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State of Louisiana

DEPARTMENT OF JUSTICE

P.O. BOX 94005

BATON ROUGE

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DEC 16 2011
OPINION 11-0256

71 – 1 –B– MUNICIPALITIES-Home Rule Charter

La. Const. Art. VI § 4

La. R.S. 9:2792.4

La. R.S. 42:1441

The Kenner Home Rule Charter expressly gives the Mayor control over non-elected personnel. An ordinance that restricts non-classified employees from participating in politics is beyond the authority of the City Council. A trier of fact must determine if the facts of a particular situation warrant the imposition of liability on a public official. Further, it is the policy of this office not to render opinions on the civil liability of state officials, whether in their official or individual capacity.

Mayor Michael S. Yenni
City of Kenner
1801 Williams Blvd
Kenner, Louisiana 70062

Dear Mayor Yenni:

Our office received your request for an opinion pertaining to the authority of the Kenner City Council ("Council") and its ability to pass an ordinance that prohibits unclassified city employees from engaging in political activities. Your letter included a copy of Ordinance 10,303, which was passed by the Council on October 20, 2011. You vetoed that Ordinance on October 27, 2011. On November 3, 2011, the Council overrode your veto and reconsidered this Ordinance, choosing to defer voting until after our office issued this opinion. Your letter also included an opinion from the City Attorney of Kenner on this Ordinance which was submitted to the Council on October 18, 2011, as well as a 1999 City Attorney opinion on a similar ordinance that ultimately was not enacted.

You have asked our office for an opinion as to: (1) whether Ordinance 10,303 is in violation of the Kenner Home Rule Charter, (2) whether the Council acted in bad faith and with malice in passing Ordinance 10,303, and (3) whether the individual members of the Council can be held personally liable for passing this Ordinance.

The City of Kenner operates under a Home Rule Charter. As it was adopted and made effective before the 1974 Louisiana Constitution, it falls under the scope of Article VI, § 4 of the Louisiana Constitution, which states:

Every home rule charter or plan of government existing or adopted when this constitution is adopted shall remain in effect and may be amended, modified, or repealed as provided therein. Except as inconsistent with this constitution, each local government subdivision which has adopted such a home rule charter or plan of government shall retain the powers, functions, and duties in effect when this constitution is adopted. If its charter permits,

each of them also shall have the right to powers and functions granted to other local governmental subdivisions.

Consistent with this constitutional provision, the City of Kenner is governed solely by its Home Rule Charter, unless it would violate state or Constitutional law.

The issue presented by this request is whether the Council has the authority to enact an Ordinance prohibiting City employees from engaging in political activity. Section 1.02 of the Kenner Home Rule Charter established a Mayor-Council form of government for the City. In determining whether the Council has the authority to restrict non-classified employees' political activities, it is necessary to consider the separation of powers between the mayor and the council as set out in Article IV § 4.01, which states:

Organization and Control. Except for the Police Department, the administrative branch of City government shall be under the direction, control and supervision of the Mayor. The Mayor shall carry out the policy direction of the Council.

(Emphasis added).

Under § 2.01, the City Council is vested with all legislative authority for the City, but that power is not unlimited. see La. Atty. Gen. Op. No. 08-0039A. The Council cannot usurp the power given to the Mayor under the guise of legislative authority. *Id.*; see also *Bourgere v. Anzelmo*, 517 So.2d 1121 (La. App. 5 Cir. 1987).

The Kenner Home Rule Charter specifically gives the mayor control, direction and supervision over the administrative branch of the City government. See Article IV §4.01. This Ordinance prohibits City employees from engaging in political activity. Directing non-elected city personnel is a power exclusively reserved for the mayor. The council has the authority to set policy for the mayor to implement, but it is the opinion of this office that this Ordinance is not policy. See Article IV §4.01. Policies are "general principles by which government is guided in its management of public affairs." Black's Law Dictionary (9th ed. 2009). Prohibiting all non-classified employees from participating in political activities is not a general principle, it is a specific direction to the administrative branch concerning personnel matters. According to the City Charter, such a direction is beyond the authority of the council. Further, the proposed ordinance directly interferes with the mayor's ability to "direct, control and supervise" the executive and administrative branch of the City. Since Ordinance 10,303 operates as the Council directing, controlling or supervising non-elected City personnel and is not setting policy, it violates the Home Rule Charter.¹

¹ Please note that this opinion does not address the restrictions on limiting non-classified employees' political activities under other state or federal law.

Article III of the Home Rule Charter further supports the interpretation that the mayor has the exclusive authority over non-classified municipal employees. It designates the mayor as the chief executive officer of the City and rests in the office of the mayor all of the City's executive and administrative authority. See Article III § 3.01. The mayor alone retains the power to hire and fire all non-elected municipal employees. See Article III § 3.10. Additionally the Charter expressly prohibits the council from interfering with the administration of the City. In § 3.12, the Charter specifically denies the council the ability to directly deal with non-elected City personnel. These sections of the Home Rule Charter strengthen the assertion that this Ordinance is beyond the power of the Council and treads on the mayor's authority over non-elected municipal employees.²

As to your second question, a public official who acts without due care and reasonable diligence and with reckless disregard for a law acts in bad faith and with malice. See *Godwin v. E. Baton Rouge Parish Sch. Bd.*, 372 So. 2d 1060, 1063 (La. Ct. App. 1979) ("...where a public official acts contrary to express statutory provision, such action is illegal and personal liability may result if the official is found to be in bad faith."); and La. R.S. 9:2798.1 (immunity for policymaking or discretionary acts of public officers of political subdivisions does not extend to "acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct."). However, whether or not the specific situation you have presented is an instance of the council or its members acting with malice or bad faith is a factual determination which must be determined by a trier of fact.

This office has a policy of not rendering opinions on the civil liability of the state or its officials. See La. Atty. Gen. Op. No. 09-0012. Therefore, we will refrain from answering this question.

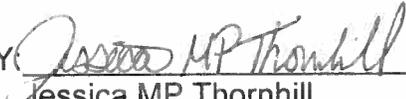
In conclusion, it is the opinion of this office that Ordinance 10,303 is beyond the power of the Council to initiate or to enact and would usurp the authority of the mayor granted by the City Charter. Further, whether the Council would be exposed to any liability as a result of enactment of the proposed Ordinance depends on a factual determination which cannot be made by this office. Further it is the policy of this office not to render opinions on the civil liability of public officials, whether in their official or personal capacities.

² We note there is a potential problem with Article VII § 7.04 which discusses how personnel rules and procedures are implemented, but the Kenner City Attorney has advised us that the mayor has the final authority over the implementation of personnel rules.

We hope that this opinion has adequately addressed the legal issues you have raised. If our office can be of any further assistance, please do not hesitate to contact us.

With best regards,

JAMES D. "BUDDY" CALDWELL
ATTORNEY GENERAL

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