



ALAN WILSON
ATTORNEY GENERAL

August 29, 2016

The Honorable Gloria C. Hines
Mayor, City of Darlington
P.O. Box 57
Darlington, South Carolina 29540

Dear Mayor Hines,

Attorney General Alan Wilson has referred your letter dated June 9, 2016 to the Opinions section regarding a proposed ordinance which would provide that the City of Darlington's municipal judge shall retire not later than the end of the fiscal year in which he reaches his seventy-second birthday. Your letter requests this Office's opinion as to whether the proposed ordinance complies with the South Carolina Constitution and the South Carolina Code of Laws.

Law/Analysis

The proposed ordinance attached to your letter reads as follows:

AN ORDINANCE TO AMEND SECTION 26-5 OF THE CODE OR ORDINANCES OF THE CITY OF DARLINGTON SO AS TO PROVIDE A MANDATORY RETIRMENT AGE FOR THE MUNICIPAL JUDGE.

The City shall amend Section 26-5 of the Darlington Municipal Code of Ordinances to add the following provision:

It shall be mandatory for a municipal judge to retire not later than the end of the fiscal year in which he reaches his seventy-second birthday.

so that Section 26-5 (Appointment) of the Code of Ordinances of the City of Darlington shall hereafter provide:

The municipal judge shall be appointed by the council at its first meeting in July each year to hold office for a period of two years and until his successor is appointed and qualified.

It shall be mandatory for a municipal judge to retire not later than the end of the fiscal year in which he reaches his seventy-second birthday.

Initially, we note that the courts have consistently recognized the basic principle that a local ordinance, just like a state statute, is presumed to be valid as enacted unless or until a court declares it to be invalid. See McMaster v. Columbia Bd. of Zoning Appeals, 395 S.C. 499, 504, 719 S.E.2d 660, 662 (2011) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional."), citing

Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991); Casey v. Richland County Council, 282 S.C. 387, 320 S.E.2d 443 (1984); Op. S.C. Atty. Gen., 2003 WL 21471503 (June 4, 2003). Only the courts, and not this Office, possess the authority to declare such an ordinance invalid. Therefore, any ordinance would have to be followed until a court sets it aside.

Next, we will examine whether, in this Office's opinion, such an ordinance would comply with the federal Age Discrimination in Employment Act and the Equal Protection Clause of the United States Constitution. Finally, we will provide this Office's opinion on whether such an ordinance complies with the South Carolina Constitution and applicable statutes in the South Carolina Code of Laws.

1. Federal Law: Age Discrimination in Employment Act and the Equal Protection Clause

This Office has previously addressed the impact of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 et seq., on mandatory magistrate retirement statutes. As stated in our prior opinion:

We noted that the United States Supreme Court had concluded in Gregory v. Ashcroft, 501 U.S. 452 (1991) that appointed State judges in Missouri were not covered by the ADEA, a federal act which was, in 1974, made applicable to the states as employers and which "removed the ADEA's upper age limit for those scheduled to retire after the effective date of the Act, January 1, 1987." Op S.C. Atty. Gen., January 13, 1987. In Gregory the Supreme Court held that state appointed judges were to be considered as "policymaking" officials, and thus not covered by the reach of the ADEA's express exemption contained therein. In light of Gregory, our conclusion was thus that any state's mandatory retirement requirement for judges remained unaffected by the ADEA.

Op. S.C. Atty. Gen., 2004 WL 1297827, at *3 (June 7, 2004). The United States Supreme Court also stated in Gregory that the federal Equal Protection Clause¹ was not violated by the mandatory retirement age for judges because the requirement was rationally related to a compelling state interest in maintaining a fully capable judiciary. 501 U.S. at 473; see also Arnold v. Ass'n of Citadel Men, 337 S.C. 265, 272, 523 S.E.2d 757, 761 (1999). Similarly, it is this Office's opinion that a mandatory retirement age for judges which is rationally related to maintaining a capable judiciary likely would not violate the federal Equal Protection Clause.

2. State Law: South Carolina Constitution and the South Carolina Code of Laws

In Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 660 S.E.2d 264 (2008), the Supreme Court of South Carolina described the two-step process to determine whether a local ordinance is valid. "First, the Court must consider whether the municipality had the power to enact the ordinance. ... [Second], if the municipality had the power to enact the ordinance, the Court must then determine whether the ordinance is consistent with the Constitution and the general law of the State." Id. at 361. For the reasons set forth below, it is this Office's opinion that municipalities do not have the power to enact a mandatory retirement age for municipal judges by ordinance.

¹ "No State shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The South Carolina Constitution vests the judicial power of the State “in a unified judicial system, which shall include a Supreme Court, a Court of Appeals, a Circuit Court, and such other courts of uniform jurisdiction as may be provided for by general law.” S.C. Const. art. V, § 1; see also Ops. S.C. Atty. Gen., 2006 WL 981701, at *1 (March 27, 2006); 1997 WL 783371, at *2 (October 20, 1997). The General Assembly delegated to the city council of each municipality in this State the authority to establish a municipal court by ordinance. S.C. Code Ann. § 14-25-5(a) (1976 Code, as amended). The municipal courts so established are expressly made part of the unified judicial system of this State. Id.; City of Pickens v. Schmitz, 297 S.C. 253, 376 S.E.2d 271 (1989) (“Municipal Courts comply with the constitutional mandate that they be part of a unified judicial system.”).

In such an ordinance establishing the municipal court, the city council must provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk. Id. The city council can either elect or appoint a judge or judges to the municipal court. S.C. Code Ann. § 5-7-230. Pursuant to Section 14-25-15(A), a municipal judge “must be appointed by the council to serve for a term set by the council of not less than two years but not more than four years and until his successor is appointed and qualified.” Further, the compensation of such municipal judges is established by city council. Id. In the case of vacancy, a successor to the municipal judge’s office “shall be appointed in the manner of original appointment for the unexpired term.” S.C. Code Ann. § 14-25-25. Thus, as this Office has previously opined², in these enumerated areas, “Municipal Judges are completely ‘responsible’ to City Council.” Op. S.C. Atty. Gen., 1996 WL 549582, at *1 (August 27, 1996).

However, one must also remember that the municipal courts are part of the unified judicial system and therefore subject to oversight by the Supreme Court of South Carolina. S.C. Const. art. V, § 4 (“The Chief Justice of the Supreme Court is designated as the administrative head of the unified judicial system.”); Spann-Wilder v. City of N. Charleston, No. CA 2:08-0156-MBS, 2009 WL 3166528, at *3 (D.S.C. Sept. 29, 2009) (“The South Carolina Supreme Court maintains oversight over municipal courts and judges as it does any other court in the unified judicial system.”). Pursuant to this authority, the Supreme Court disciplines municipal judges for violations of the Code of Judicial Conduct. See, e.g., In the Matter of McKinney, 324 S.C. 126, 478 S.E.2d 51 (1996) (Supreme Court has “inherent authority to take any action we deem appropriate to protect the state judicial system.”); In the Matter of Martin, 315 S.C. 370, 434 S.E.2d 262 (1993); In the Matter of Derrick, 301 S.C. 367, 392 S.E.2d 180 (1990). Further, the Supreme Court of South Carolina has the “power, after hearing, to remove or retire any judge [within the unified court system] from office upon a finding of disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character.” S.C. Const. art. V, § 17.

The Supreme Court of South Carolina also develops the education and training requirements for municipal judges. S.C. Code Ann. § 14-25-15. Each municipal judge is required to “take and subscribe the oath of office as set for in Article VI, Section 5 of the South Carolina Constitution.” S.C. Code Ann. § 14-25-15(C). All municipal judges are required to “complete a training program or pass certification or recertification examinations, or both, pursuant to standards established by the Supreme Court of South

² This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

Carolina.” S.C. Code Ann. § 14-25-15(D)(1). A municipal judge’s failure to comply with the training and examination requirements will result in his office being declared vacant upon written notification from the Supreme Court of South Carolina. S.C. Code Ann. § 14-25-15(E). Additionally, all municipal judges are required to annually attend a number of approved continuing education hours in criminal law and subject areas related to the municipal judge’s duties as required by the Supreme Court of South Carolina. S.C. Code Ann. § 14-25-15(G). Thus, in the areas of discipline, training, education and disability retirement, municipal judges are subject to oversight by the Supreme Court of South Carolina.

With this framework in mind, we address the question of whether a city council has the power to enact a mandatory retirement age for its municipal judges by ordinance. S.C. Code Ann. §§ 9-8-10 *et seq.* establishes the Retirement System for Judges and Solicitors. While Section 9-8-67 provides the “normal retirement age” for the system is sixty years old, Section 9-8-60(1) states “[a] member of the system may retire upon written application to the board setting forth at what time, not later than the end of the calendar year in which the member attains age seventy-two...” he plans to retire. However, the Retirement System for Judges and Solicitors does not include municipal judges. Section 9-8-10(16) defines “Judge” to mean “a justice of the Supreme Court or a judge of the court of appeals, circuit or family court of the State of South Carolina. Subject to the provisions of Section 9-8-40, ‘judge’ also means an administrative law judge.” Therefore, this mandatory retirement provision would be inapplicable to municipal judges. See *Op. S.C. Atty. Gen.*, 2004 WL 1297827, at *3 (June 7, 2004) (opining that S.C. Code Ann. § 9-8-60 is inapplicable to associate probate judges).

The General Assembly has also mandated retirement of judges of specific courts which are not included within the “Retirement System for Judges and Solicitors.” S.C. Code Ann. § 22-1-25 requires “a magistrate to retire not later than the end of the fiscal year in which he reaches his seventy-second birthday....”³ In marked contrast to magistrates and “Judges” included within the Retirement System for Judges and Solicitors, the General Assembly has not provided a mandatory retirement statute for municipal judges. 12 S.C. Jur. Magistrates and Municipal Judges § 12 (“There appear to be no statewide retirement restrictions on a municipal judge.”). It is a well-established rule of statutory construction that “the enumeration of particular things excludes the idea of something else not mentioned.” *Pa. Nat. Mut. Cas. Ins. Co. v. Parker*, 282 S.C. 546, 554, 320 S.E.2d 458, 463 (Ct. App. 1984); *Op. S.C. Atty. Gen.*, 2013 WL 4397078, at *1 (July 25, 2013). The Supreme Court of South Carolina has stated that the General Assembly can add reasonable qualifications for statutorily established offices, such as municipal judges. *McLure v. McElroy*, 211 S.C. 106, 119, 44 S.E.2d 101, 108 (1947), overruled in part by *Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997). However, the General Assembly has declined to establish a mandatory retirement age for municipal judges by its own authorization or explicitly delegate such authority to the city council. Thus, it is this Office’s opinion that a court would likely find the city council is not authorized to establish a mandatory retirement age for municipal judges.

This is not to say that if the city council concludes a municipal judge is incapable of fulfilling his duties, there is no mechanism for his removal. As discussed above, the Supreme Court of South Carolina has the authority to suspend, remove, or retire judges within the unified judicial system for disciplinary or

³ The General Assembly explicitly reaffirmed the Supreme Court of South Carolina’s authority to discipline magistrates who fail to retire as required by statute. S.C. Code Ann. § 22-1-30(A) (“A magistrate’s failure to retire in accordance with Section 22-1-25... may subject the magistrate to suspension or removal by order of the Supreme Court.”).

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disability which seriously interferes with the performance of their duties. S.C. Const. art. V, § 17. Moreover, if the city council believes that the municipal judge cannot fulfill his duties for the remainder of his appointed two year term, the city council can file a complaint with the Commission on Judicial Conduct. Rules 502, 505, SCACR.

Conclusion

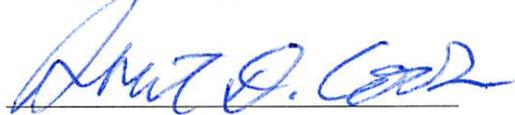
We hope that the guidance provided above will assist you and the Darlington city council in your consideration of the proposed ordinance. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any further questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General