



HENRY McMASTER
ATTORNEY GENERAL

April 23, 2009

The Honorable Michael T. Rose
Member, South Carolina Senate
613 Gressette Building
Columbia, South Carolina 29201

Dear Senator Rose:

We received your letter requesting an opinion of this Office as to “whether the Vander Linden case requires ‘weighted voting’ regarding the votes of the Dorchester County Legislative Delegation to recommend to the Governor an appointment to the Dorchester County Water Authority.” In addition, you ask:

If the Vander Linden case does require “weighted voting” in this situation, please confirm that under the Vander Linden case and regarding an appointment to the Dorchester County Water Authority:

1. The “weighted votes” of the four House members combined precisely would equal the “weighted votes” of the three Senators combined on the Dorchester County Legislative Delegation;
2. The “weighted votes” of the three Senators and any one House member would exceed the “weighted votes” of any combination of other three House members on the Dorchester County Legislative Delegation.

Law/Analysis

In addition to your request letter, you provided us with a copy of the Dorchester County Water Authority’s (the “Authority’s”) enabling legislation. According to the Authority’s enabling legislation, the Authority is to be composed of five members “who shall be appointed by the Governor, upon the recommendation of a majority of the members of the Dorchester County Legislative Delegation.” 1965 S.C. Acts 1235. You are concerned that members of the Dorchester

County Legislative Delegation (the “Delegation”), in voting on who to recommend to the Governor with regard to the Authority, are subject to the one person, one vote requirement of the Equal Protection Clause as explained in Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999).

Prior to Vander Linden, the South Carolina Supreme Court considered whether an election of members to a district highway commission by a joint delegation must comply with the equal protection principle of one person, one vote. In Moore v. Wilson, 296 S.C. 321, 372 S.E.2d 357 (1988), the Court addressed whether a county legislative delegation must comply with the equal protection principle of one person, one vote when selecting members for a district highway commission. The appellant in the case argued that “the statutory scheme is unconstitutional because it gives the smaller legislative delegations from less populous counties considerably more power than the larger delegations from more populous counties. He contends this results in a dilution of the more populous counties’ voting rights.” Id. at 325, 372 S.E.2d at 359. However, the Court disagreed stating:

In situations involving popular elections, the State is required to ensure that each person’s vote counts, as much as possible, as much as any other person’s. Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). However, where the State chooses to select members of an official body by a method other than by popular vote, the principle of one man, one vote has no relevancy. Sailors v. Board of Education of County of Kent, 387 U.S. 105, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967). In the present case, the selection of a highway commissioner is not made by voters in a popular election. Instead, the selection is made by members of the joint legislative commission and the principle of one man, one vote, is therefore inapplicable.

Id.

Subsequent to Moore, the Fourth Circuit Court of Appeals concluded that the principle of one person, one vote applies to legislative delegations. In Vander Linden v. Hodges, 193 F.3d 268 (4th Cir. 1999), South Carolina voters brought suit claiming that South Carolina’s legislative delegation system violated the one person, one vote requirement of the equal protection clause. The Court in Vander Linden explained:

“[W]henever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in

that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials.”

Id. at 272 (quoting Hadley v. Junior College Dist. of Metro. Kansas City, 397 U.S. 50, 56 (1970)). Initially, relying on the Supreme Court’s decision in Board of Estimate v. Morris, 489 U.S. 688 (1989), the Court determined that members of legislative delegations are not appointed, but are elected for purposes the Equal Protection Clause. Id. at 274. The Court continued with its opinion by considering the powers afforded to legislative delegations and determined that delegations exercise governmental functions. Id. at 278. As such, the Court concluded: “In sum, we conclude that the legislative delegations are elected bodies that exercise governmental functions, and that therefore the one person, one vote requirement applies to them. Because there is no serious dispute that the delegation system fails to satisfy this requirement, we hold it to be unconstitutional.” Id. at 281.

Instead of fashioning a remedy for the unconstitutionality of the legislative delegations, the Court remanded the case to the district court giving the Legislature time to correct the constitutional defects in its delegation system. Id. Because the Legislature failed to construct a remedy on its own, in June of 2000, Judge Duffy of the South Carolina District Court issued an order providing interim guidelines for weighted voting. Vander Linden v. Hodges, C.A. No. 2-91-3635 (S.C.D. June 22, 2000).

Since, the Fourth Circuit’s decision in Vander Linden, this Office has been asked to opine on various issues related to that Court’s decision. As you noted in your request letter, we issued an opinion in 2003 in which we considered whether elections by the joint assembly of the Legislature violate the one person, one vote requirement pursuant to the Equal Protection Clause. Op. S.C. Atty. Gen., March 4, 2003. We explained in the opinion that in elections by the joint assembly, the House of Representatives and the Senate meet as one body with each member of both bodies having one vote. Id. Initially, we determined these elections are essentially appointments made by a joint assembly of the Legislature. Id. Then, relying on the Supreme Court’s decisions in Fortson v. Morris, 385 U.S. 231 (1966) and Sailors v. Board Education of County of Kent, 387 U.S. 105 (1967), we surmised that “the Equal Protection principles of ‘one person, one vote’ are inapplicable to the selection of nonlegislative officials by appointment rather than popular election.” Id. While we acknowledged that Vander Linden applied to South Carolina legislative delegations, we did not believe a court would venture as far to require that the one person, one vote principle be applied to legislative appointments made by the joint assembly of the Legislature. Id. Moreover, we cited to Moore and stated that based upon this decision, we do not believe that our State Supreme Court would follow the reasoning of Vander Linden with respect to joint assemblies. Id.

In 2007, we issued an opinion discussing whether the method of electing commissioners to the South Carolina Department of Transportation violates the one person, one vote requirement of the Equal Protection Clause. Op. S.C. Atty. Gen., February 21, 2007. In the opinion, we reviewed section 57-1-330(A) of the South Carolina Code, which provides for commissioners to be elected by the legislative delegation of each congressional district. Id. Considering both our 2003 opinion and the South Carolina Supreme Court's decision in Moore, we concluded as follows:

[W]hile it certainly can be argued that Vander Linden now requires application of "one person, one vote" requirements to § 57-1-330(A), our Supreme Court in Moore v. Wilson, supra has ruled that because the position of SCDOT commissioner is appointed by members of various legislative delegations, rather than elected by the people, such principles do not apply. Until a court rules otherwise, we suggest Moore v. Wilson be followed. Thus, we would advise that § 57-1-330(A), as written by the General Assembly, including the requirement that "a legislator shall vote only in the congressional district in which he resides ..." is controlling here without the necessity of "weighted voting" with respect to appointments of SCDOT commissioners. Consistent with our prior opinions and decisions of the United States Supreme Court, the appointment process is not subject to the requirement of "one person, one vote."

Id.

As we previously mentioned, the Authority's members are appointed by the Governor upon the recommendation by the Delegation. 1965 S.C. Acts 1235. Thus, following our 2003 and 2007 opinions, we understand that based on these opinions, some have inferred that because the members of the Authority are appointed, the constitutional principle of one person, one vote would not apply to the Delegation's recommendation. However, we must note that the 2003 opinion was concerned with appointments made by the joint assembly of the Legislature and our 2007 opinion dealt with actions taken by collections of county legislative delegations within a congressional district. Thus, neither our 2003 nor our 2007 opinions dealt with an action taken by a county delegation. While we have narrowly construed the application of Vander Linden not to apply to situations outside of legislative delegations, in this instance we are considering a legislative delegation and its method of voting to recommend individuals to a local board.

In Vander Linden, the Fourth Circuit Court of Appeals conclusively found that delegations are subject to the one person, one vote requirement. Vander Linden, 193 F.3d 268. As we emphasized in a recent opinion, "Vander Linden was . . . concerned with the 'powers' of the legislative delegations and the inequity such exercise of powers would have when wielded by

legislators who represented disproportionate populations.” Op. S.C. Atty. Gen. March 16, 2009. The Court in Vander Linden specifically considered a legislative delegation’s power to make recommendations and to appoint governmental officials in considering whether a delegation performs governmental functions. Id. at 275. The Court stated: “South Carolina law clearly regards . . . the making of appointments . . . as a governmental function.” Id. In addition, the Court concluded that “[i]t cannot seriously be contended that the power to appoint governmental officials fails to qualify generically as a governmental function.” Thus, in light of the Fourth Circuit’s decision in Vander Linden and the Court’s clear concern that an inequity may be created by a delegation’s ability to recommend or appoint governmental officials without the delegation’s members proportionally representing those they serve, we believe the one person, one vote requirement applies to the Delegation’s vote to recommend that an individual be placed on the Authority’s board. Accordingly, we also believe Judge Duffy’s order would require that the Legislative Delegation employ weighted voting.

As we surmise that the Delegation must employ weighted voting when recommending members to the Authority, you also ask us to confirm first that the weighted votes of members of the Delegation who are members of the South Carolina House of Representatives, which you indicate there are four, would equal the votes of the Delegation members who are members of the South Carolina Senate, which you indicate there are three. Second, you ask that we confirm that the weighted votes of the three Senators and any one member of the House of Representatives exceed the weighted votes of a combination of the other three members of the House of Representatives.

In his June 22, 2000 order providing the interim guidelines for weighted voting, Judge Duffy considered bills introduced both to Senate and the House of Representatives establishing methods of weighted voting. Vander Linden V. Hodges, C.A. No. 2-91-3635 (D.S.C. June 22, 2000). However, in fashioning a remedy to the constitutional violations found by the Fourth Circuit Court Appeals, Judge Duffy chose to adopt the formula set forth in the Senate Bill 3811(C). S.3811, 113th Leg., (S.C. 1999). According to Senate Bill 3811(C), the following calculation must be used to determine the weight of each delegation member’s vote:

- (1) the number of residents in the delegation area which are represented by a member of the Senate must be divided by twice the total population of the delegation area;
- (2) the number of residents in the delegation area represented by a member of the House of Representatives must be divided by twice the total population of the delegation area;
- (3) the calculations in items (1) and (2) must be made to the fourth decimal place;

(4) to determine the weight of the vote for each member of the Senate and the House of Representatives, when voting as a legislative delegation, each calculation to the fourth decimal place in items (1) and (2) must be multiplied by one hundred;

(5) to determine the weight of the vote for each member of the Senate or the House of Representatives, when voting as a single branch delegation, each calculation to the fourth decimal place in either item (1) or (2) must be multiplied by two hundred;

(6) the numbers resulting from the calculations required by this subsection must not be rounded up or down.

Id.

To answer your question, this calculation results in members of the House of Representatives and members of the Senate having collectively equally weighted votes. Thus, in the scenario you presented, all of the Senators who are members of the Delegation constitute half of the weighted vote. Thus, all of the Delegation's Senators and one of the Delegation's House of Representatives members collectively hold more than half of the weighted vote.

Conclusion

Although prior opinions of this Office conclude that the constitutional requirement of one person, one vote does not apply to appointments, none of these opinions dealt directly with legislative delegations, which Vander Linden definitively addressed. The Fourth Circuit Court of Appeals in Vander Linden made clear that this constitutional requirement applies to the votes of legislative delegations. Moreover, that Court specifically considered legislative delegations' authority to appoint and make recommendations for appointment of various governmental officials in making its determination that the constitutional principle of one person, one vote applies. Thus, we are of the opinion that in voting on appointments and recommendations for appointment, legislative delegations should follow Vander Linden as the prevailing law. Currently, legislative delegations comply with the one person, one vote requirement by use of weighted voting as required by Judge Duffy's 2000 order. Therefore, we believe that, consistent with the Court's ruling in Vander Linden, the Delegation must employ weighted voting in recommending members of the Authority for appointment by the Governor.

As for your questions regarding the application of the weighted voting requirement described in Judge Duffy's order, we concur with your statement that in a particular delegation, the weighted

The Honorable Michael T. Rose

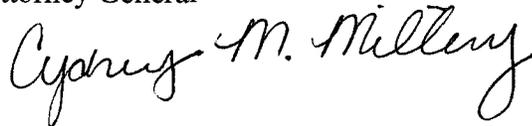
Page 7

April 23, 2009

votes of the members of the House of Representatives equal the weighted votes of the members of the Senate. Therefore, if the weighted votes of all the Delegation's members who are members of the Senate are combined with the weighted vote of one member of the Delegation who is a member of the House of Representatives, these weighted votes would exceed the weighted votes of the remaining Delegation members who are members of the House of Representatives.

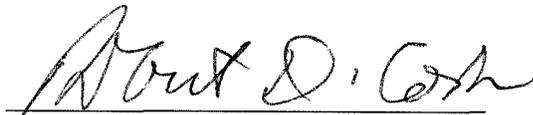
Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General