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PL 1426

The State of South Carolina



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Dear Mr. Rosen:

FACTUAL BACKGROUND AND INTRODUCTION

You have asked our advice as to the legality of Georgetown County Council's delegating to its Chairman certain of the county's administrative duties. Based upon the information you have provided us, Georgetown County Council, which presently operates under the council form of government, see § 4-9-310, had delegated to the Chairman many of the duties of a county administrator; you have advised us that the Chairman has, for the most part, been delegated those duties contained in § 4-9-630 of the Code.

We are further informed by you, however, that no separate office of position of administrator or its equivalent has been created by Georgetown County Council. See, § 4-9-30(6). No express contract of employment exists between the Chairman and County Council. Instead, Council has simply delegated additional administrative duties, ex officio, to its Chairman. We further understand that the Chairman presently receives a larger compensation than other members of County Council; as we are informed, he is paid for the performance of his duties as Chairman of County Council and receives additional compensation for the performance of his administrative duties. Again, however, such payment is from a single appropriation of money.

At the outset, we would make a few introductory remarks. We have researched your question only from the standpoint of the legal question as presented to us. We have based our legal

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research upon those facts provided to us by you and which are referenced above; we have not attempted independently to investigate other facts, because this Office does not possess the resources or authority to adjudicate factual questions. See, Op. Atty. Gen., December 12, 1983. Moreover, we assume, of course, that all facts presented by you are true as well as complete good faith on the part of Georgetown County Council. We attribute nothing but the highest of motives to County Council.

Having extensively researched your question and reviewed the several memoranda provided by you to this Office (Pursuant to Office policy) we find that the situation you present is indeed novel in this State. We are aware of no similar situation presently existing elsewhere in South Carolina. While we have found several decisions of the South Carolina Supreme Court which are analogous, there are circumstances present here which may make those cases distinguishable from the one presented by you. Likewise, we have found several cases in other jurisdictions which are strikingly similar to the Georgetown situation, but again, a court may find distinguishing features between these cases and the situation at hand.

Furthermore, this Office is not empowered by law to remove a public official or simply to "declare" that the performance of an officer's duties is invalid or inconsistent with the public policy of this State. Our duty, as with any opinion, is to research the law as it presently exists and, based upon such research, attempt to conclude what a court would most probably do under the given circumstances. But we cannot resolve the situation in Georgetown with finality.

Accordingly, for all the above stated reasons, legislative or judicial clarification is advisable in this situation. Thus, you may wish to consider a declaratory judgment action to resolve the important issues presented here in a conclusive manner. Nevertheless, in an effort to assist you, we will review in detail the authorities we have examined and set forth our analysis of how a court might decide the matter.

ISSUES RAISED

Your question presents three basic issues. First, is whether County Council, as a public body, may lawfully delegate certain administrative duties to others generally. Second, is the question whether it is consistent with the Home Rule Act to delegate such duties to the extent that it has the effect of

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becoming a different form of government. Third, is the issue of whether public policy precludes County Council from delegating administrative duties to one of its own members and then paying that member additional compensation for the performance of these duties. We will address each of these issues in turn.

DELEGATION OF ADMINISTRATIVE FUNCTIONS
TO OTHERS, GENERALLY

The first issue, whether county council can delegate administrative duties to third persons generally, is relatively easy. It is well recognized that

[t]he right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant.

20 C.J.S., Counties, § 89. Another treatise similarly states:

While legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer cannot be delegated to others, it is equally well established that ministerial or administrative functions may be delegated to subordinates. The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer of department or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates and agents.

McQuillin, Municipal Corporations, § 10.41. While legislative functions cannot be delegated by a public body to one of its members, such body can "confer ... a measure of discretion in the application of ordinances and the exercise of administrative functions." 62 C.J.S., Municipal Corporations, § 154.

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Section 4-9-310 provides that

[i]n those counties adopting the council form of government provided for in this article, the responsibility for policy making and administration of county government shall be vested in the county council... The structure, organization, powers, duties, functions and responsibilities of county government under the council form shall be as prescribed in Article I of this chapter.

The foregoing provision under the council form of government which authorizes council to perform administrative functions also gives a council, operating under this form, all of the powers contained in Article I; moreover, Section 4-9-30(6) authorizes council generally to establish such agencies, departments, etc. as are necessary and proper. Thus, it is evident that Georgetown County Council possesses the statutory authority to delegate certain administrative powers and duties to others, including a committee of or individual members of county council. So long as Council does not delegate legislative or policy making powers to others but confines its delegation of authority to administrative and ministerial powers a court would probably conclude such delegation (including to a member of county council) is not an unlawful delegation of power.

CONSISTENCY WITH HOME RULE ACT

The situation you have presented also raises a question as to whether it is consistent with the Home Rule Act, codified at § 4-9-10 et seq. Section 4-9-10 et seq. was enacted, pursuant to Article VIII, § 7 of the State Constitution, in an effort to give counties home rule. See, Duncan v. York Co., 167 S.C. 327, 228 S.E.2d (1976). Section 4-9-20 designates four permissible forms of government from which a county might choose; a county may select the council form of government, the council-supervisor form, the county administrator form or one which utilizes the council-manager. Georgetown County presently operates under the council form of government. See, § 4-9-310 et seq.

Section 4-9-10(c) of the Code expressly provides the method for altering a county's form of government, stating in pertinent part:

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After the initial form of government and the number and method of election of county council including the chairman has been adopted and selected, the adopted form, number, and method of election shall not be changed for a period of two years from the date such form becomes effective and then only as a result of a referendum as hereinafter provided for.

This provision then sets forth explicitly the requirements for a county changing from one form of government to another.

An argument could certainly be made that, since Section 4-9-10 establishes a specific procedure for changing the form of government, a county operating under the council form, which, in effect creates a county administrator, known as such, might be deemed as having altered the governmental form without following required statutory procedures. Cf., Hardy v. Francis, 273 S.C. 677, 679, 259 S.E.2d 115 (1979) ["There is no provision under the Home Rule Act for the office of County Supervisor in conjunction with the Council-Administrator form of local government."]. To our knowledge, however, Georgetown County has not created a separate office known as county administrator. Moreover, as noted earlier, it is contemplated by the Home Rule Act that Council may delegate certain administrative duties, even under the council form of government, because under that form the council possesses the power to delegate functions to the agencies, boards, departments, etc. it creates. See, Sections 4-9-30(6) and 4-9-310.

No South Carolina case has, to our knowledge, addressed this precise situation. We believe, however, a court would probably uphold as consistent with the Home Rule Act the assignment by county council operating under the council form of certain administrative duties to either an individual member or members of council or a third person. So long as council does not create the separate office known as county administrator and assign him the identical duties given to a county administrator under Section 4-9-610, a court would probably conclude that such general delegation was valid. However, we caution that there exists only a fine line between these situations and thus legislative or judicial clarification is advisable.

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PAYMENT TO COUNCIL MEMBER OF ADDITIONAL
COMPENSATION FOR THE PERFORMANCE OF
ADMINISTRATIVE DUTIES

The final issue is the most troublesome raised by your request. That is the question of whether County Council can delegate certain administrative duties to one of its own members and pay that member additional compensation for the performance of such duties. We have already concluded that a court would probably uphold as valid the delegation of certain administrative duties to a member of council; indeed, as we have noted, such is virtually given express authorization in Section 4-9-310. But, there exists a much more difficult question when council pays one of its members additional compensation for the performance of those duties.

We have not been able to find a South Carolina case which is completely on all fours with the present situation in Georgetown County. However, a number of decisions from South Carolina and other jurisdictions do provide considerable guidance and will be discussed below. Based upon these decisions, we believe a court might well conclude that the present relationship between the member of Council and Council itself contravenes public policy. But, because only a court could make such a declaration and the cases we have found may be distinguishable in certain aspects, a declaratory judgment action would be advisable to resolve the question conclusively.

As a preliminary matter, the question of dual office holding should be addressed. Section 4-9-100 of the Code prohibits a member of county council from holding "any other office of honor or profit in government except military commissions and commissions of notaries public, during his elected term." This statutory prohibition is in addition to those against dual office holding contained in the State Constitution. See, Article XVII, § 1A; Article VI, § 3. These prohibitions do not come into play, however, unless a person simultaneously holds two separate offices. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1902).

As we understand it, Georgetown County Council has not created a separate position of administrator. The council member performs his administrative duties by virtue of his position as chairman of County Council. The duties are, practically speaking performed ex officio and are inherent in the office of county councilman under the council form of government. See, Section 4-9-310. In such instances, where an

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officer is performing additional duties by virtue of his holding one office our Supreme Court has concluded that the dual office holding provision is not contravened. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1977). Based upon this reasoning, we seriously doubt that a court would conclude that the situation in question constituted dual office holding.

However, the question of the payment of additional compensation and public policy is not nearly so clear. It is fundamental that

A public officer owes an undivided duty to the public whom he serves, and it is not permitted to place himself in a position which will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interest of the public.... A member of a board or municipal council cannot validly sit in judgment on his right to office or the emoluments thereof.

43 Am.Jur., Public Officers, § 266. Closely related to this general rule is the "principle of public policy that a public official may not use his official power to further his own interests." As one court has stated,

The reasons for this must be obvious - a man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a direct pecuniary or personal or private interest which is or may be in conflict with the public interest.

Genkinger v. City of New Castle, 84 A.2d 303, 305 (Pa. 1951).

The applicability of these general rules to the situation where a board, commission or council assigns duties to one of its members for additional compensation has been addressed in a number of cases, both in this jurisdiction and elsewhere. In McMahan v. Jones, 94 S.C. 362 (1913), for example, certain members of a commission created by state statute to "establish and manage" an infirmary for Confederate veterans were employed by the Commission. One member was employed as administrator for the infirmary, the other as a physician to the institutions.

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The payment of salaries to the two was challenged as illegal and the plaintiff sought to enjoin such payment.

The defense to this arrangement was that the compensation was paid to the board members not "as members of the commission, or for services as commissioners, but as individuals, and for service rendered outside of and in addition to the services which they perform as members of the commission." 94 S.C. at 363. Nevertheless, the Court concluded that such a relationship was invalid. Relying in part upon the statute governing the infirmity commission, which prohibited members of the commission from receiving any compensation, except their actual expenses for attending the meetings, the Court rejected any characterization of the two commissioners as acting individually by concluding:

[t]he wording of the statute does not warrant the nice distinction between services rendered by members of the commission, as commissioners, and services rendered by them as individuals. We have no doubt that the form of expression used was supposed to be all that would be necessary to prevent what has been done by the commission and it was intended to have that effect.

94 S.C. at 364.

Moreover, the Court appears to have gone further in its reasoning than merely the fact that the statute in question prohibited any payment of compensation other than expenses to commissioners. Citing common law principles of public policy, the Court further commented:

No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

94 S.C. at 365. Applying this reasoning to the particular situation before it, the Court amplified upon its analysis by inquiring:

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Should Richardson, as chairman of the commission, appoint the committee to investigate his own management of the infirmary, or check his accounts as treasurer? Should he be present, when his administration of the institution is being considered and discussed? Should he and Butler participate, when their own duties are being prescribed and their compensation fixed? It requires only a moment's reflection to see that the positions are utterly inconsistent, and ought not to be held by the same persons. Propriety, as well as public policy, forbids it.

And, to the argument that the members could simply recuse themselves from deliberation upon their own status, the court, rejecting that argument as well, stated:

If it be said that there are three other members of the commission, who would make a quorum, the answer is that the legislature has expressed the intention that the State should have the benefit of the judgment and discretion, individually and collectively of a commission of five members - not three, - in the administration of this charity. By disqualifying two of their number, the commission has practically reduced its membership to three.

94 S.C. at 365. Thus, the Court enjoined payment of additional compensation to the two commissioners.

The McMahan case possesses a few distinguishing features from the situation in Georgetown as we understand it to be. It is true that, in McMahan, the statute in question expressly prohibited payment of compensation to the commissioners, whereas here, there is no such statutory limitation upon compensation of members of county council. See, Section 4-9-100. However, as we read McMahan, the Court did not rely completely upon the statute in question, but also invoked principles of public policy as part of its rationale.

Secondly, the McMahan decision seems to have characterized the relationship between administrator and board as one of employer-employee. In the Georgetown situation, it has been

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argued that the relationship is not one of employer-employee, but is simply a delegation of additional duties by county council to one of its members.

Such a distinction may not be meaningful, however. McMahan made it clear that it mattered not whether the commission characterized the service being rendered by the two commissioners as individual service to the commission or simply as part of their duties as commissioners. What was important was that two members of a commission itself charged with the administration of an infirmary, had been placed in the "utterly inconsistent" position of serving the same commission of which they were members and receiving additional compensation for the performance of those duties. As the Court stated, "[p]ropriety as well as public policy, forbids it", and the Court enjoined further payment of additional compensation.

Moreover, in McMahan, our Supreme Court cited with approval a North Carolina case, Davidson v. Guilford County, 152 N.C. 436 (1910) where it was clear that the situation in question arose not from employment but simply the delegation of additional duties by a board to a member of that board. In Davidson, a member of a board of county commissioners was delegated by the board the duty to inspect a bridge for possible rebuilding. Pursuant to such delegation of authority, the board member made a report to the full board recommending a rebuilding of the bridge. He requested compensation from the board for performance of the duties which had been assigned to him.

The North Carolina Supreme Court concluded that such additional compensation was prohibited. In part, the Court held that the governing statutes precluded compensation for the performance of these duties because such statutes allowed each board member \$3.00 per diem and mileage for regular as well as special meetings; of course, the special duty of inspecting a bridge was not related to the attendance of any meeting of the commission. Significantly, the Court went on to add, however:

Independent of any statute or precedent,
upon the general principles of law and morality a member of an official board cannot contract with the body of which he is a member. To permit it would open the door wide to fraud and corruption. The other members of the board in allowing compensation thus to one of their members would be aware that each of them in turn might

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receive contracts and good compensations, and thus public office, instead of being a public trust, would become, in the language of the day, "a private snap." (emphasis added).

Id.

It is particularly noteworthy that in the Davidson case, the North Carolina Supreme Court emphasized that principles of public policy, rather than any particular statute limiting the compensation of board members was controlling; the Court implied that whether or not the member had an actual contract with his board was not the determining factor. Moreover, it is also important to recognize that the Court characterized the performance of the commissioner's additional duties as being at the "direction" of the board of which he was a member. 152 N.C. at 436. In other words, the Court found that the commissioner's additional duties had been delegated to him by his board for additional compensation. If this situation is not identical to that existing in Georgetown it is certainly similar thereto.

Another closely analogous case should be called to your attention. In Cotlar v. Warminster Township, 8 Pa.Cmwlt. 163, 302 A.2d 859 (1973), the board of supervisors for a Pennsylvania township had employed a part-time township manager. Subsequently however, board members developed a plan for delegating certain managerial responsibilities to individual members of the board. The plan contemplated that each member was to serve as a liason between the full board and the township personnel with respect to the particular activity to which he had been assigned; this same liason relationship was also operative with respect to members of the general public. The board voted to pay each individual member \$100.00 per month additional compensation for the performance of his new duties.

The Pennsylvania court held such payments to be contrary to public policy. Pennsylvania law set a limitation for compensation of supervisors in attendance of board meetings and additionally allowed supervisors compensation when acting as superintendents, roadmasters or laborers. The Court first noted that the compensation to the supervisors in payment for their additional delegated duties was "made not for attendance at meetings or for acting as superintendents, roadmasters or laborers" and thus "were without legal authorization and illegal." 302 A.2d at 861. Said the Court,

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The supervisors had no statutory power to establish a \$100.00 a month compensation rate for their assigned duties designed to augment the responsibilities of the township manager. They personally profited to the extent of \$1,100.00 by their own unlawful action. Although it is unquestioned, and we accept it as a fact, that the surcharged supervisors acted in good faith, nevertheless they should not be permitted to keep the additional compensation.

302 A.2d at 861.

While the Court placed considerable emphasis upon the fact that Pennsylvania law limited the supervisors' compensation, the Court also noted that the additional duties in question "actually were their responsibilities as supervisors." 302 A.2d at 861. Moreover, it also emphasized that, independent of statutory limitation, "[o]ne further argument weighs heavily against the supervisors' contention that it would be unfair to surcharge them since the township has benefited from their efforts."

that argument is the well and wisely established principle of public policy. A public official may not use his official power to further his own interests.

302 A.2d at 862. Thus, for this reason as well, the Court concluded that payment of the additional compensation was invalid. As the Court subsequently stated, there is (in addition to statutory limitations)

... a strong public policy interest against permitting public officials to assign themselves public duties for which they receive additional compensation or otherwise act in their own self-interest, even if done in good faith.

Golumbeski v. Zabowski, (Pa.), 449 A.2d 84, 85 (1982).

There is one final case which we think bears discussion. In Hope v. Hamilton County, 101 Tenn. 325, 47 S.W. 487 (1898), the Tennessee Supreme Court addressed the situation where a county council appointed a committee consisting of several of

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its members to make improvements on its court house, jail and grounds. The chairman of the committee brought suit for his compensation for services rendered as part of the committee. The Court rejected the claim, noting that the "difficulty is in finding any ground upon which to rest a legal liability against the county." Observed the Court

It is clear in this case that if complainant was not a member of the county court, but had been employed or authorized as a private individual to do this service by it, the law would imply a promise to pay what the services were worth. Complainant cannot, however, claim in this capacity, since he clearly served throughout as a member of the court appointed on one of its committees and selected as the head or chairman of that committee. It cannot seriously be insisted that a mere appointment of one of its members upon a committee by the county court, and service on that committee by the member carries with it any legal right to compensation.

Id. Upon rehearing, it was argued that plaintiff could recover as if he had a contract with the board even though it was clear he had performed his duties as a member of the county court. The Court, noted it to be "a grave question ... whether a member of the court elected to fill that office, his compensation being fixed by law, can contract with the county court, of which he is a member, to render service for extra pay, and especially a service performed upon a committee appointed to attend to a matter necessary for the proper administration of the affairs of the county." 47 S.W. at 488. The Court, in its analysis, treated the compensation as if there existed an actual contract and found that payment of such additional compensation to be illegal. Concluded the Court,

... [I]n rendering services which should be done by members of these bodies, pertaining to their official position, they act simply in discharge of duties for which the statute provides compensation. For all other services they are incompetent to contract, and for such outside work it is unlawful for them to contract or receive compensation. If it becomes necessary to contract for such

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services, such contract must be made with a disinterested third person and not with a member of the body whose office it is to make the contract and provide the pay.

Id.

The foregoing decisions are sufficiently similar to your situation that we believe a court may conclude the relationship in Georgetown invalid for many of the same reasons expressed in those decisions. We emphasize again, however, that while the existing decisions are strikingly similar, they are not identical. We would point out also that there are factors here which were not necessarily present in the cases we have found. Because we cannot predict with complete certainty how a court would apply the existing case law to the situation in Georgetown, a declaratory judgement action is probably advisable.

It is particularly noteworthy that in all of the cases we have examined, the courts relied heavily upon the fact that there existed in that jurisdiction either a statutory prohibition against or limitation upon the payment of compensation to the board member. In none of the cases mentioned was the compensation left within the complete discretion of the board. However, in South Carolina, under the Home Rule Act, county council does possess the discretion to set the salaries of its members. 1/ Section 4-9-100 places no limitation upon a members' compensation,

1/ Section 4-9-100 provides in pertinent part:

After adoption of a form of government as provided for in this chapter, council shall by ordinance prescribe the salary and compensation of its members. After the initial determination of salary, council may by ordinance adjust such salary but no ordinance changing such salary shall be effective until the date of commencement of terms of members of council elected at the next general election following such changes. Members may also be reimbursed for actual expenses incurred in the conduct of their official duties.

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and certainly does not expressly forbid paying one member who performs additional duties more than the remaining council members. 2/ Since Section 4-9-310 provides that county council, under the council form of government, is to perform administrative duties, it can be argued that the Legislature anticipated the delegation of general administrative duties to one or more council members and paying those particular members additional compensation. No South Carolina case has yet addressed such an argument.

2/ In this same regard, an alternative reading of Davidson v. Guilford and McMahan v. Jones is available. One could conclude that the courts' holdings were entirely dependent upon the fact that an existing statute limited the payment of compensation to the officers for duties performed in an official capacity; in other words, it could be that the North Carolina and South Carolina Supreme Courts reasoned that the payment of compensation for the performance of duties in an official capacity, rather than as an individual, was limited only by the fact that a statute precluded any greater compensation. There is language to that effect in Davidson, 152 N.C., supra at 437 and such a reading would be in accord with the well recognized principle that an officer cannot be paid compensation unless there is statutory authorization for such payment. See, Ridgill v. Clarendon County, 188 S.C. 460, 199 S.E. 683 (1938). It could be, then, that this was all the courts were saying in these cases and that the cases would have been decided differently were there not statutory limitations.

Such a reading is countered however by the fact that both cases analyzed the situation independent of statute and on public policy grounds. Indeed, Davidson expressly noted that "[i]ndependent of any statute or precedent", the relationship in question contravened public policy. Supra. And both McMahan and Davidson saw the relationship as one where the public official inherently possessed an interest in the payment to him of additional compensation. Moreover, even if these cases were read in such a narrow way, it is clear that the Pennsylvania case, Cotlar, did not similarly distinguish between an officer's performance of official duties on the one hand and as an interested individual on the other; clearly, Cotlar treated the duties as part of the officer's official functions and, independent of statute, concluded that such duties could not be assigned to him by his board for additional compensation.

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However, in this instance, it is clear that the individual in question is receiving additional compensation for the performance of duties assigned to him by county council. As you have stated,

[t]o adequately perform the duties above mentioned ["certain administrative functions"], the person to whom said duties and responsibilities are delegated serves full time, for which reason Council fixed his salary at a sum greater than that for other members of Council.

As you note, it is also clear that these assigned administrative duties "were delegated to him as a member of County Council by the Council, in which capacity all of his activities have been carried out." See also, Section 4-9-310.

Thus, referencing the foregoing case law, a court could conclude it to be form over substance to distinguish those decisions on the basis of factors such as the lack of a statute limiting compensation of council members or arguing that there is present here no formal contractual or employment relationship.^{3/} Certainly, we have found no case which upholds a similar relationship on these grounds. And each of the cases we have discussed concludes that, independent of statute, public

^{3/} It is clear that in Davidson, for example, while the Court analyzed the question in terms of contract, the duties were simply delegated to the officer by his board. Likewise in Hope v. Hamilton Co., supra, the Court treated the question as if the member had a contract with the board, even though he was performing his delegated duties in an official capacity. Thus, even where a body simply assigns one of its members additional duties which are part of his official functions and pays him additional compensation, the courts seem to analyze the question in terms of member making a contract with or being appointed to another job by his own board. As the Pennsylvania court said in Cotlar, "[a] public official may not use his official power to further his own interest." 302 A.2d at 862. The courts seem, therefore, to treat the question as an officer's being employed by or contracting with himself.

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policy forbids a public body paying one of its members additional compensation for the performance of official duties. As one court put it,

[e]ven in the absence of statutory prohibition and even though the work or services consist of 'extra-services' if they are in point of fact a part of or germane to the official duties of his office, the officer's employment for obvious reasons is against public policy and he is not entitled to compensation for performing the services.

Polk Tp. Co. v. Spencer, (Mo.), 259 S.W.2d 804, 805 (1953). As another court has said, "[p]ublic policy requires that a public officer be denied additional compensation for performing official duties." Nodaway v. Kidder, (Mo.), 129 S.W.2d 857 (1939). See also, Neisius v. Henry, (Neb.), 5 N.W.2d 292, 297 (1942), aff'd., 9 N.W.2d 163 (1943). Therefore, a court could certainly conclude that the foregoing decisions are applicable to the situation at hand. 4/

CONCLUSION

1. A court would probably conclude that Georgetown County Council, operating under the council form of government, could delegate certain administrative or ministerial duties to a member of Council. So long as Council does not delegate legislative or policy making powers, such delegation of authority to others (including a member of County Council) probably would not be held to constitute an unlawful delegation of authority under general law.
2. A court would probably uphold the assignment of certain administrative duties to either an individual member or members of Council or a third person as being consistent with the

4/ Even if a court concluded that the relationship in question contravened public policy, it is likely that the court would treat the officer as de facto and conclude that the payment of past compensation to him was valid. McMahan v. Jones, supra.

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specific requirements of the Home Rule Act. So long as Council does not create the separate office of County Administrator under Section 4-9-610 and assign the individual the identical duties contained therein, a court would probably conclude that such general delegation is not in circumvention of the Home Rule Act. However, it is cautioned that there exists only a fine line between these situations, and thus legislative or judicial clarification is advisable as to this issue.

3. We seriously doubt that a court would conclude that the performance of certain administrative duties by a member of Georgetown County Council constitutes dual office holding.

4. The question of whether Georgetown County Council can pay a member of county council additional compensation for the performance of certain administrative duties delegated to him by council is the most troublesome and difficult of the issues raised by your request. Each of the cases we have examined conclude, under similar factual circumstances, that such is in contravention of public policy. While these cases rely in part upon statutory limitations or prohibitions, they uniformly conclude, as an additional basis for their decision, that such payment of additional compensation is prohibited by public policy.

Accordingly, based upon the authorities we have found, and even though we presume throughout that Council has acted in good faith, we nevertheless believe a court may well conclude that the situation you reference is prohibited, at least to the extent that the council member in question is receiving additional compensation for the performance of his duties as a member of County Council. Because Council is paying additional compensation to one of its own members to whom certain duties as part of that members official capacity have been assigned, a South Carolina court could well hold, like the Court in Pennsylvania, that there is "a strong public policy interest against permitting" such a relationship. Golumbeski v. Zabowski, supra.

We must point out, however, that a court could conceivably hold that, under the specific provisions of the Home Rule Act, the General Assembly has delegated to county council virtual plenary power to determine the compensation of each of its members. A court could recognize that public policy principles, expressed in the cases we have referenced, while ordinarily applicable and entirely valid, are in this instance controlled by the express language of the Home Rule Act. The Court could

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conceivably reason that were Council not able to pay a member performing additional administrative duties greater compensation than other councilmembers, the broad authority given to council under Section 4-9-100 would be eviscerated. Since this particular argument has not yet been addressed by the South Carolina courts, it would only be a guess on our part as to what a court would do if faced with the question.

Accordingly, while under the existing authorities the payment of additional compensation for the performance of official duties is prohibited, since we cannot "declare" such payment invalid, and because the question possesses an aspect not yet answered by our courts, we would advise that this novel issue be finally resolved by declaratory judgment. 5/

Sincerely,



Robert D. Cook
Executive Assistant for Opinions

RDC:djg

5/ We do not address herein any other factual situation or the application of any other statute as it might relate to the payment of additional compensation.