



HENRY McMASTER
ATTORNEY GENERAL

July 1, 2010

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Dear Mr. Smith:

We received your letter requesting an opinion of this Office regarding Richland County employees serving on the Richland County Board of Voter Registration. You asked “whether members of the Richland County Board of Voter Registration have a conflict of interest by serving as members of the Board and employees of Richland County.” You also asked “whether the Governor has the authority to name the Chairperson of the Board of Voter Registration.”

As a way of background, you explained in your request letter that “[c]urrently, and consistent with past practice, the members of the Board, appointed by the Governor upon the recommendation of the Senators of the Legislative Delegation, are also employed as full-time staffers within the Richland County Department of Voter Registration. . . . Thus, the Board members have the rights of county employees, perform work of county employees, and are paid a salary as full-time county employees. However, neither Richland County Council nor the County Administrator has the ability to hire, terminate, or discipline the Board members under the South Carolina Code of Laws. Thus, the Board members appear to be their own masters.”

This opinion will address prior opinions of this Office, relevant statutes and caselaw to determine if the county ordinance is valid and if there is a conflict of interest.

Law/Analysis

Self-Appointment

The South Carolina Supreme Court held that “[i]n the absence of constitutional or statutory provision it is, as said in 42 Am.Jur. 955, Public Officers, Sec. 97, ‘contrary to public policy to permit an officer having an appointment power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members.’” Bradley v. City Council of City of Greenville, 212 S.C. 389, 397, 46 S.E.2d 291, 295 (1948).

This Office is not a fact-finding entity, but based on previous conversations, it is the understanding of this Office that the Board of Voter Registration has a history of hiring the Chairperson of the

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Board as Director of the Department of Voter Registration. Then, the Director of the Department hires a staff; the staff is comprised of Board members. Therefore, the Board is “appoint[ing] one of its own members” and then each Board member is essentially “conferring an office upon himself.”

Validity of County Ordinance

An “ordinance is entitled to a presumption of validity,” but a “municipal ordinance may not vary state law.” Nevertheless, only a court may set an ordinance aside.” Op. S.C. Atty. Gen., March 3, 2008 (citing City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991)).

S.C. Code § 7-27-405 explains that the “Richland County Election Commission and the Richland County Board of Registration must have their members appointed and powers of their board and commission as provided by Sections 7-5-10 and 7-13-70.” In relevant part, S.C. Code § 7-5-10 governs the appointment and removal of board members as follows:

- (A) Between the first day of January and the fifteenth day of March in each even-numbered year the Governor shall appoint, by and with the advice and consent of the Senate, not less than three nor more than five competent and discreet persons in each county, who are qualified electors of that county and who must be known as the “Board of Registration of [Richland] County.” The Governor shall notify the State Election Commission in writing of the appointments. The members appointed are subject to removal by the Governor for incapacity, misconduct, or neglect of duty.

S.C. Code § 7-5-10(A).

S.C. Code § 7-5-30 articulates the duties of the Boards of Voter Registration as follows:

Such boards shall register and conduct the registration of the electors who shall apply for registration in their respective counties as herein required. Their office shall be at the county seat, and they shall keep a record of all their official acts and proceedings. *Provided*, that nothing herein shall be construed as prohibiting the boards of registration from taking their registration books across adjoining county lines to register qualified electors of their respective county whose regular place of employment is in an adjoining county or who are otherwise unable to get to the county seat during office hours to register. **One member of the board shall constitute a quorum** for the purpose of registering or refusing to register applications for registration. . . .

S.C. Code § 7-5-30 (emphasis added).

It is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990).

Any statute must be interpreted with common sense to avoid unreasonable consequences. United States v. Rippetoe, 178 S.C. 735 (4th Cir. 1949). The plain reading of S.C. Code § 7-5-30 instructs board members to conduct registration and keep record of such. It also informs that only one board member is necessary to constitute quorum and register citizens to vote. There is no reference to board members being hired by the county as staff for the department.

Almost every county in South Carolina has interpreted S.C. Code § 7-5-30 to indicate that the Department's staff and Board members should be different individuals, Richland County has adopted an alternative reading. Although Richland County's alternative reading to consider the positions of Department staff worker and Board member as one position is plausible, the better reading is the one adopted by all other counties.

The legislative intent for these positions to be filled by separate individuals is clear. For example, in S.C. Code § 7-5-35(2)(b), the statute explains that "[a]ny **member** [of Board of Voter Registration] appointed or reappointed after a break in service . . . or any **staff person** employed or reemployed after a break in service . . . must successfully complete a training and certification program." The fact that instructions to complete training is addressed to the board members and staff persons separately indicates that the legislature intended for different people to occupy these positions. In a prior opinion we explained as follows:

Before any person can take applications and issue certificates, he, or she as the case may be, must be either appointed as a member of a board of registration pursuant to Section 23-51, 1962 Code, [now codified as S.C. Code § 7-5-10 of the 1976 Code of Laws] or he must be made a deputy member by the board itself pursuant to [S.C. Code § 7-5-20].

Op. S.C. Atty. Gen., September 26, 1968. This opinion explains that members of the board already have the authority to register citizens to vote. Therefore, it is unnecessary and invalid for Richland County to create an employee position for board members.

The Richland County Code of Ordinances, Sec. 2-238(d) states as follows:

- (d) *Voter Registration.* The department of voter registration shall be the operational unit for the county board of voter registration, with each board member being responsible for administrative functions within the department. The board shall be appointed by the Governor of South Carolina, with advice and consent of the county senatorial delegation, and shall be directed by the chair of the board of voter registration, who is appointed by the Governor in the same manner as above. The department shall comply with the requirements of the South Carolina Code of Laws, 1976, as amended, sections 7-5-10 through 7-5-30, and all other relevant state laws. **Such board members shall have all rights of regular county employees**, but shall not have grievance rights as set forth elsewhere in this Code. The department shall be responsible to:

- (1) Provide for the proper registration of all persons qualified to vote;
- (2) Maintain all equipment, books, and records necessary to effect such registration of voters in the country; and
- (3) Operate an office to serve the general public and maintain the records, files and all other relevant information and/or data on voter registration.
- (4) Establish absentee and fail safe voting precincts.

Richland County Code of Ordinances, Sec. 2-238(d) (emphasis added).

The portion of the County Ordinance that gives board members “all rights of county employees” is in conflict with state law. The county ordinance is essentially creating another position for the board members to do what they are already instructed to do under S.C. Code § 7-5-30. One should note that the responsibilities of the board could become burdensome and time-consuming. However, state law provides that the board may appoint others, such as deputy registrars, to help accomplish their tasks and that those individuals may assume the “same power and duties as regular members of the board.” S.C. Code § 7-5-20.

A court would also likely find that the County Ordinance is in conflict with S.C. Code § 4-9-30(7). In an opinion of this Office dated April 6, 1989, we stated as follows:

Section 7-13-70 expressly provides that commissioners of election are appointed by the Governor upon the recommendation of the Senator and at least half of the members of the House of Representative from the county. Since the appointing authority for county election commissioners is by an authority “outside county government”, by Section 4-9-30(7)¹ the General Assembly has mandated that county council possesses no authority in this area, although county election commissioners have been determined in prior opinions of this office

¹ S.C. Code § 4-9-30 states as follows:

Under each of the alternate forms of government listed in § 4-9-20 . . . each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof . . .

- (7) to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government. **This employment and discharge authority does not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government. . .**

to be county officers. This conclusion is consistent with 1975 Op. Atty. Gen., No. 4196, p. 246 (November 21, 1975) which concluded that the Home Rule Act effects “no change in the functioning or structure” of county election commissioners.

Op. S.C. Atty. Gen., April 6, 1989. Since the Board of Voter Registration falls under the § 4-9-30 exception, it is outside the authority of the county government to hire the board members as county employees for the Department of Voter Registration. Op. S.C. Atty. Gen., August 31, 1977. Hence, the county ordinance is also in violation of S.C. Code § 4-9-30(7), and therefore, a court would likely find the ordinance to be invalid.

Master-Servant Conflict of Interest

The request letter alludes to a possible master-servant conflict of interest. This opinion will not fully explore the master-servant conflict of interest issue because if a court finds the county ordinance invalid and sets aside the portion giving board members “all rights of county employees,” then the master-servant issue will be moot. Nevertheless, in an effort to avoid the appearance of a conflict, it is the opinion of this Office that it would be best for Richland County to take steps to fill the positions of Board members and staff personnel for the Department of Voter Registration with different individuals. See generally, McMahan v. Jones, 94 S.C. 362 (1913) (“No man in the public service should be permitted to occupy the dual position of master and servant.”) Also, one should note that while a state statute may change, override, or make exception to the common law, such as the master-servant conflict of interest issue, a county ordinance does not have the same power.

One could also make an argument that serving in both functions violates the dual office holding provision.² This Office has repeatedly expressed the opinion that members of voter registration boards are public officers for dual office holding purposes. See, Ops. S.C. Atty. Gen., February 13, 1984; September 6, 1983; October 22, 1982; October 20, 1982.

² Article XVII, Section 1A of the South Carolina Constitution provides that “No person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public.” For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). “One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

The title “deputy registrar” or “deputy member” is not used by the board members or by the Richland County Department of Human Resources, yet the board members serving as staff of the Richland County Department of Voter Registration are essentially performing the function of deputy registrar.³ In an opinion of this Office dated February 5, 1968, we held that “the position of deputy member of the board of registration constitutes an office within the meaning of the dual office holding provision.” Op. S.C. Atty. Gen., February 5, 1968. Since both positions are considered officers, there would be a dual office holding violation.

In practice, Richland County has collapsed the position of serving as a board member and the position of working in the Voter Registration office as a full-time employee into one position. This practice has been ongoing for many years; however, in reality, the two positions should be separate and distinct and filled by two different individuals.

Governor’s Ability to Appoint Chairperson of Board

As for the second question posed regarding the Governor’s authority to name the Chairperson of the Board of Registration, we must look to legislative intent of the statute and subsequently to the local ordinance. As mentioned above, in an opinion of this Office dated March 3, 2008, we concluded that “a municipal ordinance may not vary state law,” but we recognized that an “ordinance is entitled to a presumption of validity. Thus, only a court may set an ordinance aside.” Op. S.C. Atty. Gen., March 3, 2008 (citing City of North Charleston v. Harper, 306 S.C. 153, 410 S.E.2d 569 (1991)).

Also, as mentioned above, it is a cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute’s operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Any statute must be interpreted with common sense to avoid unreasonable consequences. United States v. Rippetoe, 178 S.C. 735 (4th Cir. 1949).

The Governor, under S.C. Code § 7-5-10, is given express authority to “appoint, by and with the advice and consent of the Senate, not less than three nor more than five competent and discreet persons in each county, who are qualified electors of that county” to serve as members of the Board

³ S.C. Code § 7-5-20 governs deputy members of boards of registration as follows: “The board of registration of each county may appoint deputy members of the board, in numbers as may be necessary, whose terms shall be for a period of time as determined by the boards. The deputy members shall have the same powers and duties as regular members of the board. **The clerk to each board may be made a deputy member of the board for the purpose of taking applications.**” S.C. Code § 7-5-20 (emphasis added).

of Voter Registration, but the Governor is not given express authority⁴ to appoint the chairperson of the County Board of Voter Registration. However, the Richland County Code of Ordinances expressly states that the “chair of the board of voter registration . . . is appointed by the Governor” with the advice and consent of the county senatorial delegation. Richland County Code of Ordinances, Sec. 2-238(d).

In an opinion of this Office dated March 7, 1983, we explained that “the provisions of Section 7-5-10 were directory not mandatory.” Op. S.C. Atty. Gen., March 7, 1983 (citing March 18, 1970). The stronger argument is that since the state statute is silent on the issue of the Governor’s appointment of the Chairperson and the county ordinance could plausibly be harmonized with state law, the relevant portion of the county ordinance should be found valid. However, one could also argue that S.C. Code §§ 7-13-18 and 7-27-255(A)(2) are clear that the county election commission or the county in general is responsible for electing the chairman.

If a court finds that the Governor may appoint the Chairperson, the Governor should be mindful that he or she must do so consistent with the terms of S.C. Code § 7-5-10. Also, the Governor should be mindful that he or she may not appoint anyone beyond who has already been appointed as a member of the board.

Conclusion

Consistent with our prior opinions and interpretation of state law, it is the opinion of this Office that simultaneously serving as a member of the Richland County Board of Voter Registration and working as staff for the Richland County Department of Voter Registration would be a conflict under Bradley v. City Council of City of Greenville because each Board member is using his or her power to “confer an office upon himself.” Bradley, 212 S.C. 389, 397 (1948).

Only a court may set aside a municipal ordinance, but it is the opinion of this office that a court would likely conclude that the portion of the Richland County Code of Ordinances giving members of the board “all rights of regular county employees” is invalid. Sec. 2-238(d). Although county ordinances are presumed valid, they are only presumed valid if there is no conflict with state law. Here, the ordinance conflicts with state law, both Title 7 and Title 4. In violation of S.C. Code § 7-5-30, the county essentially creates an employee position to do what the board is already instructed to do⁵ or what the board is to delegate to others under state law⁶. In violation of S.C. Code § 4-9-30(7),

⁴ Cf. S.C. Code § 7-13-80 (“The county election commission must appoint the chairman of the board of managers.”); S.C. Code § 7-27-255(A)(2) (“The county shall appoint the board’s chairman.”)

⁵ S.C. Code § 7-5-30

⁶ S.C. Code § 7-5-20

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the county is exercising power that it does not have to hire county employees for a position “outside county government.” See, Op. S.C. Atty. Gen., August 31, 1977.

To avoid such a conflict, members of the Board of Voter Registration could, of course, resign their positions as Board members and retain their positions as county employees on staff for the Department of Voter Registration or vice versa.

As for the second question, it is unclear how a court would decide, but it is the opinion of this Office that a court would likely find that although S.C. Code § 7-5-10 does not expressly give the Governor authority to appoint the chairperson of the Richland County Board of Voter Registration, the Richland County Code of Ordinance does give such authority and should be followed. A court could find that the Richland County Code of Ordinance Sec. 2-238(d) can be harmonized with state law, and it does not compromise the legislative intent of S.C. Code § 7-5-10 so long as the Governor does not appoint as Chairperson anyone beyond the board members. Therefore, the ordinance allowing the Governor to appoint the Chairperson is likely to be found valid.

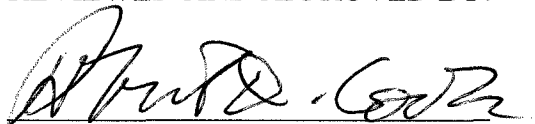
Sincerely,

Henry McMaster
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By: Leigha Blackwell
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REVIEWED AND APPROVED BY:



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