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ATTORNEY GENERAL

September 8, 2010

The Honorable Robert Ford  
Member, South Carolina Senate  
Post Office Box 21302  
Charleston, South Carolina 29413

Dear Senator Ford:

We received your letter requesting an opinion concerning actions taken by the South Carolina State University Board of Trustees (the "Board") with regard to the election of its president. Specifically, you ask the following four questions.

1. Can the Board of Trustees of South Carolina State University, by simple majority, lawfully rescind an election which was held in accordance with the Board's duly approved Bylaws?
2. Can the Board of Trustees of South Carolina State University by simple majority, lawfully expunge from the records actions which were taken during open session of a duly called meeting, and which had been recorded in the public records of the minutes of the Board of Trustees?
3. Can the Board of Trustees of South Carolina State University, by simple majority, lawfully rescind and expunge an action never taken by the Board? Specifically, when an individual was employed on an "at will" basis and employment relationship was terminated on the "at will" basis, can the Board of Trustees rescind the "at will" termination by calling it a rescission of a non-renewal?

4. Can the Board of Trustees of South Carolina State University by a simple majority, lawfully rescind an action that has been fully executed?

#### **Law/Analysis**

In reading your request, it appears to us that your first, third, and fourth questions all deal with the ability of the South Carolina State University Board of Trustees (the "Board") to rescind a previous action taken by the Board. To determine the Board's authority in this regard, we first look to authority given to the Board by the Legislature. Section 59-127-20 of the South Carolina Code (2004), creating the Board, states that it is to manage and control South Carolina State University (the "University"). In section 59-127-60 of the South Carolina Code (2004), the Legislature gave the Board the following powers:

In the management of affairs of said college whenever it is found necessary to protect or to promote the interests of the State or whenever the trustees deem it right and proper or expedient for any reason the trustees may sell, purchase or exchange real estate. And the trustees shall fix the time and duration of all vacations to be given the students of the institution. South Carolina State University shall have all the rights and privileges possessed prior to March 3, 1896 by Clafin College.

S.C. Code Ann. § 59-127-60. The provisions contained in chapter 127 of title 59 pertaining to the Board appear broad with respect to the authority given to the Board, but do not specifically address how the Board conducts its business, other than to state that "[a] majority of the board of trustees shall be necessary for the transaction of any business." S.C. Code Ann. §§ 59-127-30 (2004). Along with your request letter, you provided a copy of the Board's bylaws (the "Bylaws") and indicated that Board's actions may not have been in accordance with the Bylaws.

While none of the provisions governing Board give it authority to adopt bylaws, in a prior opinion, this office recognized "[i]n addition to the express powers which the Board or Commission might have, these governmental bodies have such implied powers as are necessarily inferred or reasonably necessary to make effective the express powers granted to them." Op. S.C. Atty. Gen., August 1, 1961. Moreover, we recognized that "generally, a board or commission has implied authority to conduct business, which would include the adoption of bylaws . . . , as such matters are reasonably necessary for the work of a board or commission." Op. S.C. Atty. Gen., February 6, 2006.

According to the Bylaws, the Board is responsible for electing “a President of the University to serve at the will of the Board or for such term and compensation as the Board may prescribe . . . .” Article IX, section 11 of the Bylaws states: “Except as otherwise specifically provided herein, all matters coming before the Board or a committee thereof for determination shall be determined by a simple majority vote of the members present. Upon request of any Board or committee member, a vote by the Board or committee, as applicable, shall be by a call of the roll and results of such roll call vote shall be recorded in the minutes of the Board or committee.” Moreover, as we mentioned above section 59-127-30 simply requires a majority of the Board’s members to transact business. Thus, we believe a majority vote is required to elect a president. Your letter and the information you provided along with your letter indicate the Board took such action in electing a president, but later decided to rescind this election. You now question whether or not the rescission of such election was proper and in accordance with the Board’s Bylaws.

Section 13 of article IX of the Bylaws somewhat addresses the rescission of an action take by the Board. This provision states:

Any member who voted on the prevailing side may move for the reconsideration of an action taken by the Board. Such motion must be made and voted upon at the same meeting at which said action is taken.

No motion for repeal or rescission of any action taken by the Board shall be voted upon unless notice of intention to make such motion shall have been given at the previous meeting or by mail to each member of the Board at least five (5) working days prior to the meeting at which such motion is to be voted upon.

The Bylaws did not specifically recognize the Board’s ability to rescind a previous vote, but section 13 of article IX indicates the Board’s authority in this regard so long as proper notice is given prior to the motion of rescission. Moreover, we did not find a provision in the Bylaws or any statutory authority indicating that the Board is prohibited from rescinding a previous vote.

Additionally, as we have concluded in prior opinions, actions taken by a board do not bind the board in a way that prohibits the board from taking further action on a matter. In a 1985 opinion, we considered whether Greenville County Council could approve additional funding for additional deputies when the positions were not originally funded in the County Councils annual appropriation ordinance. Op. S.C. Atty. Gen., October 8, 1985. We noted that by statute, county councils are permitted to adopt their own operating rules and to modify those rules. Id. Furthermore, we noted “one council cannot restrict the power of its successors to amend ordinances.” Id. We also found

the United States Supreme Court's decision in Manigault v. Springs, 199 U.S. 473, 50 L.Ed.2d 274 (1905) to be instructive on this issue. Id. We described the Court's decision in that case as follows:

In Manigault, a statute required the South Carolina legislature to follow certain procedures, including the necessity of a petition, prior to enacting private legislation. A subsequent legislature refused to follow the statutory procedure in enacting such legislation. The Supreme Court deemed the statutory procedure as having been amended by a subsequent legislature. The Court concluded:

This law was doubtless intended as a guide to persons desiring to petition the legislature for special privileges, and it would be a good answer to any petition for the granting of such privileges that the required notice had not been given; but it is not binding upon any subsequent legislature, nor does the noncompliance with it impair or nullify the provisions of an act passed without the requirement of such notice. (Emphasis added.)

199 U.S. at 487.

Id. Accordingly, we determined that the Greenville County Council had the authority to make a supplemental appropriation. Id. We came to a similar conclusion with regard to governmental boards in general in a 1973 opinion. S.C. Atty. Gen., February 27, 1973 ("Any member of a board as presently constituted may move to consider a matter that is the business of the board."). Thus, we do not believe the Board is prohibited from taking further action with regard to its selection of a University president.

In your letter, you expressed your concern over the fact that the Board employed the president on an "at will" basis, terminated the president, and then rescinded the termination. As expressed above, it is our opinion that the Board has the authority to rescind a prior action. Nonetheless, we believe the president's employment status and how the president may be affected by the Board's action is a separate issue. This Office does not have any information as to the Board's employment relationship with regard to the president, and thus, we cannot comment on the president's employment status. This would be a matter best handled by Board under the advice of its attorney. While we believe the Board may hire and terminate the University's president pursuant to the authority given to the Board by the Legislature, we cannot advise the Board of its obligations under an employment contract, if one exists. In your letter, you state that the president was employed on an at will basis, indicating the absence of an employment contract. Thus, we would presume the

The Honorable Robert Ford

Page 5

September 8, 2010

Board was free to terminate the employment relationship. However, without an understanding of all of the facts involved, we cannot comment as to the University's responsibility in this regard. As stated in numerous opinions of this Office, we cannot investigate and determine factual issues. Op. S.C. Atty. Gen., July 9, 2010. Thus, we are unable to provide you advice as to any obligations the Board may have in this respect.

You also asked us to address the Board's ability to expunge actions taken during open session of a duly called meeting that were recorded in the public records of the minutes of the Board. While we are not clear of what is meant by "expunge" as used in your letter, South Carolina's Public Records Act specifically prohibits the destruction of public records. Section 30-1-30 of the South Carolina Code (2007) states:

A person who unlawfully removes a public record from the office where it usually is kept or alters, defaces, mutilates, secretes, or destroys it is guilty of a misdemeanor and, upon conviction, must be fined not less than five hundred dollars nor more than five thousand dollars or imprisoned not more than thirty days. Magistrates and municipal courts have jurisdiction to try violations of this section.

Section 30-4-20(c) of the South Carolina Code (2007), which is part of the Freedom of Information Act ("FOIA"), defines a "public record" for purposes of the Public Records Act. See S.C. Code Ann. § 30-1-10(A) (2007). Section 30-4-20(c) states that a "public record" includes "all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body." Section 30-4-50(A)(7) of the South Carolina Code (2007) specifically states that "minutes of all proceedings of all public bodies and all votes at such proceedings . . ." are public records. Section 30-4-20(a) of the South Carolina Code (2007) defines "public body" as

any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions,

including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority. Committees of health care facilities, which are subject to this chapter, for medical staff disciplinary proceedings, quality assurance, peer review, including the medical staff credentialing process, specific medical case review, and self-evaluation, are not public bodies for the purpose of this chapter.

Because we believe the Board is a public body for purposes of the Public Records Act, we are of the opinion that the minutes taken at its meetings are public records pursuant to sections 30-4-20(c) and 30-4-50(A)(7). Thus, in accordance with section 30-1-30, the Board is prohibited from destroying any of its minutes.

Furthermore, we believe the minutes kept by the Board must accurately reflect the Board's actions. In a 1973 opinion, we addressed a county board's ability to exclude a matter from the minutes that was raised during the meeting, but not approved by the board. Op. S.C. Atty. Gen., April 13, 1973. In addressing this matter, we stated that

[a] citizen unquestionably not only has the right to attend a formal regular meeting of the governing body and to inspect its records, but he also has a right, in the opinion of this office, to inspect a record which accurately reflects the matters which were presented for consideration, even though no action was taken thereon.

Id. In this situation, we believe the need for accurate recording keeping is even more essential because, as we understand the situation, the Board took action. Thus, in accordance with our 1973 opinion and the Public Record Act, we believe the Board is prohibited from destroying minutes recorded of prior meetings. Moreover, our 1973 opinion makes clear that the Board is also prohibited from modifying those minutes in a way that distorts the actions taken during the meeting.

### **Conclusion**

Based upon our analysis above, we are of the opinion that the Board has authority to rescind a previous action it took with regard to electing the University's president. However, we cannot, in this opinion, address whether such action is in violation of any contractual relationship, if one exists, between the University and its president.

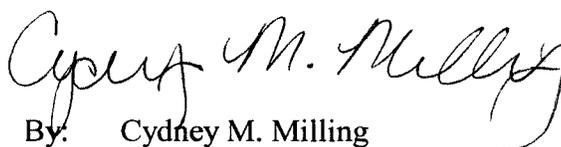
Furthermore, we advise that the Public Records Act requires any minutes kept recording actions taken by the Board must not be destroyed or modified. While it is unclear as to how the

The Honorable Robert Ford  
Page 7  
September 8, 2010

minutes recording the Board's actions with regard to the election and termination of the University's president were "expunged," we believe that any minutes taken with regard to the Board's actions must be preserved and must accurately reflect the Board's actions.

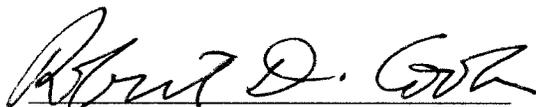
Very truly yours,

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