

January 29, 2007

The Honorable Alexander J. Stoops, Jr.
Mayor Pro Tem, Town of Latta
107 N W Railroad Ave
Latta, South Carolina 29565-1330

Dear Mr. Stoops:

In your letter to Attorney General Henry McMaster, you informed us that recently you were “elected Mayor Pro Tem by the Latta Town Council following the suspension of Mayor Lanue Berry, and the resignation of Mayor Pro Tem Christy Berry.” In addition, you have informed us that you are currently the acting Mayor for the Town of Latta and wish to know whether you have the authority to reappoint members to committees. In a follow-up letter, you specifically asked us to address reappointments to the Town of Latta Election Commission (the “Election Commission”). With regard to the Election Commission, you state: “All members have been on the commission far past the longest term of 6 years.” For our convenience, you provided us with the portion of the Latta Town Code (the “Town Code”) concerning the Election Commission and its membership.

Law/Analysis

Section 5-7-190 of the South Carolina Code (2004) addresses the position of mayors pro tempore. This provision states: “The mayor pro tempore shall act as mayor during the absence or disability of the mayor. If a vacancy occurs in the office of mayor, the mayor pro tempore shall serve as mayor until a successor is elected.” S.C. Code Ann. § 5-7-190. This provision gives the mayor pro tempore the authority to act as mayor during the mayor’s absence. Thus, mayor pro tempore, in the absence of the mayor, assumes the authority and the responsibilities vested in the mayor. Based on this analysis, we conclude that the mayor pro tempore has the same authority as the mayor with regard to appointments. Accordingly, we must look to the mayor’s appointment authority in order to determine whether you may reappoint members to various committees and commissions.

Because you are particularly concerned with your authority to appoint members to the Election Commission, we look to the portion of law creating the Election Commission to determine who has the authority to appoint its members. The portion of the Town Code pertaining to membership on the Election Commission mirrors section 5-15-90 of the South Carolina Code (2004)

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pertaining to the composition and terms of municipal election commissions. This provision states:

All municipal elections held under the provisions of this chapter shall be conducted by a municipal election commission composed of three electors who shall be residents of the municipality and who shall be appointed by the municipal governing body. The terms of the members shall be six years except of those first appointed one shall serve a term of four years and one a term of two years.

S.C. Code Ann. § 5-15-90 (emphasis added). From this provision, we gather that the governing body of the Town of Latta is authorized to appoint members to the Election Commission. Section 5-7-160 of the South Carolina (2004) vests all powers of municipalities in the council, unless otherwise provided by law. In a conversation with you, you informed us that the Town of Latta has a mayor-council form of government. Thus, Latta's Town Council ("Town Council") consists of a mayor and "not less than four council members" S.C. Code Ann. § 5-9-20 (2004). Accordingly, as mayor and acting in conjunction with Town Council, you have authority to appoint members to the Election Commission.

Under the circumstances expressed in your letter to this Office, we understand you desire clarification on whether you may remove individuals currently serving on the Election Commission and replace such members with new appointees. From your letter and in our conversation with you, you told us that the original terms of all three members of the Election Commission have expired and with the exception of one member, Town Council did not take action to reappoint these members. Thus, two of the members are serving beyond the expiration of their terms. Neither the Town Code, nor any of the provisions governing municipal election commissions contained in the South Carolina Code, addresses the service of an Election Commission member beyond his or her term.

With regard to a public official's service beyond the expiration of his or her term, the South Carolina Supreme Court, as well as numerous opinions of this Office, found

in the absence of pertinent statutory or constitutional provision, public offices hold over de facto until their successors are appointed or elected and qualify. Vacancy nevertheless exists in the sense that successors may be appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the 'holdovers' are entitled to retain the offices.

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Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228, 232 (1952). See also, Gaskin v. Jones, 198 S.C. 508, 18 S.E.2d 454 (1942); Ops. S.C. Atty. Gen., September 16, 2003; March 6, 1990; September 21, 1978; July 28, 1967. Because Town Council did not reappoint two members, those members are de facto appointees and their positions are considered vacant. Thus, Town Council has the authority to appoint new members to their positions.

However, in regard to the member reappointed by Town Council, Town Council's ability to remove this member during his or her term of office and appoint a new member presents a different issue from its ability to appoint a member to a vacant position. "As a general rule, the power to remove an officer is vested with the authority having the power to make the appointment." Op. S.C. Atty. Gen., March 15, 2000. See also, State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948). However, the power to remove is limited in situations in which the term of the office is fixed by law. As our Supreme Court stated in Williamson:

The rule, supported by authorities too numerous to cite, is that the power of removal is not incident to the power of appointment where the extent of the tenure of office is fixed by the statute. In the absence of any provision for summary removal, expressed in terms as being at will or words of similar import, appointments for a fixed term of years cannot be terminated except for cause. It is the fixity of the term that destroys the power of removal at pleasure.

Williamson, 213 S.C. at 10-11, 48 S.E.2d at 605.

The Town Code and section 5-15-90 of the South Carolina Code establish a fixed term of six years for those appointed to the Election Commission. Furthermore, in our review of the statutes pertaining to municipal election commissions and the Town Code, we do not find a provision allowing for the summary removal of Election Commission members. Based on these facts, we believe the member who is serving an unexpired term may only be removed from his or her position for cause. If Town Council removes this member for cause, then a vacancy would exist in this position as well, and Town Council would have the authority to appoint a new member to this position. However, absent a showing of cause, we caution that Town Council would not have the ability to remove the member and reappoint someone else to their position.

Conclusion

Based on the analysis above, we believe you, as Mayor Pro Tempore, may, under section 5-7-190 of the South Carolina Code, assume all of the authority and responsibilities of the Mayor when serving in the Mayor's absence. As acting Mayor, you serve as a member of Town Council, which

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has the authority to appoint members to the Election Commission. It is our opinion that because two of the members are serving beyond the expiration of their term, their positions are vacant, and therefore, Town Council may appoint new members to these two positions. In addition, we believe Town Council has the authority to remove members currently serving within his or her appointed term, however such removal may only be for cause. If Town Council removes a member for cause, a vacancy would exist, and Town Council has the authority to appoint a new member to this position.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General