



ALAN WILSON
ATTORNEY GENERAL

April 13, 2011

Grant W. Duffield, City Manager
City of Tega Cay
120 Shoreline Parkway
Tega Cay, South Carolina 29708

Dear Mr. Duffield:

We understand that you desire an opinion of this Office addressing the following three questions:

Question #1: Under the fact pattern set forth below, may a city council member be removed for absenteeism, and/or neglect of duty, from his office as a city council member?

Question #2: If a city council member can be removed under the below described circumstances, which is the proper authority to carry out such removal, and what removal procedures would be utilized?

Question #3: Will the US Department of Justice's approval be required prior to such removal?

In addition, you included the following statement of facts:

1. Council member ("CM") duly elected on 11-16-07.
2. CM took oath of office, and began serving on 1-14-08.
3. Office of the CM is up for election on 11-08-11; newly elected member to begin serving on 1-16-12.

4. CM accepted a position in Tennessee and began living there in May, or June, 2010. On information and belief, the CM has continued at all times to maintain a residence in the City of Tega Cay.
5. Since moving to Tennessee, CM has missed a total of seventeen City council meetings.
6. Since moving to Tennessee, CM has attended three City council meetings.

Law/Analysis

In a 2005, this Office discussed the general power to remove a public official from office. Op. S.C. Atty. Gen., June 27, 2005. We stated:

As our Supreme Court long ago stated, “[t]he power of removal from office . . . is not an incident of the executive office, and it exists only where it is conferred by the Constitution or by the statute law, or is implied from the conferring of the power of appointment.” State ex rel. Lyon v. Rhame, 92 S.C. 455, 75 S.E. 881, 882 (1912). If an officer holds office for a fixed term, summary removal is not authorized. State v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). The right to hold an office during a fixed term unless removed for cause may be overcome only by an unequivocal grant of power from the Legislature to remove at pleasure. Id.

Moreover, the Governor possesses no inherent power to remove or suspend from office. The Chief Executive may not remove or suspend a public officer unless the power to do so is conferred by the Constitution or statute. Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997). The power to suspend from office stands separate and apart from the power to remove, and must itself be found in statutory or constitutional authority. Id.

Id.

Article VI, section 9 of the South Carolina Constitution (2009) states: "Officers shall be removed for incapacity, misconduct, or neglect of duty, in such manner as may be provided by law when no mode of trial or removal is provided in this Constitution." Article III, section 27 of the South Carolina Constitution (2009) contains the exact language as article VI, section 9. In prior opinions, this Office concluded these constitutional provisions are not "self-executing." Ops. S.C. Atty. Gen., July 21, 2003; August 1, 2000. Thus, we stated "in order for a public officer . . . to be removed from office pursuant to the authority of these constitutional provisions, the legislature would have to enact a law providing for the ' . . . mode of trial or removal'" Op. S.C. Atty. Gen., July 21, 2003.

Initially, we reviewed the provisions contained in chapter 7 of title 5 pertaining to municipal officers. We noted that section 5-7-200 of the South Carolina Code (2004) states the grounds for forfeiture of office of a mayor or a councilman. That provision states: "A mayor or councilman shall forfeit his office if he (1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution; (2) violates any express prohibition of Chapters 1 to 17; or (3) is convicted of a crime involving moral turpitude." S.C. Code Ann. § 5-7-200(a). This provision does include language calling for the forfeiture of a councilman's office based on absenteeism. Furthermore, we did not find any other provisions in chapter 7 of title 5 addressing absenteeism.

We also examined section 1-3-240 of the South Carolina Code (2005 & Supp. 2010), allowing the Governor to remove certain public officials from office. This provision generally allows the Governor remove "[a]ny officer of the county or State . . . who is guilty of malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity" S.C. Code Ann. § 1-3-240(A)(2005). In a 1992 opinion, this Office considered whether the Governor could remove a mayor pursuant to section 1-3-240(A). Op. S.C. Atty. Gen., August 17, 1992. We determined "a mayor is not considered a county or state officer but is instead a municipal officer." In keeping with this opinion, we believe that a councilman is also a municipal officer. Therefore, we do not believe a court would find that the Governor has the authority to remove a council member for absenteeism.

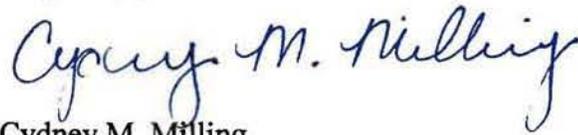
Conclusion

As we explained above, our courts only recognize the power to remove a public official from office when such authority is specifically given by the South Carolina Constitution or by statute pursuant to article VI, section 9. In our review of both the Constitution and the statutory provisions pertaining specifically to municipal officers and those pertaining generally to public officers, we did not find a provision allowing for the removal of a city councilmember due to absenteeism. Based on this conclusion, we cannot answer your other two inquiries of who has the

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authority to remove the council member under these circumstances and whether or not the U.S. Department of Justice must be involved.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General