



ALAN WILSON
ATTORNEY GENERAL

August 3, 2011

Richard E. Thompson, Esquire
Thompson & King
Post Office Box 14230
Anderson, South Carolina 29624

Dear Mr. Thompson:

We understand that your law firm serves as General Counsel for the Town of Williamston South Carolina (the "Town") and that you would like to request an opinion on behalf of the Town concerning health benefits available to the Town's council members. In your letter, you provided the following information:

This issue seeks to resolve any arguable conflict between 1976 South Carolina Code of Law Section 5-7-170, (which provides that Municipal Council determine by Ordinance the annual salary and benefits for its members) with 1976 South Carolina Code of Law Section 1-11-730, as amended (which provides that elected members of participating City and County Council whose members contribute to the South Carolina Retirement System are considered full-time employees and may participate in the South Carolina Employee Insurance Program administered by the South Carolina Budget and Control Board).

This matter arose when the Town of Williamston began participation in the South Carolina Employee Insurance Program on or about October 1, 2010. Apparently, council members have been members of the South Carolina Retirement System previously, but the benefits under the South Carolina Employee Insurance Program only became available to Williamston Councilpersons on October 1, 2010. After implantation of the plan, two separate questions have arisen to date.

The first question concerns the ability of a sitting Councilman who was in office on October 1, 2010 who now needs health insurance because his present coverage with another insurer ends on June 1, 2011. His need for major medical coverage was not contemplated or discussed when Council salary and benefits were approved in late 2010. By way of background information the salary and benefits for Councilpersons were terminated in February of 2006 although Councilpersons could continue their own coverage at their own expense

The second question concerns a Councilman who was elected after 1, 2010 at the November 2, 2010 general election and who took office on January 3, 2011 who now seeks coverage under the South Carolina Employee Insurance Program. His desire for insurance coverage was not known nor discussed when Council salary and benefits were approved in late 2010.

A strict reading of Section 5-7-170 would seem to indicate that neither of these Councilpersons can be afforded coverage at all; however the Legislature under Section 1-11-730 seems to arguably speak in the inclusive terms regarding the availability of healthcare benefits.

Accordingly, "the Town seeks to have an opinion from your office setting forth the proper procedure to use in this and other situations wherein Councilpersons who desire to receive health coverage under the South Carolina Employee Insurance Program may obtain such coverage without violation of 1976 South Carolina Code of Law Section 5-7-170.

Law/Analysis

Section 1-11-720 of the South Carolina Code (2005 & Supp. 2010) provides the entities whose employees are eligible for state health and dental insurance plans (the "Plans"). This section states, in pertinent part:

(A) In addition to the employees and retirees and their eligible dependents covered under the state health and dental insurance plans pursuant to Section 1-11-710, employees and retirees and their eligible dependents of the following entities are eligible for coverage under the state health and dental insurance plans pursuant to the requirements of subsection (B):

...

(8) municipalities;

....

S.C. Code Ann. § 1-11-720(A). Furthermore, subsection (B) of section 1-11-720 provides:

(B) To be eligible to participate in the state health and dental insurance plans, the entities listed in subsection (A) shall comply with the requirements established by the State Budget and Control Board, and the benefits provided must be the same benefits provided to state and school district employees. These entities must agree to participate for a minimum of four years and the board may adjust the premiums during the coverage period based on experience. An entity which withdraws from participation may not subsequently rejoin during the first four years after the withdrawal date.

Thus, section 1-11-720 permits municipalities to participate in the Plans. In a 2001 opinion, addressing a county's participation in the Plans, we noted that "[w]hether the county chooses to pay for the insurance coverage for its employees as a perquisite of their employment is largely left to the governing body of the county." Op. S.C. Atty. Gen., July 19, 2001. However, section 1-11-720 also states that if a municipality elects to participate, it must comply with the State Budget and Control Board's requirements and provide the same benefits available to state employees. We stated in a prior opinion discussing the predecessor to section 1-11-720, section 1-11-142, that these requirements indicate the Legislature intended "the State Health Insurance Plan be a unified system whereby the benefits, obligations and limitations of the Plan will be the same for all members" Op. S.C. Atty. Gen., October 18, 1989.

In our research, we did not find any further legislative guidance with regard to a municipality's participation in the Plans. Moreover, we did not find any official regulations dealing with a municipality's participation in the Plans. However, it is our understanding that the Budget and Control Board, through its Employee Insurance Program ("EIP") division, set forth guidelines for the participation in the Plans for any entity approved to participate by the Legislature, which includes municipalities pursuant to section 1-11-720. South Carolina Budget and Control Boards, South Carolina Budget and Control Board Employee Insurance Program Guidelines for Participation of Entities Approved by the General Assembly to Participate in the State of South Carolina Plan of Benefits, available at http://www.eip.sc.gov/publications/Local_Sub_Handbook.pdf (contained within the Local Subdivision Handbook and Application).

According to these guidelines, eligibility for participation is determined as follows:

EIP shall determine the eligibility requirements for active and retired employees of entities to participate in the state's Plan of Benefits. All of the terms and conditions of the various state plans that are applied to active and retired employees of state agencies and public school districts to determine eligibility shall also be applied to determine the eligibility of active and retired employees of entities who participate in the state's Plan of Benefits, including any exclusions and/or limitations on coverage.

Id. Therefore, whether or not a particular municipal employee is considered eligible to participate in the Plans depends on the EIP's eligibility requirements.

Your letter indicates the Town chose to participate in the Plans. When the Town chose to participate in the Plans, it agreed to abide by the guidelines set forth by the Budget and Control Board. EIP requires that all eligible employees be offered the opportunity to enroll in the Plans. South Carolina Budget and Control Board, Local Subdivision Handbook and Application, available at http://www.eip.sc.gov/publications/Local_Sub_Handbook.pdf. Therefore, if EIP determines a councilperson is eligible under these guidelines, then that person must be offered participation in the Plans. The determination of whether a particular employee, in this instance a councilperson, is eligible to participate in the Plans is a factual determination. On many occasions, this Office explained that, the Office, unlike a court, lacks the capacity to make factual determinations. Op. S.C. Atty. Gen., May 25, 2011. Therefore, we cannot address with finality whether or not the councilpersons you reference in your letter are eligible to participate in the Plans. Nonetheless, we note that the Local Subdivision Handbook published by the Budget and Control Board, states "[e]lected members of participating county and city councils whose members contribute to the South Carolina Retirement Systems (SCRS) are considered full-time employees for the purposes of the plan." South Carolina Budget and Control Board, Local Subdivision Handbook and Application, available at http://www.eip.sc.gov/publications/Local_Sub_Handbook.pdf. You stated in your letter that members of the Town's council are active in the South Carolina Retirement System. Therefore, it appears that the EIP would consider council members employees for purposes of participating in the Plans.

Presuming a council person is eligible under the Plans, you are also concerned as to whether the Town must make contributions toward the premium for that individual. The guidelines instruct as follows with regard to employee contributions to the Plans:

3. The entity shall determine the contribution of the entity and each entity employee for each state plan offered to its active and retired

employees, provided that the contributions of the entity for its active employees shall not be less than the percentage the state contributes toward the premiums for active employees of state agencies and public school districts. The level of premium contribution by the entity, if any, to eligible retirees shall be at the discretion of the entity unless otherwise provided by law. EIP shall bill the entity for the premiums of active and retired employees, survivor and COBRA participants in accordance with normal billing procedures. EIP reserves the right to cancel coverage for nonpayment, upon 30 days notice to the entity.

Id. Therefore, if a municipality elects to participate in the Plans, it must contribute at least as much as the State contributes for eligible State employees. Thus, if the council person in question is eligible to participate in the Plans and chooses to participate, the Town must make a contribution on the councilperson's behalf at least equal to the contribution provided to State employees.

In your letter you indicated your concern that section 5-7-170 of the South Carolina Code (2004) appears to conflict with section 1-11-720. Section 5-7-170 provides as follows:

The 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.

S.C. Code Ann. § 5-7-170.

This Office, like our courts, adheres to the rule of statutory construction that any conflicts between statutes should be reconciled if possible. Steinke v. South Carolina Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999). Therefore, if we can construe both sections 5-7-170 and 1-11-720 giving effect to both, we will. Although your letter mentions that section 5-7-170 gives municipal councils the authority to determine the salary and benefits of its members, we do not find any language in this provisions directly dealing with benefits. Nonetheless, we presume that municipal councils maintain such authority and believe this statute does not conflict with section 1-11-720. As we previously mentioned, whether or not

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a municipality chooses to participate in the Plans is a decision made by the municipality. However, if a municipality chooses to participate, it must abide by the requirements set forth by the Budget and Control Board. Therefore, the choice is left to the council as to whether or not its employees as a whole, including its council members, will participate in the Plans. Thus, we do not believe the choosing to participate in the Plans runs afoul of section 5-7-170.

Conclusion

Pursuant to section 1-11-720, municipalities may voluntarily choose to participate in the Plans. However, this provision also specifies that municipalities choosing to participate must abide by the guidelines set forth by the Budget and Control Board. According to the most recently published guidelines, a municipality participating in the Plans must defer to the EIP with regard to the eligibility of a particular individual. Moreover, the municipality must contribute to the premiums of its eligible employees in an amount equal to what the State would contribute for State employees. Moreover, we do not believe that the terms of section 1-11-720 conflict with section 5-7-170 because the decision as to whether or not municipal employees are covered under the Plans is within the decision making authority of the municipality's council.

Whether or not a particular individual is eligible under the Plans is a question of fact, which cannot be resolved in an opinion of this Office. Nonetheless, from the information provided by the Budget and Control Board it appears that a municipal council member may be eligible. However, we believe that a final determination of eligibility should come from EIP.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General