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) (stating the power to terminate or remove is incidental to the power to appoint); Op. S.C. Atty. Gen., November 26, 1984 (same). Section 5-9-40, as cited above, states in pertinent part: "The mayor and council may employ an administrator to assist the mayor in his office." Based on the requesters' letter, we

gather they interpret this provision as allowing authorizing the Council, with the Mayor as a member, to appoint a city administrator, but not affording the Mayor separate authority to determine whether to appoint a particular individual as city administrator. Additionally, based on our conversations with a representative of the South Carolina Municipal Association, the Association also interprets this provision as not affording a mayor with a vote separate from the council, but simply references the mayor as a member of council.

In conducting our analysis, we were unable to locate any opinion of our courts interpreting section 5-9-40. Thus, we employ the rules of statutory interpretation to determine whether the Mayor's authority to appoint a city administrator solely consists of his ability to vote as a member of council, or whether the Mayor has authority separate and equal to the collective authority of the Council in making this determination.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hawkins v. Bruno Yacht Sales, Inc., 353 S.C. 31, 39, 577 S.E.2d 202, 207 (2003).

> All technical rules of construction are subservient to this paramount consideration. In determining the legislative intent, the Court will, if necessary, reject the literal import of words used in a statute. It has been said that "words ought to be subservient to the intent, and not the intent to the words."

Arkwright Mills v. Murph, 219 S.C. 438, 443-44, 65 S.E.2d 665, 667 (1951) (quoting Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942)).

Admittedly, the authority given by the portion of section 5-9-40 in question is not clear. Section 5-9-20 of the South Carolina Code, under the provisions pertaining to the mayor-council form of government, includes the mayor as a member of council, and pursuant to section 5-9-30(3), the mayor is "to preside at meetings of the council and vote as other councilmen." Thus, one could argue because the mayor is already a voting member of council, the Legislature's inclusions of "[t]he mayor" separate from "council" in section 5-9-40 indicates an intent to give the mayor separate and equal authority to that of the council in deciding to employ a city administrator. Furthermore, one could argue this interpretation comports with other provisions in the statutes governing the mayor-council form of government indicating the Legislature's intent to vest administrative authority in the mayor. See e.g., S.C. Code Ann. § 5-9-30(2) (granting the mayor authority to appoint and supervise all city employees and administrative officers); S.C. Code Ann. § 5-9-30(4) (giving the mayor the power to direct and supervise administration of all departments, offices, and agencies); S.C. Code Ann. § 5-9-40 (conferring authority to appoint and supervise any officer to supervise the departments, offices, and agencies under direction and supervision of the mayor to the mayor). However, we are inclined to follow the interpretation as understood by the requesting members of the Council and the South Carolina Municipal Association.

To read section 5-9-40 to provide the mayor with separate and equal authority in the appointment of a city administrator, would in effect, as the request letter suggests, give the Mayor the power to veto the appointment or removal of the City Administrator. Based on our reading of the statute, we do not believe the Legislature intended to grant a mayor such authority. Generally, courts recognize "the mayor has a veto power only when and to the extent that is given by law, and the power cannot be enlarged by construction." 5 McQuillin Mun. Corp. § 16.42 (1996). Furthermore, in an opinion of this Office dated November 13, 1987, considering the powers given to a mayor under the mayor-council form of government, we determined the Legislature did not give the mayor veto powers. Op. S.C. Atty. Gen., November 13, 1987. Additionally, finding the Legislature did not expressly reserve the authority to select a bookkeeping system in the mayor by including such power in the mayor's enumerated powers under section 5-9-30, we concluded such power rests with the council.

With regard to a mayor's veto power over the council in appointing a city administrator, the Legislature did not expressly provide for such a power pursuant to section 5-9-30, in which the Legislature specifically listed other powers afforded to mayors, or any other provision contained in the Code applicable to the mayor-council form of municipal government. Therefore, we presume the Legislature did not intend for a mayor to hold such a power. Furthermore, we believe the better reading the phase "mayor and council," in the context of section 5-9-40, is that of a single collective body. Nebraska Tel. Co. v. City of Fremont, 99 N.W. 811, 812 (Neb. 1904) (interpreting the phrase "mayor and council" in an ordinance requiring "the consent of the mayor and council" as to "constitute a single collective and deliberative body."). Thus, we believe the phase "mayor and council" refers to the mayor with respect to his authority as a member of council and affording him or her the right to act as a member of council, but not affording the mayor any additional authority. Alternatively, section 5-4-90may be read as giving a municipality, acting through its council, which includes the mayor, the authority to employ a city administrator, not as giving the mayor and the council individual the authority to appoint a city administrator. Therefore, we opine section 5-9-40 gives the Council, and the Mayor solely as a member of Council, the authority to appoint a city administrator. Accordingly, we conclude the Council holds the incidental power to remove a city administrator. See State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948) (stating the power to terminate or remove is incidental to the power to appoint).

Nevertheless, we recognize one could arguably read section 5-9-40 another way, and only a court may make a final determination as to is interpretation. Thus, we suggest the Council either seek clarification from the courts on the interpretation of statute or legislative action to make the statute more clear.

Impact of Mayor's Lack of Authority on City Administrator's Contract

Next, in light of our interpretation of section 5-9-40 of the South Carolina Code, we now must address the impact of our understanding of the Mayor's authority on the City Administrator's employment contract.

Park v. City of Laurens, 68 S.C. 212, 46 S.E. 1012 (1904), addressed situation in which a taxpayer filed suit against a city based on an agreement between the taxpayer and the city's mayor in which the mayor agreed the city would pay a taxpayers attorney's fees related to a previous suit brought by the taxpayer. Our Supreme Court determined because the mayor lacked the power to make a contract for services under the city's charter, "his agreement in that capacity could not be sustained as a valid exercise of official authority, binding on the city." Id. at 217, 46 S.E. at 1013. Furthermore, the Court found: "We do not think there is any allegation of special authority conferred upon him by the city council." Id. Thus, the Court determined any agreement between the mayor and the taxpayer to pay the taxpayer's attorney's fees is void due to the mayor's lack of authority to enter into such a contract. Id. at 217-18, 46 S.E. at 1013.

This Office addressed a similar issue of a mayor's ability to bind a municipality to a contract in an opinion dated October 9, 2000. The opinion request arose out of a mayor's promise to residents of a recently annexed area of a city that if their property was annexed to the city, he would grant them a business license reduction. Op. S.C. Atty. Gen., October 9, 2000. From the request, we found no indication that the council approved such a reduction. Id. Based on the fact that the statute allowing a municipality to levy a business license tax gives authority to the city, not the mayor, and because section 5-9-20 of the South Carolina vests the power to conduct city business in the council, the mayor lacked authority to enter into such an agreement. Id. Accordingly, we found the agreement unenforceable due to the mayor's lack of authority to bind the municipality. Id.

The councilmembers requesting this opinion included an excerpt from the City Administrator's employment contract with their request letter. This contract indicates it was entered into by the City Administrator and the Mayor, on the City's behalf. Furthermore, the requesters included an excerpt from the Council meeting minutes at which the Council authorized the employment of the City Administrator. The minutes do not indicate the Council authorized the Mayor to include a term in the contract with the City Administrator giving the Mayor greater authority than he otherwise has under section 5-9-40 of the South Carolina Code. Thus, we find the Mayor, by including such term in the contract, exceeded his authority. Accordingly, we believe the City is not bound by such a term.

Necessity of a Contract for an Appointed Position

Finally, we address your general question as to whether a the City is required to enter into a written employment contract with individuals it appoints. In our review of the municipal code, we found no statutory requirement that a municipality must enter into a written contract with individuals it appoints to serve as a municipal official. Therefore, we believe no written contract is required.

Conclusion

Based on our analysis of the mayor-council form of government, we find section 5-9-40 of the South Carolina controlling as to the appointment of a city administrator in a mayor-council form of government. Furthermore, we read section 5-9-40 as allowing the Council to appoint a city administrator, thus giving the Council the power to remove such an administrator and giving the Mayor no more power in this appointment or removal than his or her vote as a member of Council. Because we find the Mayor's authority limited in this regard, a provision in a city administrator's employment contract requiring the Mayor's separate approval for the termination of the city administrator is beyond the scope of the Mayor's authority. Therefore, we believe the City would not bound by such a provision. Finally, we find no statutory authority requiring a municipality to enter into a written contract with its appointees.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General