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The State of South Carolina



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February 17, 1989

The Honorable Charles M. Condon
Solicitor, Ninth Judicial Circuit
Post Office Box 58
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Dear Solicitor Condon:

By your letter of September 13, 1988, you have requested an interpretation of Section 5-7-170, Code of Laws of South Carolina (1976 & 1987 Cum. Supp.), as it pertains to the effective date of an increase in salary for the mayor of a municipality. You stated in your letter:

It is my understanding that the mayor is covered by Section 5-7-170, and therefore is entitled to participate and vote in the pay raise issue; however, the date that the pay raise becomes effective will not be until after the upcoming election.

For the reasons following, we concur with your conclusion.

Prior to amendment in 1979, Section 5-7-170 provided the following in pertinent part:

The council may determine the annual salary of the mayor and councilmen by ordinance, but no ordinance changing such salary shall become effective until the date of commencement of the terms of councilmen elected at the next general election following the change. ...

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After amendment by Act No. 98, 1979 Acts and Joint Resolutions, the pertinent portion of Section 5-7-170 now provides:

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. ...

In construing a statute, the primary obligation of the courts and this Office is to determine and effectuate legislative intent if at all possible. Anders v. South Carolina Parole and Community Corrections Board, 279 S.C. 206, 305 S.E.2d 229 (1983). The title or caption of an act may be considered in aid of the construction of the act. University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966). The title of Act No. 98 of 1979 provides the following:

An Act To Amend Section 5-7-170, Code Of Laws Of South Carolina, 1976, Relating To Salaries And Expenses Of Mayors And Council Members, So As To Correspond The Method Of Establishing Compensation Of Municipal Officials To The Procedure Used In Establishing Compensation For Members Of County Councils.

The caption then appearing in the act reads:

Salary of mayor and council members[.]

Thus it would appear from the title and caption that the General Assembly intended to place the mayor in the same position as members of council with respect to determination of salary and its effective date.

For a variety of reasons, it would be appropriate to treat the mayor on the same basis as other council members. Salaries must be set by ordinance; clearly a mayor could not single-handedly set a salary, since an ordinance of council is required. A mayor is a member of council, by virtue of Code Sections 5-9-20, 5-11-20, and 5-13-20. Other Code provisions refer to council as a whole when it is clear that the reference includes the mayor; see, for examples, Section 5-7-160 (powers of municipality vested in the council) and

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Section 5-7-250 (council meetings, rules of procedure, and so forth). In addition, the mayor votes as any other council member would; see Sections 5-9-30(3) (the mayor may "vote as other councilmen"), 5-11-30 ("Each member of council, including the mayor, shall have one vote."), and 5-13-30 ("each member, including the mayor, to have one vote") (emphasis added in all statutes). Therefore, the mayor should be treated as other council members.

As the title to Act No. 98 of 1979 indicates, the intent of the amended statute is to place municipal councils in the same stead with county councils with respect to salaries. Thus, it is helpful to refer to Section 4-9-100 of the Code, relative to compensation of county council members, to determine what method the General Assembly was attempting to follow in establishing the salaries of mayor and council members.

In pertinent part, Section 4-9-100 provides the following:

... After adoption of a form of government as provided for in this chapter, council shall by ordinance prescribe the salary and compensation for its members. 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. The additional compensation becomes effective with the passage of the ordinance increasing the compensation of the chairman. ...

The chairman of a county council is an integral part of county council; there appears to be no reason why the mayor should not be treated as an integral part of a municipal governing body. By analogy, generally the mayor of a municipal council and a chairman of a county council are both presiding officers of their respective bodies, yet each is also a voting member of their respective bodies. See Sections 4-9-110 (but note an exception in the council-supervisor

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form of government, Section 4-9-420, wherein the supervisor is the presiding officer); 5-9-30(3) as to mayor-council form of government; 5-11-30 as to council form of municipal government; and 5-13-30 as to council-manager form of municipal government. Thus, both a mayor and a chairman of a county council should be treated as members of their respective bodies for the setting of salaries. It is not necessary and would, arguably, be superfluous to refer to a mayor and members of council since the mayor is a member of council.

The omission of "mayor" from the amended version of Section 5-7-170 could have yet more significance. If the mayor is not considered to be a member of council, then no authority exists to establish a salary for the mayor (though the second part of Section 5-7-170 would allow his actual expenses to be reimbursed, as provided by ordinance). As stated in 63A Am. Jur.2d Public Offices and Employee 440, "Compensation is not indispensable to a public office" If compensation is not authorized by some constitutional or statutory provision, arguably none is to be paid and the position is deemed to be an honorary one, with services being rendered gratuitously. Id. This seemingly harsh result would be avoided if the mayor is deemed a member of council. Extending that argument, it would be appropriate to increase the mayor's salary on the same date as other council members.

An argument may be made that a salary for a mayor may be increased at a time other than the effective date for council members, by analogy to Section 4-9-100, supra. As to compensation of county council members, the plain language of Section 4-9-100 permits the chairman of county council to be assigned additional duties and to receive additional compensation as the council may provide. The additional compensation is to become effective "with the passage of the ordinance increasing the compensation of the chairman." It is not necessary in that instance to wait 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. ..."

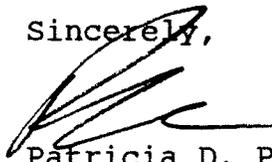
To make the compensation scheme comparable for both municipal councils and county councils, it would arguably be appropriate for the mayor to be able to be compensated at a rate different from the remainder of the municipal council, with the effective date not determined with respect to the date of commencement of terms of two or more members of council elected at the next general election following adoption of a salary ordinance. However, the better approach, given the plain language of Section 5-7-170 as amended and the reasoning discussed above, as well as the more fiscally responsible approach, would be to treat the mayor as a member of council and make his salary increase effective at the date specified in Section 5-7-170.

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In conclusion, it is the opinion of this Office that should a mayor's salary be increased, the effective date would be as specified in the provisions of Section 5-7-170 of the Code. The foregoing is an opinion on the law generally and is not intended to address any factual situation of how a particular salary increase may have been accomplished; such would necessitate the finding of fact which is outside the scope of this Office's authority.

With kindest regards, I am

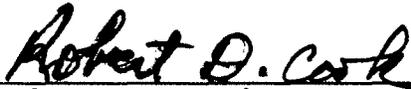
Sincerely,



Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions