



ALAN WILSON
ATTORNEY GENERAL

December 16, 2015

Mr. Michael W. Battle, Esq.
City Attorney for the City of Loris
Post Office Box 530
Conway, South Carolina 29528

Dear Mr. Battle:

You have requested clarification on whether S.C. Code Ann. § 5-7-180 (2004 & Supp. 2014) prohibits the Fire Chief or member of the City of Loris Volunteer Fire Department from simultaneously serving as a member of the Loris City Council. While you acknowledge that our Office has previously written on this subject, you provide that one of the prospective council members believes that the South Carolina Attorney General has issued an opinion to the effect that council members may simultaneously serve on city council and as a volunteer for the fire department of the same city. Accordingly, clarification follows.

Law / Analysis

Although you have not asked for further explanation as to whether service as a fire chief or volunteer member of the fire department at the same time as service on city council would violate the prohibition against dual office holding as set forth in Article XVII, section 1A of the South Carolina Constitution, we nevertheless reiterate our opinion that “members of a fire department, in their capacity as fire chief, assistant fire chief, or firefighters” are exempted “from the dual office holding prohibition.” Op. S.C. Att’y Gen., 2012 WL 3142775 (July 19, 2012). While the dual office holding prohibition is not violated, as you recognize, statutory law must also be considered.

S.C. Code Ann. § 5-7-180 provides that “[e]xcept where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving for the term for which he was elected.” S.C. Code Ann. § 5-7-180 (2004 & Supp. 2014). Pursuant to S.C. Code Ann. § 5-7-200(a), a violation of Section 5-7-180 constitutes grounds for forfeiture of the office of mayor or councilman. See S.C. Code Ann. § 5-7-200(a) (2004 & Supp. 2014); see also Op. S.C. Att’y Gen., 2012 WL 1036294 (March 20, 2012) (“We further note that under section 5-7-200(a), a violation of section 5-7-180 constitutes grounds for forfeiture of the office of mayor or councilman of a municipality”).

In an opinion dated May 27, 2015, we discussed Section 5-7-180, and whether it would be violated, in the context of a similar situation of simultaneous service as mayor and chief of a fire department. Op. S.C. Att’y Gen., 2015 WL 3533915 (May 27, 2015). In our discussion, we recognized that Section 5-7-180 “is, in part, designed to address the common law principle that one cannot be both master and servant at the same time.” Id. at *2 (quoting Op. S.C. Att’y Gen.,

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2013 WL 5921571 (Sept. 9, 2013); Op. S.C. Att’y Gen., 2004 WL 1182071 (May 21, 2004)). In regards this common law principle, we further explained that:

A conflict of interest exists when one individual is both master and servant. The master-servant relationship is based on common law and may be 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 had 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, or to audit his accounts.

Id. (quoting Op. S.C. Att’y Gen., 2012 WL 889084 (March 5, 2012); Op. S.C. Att’y Gen., 2003 WL 21040130 (Feb. 19, 2003)).

The City of Loris has implemented a council form of government. See Loris, SC, City of Loris Code art. I, § 2-1 (“Pursuant to S.C. Code 1976, § 5-11-10 et seq., the form of government for the city shall be the council form of government”). Under a council form of government, council – that can be made up of five, seven, or nine members, including the mayor – exercises all legislative and administrative functions of the city and establishes all departments, offices, and agencies of the municipality. See S.C. Code Ann. §§ 5-11-20, 5-11-30, 5-11-40 (2004). Furthermore, all departments, offices, and agencies may be administered by an officer appointed by and subject to the direction and supervision of the council and council is responsible for adopting a balanced operating budget. S.C. Code Ann. § 5-11-40 (2004 & Supp. 2014).

Specifically in regards to the volunteer fire department established by the City of Loris, from the applicable portions of the Loris City Code that you have provided us with a copy of, the Fire Chief is appointed by City Council. Loris, SC, City of Loris Code art. III, § 20-62 (“There shall be appointed by council at the time appointed for the regular election by the council of city officers, an officer whose designation shall be chief of the volunteer fire department and whose term of office shall be for one year or until his successor is duly appointed and qualified. The election shall be by ballot and determined by the majority of the votes cast”). Furthermore, it is also at the discretion of City Council as to how many members shall serve on the volunteer fire department as well as how much compensation members are to receive for each fire call answered. Loris, SC, City of Loris Code art. III, § 20-64 (“The volunteer fire department of the city shall consist of as many members as the council deems necessary, including the chief and the assistant chief”); Loris, SC, City of Loris Code art. III, § 20-67 (“The members of the volunteer fire department, including the chief and assistant chief, shall receive no salary as such, but the fire department shall receive compensation for each fire call actually answered and in the amount for each call council may determine”).

From the aforementioned authority, it is our belief that a court would find simultaneous service as a Fire Chief for the City of Loris or as a member of the City of Loris’ Volunteer Fire Department would create a master-servant conflict of interest and a violation of S.C. Code Ann.

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§ 5-7-180. In regards to the position of Fire Chief, as noted above, the Fire Chief is appointed by City Council. Furthermore, pursuant to S.C. Code Ann. § 5-11-40, the Fire Chief is subject to the direction and supervision of City Council. City Council also determines the number of members that will make up the volunteer fire department as well as controls the amount of compensation that the volunteer fire department will receive for fire calls answered.

We have also “repeatedly opined that volunteer firemen are municipal employees for purposes of Section 5-7-180 such that a mayor or councilmember of a municipality is prohibited from holding that such a position.” Op. S.C. Att’y Gen., 2012 WL 1036294 (March 20, 2012) (citing Ops. S.C. Att’y Gen., 1996 WL 82889 (January 8, 1996); 1995 WL 810372 (December 6, 1995); 1982 WL 189415 (September 7, 1982); 1979 WL 43509 (August 8, 1979)). As we explained in our May 27, 2015 opinion, the Supreme Court in Miller v. Town of Batesburg held that “a volunteer fireman was an employee of the Town of Batesburg subject to dismissal by the mayor in a mayor-council form of government because he was paid a nominal sum for his services, provided with a small life insurance policy and workers’ compensation insurance, and allowed to use equipment owned by the town.” Op. S.C. Att’y Gen., 2015 WL 3533915 (May 27, 2015) (discussing Miller v. Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979)). In light of this conclusion, we explained that simply “labeling a fireman as a ‘volunteer’ does not prevent him from being an employee of the town. Id. at *4. Under similar analysis applied by the Supreme Court in Miller, we believe it is likely a court would find a councilmember in a council form of government, in his capacity as a volunteer fireman or as fire chief, would be considered an employee of the City of Loris.

Conclusion

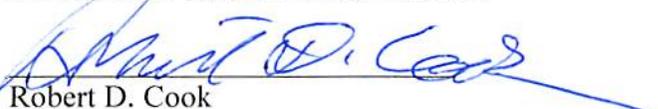
In light of the foregoing analysis, it is the opinion of this Office that a court would likely find simultaneous service as a Loris City Councilmember and as a member of the Volunteer Fire Department of the City of Loris or as Fire Chief for the City of Loris Volunteer Fire Department would create a master-servant conflict of interest and would violate S.C. Code Ann. § 5-7-180. If it is determined a councilmember has violated Section 5-7-180, pursuant to S.C. Code Ann. § 5-7-200(a), such violation would constitute grounds for forfeiture of the office of councilmember of the municipality.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General