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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 17, 1999

The Honorable Mark S. Kelley
Member, House of Representatives
326-C Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Kelly:

Your opinion request has been forwarded to me for reply. You have asked this Office to review a letter written by John Kost dated December 20, 1998. In this letter, Mr. Kost raised several questions regarding the propriety of paying members of county council cost of living increases, longevity pay increases and bonuses.

As an initial matter, I will take this opportunity to briefly explain the manner in which this Office received your opinion request. This Office received a letter, along with a packet of accompanying information, from Mr. John Kost, a member of Horry County Council, requesting a legal opinion on several questions involving the compensation of county council members. After reviewing the materials, I realized that Mr. Kost requested the opinion in his capacity as individual member of county council and not on behalf of county council as a whole. I then called Mr. Kost and explained to him, as I would to any other individual member of a council on any question presented, that Office policy, in strict accordance with state law, did not authorize me to issue an opinion to a single member of a governing body or board or commission because only the entity itself may make decisions or take actions. Office of the Attorney General, Office Manual, page 48, § 9(e); Op. Atty. Gen. dated September 6, 1984. This Office asks that the opinion request come through the chairman of the council or by a member acting on behalf of the council, upon majority vote of the council. I further explained to Mr. Kost that this Office would be happy to answer any opinion request received in such a manner or an opinion request received from a

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member of the General Assembly. At some point thereafter, this Office received the present opinion request.

In no way should my explanation regarding this Office's policy on opinion requests received from individual members of councils be viewed as an attempt to avoid answering the questions presented by Mr. Kost. On the contrary, it should be viewed as an attempt to get these important and complicated questions before this Office in a manner consistent with Office policy and state law so that they can be answered properly.

Before moving to the questions presented, I note the answers contained in this opinion must be viewed with the recognition that an ordinance, like a statute, is presumed valid and will not be declared invalid by a court unless such invalidity is clear. Rothschild v. Richland County Board of Adjustment, 309 S.C. 194, 420 S.E.2d 853 (1992). Further, this Office possesses no authority to declare an ordinance invalid as only a court may do so.

Question 1

Can Council receive Bonuses?

Article III, Section 30 of the State Constitution provides:

The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law

"Extra Compensation" as used in Article III, Section 30 has been defined as "any compensation over and above that fixed by law or contract at the time the service was rendered." State ex rel. McLeod v. McLeod, 270 S.C. 557, 243 S.E.2d 446 (1978). Use of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public officers or employees is unconstitutional if it is greater than that which the State has a contractual or legal obligation to provide. Op. Atty. Gen. dated July 19, 1979. Further, it is a general rule that a municipal corporation cannot legally bestow a gratuity on an officer or an employee. Op. Atty. Gen. dated July 14, 1958; 64 C.J.S. Municipal Corporations § 1837 (1950). Even though Article III, Section 30 by its terms prohibits only action by the General Assembly, this Office has concluded that this

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constitutional provision also serves to limit political subdivisions, such as counties, at least in the powers delegated to them by the General Assembly. Ops. Atty. Gen. dated June 18, 1991 and July 14, 1958.

Based upon the foregoing, this Office has repeatedly concluded that bonus payments (or such pay that amounts to bonus payments) are prohibited as being made after services have been rendered or a contract fulfilled. Ops. Atty. Gen. dated October 10, 1985; July 19, 1979; August 23, 1979; July 14, 1958; and February 25, 1955. Accordingly, if a county is not under any legal or contractual obligation to pay council members bonuses, the payment of bonuses would be inappropriate. However, in regards to your specific question, since a determination of whether Horry County is under a legal or contractual obligation to pay council members bonuses is a factual one and this Office is not authorized to make factual determinations in a legal opinion, I would respectfully defer to the county attorney's judgment in this matter.

Question 2

If yes, [c]an Council receive Bonuses without specific Council direction?

As stated in Question 1, whether council may receive bonuses would depend on whether the county is under a legal or contractual obligation to pay bonuses to council members. Of course, the main factor in making this determination would be whether the payment of such is authorized.

Question 3

Is the Step (Longevity) Increase legal--without an ordinance specifically relating to Council?

Before addressing whether there must be an ordinance specifically relating to council, it must first be determined whether members of county council are entitled to receive longevity salary increases at all. I have been unable to locate any South Carolina cases or prior opinions of this Office on the propriety of longevity increases for elected officials. Therefore, I must turn to the general law on this subject and the law of other states.

As a general rule, compensation of public officers is a mere incident to the lawful title or right to the office, and belongs to the officer so long as he or she holds the office; or, as

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sometimes stated, the salary pertaining to an office is an incident to the office itself and not to the person discharging the duties of the offices. 63C Am.Jur.2d Public Officers and Employees §273 (1997). Custom in the matter of office-holder salaries suggests that the salaries of elected "officers" are assumed to be generic and linked to the office and its responsibilities rather than to the person's longevity in office. Utah Op. Atty. Gen. dated December 15, 1987.

In an opinion dated June 26, 1992, the Wisconsin Attorney General addressed a similar issue regarding longevity pay:

With respect to elected county officials, at least one such restriction is that compensation must be attendant to the office, not the personal characteristics of the individual that holds that office at any particular time. See, e.g., 65 Op.Att'y Gen. 62, 64 (1976), which concluded that a county board could not establish sick leave and vacation benefits for elected county officials. This principle was succinctly explained in 66 Op.Att'y Gen. 329, 330 (1977), which determined that longevity pay could not be based on years of service of the incumbent:

The compensation established under sec. 59.15(1)(a), Stats., is for the office, and the incumbent is entitled to it as an incident of office. See 61 Op.Att'y Gen. 165 and 61 Op.Att'y Gen. 403 (1972). Under sec. 59.15(1)(a), Stats., the board could establish the annual compensation for the office at a given figure for the first year of the term and at a higher figure for the second year of the term, but any occupant of the office would be entitled to the fixed amounts in the given years regardless of personal longevity.

61 Op. Att'y Gen. 165 (1972) and 61 Op.Att'y Gen. 403 (1972), the two opinions cited in the above quotation, appear to be directly responsive to your request. Both concluded that a county board may not establish a step-salary program for the district attorney, who at that time was paid with county funds.

The payment of longevity increases to members of county council would seem to run directly counter to the general rule that salary pertaining to an office is incident to the office itself and not to the person discharging the duties of the office. Accordingly, it is likely that

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if a court in South Carolina were to address this question, it would conclude under the present law, the payment of longevity salary increases to members of county council is improper.

In the event that a court were to conclude that longevity increases were proper, such increases would have to be accomplished in accordance with the law on salary increases for county council members. This law is found in Section 4-9-100 of the South Carolina Code of Laws and reads in pertinent part as follows:

After the initial determination of salary, council may by ordinance adjust the salary but the ordinance changing the salary is not effective until the date of commencement of terms of at least two members of council elected at the next general election following the enactment of the ordinance affecting the salary changes at which time it will become effective for all members. ...

This Office has never addressed the question of whether Section 4-9-100 requires a separate and distinct ordinance for increasing the salaries of county council members. However, this Office has addressed this question for city council members under a statute similar to 4-9-100. In an opinion dated April 8, 1996, we were asked whether a separate ordinance must be adopted specifically to address mayor and council salaries prior to a salary increase being implemented. This Office concluded that since the statutes relative to the adoption of ordinances did not contain specific guidance as to how an ordinance increasing salaries of the mayor and council members should be adopted, it would appear that the municipal council had the discretion to determine the appropriate manner to do so. In doing so, it would be possible to include the increase in some other ordinance, such as a budget ordinance.

Using the 1996 opinion as a guide, it would appear that an increase in salary for county council members would not necessarily have to be contained in a distinct and separate ordinance, but may be a part of another ordinance, such as a budget ordinance. However, the intent of Section 4-9-100 would not be met if a county council attempted to give themselves a pay raise without clear indication that they are doing so. Therefore, if council included a pay raise in another ordinance, specific reference to council's pay raise in such ordinance would be required.

Question 4

Can County Council contravene State Home Rule legislation?

It goes without saying that County Council must adhere to the law. Therefore, it would be improper to contravene the Home Rule legislation found in the South Carolina Code of Laws.

Question 5

Is it legal for Council to set up automatic increases for itself by stating they will receive COL and longevity increases that do not require specific action when those increases are due?

As previously stated, Section 4-9-100 is the controlling law on the subject of salary changes for members of county councils. Thus, if a county council desires to alter its salary in any way, such must be done in accordance with the rules set forth in this Section. Pursuant to Section 4-9-100, council may change its salary but such must be done by ordinance and the change is not effective until the date of commencement of terms of at least two members of the council elected at the next general election following the enactment of the ordinance. The clear language of this statute seems to preclude an automatic salary increase for members of council as a salary increase requires council action, i.e., an ordinance. Furthermore, an automatic yearly salary increase would violate the language of the statute regarding the effective date of salary increases. See Lee v. City of Taylor, 234 N.W.2d 483 (Mich Ct. App 1975)(ordinance containing cost-of-living escalator clause was violative of charter provision prohibiting salary increase during term of office).

Question 6

Is it legal to compensate Council members at varying rates? (When no specific additional duties are assigned?) If yes, what will the filing fee amount be for the next election?

This again is a question governed by Section 4-9-100. Unfortunately, I have been unable to locate any South Carolina cases or prior opinions of this Office addressing this question. However, I have located an Arizona case which interprets a constitutional provision similar in some respects to Section 4-9-100. In Maricopa County v. Rodgers, 78

P.2d 989 (Ariz. 1938), the supreme court was asked to interpret Section 17 of the Arizona Constitution. This Section provided:

The legislature shall never grant any extra compensation to any public officer, agent, servant, or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer be increased or diminished during his term of office, provided, however, that when any legislative increase or decrease in compensation of the members of any court, board or commission, composed of two or more officers or persons, whose respective terms of office are not coterminous, has heretofore or shall hereafter become effective as to any member of such court, board, or commission, it shall be effective from such date as to each of the members thereof.

The court stated that whatever may be said as to the relative meaning and effect of this section, there can be no question but that both the Legislature and the people of Arizona adopted the amendment to section 17 above set forth for the express purpose of insuring that all members of a court, board, or commission composed of more than one person, who were doing, in substance, the same work, should at all times receive the same salaries. *Id.* at 991-992. The court found the Legislature has the power to fix the salaries of public officers at any amount, reasonable or unreasonable, discriminatory or not discriminatory, which it may see fit, unless prohibited by some provision of the Constitution of Arizona, and the Constitution not only does not prohibit uniformity of salaries in offices, but specifically commands it. *Id.* at 992.

Section 4-9-100 reads in part as follows:

After the initial determination of salary, council may by ordinance adjust the salary but the ordinance changing the salary is not effective until the date of commencement of terms of at least two members of council elected at the next general election following the enactment of the ordinance affecting the salary changes at which time it will become effective for all members. A chairman of a county council who is assigned additional administrative duties may receive additional compensation as the council may provide. ...

Using the Arizona case as a guide, a court interpreting this Section 4-9-100 may conclude that the intent of the General Assembly in adopting this legislation was to assure

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that members of county council doing, in substance, the same work, are to receive at all times the same salaries. This intent seems to be supported by the language in the statute which provides the salary change "become[s] effective for all members [of county council]." Furthermore, the statute specifies only that the chairman who is assigned additional administrative duties may receive additional compensation. The statute does not include similar language for any other member of council.

Question 7

Can Council members ever legally be considered as employees of the County? If the answer is yes, does it not imply that they work for the Administrator, since all County employees work for the Administrator?

There is no simple yes or no answer to the first part of your question. If you are asking whether county council members are considered employees as the term is commonly used, a person who works for another in return for compensation, the answer is no. A member of county council is a "public officer" and is not an "employee" in the usual sense of the word. See Op. Atty. Gen. dated November 23, 1987 (county council member is a public officer); 63C Am.Jur.2d Public Officers and Employees §7 (1997)(the distinction between governmental employee and elected public official is significant). However, in certain instances, the legislative body may choose to include public officers in a definition of "employees" found in a statute or ordinance. If such is the case, the public officer would be considered an "employee" for the limited purpose found in the legislation. 63C Am.Jur.2d Public Officers and Employees §7 (1997).

It goes without saying that members of county council do not work for the county administrator. On the contrary, under Section 4-9-610 et seq., the county administrator is employed by and serves at the pleasure of county council.¹

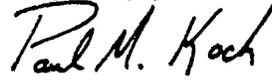
This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the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

¹ Of course, the removal of those county administrators employed for a definite term must be done as provided by law.

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With kindest regards, I remain

Very truly yours,

A handwritten signature in cursive script that reads "Paul M. Koch". The signature is written in black ink and is positioned above the printed name.

Paul M. Koch
Assistant Attorney General