



HENRY McMASTER
ATTORNEY GENERAL

November 18, 2010

The Honorable John M. "Jake" Knotts, Jr.
South Carolina Senate, Dist. No. 23
PO Box 142
Columbia, SC 29202

Dear Senator Knotts:

We received your letter requesting an opinion of this Office concerning the mayor's authority to contact an outside attorney at the city's expense. You asked the following:

1. Does the mayor of a municipality that operates under the council-manager form of government have the authority to contact an outside attorney at the expense of the city, without prior approval of the council and consultation from the city manager?
2. Would it fall under the authority of the city council to authorize payment for the services of said attorney if these services were improperly or illegally obtained?

This opinion will address prior opinions, relevant statutes and caselaw to determine if the mayor has authority to hire an outside attorney using city funds.

Law/Analysis

South Carolina Code § 5-5-10 lists the various forms of municipal government in this State. You explained in the request letter that the municipality in question has adopted the council-manager form of government which is described in Title 5, Chapter 13 of the South Carolina Code of Laws of 1976. This form of government is often referred to as the "manager form." Under the council-manager form of government, "there shall be a municipal council composed of a mayor and four, six or eight councilmen." S.C. Code § 5-13-20(a). "All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote." S.C. Code § 5-13-30.

Chapter 13 of Title 5 specifically addresses the council-manager form of government, but Chapter 7 of Title 5 provides guidance for all forms. In any form of municipal government, the **city council may appoint or elect a municipal attorney**. S.C. Code § 5-7-230;¹ See, Op. S.C. Atty. Gen., July 28, 2003; June 2, 2000; September 27, 1996; September 15, 1977.

In an opinion of this Office dated July 28, 2003, we stated as follows:

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., July 28, 2003

One should note that “there are limitations . . . on the types of duties which can be assigned to a city attorney. **No governing body may spend public funds for a private purpose.**” Op. S.C. Atty. Gen., July 28, 2003 (citing Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967)) (emphasis added). In other words, “[p]ublic funds may only be expended for public purposes.” Id.; see also, Op. S.C. Atty. Gen., February 15, 1985 (“[D]etermination 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 is challenged. Op. S.C. Atty. Gen., July 1, 1977.”).

It is well recognized that “**where a statute [or ordinance] authorizes legal counsel charged with the duty of conducting the legal business of a governmental agency, contracts with other attorneys for legal services are void.**” Op. S.C. Atty. Gen., February 15, 1985 (quoting Board of Supervisors of Maricopa County v. Woodall, 120 Ariz. 379, 586 P.2d 628 (1978)). See also, 10 McQuillin, Municipal Corporations, 29.12 (3d ed.)). The purpose of such a rule is to ensure that the local government is acting responsibly. “Not only is it designed as a safeguard against the extravagance or corruption of [local] . . . officials, as well as their collusion with attorneys . . . but also, to prevent confusion and contradiction in the direction of the [local governments’] . . . litigation [citations omitted.]” Op. S.C. Atty. Gen., February 15, 1985 (quoting Cahn v. Town of Huntington, 29 N.Y. 2d 451, 278 N.E. 2d 908, 910 (1972)).

However, there is an exception if counsel is hired in good faith because of extenuating circumstances. A **local government official has implied authority to hire outside counsel if the prosecution or defense action is taken in the public’s best interest or in conjunction with his or her official duties, and the municipal attorney refuses to act or is incapable of or disqualified**

¹ “The city council may elect or appoint a municipal attorney and a judge or judges of the municipal court, whose duties shall be as prescribed by law. . . .” S.C. Code § 5-7-230.

The Honorable John M. "Jake" Knotts, Jr.

Page 3

November 18, 2010

from acting. Id. (quoting Coventry School Committee v. Richtarik, 411 A.2d 912, 916 (1980)); See, Op. S.C. Atty. Gen., September 27, 1996.

"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning. The words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limit or expand the statute's operation." Strickland v. Strickland, 373 S.C. 76, 88-89, 650 S.E.2d 465, 472 (2007).

S.C. Code § 5-7-230 is clear that under any form of government, the city council may elect or appoint a municipal attorney. Any other contract with legal counsel would be void. The code makes no specific reference to the mayor's ability to hire outside counsel at the city's expense.

"Each municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general laws of this State . . ." S.C. Code § 5-7-30 (Supp. 2009). For example, Section 2-285(6) of the Aiken City Code states as follows:

the city attorney shall make recommendations to the city manager and city council on retaining outside legal counsel on specified matters. The retaining of counsel where the estimated cost does not exceed \$1,000 may be approved by the city manager.

Aiken City Code Section 2-285(6); See, Op. S.C. Atty. Gen., September 8, 2003. The City of Aiken operates under a council-manager form of government like the municipality in question.

The request letter does not disclose which municipality is in question. Therefore, it would be best for one to search the City Code to determine if any regulation has been set forth regarding procedure to hire outside counsel. It is the opinion of this Office that in general the city council is ultimately responsible for approving the retention of outside counsel.

Doctrine of Ratification

Under the South Carolina law of agency, if an agent acts without authority, the principal may later authorize the act. The principal's ratification relates back to cover the agent's act with authority. To ratify the agent's unauthorized action, certain requirements must be met. First, the principal must have had the capacity to act at the time the action was taken. Second, the principal must be known; the principal cannot be undisclosed. Third, the principal must know all material facts about the act before it can be ratified. Finally, the ratification must be complete; the principal must make an unequivocal affirmation of the action. See, Lincoln v. Aetna Casualty & Surety Co., 300 S.C. 188, 386 S.E. 2d 801 (1989); Hopkins v. Smathers, 114 S.C. 488, 104 S.E. 30 (1920).

There is no express agency relationship between the mayor and the city council. However, in this instance, it appears that an implied agency relationship was created when the mayor contacted the

outside attorney on behalf of the city. The city council would be considered the principal and the mayor considered the agent. The city council is the principal in this situation because the city council has the authority under S.C. Code § 5-7-230 to appoint or elect a municipal attorney and implicitly determine the duties of the city attorney. Because of that express authority, it logically falls on the city council to hire or approve the hiring of outside counsel when necessary.

Conclusion

Question 1

It is the opinion of this Office that the mayor does not have authority to hire outside counsel without approval except in very extenuating circumstances.² It is well recognized that "where a statute [or ordinance] authorizes legal counsel charged with the duty of conducting the legal business of a governmental agency, contracts with other attorneys for legal services are void." Op. S.C. Atty. Gen., February 15, 1985. The city attorney is responsible for conducting all legal business of a local government. This undisclosed municipality may have regulations in place setting forth procedure for hiring outside counsel. Those regulations should be followed.

Since the city council may appoint or elect a municipal attorney under S.C. Code § 5-7-230 and has the power to appropriate money, it is a logical conclusion that the city council is responsible for hiring or approving the hire of outside counsel.

Question 2

It is the opinion of this Office that the city council may ratify the mayor's actions to authorize payment for the services of the attorney even though the services were improperly obtained. The council is given all legislative powers of the municipality and has express authority to determine all matters of policy,³ and the city "council possesses broad powers to appropriate monies where the matter in question is within the scope of the [city's authority]. Its discretion to appropriate funds within the sphere of its authority is virtually unlimited." Op. S.C. Atty. Gen., February 15, 1985. To properly ratify an action, the principal must have had the capacity to act at the time the action was

² In general, the mayor may not hire an outside attorney at the expense of the city without approval. However, it is well established that "in certain extenuating circumstances, there is . . . the implied authority of a [local government] . . . board or officer to hire counsel in the good faith prosecution or defense of an action taken in the public interest and in conjunction with its or his official duties where the . . . [local government's] attorney refuses to act or is incapable of or is disqualified from acting." Op. S.C. Atty. Gen., September 27, 1996; February 15, 1985. This Office has no ability to make factual determinations in an opinion; therefore, this Office cannot discover whether there are special or unique circumstances at issue here to invoke the exception discussed above. Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006; September 27, 1996.

³ S.C. Code § 5-13-30.

The Honorable John M. "Jake" Knotts, Jr.
Page 5
November 18, 2010

taken by the agent (mayor). It is the opinion of this Office that a court would likely conclude that the city council would have had the capacity to approve the hiring of the outside attorney after going through the proper procedures of the city code.

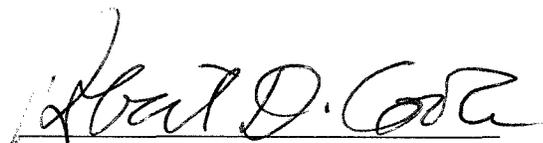
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General