

1979 WL 43133 (S.C.A.G.)
Office of the Attorney General
State of South Carolina
October 25, 1979

*1 David B. Ward, Esquire
Post Office Box 10167 F.S.
Greenville, South Carolina 29603

Dear Mr. Ward:

You have recently asked the opinion of this Office on what the effect is of a member of the municipal council of the Town of City View having been granted by that council a leave of absence therefrom¹ of one year to serve as the Chief of the Fire Department of that Town. As I understand the circumstances, the individual now has resigned from the position of Chief of the Fire Department and wishes to resume his duties as a member of the council. In addition, you ask whether the individual has vacated his office as a councilman by such action.

[Section 5-7-180 of the Code of Laws of South Carolina](#), 1976, provides in part:

[N]o . . . councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected.

If a councilman violates this statute, which is set forth in Chapter 7 of Title 5 of the Code, Section 5-7-200(a) states that he forfeits his office.

With regard to your request which in effect asks whether it is the opinion of this Office that [Section 5-7-180](#) has been violated by the circumstances recited by you, this Office cannot respond. Such a determination must be made by the council of the Town of City View pursuant to Section 5-7-210. This section states:

The council shall be the judge of the election and qualifications of its members and of the grounds for forfeiture of their office and for that purpose shall have power to subpoena witnesses, administer oaths and require the production of evidence. A member charged with conduct constituting grounds for forfeiture of his office shall be entitled to a public hearing, and notice of such hearing shall be published in one or more newspapers of general circulation in the municipality at least one week in advance of the hearing. Decisions made by the council under this section may be appealed to the court of common pleas.

Concerning whether the circumstances recited in your request resulted in a vacancy on the council of the seat of the noted individual, Section 5-7-210 again provides guidance. If a possible forfeiture of office pursuant to Section 5-7-200(a)(2) is involved, it requires that the councilman must be charged with conduct constituting grounds therefor; designates the council as the judge of the grounds of such forfeiture; states that a councilman so charged is entitled to a hearing; and requires public notice one week preceding the hearing. Thus, the actual forfeiture of office could be effected only after a decision by the council finding such a violation, and a vacancy would not occur until this forfeiture. The legislative intent with regard to this is clearly inferable from Sections 5-7-200 and 5-7-210.

The circumstances recited in your request raise the additional issue of whether the recited events violate [Article XVII, § 1A of the South Carolina Constitution](#), which prohibits the simultaneous holding by one person of two State or local offices having duties involving an exercise of some portion of the sovereign power of the State. See [Sanders v. Belue](#), 78

[S.C. 171 \(1907\)](#). At this time, however, this Office does not have sufficient information to determine if the position of Chief of the Fire Department of the Town of City View is an office within the meaning of [Article XVII, § 1A](#). We have been informed and believe that this position is not created or provided with specific duties by ordinance. Furthermore, we have not found any such relevant State statutes applicable thereto other than Section 5-25-20. This section merely provides a town council with the control of its municipal fire department and does not deal with department chiefs. Although due to the present lack of information this Office cannot render an opinion on whether the recited conduct violated [Article XVII, § 1A](#), it does appear that the position of Chief of the Fire Department of the Town of City View may be one of mere municipal employment. If this is correct, the position would not be subject to the prohibition of [Article XVII, § 1A](#). However, such a conclusion has no effect on [Section 5-7-180](#) because that section expressly includes municipal employment within its prohibition.

*2 Based on the foregoing, it is the conclusion of this Office that the determination of whether the conduct recited in your request violated [Section 5-7-180](#) thereby resulting in a forfeiture of office must be made by the council of the Town of City View under the authority of Section 5-7-210. It is also the conclusion of this Office that a vacancy on the council would result only after the finding of such a violation by the council.

Sincerely,

James M. Holly
State Attorney

Footnotes

- 1 This writer has discovered no legal authority which permits an elected official to take a leave of absence, and, therefore, any such action by the municipal council may be a nullity.

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