



ALAN WILSON  
ATTORNEY GENERAL

June 18, 2019

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Spartanburg, SC 29302

Dear Mr. Flynn:

We received your request seeking an opinion on when a decrease in a mayor's salary can be made effective. This opinion sets out our Office's understanding of your question and our response.

**Issue (as quoted from your letter):**

The City [of Union, S.C.] operated under the mayor-council form of government pursuant to Title 5, Chapter 9 of the Code of Laws of South Carolina . . . until November 2016 when an election was held which resulted in a change in the form of government. The City now operates under the council form of government pursuant to Title 5, Chapter 11. As a result of such change of government, City Council is considering hiring a full-time city administrator, which will reduce the time required by the mayor to fulfill mayoral duties. City Council is contemplating a reduction in the mayor's salary to compensate for his reduced duties.

The City of Union requests an opinion from your office on the following:

- 1) Is a reduction of the mayor's salary governed by the provisions of S.C. Code Ann. § 5-7-170[]?
- 2) Depending on the answer to question one, when can such decrease go into effect?

**Law/Analysis:**

It is the opinion of this Office that Section 5-7-170 does not govern the timing of a reduction of a mayor's salary following a change in the municipal form of government in the situation you describe. *See Op. S.C. Att'y Gen.*, 2004 WL 2745681 (2004). This conclusion is consistent with a prior opinion of our Office which addressed an increase in a mayor's salary following a change in the City of Union form of government in 2004. *Id.* Our discussion follows.

In the way of background, Section 5-7-170 reads in full:

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. The mayor and council members may also receive payment for actual expenses incurred in the performance of their official duties within limitations prescribed by ordinance.

S.C. Code Ann. § 5-7-170 (2004) (emphasis added). Several prior opinions of this Office have discussed this statute at length, and those opinions contain a fuller exposition of Section 5-7-170 than is necessary in this opinion. *See, e.g., Ops. S.C. Att’y Gen.*, 1989 WL 406105 (February 17, 1989), 2014 WL 2538226 (May 5, 2014).

For the purposes of this opinion, we focus here on one prior opinion which specifically addressed whether Section 5-7-170 controlled a change to a mayor’s salary following a change in the municipal form of government. *Op. S.C. Att’y Gen.*, 2004 WL 2745681 (November 8, 2004). Our research reveals that in 2004 a referendum was conducted and succeeded in changing the Union, SC form of government from a “weak mayor” to a “strong mayor” form of government pursuant to Section 5-9-10 *et seq. Id.* As a result of this change, the City was considering whether “to assign the duties of full-time Administrator to the mayor.” *Id.* Our Office was asked whether “the council [could] set a salary for that position [of mayor] after the ordinance adopting the form of government is approved.” *Id.* We opined that the council was not prohibited either by Section 5-7-170 or other applicable law from increasing the salary, observing:

Authorities from other jurisdictions have concluded that statutes such as § 5-7-170 are inapplicable “... where the duties added or taken away are extrinsic to the office and not incidental or germane thereto ....” 67 C.J.S. Officers, § 235. Moreover, other authorities have concluded that where a new form of government is created, the council may fix the salary of new officers, such as the mayor, notwithstanding a prohibition against increasing the mayor's salary during the term for which he is elected. *Rockwood v. City of Cambridge*, 228 Mass. 249, 117 N.E. 312 (1917).

*Id.* The opinion also observed “that the General Assembly created the separate position of Administrator in § 5-9-40” and reasoned:

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Such would indicate that the assignment of such duties to the mayor in a “strong mayor” form of government would constitute an example of duties which are “extrinsic . . . and not incidental or germane thereto.” 67 C.J.S. Officers, supra at § 235. As we understand your letter, any additional compensation for the mayor would be compensation for additional duties of Administrator imposed by Union City Council. As such, we do not believe such would contravene state law.

*Id.*, see also *Op. S.C. Att’y Gen.*, 2012 WL 2364242 (2012) (municipal council has discretion following a change in the form of government to adjust officer salaries accordingly).

It appears that the same reasoning in our 2004 opinion controls the question here. Following the change in form of government in 2016, the council anticipates that the Union mayor will have their duties decreased as a direct result of that change in government. Presumably those duties are “extrinsic . . . and not incidental or germane thereto.” *Op. S.C. Att’y Gen.*, 2004 WL 2745681 (November 8, 2004) (quoting 67 C.J.S. Officers, § 235). This is the mirror image of the increase to the duties of that office considered in 2004. Just as Section 5-7-170 did not govern the timing of a pay increase then, we believe that a court would conclude that Section 5-7-170 does not govern the timing of a pay decrease now. *Id.*

Your letter also asks when such a pay decrease may go into effect. One previous opinion of this Office addressed when a change in a municipal form of government would go into effect following a referendum, and whether Section 5-7-170 or other law impacted the timing of the change. *Op. S.C. Att’y Gen.*, 2012 WL 2364242 (June 11, 2012). That opinion concluded:

We have discovered no other provision fixing an effective date for subsequent changes in municipal form. Accordingly, it is our opinion that a court likely would find a municipality may fill that gap by ordinance.

*Id.* (citing *Op. S.C. Att’y Gen.*, 1988 WL 383523 (May 10, 1988)). Similarly, we are not aware of any provision fixing a specific effective date for a change in a mayoral salary following a change in a municipal form of government which substantially alters the duties of that office. Consistent with our 2012 opinion, we believe that this also is a gap which a municipality may fill by ordinance. *See id.*

Presumably such an ordinance may be passed within some reasonable amount of time. *Cf.* Act No. 212, § 1, 1977 S.C. Acts 540, 541 (“Municipal councils shall, as soon as practicable following the final adoption of a form of government. . . , take action by ordinance to implement the requirements of the form adopted.”). We decline to speculate what the outer limit of such a reasonably window of time would be. At a minimum, however, once a new term of office for a mayor has begun under the new form of municipal government, a court most likely would hold

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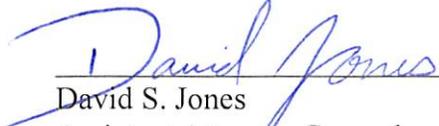
that Section 5-7-170 would control the timing of any change to the salary thereafter. S.C. Code Ann. § 5-7-170 (2004); *see also Ops. S.C. Att'y Gen.*, 1989 WL 406105 (February 17, 1989), 2014 WL 2538226 (May 5, 2014).

**Conclusion:**

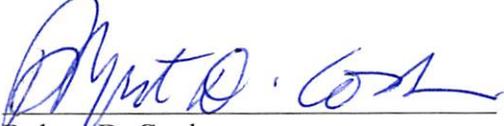
In conclusion, it is the opinion of this Office that Section 5-7-170 does not govern the timing of a reduction of a mayor's salary following a change in the municipal form of government in the situation you describe. *See Op. S.C. Att'y Gen.*, 2004 WL 2745681 (2004). Consistent with prior opinions of our Office, we believe that this is a gap which a municipality may fill by ordinance. *See Op. S.C. Att'y Gen.*, 2012 WL 2364242 (June 11, 2012).

We emphasize that our opinion here is expressly limited to an adjustment in the salary of a mayor following a change in a municipal form of government where the duties of a mayor are altered as a consequence of that change. We also have not undertaken to opine on the outer time limit on any such salary change. At a minimum, a court most likely would hold that Section 5-7-170 would control the timing of any change to a mayoral salary once a new term of office for a mayor has begun under the new form of municipal government. S.C. Code Ann. § 5-7-170 (2004); *see also Ops. S.C. Att'y Gen.*, 1989 WL 406105 (February 17, 1989), 2014 WL 2538226 (May 5, 2014).

Sincerely,

  
\_\_\_\_\_  
David S. Jones  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
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Robert D. Cook  
Solicitor General