



ALAN WILSON
ATTORNEY GENERAL

August 28, 2013

Robert L. Waldrep, Jr., Chairman,
South Carolina State University Board of Trustees
116 West Whitner Street
Anderson, SC 29624

Dear Mr. Waldrep:

By your letter dated July 26, 2013 you have asked for the opinion of this Office regarding the interpretation of Section 59-127-20 as it relates to the effect of the General Assembly's failure to re-elect a member of the South Carolina State Board of Trustees ("The Board"). Per your letter you explain:

[O]n May 1, 2013, the General Assembly held elections for six of twelve seats on the Board filled by election. The thirteenth seat is filled by the Governor or her designee. For five of the seats, numbered 6, 7, 9, 11 and 12, a person was elected to fill the seat on the Board. However, for Seat #5, the General Assembly failed to elect a person to the seat, as the incumbent Ms. [Linda Edwards] Duncan ran unopposed, but the General Assembly voted not to elect Duncan to the seat by a vote of 106-33.

In light of these facts you ask the following questions:

- (1) When the General Assembly voted 106-33 not to elect sitting member . . . [Ms.] Duncan to another term for Seat #5, did the effect of that vote work as a removal and end Ms. Duncan's service as a board member immediately or does Ms. Duncan continue to serve in holdover status until her successor is elected since the General Assembly has not elected a replacement?
- (2) If the results of the General Assembly's May 1, 2013 vote was to end Ms. Duncan's service immediately and thus create a vacancy in Seat #5, may the Governor fill the vacancy until the General Assembly acts to fill the vacancy?

Law/Analysis

In response to your first question, it is this Office's opinion that the General Assembly's failure to re-elect Ms. Duncan does not have the effect of a removal from the Board and as such, she continues to serve in a holdover capacity. Based upon this conclusion, we further opine that because Ms. Duncan was not removed and still serves as a member of the Board, there is of course no vacancy to fill.

Removal of state officers such as a member of the South Carolina State Board of Trustees is generally provided for by both State statute and State Constitutional law. See e.g. 8 S.C. Jur. Public Officers and Public Employees, § 42; 8 S.C. Jur. Public Officers and Public Employees, § 12. For example, the General Assembly can remove public officers "for incapacity, misconduct or neglect of duty, in such manner as may be provided by law when no mode of trial or removal is provided in [the state] constitution." S.C. Const. Art. III, § 27. Similarly, Section 8-11-60 of the Code allows for removal of an officer elected by the General Assembly where there is willful neglect of duty, or other reasonable cause by a two thirds vote of the General Assembly. S.C. Code Ann. § 8-11-60 (West 1986); S.C. Const. Art. XV, § 3. Our Supreme Court has also weighed in on this matter explaining, with respect to removal that "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." State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 11-12, 48 S.E.2d 601, 605 (1948). Thus, it is clear that under South Carolina law, removal of an appointee with a fixed term requires a finding of cause.

Here, because the General Assembly simply decided against re-electing Ms. Duncan and did not vote on whether she should be removed from office, it cannot be said that the General Assembly truly "removed" Ms. Duncan. In light of this, Ms. Duncan would be able to serve on the Board in a holdover capacity until a successor can be elected and qualified under Section 59-127-20(A) of the Code. See e.g. Op. S.C. Atty. Gen., 2013 WL 2450881 (May 29, 2013) (explaining the failure to re-elect members of the College of Charleston's Board of Trustees resulted in the trustees serving in a holdover capacity); Op. S.C. Atty. Gen., 2003 WL 21471510 (June 5, 2003) (concluding an individual whose term expired in office but continued to serve, did so in a holdover capacity). Moreover, it is clear that because Ms. Duncan has not been removed, no vacancy exists. As a result, the answer to your second question is that the Governor cannot appoint someone to Ms. Duncan's seat.

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Conclusion

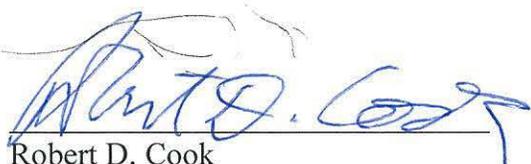
In light of the foregoing analysis, it is this Office's opinion that the General Assembly's failure to re-elect Ms. Duncan does not have the effect of a removal from the Board and as such, she continues to serve in a holdover capacity. Based upon this conclusion, we further believe that because Ms. Duncan was not removed and still serves as a member of the Board, there is simply no vacancy for the Governor to fill.

Sincerely,



Brendan McDonald
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General