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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

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501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

Honorable Marion E. Wynne
Attorney, City of Fairhope
Wilkins, Bankester, Biles & Wynne
Post Office Box 1367
Fairhope, Alabama 36533

Municipalities – Employees, Employers,
Employment – Municipal Employees –
Offices and Officers – Removal from Office –
Baldwin County

Section 11-43-160 of the Code of Alabama
gives the city council the authority to remove
any officer in the several departments, but
not employees.

The term “officer” includes all those
positions specifically set forth in the Code of
Alabama as “officers,” as well as any
position created by the city council pursuant
to ordinance.

An officer is limited to a person that
exercises some level of authority, presumably
over employees, and performs some
discretionary, policy-making functions.

Dear Mr. Wynne:

This opinion of the Attorney General is issued in response to your request
on behalf of the City of Fairhope.

QUESTIONS

(1) Is a city council authorized to fire
employees pursuant to section 11-43-160 of the Code of
Alabama?

(2) Does the term “officer” identify only those city employees specified under sections 11-43-3 and 11-43-5 of the Code?

(3) What does the word “officer” mean in section 11-43-1, *et seq.*, of the Code?

FACTS AND ANALYSIS

Initially, you seek guidance regarding the ability of the city council to fire employees pursuant to section 11-43-160 of the Code. This particular section authorizes the removal of officers. It states the following:

(a)(1) Any person appointed to office in any city or town may, for cause, after a hearing, be removed by the officer making the appointment.

(2) The council of the municipality may remove, by a two-thirds vote of all those elected to the council, any person in the several departments for incompetency, malfeasance, misfeasance, or nonfeasance in office and for conduct detrimental to good order or discipline, including habitual neglect of duty.

(b) Notwithstanding subsection (a), in municipalities having a population of less than 12,000 inhabitants, according to the last or any subsequent federal census, the mayor may vote on the removal of any person appointed to office in the municipality pursuant to subsection (a) and the mayor shall be considered as a member of the council in determining whether there is a two-thirds vote of the council for the removal of the officer.

ALA. CODE § 11-43-160 (Supp. 2011).

The Supreme Court of Alabama, in *State ex rel. Reeves v. Thompson*, 211 Ala. 429, 429, 100 So. 756, 757 (Ala. 1924), analyzed the predecessor codification of section 11-43-160. The Court stated, in pertinent part, as follows:

“Removal of Municipal Officers. Any person appointed to office in any city or town may, for cause, after a hearing, be removed by the officer making the

appointment. The city council may remove, by a two-thirds vote of all those elected to the council, any person for incompetency, malfeasance, misfeasance, or nonfeasance in office and for conduct detrimental to good order or discipline, including habitual neglect of duty, in the several departments.” Code 1907, § 1172.

It will be noted that this section provides two means of removal of officers: First, by the officer making the appointment. This must be for cause, after a hearing. Second, by the city council for causes named. The former provision does not name the causes. The latter does not provide for a hearing.

The statute should be construed as a whole and in connection with general rules of law governing removals from office. The proceeding is quasi judicial. In both cases, the removal is for the causes named upon notice and hearing.

Thompson, 211 Ala. at 429, 100 So. at 757.

Section 11-43-160 still appears in the article of the Code dealing with the removal of municipal officers. Nothing within section 11-43-160 expressly authorizes or speaks to the removal of municipal employees. Some 100 years later, the pertinent tenets and verbiage of this statute remain virtually unchanged. The Supreme Court, in *Thompson*, determined that this statute provided two means for removal of officers. This Office finds no reason to controvert the Court’s findings.

This Office notes that substantive changes were made to this section in 2009. The key change to this section consisted of the addition of subsection (b), which is not relevant to your particular inquiry. Besides this addition, there were other non-substantive or stylistic changes. It is the opinion of this Office that the substitution of the word “any such” for the word “any” was a non-substantive or stylistic change that did not alter the meaning of section 11-43-160(a). ALA. CODE § 11-43-160 (Supp. 2011).

The term “officer,” as used in section 11-43-160 of the Code, should not be considered synonymous with the term “employee,” which is not used in section 11-43-160. These terms, officer and employee, are not synonymous. See 73 Am. Jur. 2d. *Statutes* § 149 (2011) (identical terms or expressions-same statute); *Trott v. Brinks, Inc.*, 972 So. 2d 81, 88 (2007) (stating that different terms used within a legislative enactment should be afforded different meanings). Thus, it is the opinion of this Office that a city council is not authorized to fire an employee pursuant to section 11-43-160 of the Code.

Next, you question whether the term “officer” identifies only those city employees specified under sections 11-43-3 and 11-43-5 of the Code. Sections 11-43-3 and 11-43-5 are instances in which the city council may elect or provide for the position of the city clerk, city treasurer, tax assessor, tax collector, chief of police, and chief of the fire department. There are other positions, however, outside these Code sections for which the city council is authorized to appoint. Specifically, sections 12-14-30 and 11-43-20 of the Code authorize the city council to appoint the municipal court judge and city manager, respectively. Persons serving in these positions should be considered officers of the municipality.

Moreover, section 11-43-3 authorizes a city council to elect any officer whose election is required by ordinance, to prescribe the duties, to fix the salaries, and to set the terms of office for these officers. This section states as follows:

In cities having a population of more than 6,000, there shall be elected by the council, at its first regular meeting or as soon thereafter as practicable, a city treasurer and a city clerk, who shall hold office until the next general election and until their successors are elected and qualified, and *such council may elect an auditor, and any officers whose election is required by ordinance, and, except as otherwise provided, the council shall have authority to fix the terms of office, prescribe their duties and fix the salaries of the officers.* The council may, by ordinance, require the city treasurer and the city clerk to be residents of the city. Such council may by a two-thirds vote of the members elected, by and with the consent of the mayor, consolidate two or more of the offices and may abolish any such offices; provided, that the term of office of no incumbent shall be diminished.

ALA. CODE § 11-43-3 (2008) (emphasis added). Although this section specifically authorizes the council, via ordinance, to create various “officers” within municipal government, the term of service of any such officer may not exceed the term of the mayor. ALA. CODE § 11-43-46 (2008).

Reading section 11-43-3 in conjunction with section 11-43-81 of the Code, which authorizes the mayor to appoint all officers whose appointment is not otherwise provided for by law, and in the light of *Scott v. Coachman*, 73 So. 3d 607 (Ala. 2011), it is the opinion of this Office that because this statute authorizes the council to create, via ordinance, an “officer” position, any position so created would be “as otherwise provided,” and such ordinance would

not be outside the authority delegated to the council by law. *See* ALA. CODE § 11-43-81 (2008). Thus, the Legislature, through section 11-43-3 of the Code, has created a mechanism for the city council to create or appoint persons as municipal officers as these positions may be necessary.

Finally, you seek further clarification regarding the meaning of the term “officer” as the term is used in sections 11-43-1, *et seq.*, of the Code. The term “officer” is not defined within these sections of the Code. In adhering to the plain-language maxim of statutory interpretation, we turn to the commonly understood meaning of the word “officer” as defined in Black’s Law Dictionary, which defines the term “officer” as “[a] person who holds an office of trust, authority, or command. In public affairs, the term refers esp. to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function.” BLACK’S LAW DICTIONARY 1193 (9th ed. 2009).

Based on the meaning of the term “officer” as defined in Black’s Law Dictionary, any office created by a city council must be assigned specific duties and hold a position of authority. Paramount to the authority of an officer is the ability to discharge some portion of the sovereign power. The Supreme Court of Alabama, in defining the term “office,” stated the following:

“We apprehend that the term ‘office’ [as used in the context of public office] implies a delegation of a portion of the sovereign power, and the possession of it by the person filling the office; and the exercise of such power, within legal limits, constitutes the correct discharge of the duties of such office. The power thus delegated and possessed may be a portion belonging sometimes to one of the three great departments, and sometimes to another; still, it is a legal power, which may be rightfully exercised, and, in its effects, will bind the rights of others, and be subject to revision and correction only according to the standing laws of the state. An employment, merely, has none of these distinguishing features.” *State v. Stone*, 240 Ala. 677, 680, 200 So. 756, 758 (1941) quoting from *Montgomery v. State ex rel. Enslin*, 107 Ala. 372, 381, 18 So. 157, 159.

Cooper v. Green, 359 So. 2d 377, 379 (Ala. 1978); *see also*, 3 Eugene McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 12.30 (3rd ed. 1997-2001).

The term “employee” is not defined in section 11-43-1, *et seq.*, of the Code. Black’s Law Dictionary defines an “employee” as “[a] person who works within the service of another person (the employer) under an express or implied

contract of hire, under which the employer has the right to control the details of work performance.” BLACK’S LAW DICTIONARY 602 (9th ed. 2009).

As noted in *Cooper*, an officer must have responsibilities and hold a position that is superior to that of an employee. Furthermore, an employee does not perform the “discretionary, policy-making functions associated with the term ‘officer’ as that term is used in §11-43-8.” *Johnson v. City of Fort Payne*, 485 So. 2d 1152, 1154 (Ala. 1986).

Any attempt by the city council to designate a person as an officer who would occupy or fulfill a position comparable to that of an employee would violate the authority given to the city council pursuant to section 11-43-3 of the Code. Accordingly, an officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions.

CONCLUSION

Section 11-43-160 of the Code gives the city council the authority to remove any officer in the several departments, but not employees.

The term “officer” includes all those positions specifically set forth in the Code as “officers,” as well as any position created by the city council pursuant to ordinance.

An officer is limited to a person that exercises some level of authority, presumably over employees, and performs some discretionary, policy-making functions.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:



BRENDA F. SMITH

Chief, Opinions Division