

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

January 8, 1987

The Honorable George H. Bailey
Member, House of Representatives
100 Metts Street
St. George, South Carolina 29477

Dear Representative Bailey:

Referencing the 1961 legislative act which created the office of county attorney for Dorchester County, you have asked whether this legislation may be modified by Dorchester County Council and further whether restrictions may be placed upon the county attorney as to which county agencies he is to represent. You have also asked whether, under the council-administrator form of government, Dorchester County Council or the county administrator would be the appropriate entity to hire the county attorney.

Act No. 46, 1961 Acts and Joint Resolutions, provides in Section 1:

In Dorchester County, there is hereby created the office of county attorney. The attorney shall be appointed by the Governor upon the recommendation of a majority of the legislative delegation. ...

This enactment preceded the adoption of the Home Rule Act, Act No. 283 of 1975. You have asked whether Dorchester County Council has authority now to amend or otherwise vary from this local law. We advise that Dorchester County Council does have such authority.

A portion of Section 3 of the Home Rule Act, supra, provides that

All operations, agencies and offices of county government, appropriations and laws related thereto in effect on the date the change in form become effective shall remain in full force and effect until otherwise implemented by ordinance of the council pursuant to this act. Provided, however, that county councils shall not enact ordinances in conflict with existing law relating to their respective counties and all such laws shall

The Honorable George H. Bailey
January 8, 1987
Page Two

remain in full force and effect until repealed by the General Assembly, or until January 1, 1980, whichever time is sooner,....

This provision was construed recently by the South Carolina Supreme Court in Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986), a copy of which is enclosed. Applying this provision to Act No. 46 of 1961 and following the Court's guidance from Graham v. Creel, several options are apparent:

1. Act No. 46 may continue to be followed as it was when Home Rule became effective in Dorchester County; or
2. Act No. 46 may be "adopted" by ordinance of Dorchester County Council to become its own enactment; or
3. Dorchester County Council may adopt an ordinance of its own, altering this special law in whatever way it deems desirable or necessary.

As noted in the Home Rule Act and Graham v. Creel, such local laws remain in full force and effect unless and until council chooses to provide otherwise by ordinance, since the local law is not in conflict with any general law.

Whether Dorchester County Council may place restrictions on which county agencies or departments which the county attorney may represent is your second question. Again, we must answer in the affirmative. Section 2 of Act No. 46 of 1961 provides that the "[t]he county attorney shall render legal service and advice to all county officials, boards and departments." As discussed supra, council has authority under the Home Rule Act to modify this legislative enactment if it chooses, by ordinance.

In addition, Section 4-9-30(6), Code of Laws of South Carolina (1976, as amended), gives a county council the authority

to establish such ... positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such ... positions, except at otherwise provided for in this title. ...

By the clear and unambiguous language of this statute, the General Assembly has authorized a county council to regulate a position which it creates and to prescribe the functions of such position. Prescribing or limiting the functions of a county attorney would be encompassed by this statute.

The Honorable George H. Bailey
January 8, 1987
Page Three

Your remaining inquiry concerns the authority to hire a county attorney in a county utilizing the council-administrator form of government if Act No. 46 were to be modified by council. We advise that while a county council may establish the position and prescribe its functions, requirements, and limitations, the hiring of an individual to serve as county attorney would be within the purview of the county administrator's functions.

As previously discussed, a county council has authority to create positions, prescribe functions, and so forth. Section 4-9-30(7) further authorizes a county council to

develop personnel system policies and procedures for county employees by which all county employees are regulated ... and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government

Thus, the ultimate responsibility for the employ and discharge of county employees rests with county council.

In counties such as Dorchester which have adopted the council-administrator form of government, council is to employ an administrator, who is to be the administrative head of county government. Section 4-9-620 of the Code. As such, he is responsible for administration of all departments of county government over which council has authority to control. By Section 4-9-630, the administrator's powers and duties require him

- (7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council; [and]
- (8) to be responsible for employment and discharge of personnel subject to the provisions of subsection (7) of §4-9-30 and subject to the appropriation of funds by the council for the purpose

Authority of council members over county employees is governed by Section 4-9-660 of the Code:

Except for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall

The Honorable George H. Bailey
January 8, 1987
Page Four

give orders or instructions to any such officers
or employees.

While county councils have ultimate responsibility for the employment and discharge of county personnel, the county administrator is responsible for the actual hiring and firing since a county council generally must deal with county employees through the county administrator. See also Section 4-9-670 of the Code.

A statute virtually identical to Section 4-9-630(8) is Section 4-9-430(12), which specifies the duties of the supervisor in the council-supervisor form of county government. Section 4-9-430(12), which provides for employment and discharge of personnel subject to Section 4-9-30(7) of the Code, has been construed in Poore v. Gerrard, 271 S.C. 1, 244 S.E.2d 510 (1978), with respect to employing a county attorney (copy enclosed). In construing Sections 4-9-30(7) and 4-9-430(12), the state Supreme Court stated that

county council is empowered to create and fund positions for the operation of county government, but personnel to fill such positions shall be appointed by the county supervisor. This conclusion is reenforced by further provisions of Section 4-9-430 which provides that

Except for the purposes of inquiries and official investigations, neither the council nor its members shall give direct orders to any county officer or employee, either publicly or privately.

271 S.C. at 4. As to the position of county attorney, the Court went on to say:

It is undisputed that the position of county attorney is a position created by county council and that the creation of such position was within its powers under Section 4-9-30(7).

It, therefore, follows that the county supervisor of Anderson County has the authority to employ a county attorney pursuant to Section 4-9-420(12). ...

271 S.C. at 4. Due to the similarity of all statutes involved, Poore v. Gerrard is very persuasive authority for the conclusion that employment of a county attorney would be within the purview of the county administrator.

The Honorable George H. Bailey
January 8, 1987
Page Five

In conclusion, we advise:

1. Until changed by an ordinance of Dorchester County Council, under its authority granted by the Home Rule Act, Act No. 46 of 1961 remains in full force and effect.
2. Dorchester County Council has authority to modify the terms of the 1961 act, to prescribe functions of the county attorney or otherwise place requirements or limitations upon the office.
3. If the terms of the 1961 act are varied by Dorchester County Council, authority to employ the county attorney would be within the purview of the county administrator rather than council.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/rhm

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions