

October 11, 2007

John B. Williams, Esquire
Williams & Hulst, LLC
209 East Main Street
Moncks Corner, SC 29461

Dear Mr. Williams:

We understand from your letter that you represent the Town of Moncks Corner (the "Town") and wish to request an opinion on the Town's behalf concerning implementation of pay increases for the Town's council and mayor. You provided us with the following information:

The Town has elected to cancel the election scheduled for November for the office of Mayor and Councilman because no one filed in opposition to the incumbents. Therefore, no actual election will take place on that date.

The Council has voted to increase the pay for both Council and Mayor.

I am aware that this increase cannot take place until after the election and that an ordinance will need to be passed to implement the pay increase.

Since the Town is not having an actual election and the incumbents will be deemed elected on that date, is there anything special that needs to be done to implement the pay increase? The Town is going to proceed with enacting the ordinance and having the necessary readings thereon.

Law/Analysis

Before considering the implementation of the pay increase for both the Town's mayor and council, we are compelled to point out that it has been the position of this Office that elections for municipal offices must be held regardless of whether only one candidate runs for the position. We noted in an opinion issued in 1961 that this has been the position of the Office going back to at least

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1935. Op. S.C. Atty. Gen., March 16, 1961. In the 1961 opinion, we stated: “[I]nsofar as a general election is concerned, it appears clear that the general election cannot be dispensed with but must be conducted at the stipulated time, particularly in view of the fact that under the Constitution of this State any qualified elector is eligible to an office for which he may vote.” Id.

The constitutional provision to which the 1961 opinion refers is now codified as article I, section 5 of the South Carolina Constitution (1976). This provision states: “All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.” S.C. Const. art. I, § 5. In an opinion issued in 1968, discussing whether the Legislature by statute can prevent a defeated primary election candidate from running in the general election as write-in candidate, we discussed this particular constitutional provision. Op. S.C. Atty. Gen., June 18, 1968. Citing Gardner v. Blackwell, 167 S.C. 313, 166 S.E. 338 (1932), we surmised “[t]hat case effectively recognized the right to be voted for even though one’s name was not placed upon an official ballot. It recognized the validity of a write-in ballot prior to the incorporation in the official ballot form of a write-in space for candidates.” Id. Based on this analysis, this Office has consistently found that “the right to write-in the candidate of one’s choice is constitutionally protected by the Constitution of South Carolina. This right includes a write-in even on election day and where no write-in candidacy has been offered.” Op. S.C. Atty. Gen., September 4, 2003.

Given that article I, section 5 provides voters with the constitutional right to write-in candidates even on election day, we opined on several occasions that if an election is called for by statute, it must be held even if the incumbents are unopposed. Ops. S.C. Atty. Gen., July 15, 1991 (Abbeville County School District); April 14, 1988 (Mayor of the Town of Cameron). Finding no reason to veer from our prior decisions, we continue to rely on these opinions. Thus, despite the lack of opposition to its incumbents, we believe the Town must hold an election, thereby giving voters the opportunity to cast write-in votes.

Having determined the Town must hold an election to fill the positions of its mayor and councilmembers, we turn to your question as to when any pay increases for the council and mayor may be implemented should they vote to adopt them prior to the end of their terms. Salaries of municipal councils are governed by section 5-7-170 of the South Carolina Code (2004). This provision states, in pertinent part:

The council may determine the annual salary of its members by ordinance; provided, that an ordinance establishing or increasing such salaries shall not become effective until the commencement date of the terms of two or more members elected at the next general election following the adoption of the ordinance, at which time it will become effective for all members whether or not they were elected in such election.

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S.C. Code Ann. § 5-7-170 (emphasis added).

In determining when the pay increases may go into effect, we look to the rules of statutory interpretation. As our Supreme Court explained in Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 525-26, 642 S.E.2d 751, 754 (2007):

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

According to the language used in section 5-7-170, pay increases may not become effective until after two or more members' are "elected at the next general election . . ." and their terms of office commence. While we believe an election is required, should an election not be held, we find it questionable as to whether the commencement of a term of office without an election is sufficient to meet the requirements of this provision. Furthermore, in past opinions, this Office interpreted this statute as allowing pay increases to take effect only after the next general election. Ops. S.C. Atty. Gen., September 20, 1983; June 30, 1978. Thus, in accord with our prior opinions and within the literal meaning of the statute, we believe a court would most likely hold that pay increases may not take effect until after the general election in which the mayor or council member is elected. Nevertheless, given that we believe a general election is necessary under the circumstances presented in your letter, the holding of such an election would certainly provide additional comfort that the terms of section 5-7-170 are satisfied and that the Town's council and mayor may receive their pay increases upon the commencement of the elected members' terms.

Conclusion

Although you initially asked us to address the process by which pay increases are implemented for the Town's mayor and councilmembers when no general election is conducted, we find it imperative to make you aware of our Office's position that despite the lack of a challenger among the vacant positions on the Town's council, we believe a general election must be conducted for municipal offices. Furthermore, based on the language used in section 5-7-170 and our prior

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interpretations of this provision, we believe a court may find a pay increase is not eligible to take effect until after the conduct of a general election.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General