



HENRY McMASTER
ATTORNEY GENERAL

June 17, 2009

The Honorable Michael T. Rose
Senator, District No. 38
409 Central Avenue
Summerville, South Carolina 29483

Dear Senator Rose:

In a letter to this office you indicated that a member of the Dorchester County Board of Elections and Registration (hereinafter "Elections Board") purported to take a "leave of absence" for approximately ten months in 2008 in order to help his wife campaign for reelection as Dorchester County Treasurer. According to your letter, during that ten months, the individual participated in his wife's campaign and engaged in other political activities.

You stated that all seven members of the Elections Board receive from Dorchester County a stipend of \$1500 using a State grant to Dorchester County amounting to \$1500 per Elections Board member per year. You stated that during the referenced member's leave of absence, he did not accept his proportionate share (i.e. 10/12) of that \$1500 that would typically have been paid to him. Instead, that proportionate share not paid to him was distributed to the other six members of the Elections Board rather than being returned to the State. You stated that the Dorchester County Legislative Delegation did not authorize the redistribution to other Elections Board members of money that would have been paid to the absent member.

You further stated that after the absent member's wife was reelected as Dorchester County Treasurer, the member purported to resume his duties as a member of the Elections Board and resumed receiving \$1500 per year as a member of the Board. Before the member took his leave of absence, an employee of the Elections Board asked the State Ethics Commission whether there was a possible conflict of interest due to the member's serving as a member of the Elections Board while his wife was on the ballot as a candidate for Treasurer. In response, the Ethics Commission issued an opinion basically stating that in the event of a conflict of interest, the member of a board "must recuse himself from participating in certain governmental actions or decisions." Also, it was advised that if a matter were to come before the Elections Board that "might affect the economic interest" of the Treasurer, the member's spouse, the member should recuse himself from the proceedings as set forth in S.C. Code Ann. § 8-13-700(B)(1) and (5).

Referencing the above, you have raised several questions. In your first question, you asked whether the member was entitled to take a "leave of absence" from his duties as a member of the

The Honorable Michael T. Rose
Page 2
June 17, 2009

Elections Board. You referenced a letter dated March 18, 2008 from the Chairman of the Elections Commission to Senator Scott which stated that the referenced member "...request(s) a leave of absence effective immediately and continuing through the November general election cycle..." and that the Board member "...be permitted to remain on the Board while he takes a leave of absence...." You stated that such is also evidenced in the minutes of the March 27, 2008 meeting of the Elections Board.

An opinion of this office dated January 8, 1996 stated that the term "leave of absence"

...does not mean a permanent separation from employment. Rather, it signifies a temporary absence from duty with an intention to return, during which time remuneration is suspended. The relationship of public employer and public employee would therefore continue during this period of leave except for suspension of his obligation to carry out the duties of his work and the

compensation therefor. See also: 67 C.J.S., Officers Section 134.

I am unaware of any statutory provisions or policies authorizing a leave of absence for a member of an Elections Board. Such absence of authority here contrasts with provisions, such as S.C. Code Ann. §§ 8-7-20 and 8-7-90, which authorize leaves of absence for public employees serving in the military or National Guard. Opinions of other attorneys general have cited situations in which leaves of absence are specifically provided for by policies or statutes. See: Ops. Ala. Atty. Gen. dated July 19, 2004 and March 11, 1998; Op. Miss. Atty. Gen. dated March 28, 2003; Fla Atty. Gen. dated October 29, 2001. Therefore, based upon our review, I am unaware of any basis that would have authorized a "leave of absence" for a member of the Elections Board. Without such authority from the Legislature, we do not believe the Board would possess the power to grant a member any such leave.

In your next question you asked whether the member of the Elections Board was entitled by law to resume his duties on the Board after his taking a ten month "leave of absence." In examining your question, reference may be had to the provisions of S.C. Code Ann. § 7-27-295(E) which state that

[a] member who misses three consecutive meetings of the...(Elections)...board is considered to have resigned his office and a vacancy on the board exists which must be filled in the manner provided in subsection (B)¹.

¹Subsection (B) states that "[a] vacancy on the board must be filled by appointment in the manner of original appointment for the remainder of the unexpired term."

The Honorable Michael T. Rose
Page 3
June 17, 2009

The bylaws of the Elections Board state that “[i]t is incumbent on all board members to attend all monthly and special meetings...In compliance with the legislation creating the board...a member who misses three consecutive meetings of the board is considered to have resigned his/her office and a vacancy on the board exists which must be filled in the manner provided....” Inasmuch as there are no exceptions or recognized bases for the member to have taken a leave of absence from the Elections Board and Section 7-27-295(E) provides that a vacancy exists upon the missing of three consecutive meetings, in the opinion of this office, the individual member was not entitled to resume his duties on the Board and a vacancy should have been considered as having existed. It does not appear that this conclusion can be waived.

By contrast, this office in an opinion dated October 2, 1990 determined that where a particular board had a policy stating that a member who was absent from three consecutive meetings without reason “shall be withdrawn from the Board”, there was no statutory grant of authority for the board to adopt such a rule. That situation is obviously in conflict with the situation referenced here where Section 7-27-295(E) expressly provides for a vacancy following an Elections Board member missing three meetings. See: McEvers v. Oklahoma Department of Corrections, Appointing Authority, 615 P.2d 307 (Ok.Ct.App. 1980) (where individual’s absence was premeditated and deliberate, request for annual leave was ineffective to prevent absence from being treated as a resignation. Statute at issue stated that absence for three days without authorization was deemed a resignation.). In short, in the opinion of this office, the referenced member forfeited his membership on the Elections Board and the statute noted above treats his absence as a resignation.

In your next question, you asked whether the referenced member ceased being a member of the Elections Board despite his claim to have taken a “leave of absence” from the Board. Consistent with the above response, in the opinion of this office, the member should have been considered to have resigned from office by operation of law. The member declared his non-participation in meetings. Such declaration and Section 7-27-295(E) should be considered a resignation even though he may not have intended to vacate the position. Pending the appointment of someone to fill the vacancy, he served in a *de facto* capacity. This means that the member’s acts were valid vis-a-vis the public. See: Op. Atty. Gen. dated October 28, 2008.

You next asked whether if the member in such circumstances would have been subject to the provisions of S.C. Code Ann. § 7-13-75 and 7-25-190. Section 7-13-75 states that

[n]o member of a county or municipal election commission, voter registration board, or combined election and voter registration commission may participate in political management or in a political campaign over whose election the member has jurisdiction during the member's term of office. No member may make a contribution to a candidate or knowingly attend a fundraiser held for the benefit of a candidate over whose election the member has jurisdiction. Violation of this section subjects the member to removal by the Governor or appropriate appointive authority.

Section 7-25-190 provides that

A person who votes at any general, special, or primary election who is not entitled to vote, or who by force, intimidation, deception, fraud, bribery, or undue influence obtains, procures, or controls the vote of any voter to be cast for any candidate or measure other than as intended or desired by such voter, or who violates any of the provisions of this title in regard to general, special, or primary elections is guilty of a felony. Upon conviction, the person must be fined not less than one hundred nor more than one thousand dollars or imprisoned not more than five years, or both.

The determination of whether an individual's conduct is a violation of either statute involves a factual determination. This office has repeatedly stated that an opinion of this office cannot determine facts noting that the determination of facts is beyond the scope of an opinion of this office. See: Ops. Atty. Gen. dated November 12, 2008; March 19, 2008; October 8, 2007. While the statutes speak for themselves, we cannot determine facts and the matter of whether an individual would be subject to such provisions depends upon the investigation of the factual situation presented, a matter beyond the scope of an opinion of this office. We would add, however, that in our view, Section 7-27-295(E) was triggered, thereby deeming as a matter of law that the member had resigned.

You next referenced the opinion of the State Ethics Commission dated February 27, 2008 referenced above which basically stated that in the event of a conflict of interest, a member of a board "must recuse himself from participating in certain governmental actions or decisions." Also, it was advised that if a matter were to come before the Elections Board that "might affect the economic interest" of the Treasurer, the member's spouse, the member should recuse himself from the proceedings as set forth in S.C. Code Ann. § 8-13-700(B)(1). You questioned whether that opinion relieved the Elections Board member from complying with the provisions of Sections 7-13-75 and 7-25-190 during the time he was a member of the Elections Board. You asked "doesn't that informal opinion interpret the State ethics laws but not the State election laws which are separate?"

In the opinion of this office, you are correct in your assumption that the Ethics opinion only relates to the ethics laws and should be considered separate from any other statutory provisions. See: S.C. Code Ann. § 8-13-320(11) (the Ethics Commission issues advisory opinions "on the requirements of this chapter."). The Ethics Commission opinion should not be considered as commenting on the applicability of Sections 7-13-75 or 7-25-190.

In your next question, you questioned that in circumstances where the referenced board member declined to accept his 10/12 of the \$1500 stipend, did that money have to be redistributed only as recommended by the county legislative delegation as stated in Section 7-27-295(C). That provision states that

The Honorable Michael T. Rose
Page 5
June 17, 2009

[m]embers of the board and its staff receive compensation as may be appropriated by the governing body of Dorchester County upon the recommendation of the county legislative delegation.

Also to be considered in your question are the provisions of 2008 Budget Proviso 79.1 which states that:

[t]he amounts appropriated in this section for “County Registration Board Members and County Election Commissioners,” shall be disbursed annually to the County Treasurer at the rate of \$1,500 for each member, not to exceed \$12,500 per county. The County Treasurer shall use these funds only for the compensation of County Registration Board Members and County Election Commissioners. Any funds not used for this purpose shall be returned to the State Treasurer.... (emphasis added).

In the opinion of this office, Section 7-27-205(C) does not provide for redistribution of monies not considered payable to a particular member. Instead, any monies remaining after the distribution at the rate of \$1500.00 per member should have been returned to the State Treasurer.

You next questioned whether when the referenced board member took his “leave of absence” and thereafter declined to accept his 10/12 of his \$1500 annual stipend, was it legal for the money to have been distributed to the other six members of the Elections Board or was that money required to be returned to the State. Consistent with the referenced budget proviso, any monies not distributed to the member who took a “leave of absence” should not have been distributed to the other six members of the Elections Board. Instead, consistent with the budget proviso, such monies should have been returned to the State Treasurer. A prior opinion of this office dated February 21, 2003 recognized that “[g]enerally, compensation paid to a public officer which is not authorized by law, or which is in excess of the compensation authorized by law, may be recovered by the proper government body notwithstanding the fact that payment was made under mistake of law....” It was further stated that “a ‘public officer has no right to give away public funds’ and such officer ...must deliver such funds...to the public official or function for whom or which they were intended. Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds is personally liable for such misappropriation or illegal payment.” See also: Op. Atty. Gen. dated March 3, 1997 (“[c]ourts in other jurisdictions have found public officials personally liable for improper expenditure of public funds or where such expenditure is not in accord with the governing law.”). Moreover, as to your next question of whether if the members who received such funds that were declined by the member who took a “leave of absence” should return that money to the State, in the opinion of this office, consistent with the referenced budget proviso, such monies should be returned.

In your next question you asked what is the relevance of a prior opinion of this office dated February 23, 1994 that dealt with how monies declined by a member of a board who took a “leave of absence” should have been distributed? That opinion dealt with a situation where a member of

a five member voter registration board died. Following that member's death, the compensation for the remaining four members of the board was increased by dividing the annual stipend which was provided for board members salary by four instead of five, thereby increasing the amount of the stipend. That opinion referenced the provisions of S.C. Code Ann. § 7-5-40 which provided that "[e]ach county shall receive an annual supplement from the State to help defray the expense of personnel in keeping the registration office open...." A proviso of the 1993-94 General Appropriations Act, Act No. 164, Section 16.1 stated in part that

[t]he amount appropriated to this section for the "County Board of Registration members" shall be disbursed annually at the rate of \$4,860 to each County Treasurer. These funds shall be disbursed equally to the members of the County Boards of Registration only.

The referenced opinion stated that

[w]hen these statutes are read together with Section 16.1 of the Appropriations Act, it is clear that the amount of \$4,860 is appropriated to each county treasurer and that amount is to be equally divided among either three, four or five persons dependent upon how many persons have been appointed to the county board. When Beaufort County had a five member board the amount was divided by five, when they became a four member board, the amount was to be divided by four.

The proviso from the 1993-94 appropriations act differs from the 2008 budget proviso cited above which again states that

[t]he amounts appropriated in this section for "County Registration Board Members and County Election Commissioners," shall be disbursed annually to the County Treasurer at the rate of \$1,500 for each member, not to exceed \$12,500 per county. The County Treasurer shall use these funds only for the compensation of County Registration Board Members and County Election Commissioners. Any funds not used for this purpose shall be returned to the State Treasurer.... (emphasis added).

Such proviso is quite specific in limiting the amount paid to each member to \$1500.00. The proviso quoted in the 1994 opinion stated that "[t]he amount appropriated to this section for the "County Board of Registration members" shall be disbursed annually at the rate of \$4,860 to each County Treasurer. These funds shall be disbursed equally to the members of the County Boards of Registration only." There is no specific dollar amount to be paid to each member as is the case with the 2008 budget proviso. Therefore, the reasoning and conclusion of the 1994 opinion is inapplicable to the current situation involving the Dorchester Elections Board.

You also forwarded questions posed of the Dorchester Elections Commission regarding the referenced member's "leave of absence." You asked whether when the referenced member attended

a meeting of the Elections Board as an observer but while on an official leave of absence, did that attendance count as a “miss” of a meeting? You further asked whether such “observing” meant that while he was attending he was not functioning as a member of the Board? You stated that attached to the March 27, 2008 minutes is a letter dated February 22, 2008 which stated that “it is the Board’s plan to have...(the referenced member)...work in the elections warehouse taking calls during the primary versus visiting any of the precincts.” You asked what work, if any, did the referenced member perform for the Elections Board or the Elections Commission while he was on his “leave of absence”? How is this work consistent with that member’s status as being on a “leave of absence”?

Of course, as to those questions posed, as indicated above, this office cannot in an opinion comment or determine facts as to what work the particular member may have performed. However, any work done does not appear to comply with the mandate of Section 7-27-295 that a member not miss three consecutive meetings. Therefore, it appears that any work done during the primary would be irrelevant to the requirement of not missing three consecutive meetings.

You stated that the referenced member missed completely Elections Board meetings on April 17, 2008 and May 15, 2008. According to the Board minutes, he was considered “observing” at the March 27, 2008 meeting of the Elections Board. He was considered “present” at meetings on June 26, 2008, July 17, 2008, August 18, 2008 and September 18, 2008. He also missed the October 16, 2008 meeting. The member attended the Elections Board meeting on November 20, 2008. A separate memorandum states that the member “...was on leave of absence from March 27, 2008 until November 15, 2008.”

You asked why the member was listed as “present” at the referenced meetings, in what capacity did he attend these meetings, and what did he do during those meetings. Of course, as stated previously, the bylaws of the Elections Board state that “[i]t is incumbent on all board members to attend all monthly and special meetings...In compliance with the legislation creating the board...a member who misses three consecutive meetings of the board is considered to have resigned his/her office and a vacancy on the board exists which must be filled in the manner provided...” Of course, again, the questions noted above raise factual issues that cannot be investigated or resolved by an opinion of this office. See: Op. Atty. Gen. dated November 12, 2008. As to your question of how was his being on a “leave of absence” to avoid an appearance of impropriety consistent with the consideration that he was in fact present at those meetings of the Elections Board, in the opinion of this office, a court would likely determine such position to be vacant consistent with Section 7-27-295(E) regardless of his been deemed “present” at these meetings. Either he was on the Elections Board or not and the fact that he attended meetings is, in the opinion of this office, of no consequence. The fact to be considered is whether he participated in a Board meeting or did not participate. Such determination is what is important in determining his status, not the fact of whether or not he was “present”. See: Op. Atty. Gen. dated August 19, 2002 (“[a] member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias or other good cause may not be counted for purposes of a quorum at a meeting where the board acts upon the

The Honorable Michael T. Rose
Page 8
June 17, 2009

matter...[A]uthorities conclude that the members present who are not part of the committee or body conducting the meeting must actually participate in the meeting in order to be counted for purposes of a quorum of the full board.”). See also: Corvelli v. Fonseca, 732 A.2d 1147 (N.J. 1999) (date of first meeting missed by a member began period of statute deeming the member’s office vacant if the member fails to attend and participate in any meetings.).

In summary, while only a court may ultimately resolve these issues with finality, it is the opinion of this office that the referenced member of the Elections Board who purportedly took a “leave of absence” for approximately ten months in order to help his wife campaign for reelection as Dorchester County Treasurer should be deemed to have resigned his office. This office is unaware of any basis to support a claim of a “leave of absence” that would allow that member to resume duties as a member of the Board. The law does not recognize such a “leave of absence” unless specifically authorized by the Legislature, and in this instance, no such authorization is present. Accordingly, in our opinion, Section 7-27-295(E) is controlling. In short, when the member declared a “leave of absence”, he thus subjected himself to the operation of Section 7-27-295(E)’s provision, thereby resigning as a matter of law.

Hopefully the above is in full response to your inquiry.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General