



ALAN WILSON  
ATTORNEY GENERAL

March 16, 2011

The Honorable Kris Crawford  
Member, House of Representatives  
327-D Blatt Building  
Columbia, South Carolina 29211

Dear Representative Crawford:

We understand you desire an opinion of this Office concerning an issue involving the Florence City Council ("Council"). Specifically, you ask us to address the following two issues:

Issue No. 1

Is it lawful for the City Council of the City of Florence to create a new position by voting on a detailed job description and requiring the City Manager to use the detailed job description in filling and supervising the position, or is such action precluded by Title 5 of the South Carolina Code of Laws since Florence operates as a Manger-Council form of government?

...

Issue No. 2

If you respond to Issue No. 1 above by concluding that Council was within its authority in a Council-Manager form of government to specify a specific job description, may such a description include a requirement that the individual hired ". . . shall not serve as director, officer, or member of any other entity . . ."?"

**Law/Analysis**

In accordance with section 5-7-30 of the South Carolina Code (Supp. 2010), in addition to the powers specifically afforded to municipalities, they "may enact regulations, resolutions,

and ordinances, not inconsistent with the Constitution and general law of this State.” Chapter 13 of title 5 contains specific provisions dealing with the council-manager forms of municipal government. Section 5-13-30 of the South Carolina Code (2004) states the powers of the municipal council in a council-manager form of government. Namely, this provision states:

All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. Without limitation of the foregoing, the council shall:

...

(10) Enact ordinances of any nature and kind, not prohibited by the law or Constitution of the State or of the United States . . . .

S.C. Code Ann. § 5-13-30. Accordingly, Council has broad authority to take action, so long as the action taken is not prohibited under State law or the Constitution.

Under the council-manager form of municipal government, the Legislature provides that specific powers be vested in the manager. These powers are as follows:

The manager shall be the chief executive officer and head of the administrative branch of the municipal government. He shall be responsible to the municipal council for the proper administration of all affairs of the municipality and to that end, subject to the provisions of this chapter, he shall:

(1) Appoint and, when necessary for the good of the municipality, remove any appointive officer or employee of the municipality and fix the salaries of such officers and employees, except as otherwise provided in this chapter or prohibited by law and except as he may authorize the head of a department or office to appoint and remove subordinates in such department or office;

(2) Prepare the budget annually, submit it to the municipal council and be responsible for its administration after adoption;

- (3) Prepare and submit to the municipal council at the end of each fiscal year a complete annual report on the finances and administrative activities of the municipality for the preceding year and make such other financial reports from time to time as may be required by the council or by Chapters 1 through 17;
- (4) Keep the municipal council advised of the financial condition and future needs of the municipality and make such recommendations as may seem to him desirable; and
- (5) Perform such other duties as may be prescribed by law or required of him by the municipal council, not inconsistent with the provisions of Chapters 1 through 17.

S.C. Code Ann. § 5-13-90 (Supp. 2010). In addition, section 5-13-40 of the South Carolina Code (2004) states in relevant part:

- (b) Neither the council nor any of its members shall in any manner be involved in the appointment or removal of any municipal administrative officers or employees whom the manager or any of his subordinates are empowered to appoint.
- (c) Except for the purpose of inquiries and investigations, neither the council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager except through the manager, and neither the council nor its members shall give orders to any such officer or employee, either publicly or privately.

Thus, clearly the manager in a council-manager form of government maintains the authority to hire municipal employees. However, nothing in sections 5-13-90 or 5-13-40 give the manager sole authority with regard to establishing municipal positions. Furthermore, section 5-13-100 of the South Carolina Code (2004) specifically gives Council the authority to create, change and abolish offices, departments, and agencies. This provision states:

Municipal council may, by ordinance, create, change and abolish offices, departments or agencies of municipal government upon the recommendation of the manager or may, in accordance with such recommendations, assign additional functions and duties to such

offices. The head of each department shall be designated director thereof and shall have supervision and control over his department subject, however, to the direction of the manager.

S.C. Code Ann. § 5-13-100. Therefore, we are of the opinion that Council may create municipal positions and may establish a detailed job description for that position, but the city manager shall make the hiring decisions for the position.

Next, you question whether or not Council may include in the job description for a particular position a requirement that individual serving in the position not “serve as director, officer, or member of any other entity . . . .” In your letter to us, you argue that this is an invasion of the employee’s rights because it precludes the employee from serving “on boards or be a member of organizations or entities of any type, including religious organizations and entities.”

We do not have a copy of the full job description and are not aware of whether Council defined the term “entity.” Thus, we are not sure exactly what this provision in the job description is prohibiting. However, as cited above, section 5-13-30 gives Council the authority to make determinations of policy. Furthermore, we note that on occasion, this Office has addressed the ability of governmental entities to place restrictions on their employees’ service and membership in outside organizations. Particularly, in several opinions, we determined that a governmental entity may restrict the political activity of its employees without violating the due process or equal protection rights of those employees. Ops. S.C. Atty. Gen., December 16, 2009; November 2, 2005; March 18, 1998; August 24, 1982; September 27, 1979. In those opinions, we relied on several federal court decisions, including the United States Supreme Court’s decision in Broadrick v. Oklahoma, 413 U.S. 601(1973), which concluded that policies restricting government employees from political activity serve an important governmental interest in promoting efficiency and integrity to the discharge of official duties and insulating public employees from political pressures.

As stated previously, we do not have any information on the position in question. Moreover, we are not privy to the reason Council placed the restriction you described on the newly created position. However, we believe a court would employ an analysis similar to that employed by the Supreme Court in Broadrick and would determine whether or not this restriction serves an important governmental interest.

Nonetheless, the determination of whether or not the restriction serves an important governmental interest involves a question of fact. As stated in prior opinions, only a court, not this Office, has the ability to investigate and determine factual issues. Op. S.C. Atty. Gen., July 9, 2010. Therefore, even if we had additional information on the position and the reasons for

Council's decision to place these restrictions on this particular position, we would not be able to determine with finality whether or not the restrictions sufficiently serve an important governmental interest in order to pass constitutional muster.

### Conclusion

Based on our review of the law governing council-manager forms of municipal government, although the manager has discretion in filling the position, we believe Council has authority to create new positions and establish job descriptions for such positions.

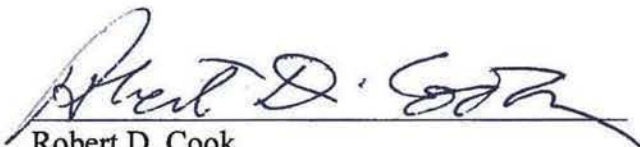
Because we believe Council has authority to create the position, you question whether or not it can prohibit an individual hired for the position from serving "as a director, officer, or member of [another] entity." Initially, we recognize Council has authority to establish personnel policies pursuant to section 5-13-30 of the South Carolina Code. In addition, in several prior opinions dealing with political activity by government employees, we determined that courts will likely uphold such restrictions because they serve an important governmental interest. However, without more information, we are not sure what this provision prohibits. Furthermore, while we presume the restriction is aimed at preventing conflicts of interest, we are not privy to the reasons why Council found it necessary to place this restriction on this particular position. Nonetheless, even if we had more information on the position and Council's reasons for the restriction, determining whether or not those reasons satisfy an important governmental interest is a factual determination that may only be made by a court. Therefore, we are unable to determine whether the restriction is constitutionally valid.

Very truly yours,



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REVIEWED AND APPROVED BY:



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