



HENRY McMASTER
ATTORNEY GENERAL

December 17, 2008

The Honorable Phillip E. Clardy
Mayor, Town of Williamston
P. O. Box 70
Williamston, South Carolina 29697

Dear Mayor Clardy:

In a letter to this office you questioned whether a member of a municipal election commission can vote his or her personal knowledge during a protested hearing. You referenced a situation where a voter's residency is challenged during a protest hearing and the commission member has personal knowledge disputing or confirming the voter's residency. In such situation you have asked whether the commission member may vote his or her personal knowledge regardless of the evidence or lack thereof presented by a protestant. You also questioned whether judicial notice would apply in the situation. You indicated that this situation arose during a recent hearing but that matter has now been concluded and any appeal time from that hearing has now run.

Courts have determined that relying on personal knowledge at a contested hearing does not meet the requirement of due process. In Martin v. Sizemore, 78 S.W.3d 249 at 270 (Ct.App. Tenn. 2001), the court stated that

...an administrative agency's fact-finding must be limited to evidence properly included in the administrative record. The record serves as the "exclusive basis for agency actions in adjudicative proceedings."...When the administrative record contains no other expert testimony, allowing the board members to base their decision on personal knowledge and opinions, especially when they are not reflected in the record, is contrary to this "exclusiveness" principle...[W]ithout the exclusiveness principle, the right to be heard is a right to present only one side of the case. The hearing itself becomes only an administrative...meeting rather than the adversary proceeding required by due process.

See also: Webb v. State of Arizona by the Arizona Board of Medical Examiners, 48 P.3d 505 at 510 (Ct.App. Az. 2002)(“Although the Board may establish the standard of professional care based upon its members’ experience and expertise, the Board ‘cannot base its findings...upon either undisclosed evidence or personal knowledge of the facts.’”); People v. Superior Court, 281 Cal. Rptr. 900 at 903 (5th Dist. Ct. App. Cal., 1991) (“Nevertheless, provided that no member of the disciplinary committee has participated or will participate in the case as an investigating or reviewing officer, or either is a witness or has personal knowledge of material facts related to the involvement of the accused inmate..., a hearing board comprised of prison officials will satisfy the due process requirement of a “neutral and detached” hearing body.”); Barber Pure Milk Co. of Montgomery, Inc. v. Alabama State Milk Control Board, 156 So.2d 351 at 354 (Ala. 1963) (“That the Board, in adopting the order, considered matters within the personal knowledge of its members and not presented by evidence at the hearing on the order...was a denial of due process.”).

As to judicial notice, some matters are considered proper for judicial notice. For instance, it has been stated that

...a court will take judicial notice of the results of an election,...of the reelection of ...a particular officeholder),...the election of new members of a board...and of the fact that an election was held in a certain city at a certain time.

Jackson v. Denver Producing and Refining Co., et al., 96 F.2d 457 at 460 (10th Cir. Ct. Appeals, 1938). However, it is also generally stated that

[judicial notice is limited to what a judge may properly know in a judicial capacity, and the judge is not authorized to make his or her individual knowledge of a fact not generally or professionally known the basis of an action...[I]t is also said that personal knowledge is not judicial knowledge, and a judge may personally know a fact of which he or she cannot take judicial notice. 31A C.J.S. Evidence, Section 15.

Consistent with the above, in the opinion of this office, a member of a municipal election commission should not vote based upon his or her personal knowledge during a protested hearing. Instead, the vote should be based solely upon the evidence properly admitted. To vote based upon a member’s personal knowledge regardless of the evidence or lack thereof presented by a protestant would violate due process. It is further the opinion of this office that such a matter of personal knowledge cannot be taken as judicial notice for the same reason as to do so would also violate principles of due process.

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With kind regards, I am,

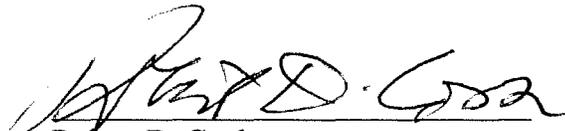
Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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