

1997 WL 87939 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 17, 1997

Re: Informal Opinion

*1 The Honorable Randy Scott
Member-Elect, Dorchester County Council
107 Cleveland Street
Summerville, South Carolina 29483

Dear Mr. Scott:

Attorney General Condon has forwarded your opinion request to me for reply. In your letter, you pose the following questions:

1. Does County Council, two months prior to the end of its term of administration, of which two members are leaving office, have the authority to bind the incoming council on a long term contract (2 years) for the employment of County employee?
2. Under South Carolina law can a County Council offer the County Attorney a long term two (2) year contract or is this the County Attorney an employee at will of the County?

In regards to your questions, if the term of the contract in question extends beyond the term of the governing members of the county council entering into the contract, the validity of the contract is dependent on the subject matter of the contract. See, Piedmont Public Service District v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (1995). With respect to the power of a county council to enter, in behalf of the county, into a contract which will extend beyond the term for which the members of the council were elected, a distinction is drawn based upon the subject matter of the contract, whether legislative or governmental, or whether business or proprietary. Thus, where the contract involved relates to governmental or legislative functions of the council, or involves a matter of discretion to be exercised by the council unless the statute conferring power to contract clearly authorizes the council to make a contract extending beyond its own term, no power of the council so to do exists, since the power conferred upon councils to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the council presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. See, Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948).¹

The acts of former councils relating to the governmental functions of said councils which involve a matter of discretion to be exercised by such councils are without force and effect upon succeeding councils. Id. The power conferred upon councils to exercise legislative or governmental functions is done so to be exercised as often as may be found needful or political; and the council holding such powers is vested with no authority to circumscribe, limit or diminish their efficiency, but must transmit them unimpaired to their successors. Id. A council is bound always to act as trustee of the power delegated to it and may not surrender or restrict any portion of such power conferred upon it. Id.

While the courts in South Carolina have never ruled on whether the employment of a county attorney would be within the council's governmental or business functions, courts in other jurisdictions have found that the engagement of legal counsel was within the counsel's governmental function. See, Parent v. Woonsocket Housing Authority, 87 R.I. 444, 143 A.2d 146 (1958)(contract by housing authority for the performance of legal services by an attorney relates to the

governmental functions of the authority); See, McCormick v. Hanover Township, 246 Pa. 169, 92 A. 195 (1914)(a board of supervisors were exercising a governmental function when they engaged legal counsel).

*2 Other courts have also found that the employment of attorneys raises special concerns apart from the employment of other individuals. In Duggan v. City of Taunton, 360 Mass. 644, 277 N.E.2d 268 (1971), the Supreme Court of Massachusetts found that “[p]ublic policy requires assuring municipal bodies that they, as well as other clients, as persons ‘in need of legal help,’ shall have freedom ‘to select an attorney [and] to change attorney.’” (brackets in original). The court went on to state:

Between a municipal body or board and its legal advisers, it is desirable that there be a relationship of trust and confidence. Except where a valid contract, a clearly expressed statutory policy, or some special exigency requires a different result, we should be slow to permit a “lame duck” municipal body to dictate to its successors the choice of the attorneys who are to advise them.

The Supreme Court of Alabama has also found that it is contrary to public policy and injurious to the interest of the public for a county board to extend the contract of a county attorney beyond the term of the counsel as it existed at the time of the execution of such contract. Willett & Willett v. Calhoun County, 217 Ala. 687, 117 So. 311 (1928). The court found that the effect of such contract would be “tying the hands of the succeeding board and depriving the latter of their proper powers.” Id. Such succeeding board, as personally constituted, should at all times be free to select its own confidential legal advisor. Id. Important in this decision is the attorney's confidential and personal relation to the board. Id.

Furthermore, in Jessup v. Hinchman, 77 Ind. App. 460, 133 N.E. 853 (1922), the Appellate Court of Indiana found it was improper for a board of county commissioners to enter into a contract with an attorney to render legal services in the discharge of its duties for a term extending beyond the time when a change will occur in its membership. One of the reasons for this conclusion is as follows:

The relations existing between an attorney and his client are unlike those ordinarily existing between employer and employee. They are of an intimate and confidential character. The attorney, instead of acting under the direction and instruction of his client, is himself largely the adviser and instructor. One of the principal duties imposed upon him by his employment is to advise as to the law. There is therefore much reason in holding that the board, as personally constituted, should be at all times free to select its own confidential legal adviser.

Id. (quoting Board of Commissioners v. Shields, 130 Ind. 6, 29 N.E. 385 (1891)).

To summarize the foregoing, whether the county council may enter into a contract with an employee which extends beyond the term for which the members of the council were elected depends on whether the employment falls within the council's governmental or legislative function or its business or propriety function. With regards to a county attorney, this position would be one which falls within the council's governmental function. Therefore, it would be improper for a county council to enter into a contract with a county attorney to provide general legal services beyond the term for which the members of the council were elected.²

*3 This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain
Very truly yours,

Paul M. Koch

Assistant Attorney General

Footnotes

- 1 You have advised that there is no Dorchester County statute or ordinance which governs the role of county attorney. This legal opinion is based on this information. The existence of such a statute or ordinance may alter the legal conclusion contained herein.
- 2 It is generally accepted that if the contract in question is a unitary one for the doing of a particular and specified act, but its performance may extend beyond the term of the officers making it, if it appears that the contract was made in good faith and in the public interest it is not void because it will not be completed during the term of those officers. Pima County v. Grossetta, 54 Ariz 530, 97 P.2d 538 (1939); See, Jessup v. Hinchman, *infra*.

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