ALAN WILSON
ATTORNEY GENERAL

May 31, 2016

Ms. Miriam Hair
Executive Director
Municipal Association of South Carolina
Post Office Box 12109
Columbia, South Carolina 29211

Dear Ms. Hair,

You have asked this Office to reconsider an opinion, dated April 20, 2016, in which we concluded that "Irmo's town council lacks the authority to discipline one of its members by removing such an individual from a meeting." Op. S.C. Att'y Gen., 2016 WL 2607250 (April 20, 2016). You note that the Municipal Association of South Carolina has taught for many years that municipal councils are empowered by state law to discipline their members. In support of your position, you cite S.C. Code Ann. § 5-7-250(b) (2004) which allows municipal councils to determine their own rules and order of business as well as a provision of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-70(d) (2007), providing that "[t]his chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised." Our analysis follows.

Law / Analysis

We first note that our April 20, 2016 opinion relied in large part on a prior opinion of this Office dated February 11, 2016. In our February 11, 2016 opinion, we were asked to address whether a county board of education could enter into executive session to discipline one of its own members. Op. S.C. Att'y Gen., 2016 WL 963697 (Feb. 11, 2016). In regards to whether a county board of education could discipline one of its own members, we examined the express and inherent powers granted to county boards of education to conclude that "without clarification from the legislature, we do not believe that the Board can exercise general disciplinary powers as an inherent power upon review of the express powers granted to it." Id. However, we distinguished our belief that "a board of education is not powerless to express its disapproval of actions of a member in violation of the board's standards, rules, and bylaws." Id.

The April 20, 2016 opinion you have asked us to reconsider followed the same analysis as our February 11, 2016 opinion by addressing whether either the express or inherent powers provided to municipal councils would likely permit the Irmo Town Council to discipline one of its members by removing him or her from a council meeting. Op. S.C. Att'y Gen., 2016 WL 2607250 (April 20, 2016). The opinion relied on the conclusion reached in our February 11, 2016 opinion, stating that "county boards of education, which like municipal corporations are creatures of statute, could not exercise disciplinary authority because 'any inherent authority of

the Board must be derived from or be necessary in carrying out its express power.'" Id. (citing Op. S.C. Att'y Gen., 2016 WL 963697 (February 11, 2016)). Therefore, applying this conclusion, our April 20, 2016 opinion determined that no express or inherent power granted the Town Council of Irmo the disciplinary authority to dismiss a fellow member from a meeting. Id.

It is important to point out that our February 11, 2016 opinion distinguished that as part of their legislative powers, it has been recognized throughout history that legislative bodies have the inherent authority to discipline their own members. Op. S.C. Att'y Gen., 2016 WL 963697 (February 11, 2016). Looking to Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997), decided by the Fourth Circuit Court of Appeals, and prior opinions of this Office, we explained as follows:

> Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997) is relevant when answering this question being that the Fourth Circuit Court of Appeals specifically addressed the power to disciple one's own member by censure and stripping the member of his committee assignments for a period of one year due to use of abusive language. We note that the public body under scrutiny in the case was the Loudoun County, Virginia Board of Supervisors ("Board of Supervisors"). Id. at 741. In counties in Virginia adopting what is known as the County Board Form of Government, the powers and duties of the county as body politic and corporate are vested in a board of county supervisors. See V.A. Code Ann. § 15.2-402. Thus, the Loudoun County Board of Supervisors discussed in Whitener appears to be akin to a county council operating in our state.
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> The Whitener Court affirmed the internal disciplinary measures taken by the Board of Supervisors, characterizing them as "legislative in nature." Id. at 744. It noted the authority and accompanying legislative immunity from exercising such authority "'has [its] taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.'" Id. at 743 (quoting Tenney v. Brandhove, 341 U.S. 367, 372, 71 S.Ct 783, 786 (1951)) (modification in Whitener). After highlighting that the United States Constitution "enumerates for Congress the power, long asserted by Parliament, to 'punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member,'" the Court recognized "Americans at the founding and after understood the power to punish members as a legislative power inherent even in 'the humblest assembly of men'" and, that it is with this power that "institutional integrity" is preserved. Id. at 744 (quoting U.S. Const. art. I § 5, cl. 2; Joseph Story, Commentaries on the Constitution of the United States § 419; Powell v. McCormack, 395 U.S. 486, 548, 89 S.Ct. 1944 (1969)). Accordingly, the court concluded that the Board of Supervisors was authorized - acting in its legislative capacity - when it voted to discipline one of its own members and was protected by legislative immunity when doing so. Id. at 744.
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> In regards to legislative authority or capacity, prior opinions of this Office have stated that "as a general rule, the legislature has the power to investigate any subject with respect to which it may desire information in aid of the proper

> discharge of its function to make or unmake written laws, or to perform any other act delegated to it." Op. S.C. Att'y Gen., 1986 WL 191969 (Jan. 14, 1986) (citing 81A C.J.S. States § 56). "In other words, it is a general principle of law that 'the power to investigate is an essential corollary to the power to legislate.'" Id. Consistent with the Whitener decision, we have pointed out that "this rule is also applicable to local legislative bodies such as city or county council which have been given extensive authority under Article VIII of the Constitution and the Home Rule Acts." Id. (citing § 4-9-10 et seq.; § 5-7-10 et seq.: 4 McQuillin, Municipal Corporations, § 13.05).

Op. S.C. Att'y Gen., 2016 WL 963697 (February 11, 2016).

In review of the authorities quoted above, it appears the power of a legislative body to discipline one of its members would be considered an inherent "legislative power." And, as we have expressed in prior opinions of this Office, these legislative powers are applicable to local legislative bodies such as a municipal council. Accordingly, as a legislative body, we believe it is likely a court would find a municipal council has the authority to discipline one of its members as an inherent legislative power. It follows that this inherent authority could include removal of a member from a council meeting.

As noted in Whitener, this authority, with its "taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" "is the primary power by which legislative bodies preserve their 'institutional integrity' without compromising the principle that citizens may choose their representatives." Whitener v. McWatters, 112 F.3d 740, 744, (4th Cir. 1997) (citations omitted). Thus, as history reveals, the source of the power to discipline is inherent from the power to legislate. While we believe no substantive right to discipline one's members has been created by the authorities you cite – S.C. Code Ann. § 5-7-250(b) permitting council members to determine its own rules and order of business as well as a provision of the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-70(d), providing that "[t]his chapter does not prohibit the removal of any person who willfully disrupts a meeting to the extent that orderly conduct of the meeting is seriously compromised" – such provisions do provide support that the inherent power to discipline exists. In fact, as to a legislative body's rule making authority, Joseph Story's Commentaries on the Constitution of the United States provides as follows: "the power to make rules would be nugatory, unless it was coupled with a power to publish for disorderly behavior, or disobedience to those rules." Joseph Story, Commentaries on the Constitution of the United States § 419.

While we are of the opinion that a municipal council possesses inherent authority to discipline one of its members by removal from a meeting, we also emphasize the need for considerable caution. There is a fine line between First Amendment rights of free speech and disruption of a meeting. The members of council must thus be very careful to avoid infringing upon First Amendment rights. See Norse v. City of Santa Cruz, 629 F.3d 966 (9th Cir. 2010) (finding that attendee of city council meeting has a First Amendment right to be free from view point discrimination; the person must actually be disruptive to warrant ejectment). Thus, council must be vigilant in not abusing its power. Additionally, we believe legislative guidance as to the extent of such authority would be beneficial to ensure the power is appropriately used.

Conclusion

Based upon the above analysis, our opinion dated April 20, 2016 is modified. We believe a municipal council does possess the power to discipline one of its own members by removal from a meeting as an inherent legislative power; however, it is also our opinion that such power should be exercised with great caution to prevent abuse and a potential infringement of one's First Amendment rights. Furthermore, as the inherent power of a municipal council to discipline one of its own members is far from defined, we believe legislative guidance as to the extent of such power would be beneficial.

Very truly yours,

Anne Marie Crosswell

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REVIEWED AND APPROVED BY:

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