



HENRY McMASTER
ATTORNEY GENERAL

August 25, 2009

Ladson F. Howell, Esquire
County Attorney, Beaufort County
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Beaufort, South Carolina 29901-1228

Dear Mr. Howell:

We understand from your recent letter that you wish to request an opinion of this Office concerning “the appropriate term that a gubernatorial appointee should serve in filling a recent vacancy in the Clerk of Court’s Office here in Beaufort County.” You explain that “[o]ur Clerk of Court recently resigned after being elected in the general election of 2008 for a 4-year term, which would have expired in the general election year 2012.”

Law/Analysis

Section 14-17-30 of the South Carolina Code (1976) provides:

In the event of any vacancy in the office of clerk the Governor shall have full power to fill it by appointment as provided in § 4-11-20. Until such vacancy be filled by appointment or election the judge of probate of the county shall take charge of the office and all of the papers therein, discharge the duties and receive the fees thereof, and be subject to all its liabilities as provided by law.

Section 4-11-20 of the South Carolina Code (1986) states:

In the event of a vacancy at any time in any of the offices of any county of the State the Governor may appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, he shall be entitled to enter upon and hold the office to which he has been appointed:

(1) If it be an elective office, until the next general election for such office if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed, in which latter case an election shall then be held to fill the unexpired term and in either such event such person shall hold office until his successor shall qualify; and

(2) If it be an office which was filled originally by appointment, until the adjournment of the General Assembly at the regular session next after such appointment.

Any officer so appointed shall be subject to all the duties and liabilities incident to his office during the term of his service therein. Any officer elected to fill an unexpired term under the provisions of this section shall hold office for such term and until his successor shall qualify.

(emphasis added). In addition to section 4-11-20, section 1-3-220 of the South Carolina Code (2005) contains a provision regarding appointments by the Governor to fill vacancies in county offices. This provision states, in pertinent part:

The following appointments shall be made by the Governor and are in addition to those appointments by the Governor authorized in other provisions in the Code:

...

(2) An appointment to fill any vacancy in a county office. The person so appointed shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify; and in the case of offices originally filled by appointment and not by election, until the adjournment of the session of the General Assembly next after such vacancy has occurred. The Governor may remove for cause any person so appointed by him under the provisions of this paragraph to fill any such vacancy.

....

S.C. Code Ann. § 1-3-220 (emphasis added).

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According to article V, section 24 of the South Carolina Constitution (2009), clerks of court serve four-year terms. Thus, under section 4-11-20 of the South Carolina Code, the Governor's appointee would serve until the next general election for clerks of court. However, section 1-3-220 simply states that appointments made by the Governor are to serve until the next general election. Thus, this provision does not specify the next general election to which that office is normally elected.

In a 2002 opinion addressing a different matter, this Office commented as to the apparent disparity between sections 4-11-20 and 1-3-220 in a footnote. Op. S.C. Atty. Gen., August 2, 2002. We stated:

Although prior opinions have indicated that elections to fill vacancies in clerks of court positions are not to be held until the next general election for that office because their terms are fixed by the Constitution (now S.C. Const. art.5 § 24), the Opinions appear to be limited by statutory change since then. Ops. Atty Gen. (January 30, 1978 (No. 78-18) and March 21, 1966). The Opinions relied upon the statute now codified as § 4-11-20 which appears to have been superseded by the more recent provisions of § 1-3-220(2). Section 4-11-20 provides that appointees to fill vacancies hold office until the "next general election for such office if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed" (emphasis added) Section 1-3-220(2), which is similarly worded, provides that "[t]he person so appointed [to fill any vacancy in a county office] shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify." Because it is the more recent provision and refers to "all cases in which the office is elective", § 1-3-220 appears to be controlling. Yahnis Coastal, Inc. v. Stroh Brewery, 295 S.C. 243, 368 S.E. 2d 64 (1988) (The last passed statute will prevail if the statutes are incapable of any reasonable reconciliation.).

Id.

While our previous opinion is correct in stating that the later statute would control, this opinion did not address impact of the rulings of our Supreme Court in Cannon v. Sligh, 170 S.C. 45, 169 S.E. 712 (1933) and Limehouse v. Blackwell, 190 S.C. 122, 2 S.E.2d 483 (1939) finding that an election to fill an unexpired term would be void because the term for a clerk of court is fixed by the Constitution. As explained in a 1966 opinion of this Office, "[w]hat this means is that under the Constitution in South Carolina, a clerk of court must be elected for a term of four years and cannot be elected for a lesser term of years even though it may be to fulfill an unexpired term." Op. S.C. Atty. Gen., July 14, 1966.

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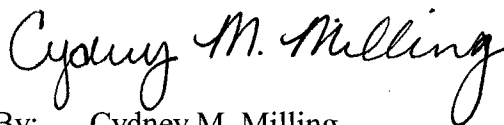
Because a clerk of court is prohibited under the Constitution from being elected to serve a partial term, any statute requiring such an election would be void. This Office, just as a court, always attempts to construe a statute so as to render it valid if possible. Littlefield v. South Carolina Forestry Comm'n, 337 S.C. 348, 353, 523 S.E.2d 781, 783 (1999). Therefore, we believe construing words "the next general election" in section 1-3-220 to mean the next general election for clerks of court is the better reading and is consistent with the Constitution and prior rulings of our Supreme Court. See Ops. S.C. Atty. Gen., January 30, 1978; March 21, 1966. As such, we are of the opinion that the person appointed by the Governor shall serve the remainder of the clerk of court's unexpired term and a new clerk of court shall be elected at the next general election at which clerks of court are elected, which you indicate as the general election year 2012.

Conclusion

Based on our review of the applicable statutes, constitutional provisions, and case law governing clerks of court, we believe that should a vacancy arise in the clerk of court's position, a gubernatorial appointee should serve out the remainder of the clerk of court's unexpired term and a new clerk of court shall be elected at the next general election at which a clerk of court would be elected.

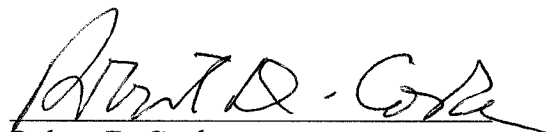
Very truly yours,

Henry McMaster
Attorney General



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REVIEWED AND APPROVED BY:



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