

ISSUES ON REPLY

- I. SHOULD THE EXCEPTION FOR INVESTIGATION AND INQUIRIES IN THE HOME RULE ACT BE READ SO BROADLY AS TO PROVIDE A BASIS FOR A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT TO END RUN THE HOME RULE ACT BY DIRECTLY HIRING AND SUPERVISING EMPLOYEES OTHER THAN THE COUNTY ADMINISTRATOR OR THE COUNCIL CLERK AND PERMIT A COUNTY COUNCIL TO IGNORE ITS OWN ORDINANCES RELATING TO PROCUREMENT AND THE HIRING OF PROFESSIONALS, INCLUDING ATTORNEYS?

ARGUMENT

- I. THE EXCEPTION FOR INVESTIGATION AND INQUIRIES IN THE HOME RULE ACT CAN NOT BE READ SO BROADLY AS TO PROVIDE A BASIS FOR A COUNTY COUNCIL IN A COUNCIL-ADMINISTRATOR FORM OF GOVERNMENT TO END RUN THE HOME RULE ACT BY DIRECTLY HIRING AND SUPERVISING EMPLOYEES OTHER THAN THE COUNTY ADMINISTRATOR OR THE COUNCIL CLERK OR PERMIT A COUNTY COUNCIL TO IGNORE ITS OWN ORDINANCES RELATING TO PROCUREMENT AND THE HIRING OF PROFESSIONALS, INCLUDING ATTORNEYS, BECAUSE DOING SO WOULD DIRECTLY CONFLICT WITH THE VERY CLEAR MANDATE OF S.C. CODE ANN. §4-9-630(1) & (8)?

At the motion to dismiss hearing, Respondent took the position that:

4-9-660 of the Home Rule Act, which has the exception that clearly provides that council does not act through the administrator when it conducts its own investigation; and that the Home Rule Act, which is the entire legal basis of the plaintiff's case, expressly exempts council investigations from limitations of the administrator form of government.

R.p. 187

Throughout Respondent's brief they cite the Home Rule Act and the "investigation and inquiry" language in support of their contention that once a County merely declares they are conducting an inquiry or investigation, they have carte blanche to hire direct employees (such as a "Budget and Control Bob Daniel) and end run County Ordinances on procurement, including the hiring of professionals such as attorneys. Respondents go so far as to say "the Home Rule Act could not be clearer" on their authority to do so. (Resp. Brief, p. 6).

However, Respondents concede on the next page of their brief that despite the

Opinion of the Attorney General that a County Council can NOT hire an “internal auditor” as an employee or contractor that reports directly to the County Council in a Council-Administrator form of government, that this is “an issue that has not been addressed by the South Carolina appellate courts.” (Resp. Brief, p. 11). The very section they cite clearly does NOT give a Council in a Council-Administrator form of government the right to hire direct employees even during an investigation or inquiry. The section states:

Except for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.

S.C. Code Ann. §4-9-660

Instead, the logical interpretation of that language could be two-fold, depending on how the court interprets the “and” in the sentence. This Court could find that in the case of an investigation or inquiry, the Council could “deal with” the employees directly, but would still be prohibited from giving such employees “orders or instructions.” This interpretation is influenced by the placement of the “and” in the paragraph and the fact that the “and” acts as a coordinating conjunction joining two independent clauses. The portion before the “and” in the compound sentence contains a dependent clause (“*Except for the purposes of inquiries and investigations,*”) and an independent clause (“*the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator.*”). The second portion of the compound sentence after the “and” contains an independent clause (“*and neither the council nor its members shall give orders or instructions to any such*

officers or employees.” The most reasonable reading from a technical English sentence diagramming standpoint would be that the “inquiry and investigation” dependent clause only modifies the first independent clause in the compound sentence, not the entire compound sentence. Alternately, the Court could find that in the case of investigations or inquiries that the dependent clause language modifies both independent clauses after it, despite the placement of the coordinating conjunction. Under this interpretation, the Council could “deal with” said employees and give those employees orders or instructions. Regardless of the interpretation adopted in either case, the “investigation and inquiries” exception in S.C. Code §4-9-660 does not supercede the very clear mandate of S.C. Code Ann. §4-9-630(1) & (8) that only the County Administrator shall serve as the chief administrative officer of the county government in a Council-Administrator form of government and only the County Administrator shall employ and discharge personnel.

Though the Defendants admit that there is no case on point and that this is a situation of first impression for the Court, they challenge the Attorney General’s April 4, 2008 Opinion. Despite this, the Attorney General’s reasoning is sound:

Section 4-9-30 of the South Carolina Code (1986 & Supp. 2007), provides the powers afforded to county governments. Among these is the power "to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title." S.C. Code Ann. § 4-9-30(6). However, under the provisions of the Code governing council-administrator forms of county government, section 4-9-620 states county administrators "shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control." S.C. Code Ann. § 4-9-620 (1986). Furthermore, section 4-9-630 of the South Carolina Code (1986) explains

the powers and duties afforded to county administrators. This statute provides:

The powers and duties of the administrator shall include, but not be limited to, the following:

- (1) to serve as the chief administrative officer of the county government;*
- (2) to execute the policies, directives and legislative actions of the council;*
- (3) to direct and coordinate operational agencies and administrative activities of the county government;*
- (4) to prepare annual operating and capital improvement budgets for submission to the council and in the exercise of these responsibilities he shall be empowered to require such reports, estimates and statistics on an annual or periodic basis as he deems necessary from all county departments and agencies;*
- (5) to supervise the expenditure of appropriated funds;*
- (6) to prepare annual, monthly and other reports for council on finances and administrative activities of the county;*
- (7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council;*
- (8) to be responsible for employment and discharge of personnel subject to the provisions of subsection (7) of § 4-9-30 and subject to the appropriation of funds by the council for that purpose; and*
- (9) to perform such other duties as may be required by the council.*

S.C. Code Ann. § 4-9-630. According to this provision, county administrators are charged with the responsibility of hiring county employees, which we would presume includes an internal auditor. Moreover, section 4-9-660 of the South Carolina Code limits the authority of council over county employees by stating:

Except for the purposes of inquiries and investigations, the council shall deal with county officers and employees who are subject to the direction and supervision of the county administrator solely through the administrator, and neither the council nor its members shall give orders or instructions to any such officers or employees.

Thus, according to this provision, under a council-administrator form of county government, council must go through the county administrator with regard matters of county personnel including internal auditors.

As you noted in your letter, on several occasions this Office considered the question of whether the county administrator or county council has authority to employ an internal auditor under a council-administrator form of government. In an opinion issued in 1987, we considered this exact question and determined that "appointment of the internal auditor would be within the purview of the county administrator rather than county council." Op. S.C. Atty. Gen., March 5, 1987.

In 1996, we addressed the same question with regard to Anderson County. Op. S.C. Atty. Gen., September 24, 1996. In that opinion, we cited to our 1987 opinion, as well as two opinions issued prior to 1987, "dictating that if the internal auditor is subject to the personnel rules of [Anderson] County, that individual would be under the direction and control of the county administrator." Id.

*Finally and most recently in 2002, we considered whether the Beaufort County Council could hire an internal auditor as an independent contractor reporting directly to County Council rather than the county administrator. Op. S.C. Atty. Gen., August 16, 2002. We again reiterated the findings in our prior opinions that "such employment and discharge was ultimately the responsibility of county council but that the county administrator would actually perform the duties since council could deal with county employees only through the administrator." Id. (quotations omitted). **In addition, we concluded that "the reasoning expressed in our prior opinions is applicable to the situation you describe regardless of the label attached to the . . . auditor." Id. Therefore, it did not matter if a county council hired the auditor as an independent contractor. We also concluded that while a county council can create a position and proscribe the functions of an internal auditor, "[i]f a county council were to attempt to assume administrative duties statutorily assigned to the county administrator, such action could be viewed as an illegal alteration of the form of government without following the required statutory procedures." Id.***

2008 S.C. AG LEXIS 68, pp. *2-*6 (emphasis added)

Respondents have provided no legal support that the “investigation and inquiry” exception permits a County Council in a Council-Administrator form of government to directly hire and supervise an employee other than the County Administrator and Council Clerk.

While the provision clearly permits a Council to “deal” with the employees in the case of an inquiry or investigation, nowhere does the plain statutory language permit the Council in a Council-Administrator government to directly hire an employee, such as the one at issue in this suit. Nowhere does the “inquiry and investigation” language except or pre-empt S.C. Code Ann. §4-9-630(1) & (8) or the County’s own ordinances which do not directly conflict with the provision. Further, the “investigation and inquiry” provision is absolutely devoid of any provision that would permit a County Council to ignore its very own legally promulgated ordinances pertaining to the procurement of professional services, such as the hiring of attorneys.

To accept the Respondent’s position would be to decimate the checks and balances of the Home Rule Act and permit County Councils to circumvent state law, the government chosen by the county electorate, and their own ordinances by simply claiming a Council wants to “inquire” into an issue or “investigate” it. Surely, the Legislature did not intend such a result that would permit a Council in a Council-Administrator form of government to ignore the will of its electorate and act as a Council or Council-Supervisor form of government simply by declaring the need for an “investigation or inquiry.”

CONCLUSION

Accordingly, the dismissal of Appellants’ claims should be reversed with instructions that this matter be permitted to proceed on the merits.

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