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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 28, 2003

Teresa P. Hanna, Administrator
City of Johnsonville
Post Office Box 428
Johnsonville, SC 29555

Dear Ms. Hanna:

You have on the behalf of the Mayor of Johnsonville requested an advisory opinion from this Office regarding the following question:

Is the City, either through its Counsel or otherwise, obligated to provide legal representation to the Mayor of the City with respect to an election contest filed by one of the Mayor's election opponents?

You have indicated that the Mayor was elected to a new term as the incumbent in the November 2002 election, which was conducted by Florence County, by a margin of three (3) votes. The Mayor's opponent in that election filed a contest with the Florence County Board of Canvassers which was denied. The Mayor's opponent then filed an appeal with the State Election Commission, who affirmed the Board of Canvasser's decision and upheld the election results. The Mayor's opponent has now appealed the Election Commission decision to the South Carolina Supreme Court, where the case was pending as of the date of your request.

You further indicate that the Counsel to the City of Johnsonville has refused to provide legal representation to the Mayor in the matter that is currently pending before the Supreme Court. The reasoning given by the City Attorney is that the Mayor is a party to this proceeding not in his capacity as Mayor of the City, but a candidate in the November 2002 election. Accordingly, the City Attorney has advised the Mayor that the City is not obligated to provide him with legal counsel in this matter, and moreover the representation of the Mayor in this matter is not within his scope of duties as Counsel to the City of Johnsonville. The Mayor has requested this opinion in order to obtain clarification on this issue.

LAW/ANALYSIS

The general law of this State provides authority for municipalities to employ a city attorney. S.C. Code Ann. §5-7-230 states that "[t]he city council may elect or appoint a municipal attorney

... whose duties shall be as prescribed by law.” As you can see, city council possesses the power to dictate the duties of the municipal attorney. Generally, the duties of a municipal attorney require him to act as attorney, counsel, and legal advisor of every agency of the city, and of the heads of the departments. Op. S.C. Atty. Gen., dated September 15, 1977 and June 2, 2000.

There are limitations, however, on the types of duties which can be assigned to a city attorney. No governing body may spend public funds for a private purpose, see, Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) or beyond its corporate purpose, Paslay v. Brooks, 198 S.C. 345, 17 S.E.2d 865 (1941). Accordingly, a municipality “may not employ counsel [or pay counsel with public funds] in matters in which it is not directly interested or which lie outside its corporate purpose.” 56 Am.Jur.2d, Municipal Corporations, § 220, see also Op. S.C. Atty. Gen., dated February 15, 1985. As this Office has stated, the “... determination of whether or not the [matter is one in which the local government] ... is directly interested, and consequently, a matter which involves public purpose ... is to be made by the governing body subject of course, to final determination by a court of competent jurisdiction if challenged. See Op. S.C. Atty. Gen., dated July 1, 1977. It appears as though our Supreme Court has previously addressed the question of a public body providing legal representation for an elected official in litigating an election contest. In Paslay v. Brooks, supra, the Court held a school district is without power to employ an attorney to represent the successful candidates for positions on the school board in an election contest and stated

A school district in its corporate capacity has no interest in the success of any individual or group of candidates who may run for the office of school trustee. There is no authority in this State, statutory or otherwise, which empowers school trustees to issue warrants covering fees of counsel for candidates engaged in a legal contest for the office of school trustee. It is not the duty of the public to pay for such services; such is not a school district purpose, and the taxpayers of a school district cannot legally be called upon to meet the expenses of such contests growing out of school district elections. The case would be no whit different in principle if the trustees had issued a warrant for the payment of counsel fees of the three defeated candidates who ran in the same election for the office of school trustee.

17 S.E.2d at 868.

Based on the decision in Paslay, it is apparent that our Supreme Court has determined the expenditure of public funds to provide legal representation to an individual in an election contest is inappropriate as it is beyond the corporate purpose of a public body and it is for a private rather than a public purpose. Authorities in other jurisdictions have reached similar conclusions. In Markham v. State Department of Revenue, 298 So.2d 210 (Fla. Dist. Ct. App. 1974), a county tax assessor sought a declaration that his office could lawfully pay the attorneys fees in his successful defense of an election contest for the office. In holding against the tax assessor, the Florida Court noted the fundamental concept that public funds may not be expended for other than public purposes and

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stated that “[t]he legal battle between the political contestants in the election contest was purely personal” and no public purpose justified the expenditure of public funds on it. 298 So.2d at 212.

In a case addressing a similar question as that raised in your request, a New Jersey court considered whether the former mayor of Atlantic City could require the city to pay his legal expenses in his successful defense of an election contest. Matthews v. City of Atlantic City, 481 A.2d 842 (N.J. Super. Ct. Law Div. 1984). The New Jersey court employed the reasoning of the Florida case of Markham v. State Department of Revenue, *supra*, and held that the mayor was not acting in an official capacity as mayor when any of the relevant events occurred, and concluded that the city was precluded from paying his legal expenses. 481 A.2d 845. Also, the Attorney General of Texas, citing Paslay, Markham and Matthews concluded that a “... school district has no authority to pay the legal expenses of an individual school trustee in defending an election contest involving the vote count in his election as trustee” as this would be expending public money for a private purpose. See Op. Tx. Atty. Gen., dated April 24, 1987.

CONCLUSION

Public funds may only be expended for public purposes. The determination of whether or not a matter is one which involves public purpose is to be made by the governing body subject to final determination by a court of competent jurisdiction if challenged. Based on the aforementioned authority, it is my opinion that a reviewing court would most likely determine that the City of Johnsonville is not obligated to, and in fact is precluded from, providing legal representation to the Mayor with respect to an election contest filed by one of the Mayor’s election opponents.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Avant', written over a large, light-colored oval scribble.

David K. Avant
Assistant Attorney General