

1984 WL 249892 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 21, 1984

\*1 The Honorable Charles Ross  
Mayor  
Town of Lincolnton  
Post Office Box 536  
Summerville, South Carolina 29483

Dear Mayor Ross:

By your letter of April 24, 1984, to Attorney General Medlock, you have asked whether it is legal for a newly-elected member of your Town Council to be paid by the Town for doing the Town's automobile mechanical work and if so, what would be the maximum amount that he could be paid annually. Because we do not know the relationship of the councilman to the Town vis a vis his automobile maintenance work, we will provide you with applicable law on the two most likely situations. It is possible that a problem may exist, but there are steps which may be taken if a problem does exist.

#### Master-Servant Relationship

From your letter we cannot determine whether the councilman in question is an employee of the Town. If he is both an employee and a councilman, he would be considered to be both master and servant. This relationship is based on common law rather than statutory law in this State and is summarized as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other . . .

\*\*\*

The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions . . . In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality . . .

67 C.J.S. Officers, § 27. See also Op. Atty. Gen., dated March 3, 1978. Applying common law principles to your situation, if the councilman is also a Town employee, it is possible that a conflict of interest exists. To cure the problem, if such problem exists, the individual in question could make a choice as to which position he wished to hold, giving up the other position.

#### Independent Contractor

If the councilman is not an employee of the Town but instead provides the automobile maintenance work by a contract with the Town or on an as-needed basis, he may instead be considered an independent contractor. If this should be the case, there are several state laws which would govern the councilman's actions. These include [Sections 5-21-30](#) and [5-7-130 of the Code of Laws of South Carolina \(1976\)](#) and portions of South Carolina's Ethics Act, Section 8-13-10 et seq. of the Code.

[Section 5-21-30](#), which may well address the situation described by you, provides in pertinent part:

No municipal officer shall take a contract to perform work or furnish material for the municipal corporation of which he is an officer and no such officer shall receive any compensation on any such contract except that:

\*\*\*

\*2 (2) Any municipal officer may enter into such a contract whenever the contract is awarded to him as low bidder after a public call for bids and such contract be allowed by the unanimous vote to be taken by yeas and nays and entered upon the council's minutes.

Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by fine or imprisonment, in the discretion of the court before whom such conviction is had.<sup>1</sup>

Furthermore, the provision of [Section 5-7-130](#) must be considered:

Any municipal officer or employee who has a substantial financial interest in any business which contracts with the municipality for . . . services or who personally engages in such [services] shall make known that interest and refrain from voting upon or otherwise participating in his capacity as a city officer or employee in matters related thereto.

Any city officer or employee who wilfully conceals such a substantial financial interest or wilfully violates the requirements of this section shall constitute malfeasance in office and upon conviction shall forfeit his office or position. Violation of this section with the knowledge express or implied of the person . . . contracting with . . . the city shall render the contract . . . voidable by the municipal governing body.<sup>2</sup>

In addition, the Ethics Act provides the following in Section 8-13-410:

- (1) No public official or public employee shall use his official position or office to obtain financial gain for himself.
- (2) No public official or public employee shall participate directly or indirectly in a procurement when he has knowledge or notice that:
  - (a) he or any business with which he is associated has a financial interest pertaining to the procurement; . . .

\*\*\*

The Ethics Act also prescribes action to be taken by a public official where a decision of the public body of which he is a member would affect the member's financial interest. Section 8-13-460 provides in part:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

- (a) Prepare a written statement describing the matter requiring action or decisions, and the nature of his potential conflict of interest with respect to such action or decision.

\*\*\*

(c) If he is a public employee, he shall furnish a copy to his superior, if any, who shall assign the matter to another employee who does not have a potential conflict of interest. If he has no immediate superior, he shall take such action as prescribed by as [sic] the State Ethics Commission. If the public official is a member of the governing body of any . . . municipality, . . . he shall furnish a copy to the presiding officer and to the members of that governing body, who shall cause such statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists, and shall cause such disqualification and the reasons therefor to be noted in the minutes.

\*3 The Ethics Act further provides, in Section 8-13-500(3):

It shall be a breach of ethical standards for a business, in which a public employee or public official has a financial interest, knowingly to act as a principal or as an agent for anyone other than the State or other governmental entity with which he is associated in connection with any contract, claim or controversy, or any judicial proceeding in which the public employee or public official either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the official's or employee's official responsibility, where the State or governmental entity is a party or has a direct and substantial interest.

Clearly, whether the councilman in question is an employer of the Town or an independent contractor, portions of the Ethics Act and [Sections 5-21-30](#) and [5-7-130](#) must be taken into account and the requirements in those statutes followed. We suggest that you consult the State Ethics Commission about this matter to receive a more definitive response. You should provide that agency with as many specific facts as possible concerning the councilman's relationship to the Town regarding the automobile maintenance work. You may reach the Commission by calling 758-7408 or writing to Gary Baker, Executive Director, State Ethics Commission, SCN Center, Suite 930, 1122 Lady Street, Columbia 29201.

We hope this information will be of some benefit to you and strongly urge you to consult the Ethics Commission in this matter. Please contact us at 758-3970 if we may provide other assistance.

Sincerely,

Patricia D. Petway  
Staff Attorney

#### Footnotes

- 1 While repeal of a statute by implication is not favored, [Strickland v. State](#), 276 S.C. 17, 274 S.E.2d 430 (1981), it is possible that the Ethics Act, Section 8-13-10 et seq., has impliedly repealed this Section. Furthermore, the Ethics Act, as the later expression of the legislature's will, may be deemed as controlling, rather than this Section. [Feldman v. South Carolina Tax Commission](#), 203 S.C. 49, 26 S.E.2d 22 (1943). As will be noted in the body of this letter, the State Ethics Commission would be the appropriate body to make the determination of which statute should be applied.
- 2 Both [Section 5-7-130](#) and the Ethics Act use the term 'substantial.' Using that term in its ordinary and plain meaning, [Worthington v. Belcher](#), 274 S.C. 366, 264 S.E.2d 148 (1980), courts have construed the term to mean 'something of real work and importance; of considerable value; valuable; something worthwhile as distinguished from something without value or merely nominal.' [Newman v. Piggie Park Enterprises, Inc.](#), 256 F.Supp. 941, 950-51 (D.S.C. 1966), citing [Black's Law Dictionary](#) (4th Ed. 1951) (emphasis added).

1984 WL 249892 (S.C.A.G.)