



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 23, 1995

The Honorable Ronald N. Fleming
Member, House of Representatives
414-A Blatt Building
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Representative Fleming:

By your recent letter to Attorney General Condon, you have sought an opinion regarding the composition, verification, and terms of the newly created Board of Election and Registration of Union County. You advise that some confusion exists as to the proper composition and verification of appointees to the Board.

Pursuant to Act No. 231 of 1993, the Union County Election Commission and the Board of Registration were consolidated into one board, the Board of Election and Registration of Union County. Appointments to the new board were made by the former Union County Legislative Delegation on November 22, 1993. A list of the appointees was sent to the Governor's Office and then forwarded to the State Election Commission for certification. The State Election Commission notified the Governor's Office that it was unable to certify that at least one of the appointees represented the second largest political party as determined by the composition of the county delegation in the General Assembly, as the chairman of the Union County Republican Party did not recognize two of the appointees as Republicans. Based on these circumstances, you have raised several issues, each of which will be addressed separately, as follows.

Question 1

Currently the Union County Legislative Delegation is comprised of two Republicans and three Democrats. You have asked how many board members should represent each party.

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Act No. 231 of 1993 requires that nine members of the Board be appointed by the Governor upon the recommendation of a majority of the Union County Legislative Delegation, including the Senators. An additional requirement is imposed by S.C. Code Ann. §7-13-70, which provides in relevant part:

The Governor shall notify the State Election Commission in writing of the appointments. The State Election Commission shall verify that at least one of the appointees represents the largest political party and one represents the second largest political party as determined by the composition of that county's delegation in the General Assembly or the makeup of the General Assembly as a whole if the county's delegation is composed of only one party's members. ...

The only absolute requirement is that one appointee represent the largest political party and one appointee represent the second largest political party as determined, in this case, by the composition of the Union County Legislative Delegation. How many appointees "should" represent each political party is a matter of discretion to be exercised by the Union County Legislative Delegation.

Question 2

You have asked who has the authority to challenge a board member's party affiliation. If a member claims to be affiliated to a certain party, who may challenge this claim, and how is the claim verified?

Neither Act No. 231 of 1993 nor §7-13-70 provides a means to challenge a board member's party affiliation or to resolve any challenge that might be brought. It is our understanding that the State Election Commission communicates in writing with the chairmen of the respective political parties to identify the political party affiliation of the appointees; if the chairman of a party does not recognize a person as affiliated with that party, the chairman so notifies the State Election Commission of that fact. There is no mechanism for appeal from that process.

One possible way to handle the situation would be through a meeting or a hearing held by the Delegation, probably prior to appointment, so that interested prospective appointees and political party chairmen could be heard or interviewed or questioned as to party affiliation. Prospective appointees could demonstrate to the party of their choice and to the Delegation that their affiliation is with a particular party. If this is not done prior to the appointment (actually, the recommendation to the Governor), perhaps such a meeting could be held to clarify an appointee's affiliation when the State Election Commission notifies the Governor's Office that it cannot certify a particular appointee's

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affiliation. If it can be shown that an appointee's affiliation is with the party in question, perhaps the nomination could be resubmitted. There are likely other viable alternatives, as well.

Because there is no statutory mechanism in place to verify one's status as a member or representative of a political party, particularly since electors do not register to vote as members of a particular party in this State, there is no clear-cut way to verify that an individual is a member or representative of a particular political party. I believe that a court considering the issue would imply a requirement that any reasonable means might be used to verify one's status.

Legislative clarification as to these issues would be helpful to prevent similar problems from arising in the future.

Question 3

If certain appointments are not verified or certified by the State Election Commission because uncertainty of an appointee's party affiliation, to the extent that the board would not comply with §7-13-70, must the delegation reappoint persons to the board so that it does comply?

The appointment process is comprised of multiple steps. The Delegation makes its recommendations for appointment to the Governor. The Governor's Office submits the names of the appointees to the State Election Commission. The Commission certifies, or not, that the appointees represent the political parties as required by §7-13-70. Upon receipt of certification, the Governor is then in the position to complete the appointment process. It is clear that the Governor will not make the appointments until his office is satisfied that the requirements of §7-13-70 have been met.

The relevant statutes do not provide an answer for the steps to take when one of the appointees cannot be certified. One approach would be to withdraw from consideration the name or names of appointees whose affiliation cannot be verified and submit additional names for whom party affiliation may be certified. There may be other, equally viable approaches, as well. Clearly, §7-13-70 must be complied with, by whatever means may be necessary.

Question 4

You have advised that at least one other member of the Board of Election and Registration of Union County serves on another board, specifically the County Transportation Committee, which is also an

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appointment made by the Union County Delegation. You have asked whether such member may serve simultaneously on these two boards.

The issue which is presented is one of dual office holding. Article XVII, Section 1A of the state Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for 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). 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).

This Office has previously advised that, while the conclusion was not entirely free from doubt, one who would serve on a county transportation committee would hold an office for dual office holding purposes. Op. Att'y Gen. dated July 28, 1993 (copy enclosed). Similarly, this Office has advised on numerous occasions that one who would serve on an election commission or voter registration board (the two boards which were consolidated in Union County) would be considered an office holder for dual office holding purposes. See Ops. Att'y Gen. dated September 12, 1990; August 6, 1991; and May 6, 1992 as representative of those opinions concluding that county election commission members would be office holders; and see Ops. Att'y Gen. dated May 6, 1992; June 19, 1987; and July 11, 1984 as representative of those opinions concluding that one who would serve on a voter registration board would be an office holder. Examining Act No. 231 of 1993 reveals that the combined board serves in the same capacities as would the individual boards which this Office has previously concluded to be offices.

Thus, I am of the opinion that an individual may not serve simultaneously on a county transportation committee and on the Board of Election and Registration of Union County due to the dual office holding prohibitions of the South Carolina Constitution.

Question 5

When the former legislative delegation appointed the new Board, terms were not set on these board members as required by Act No. 231 of 1993. If the appointees are returned that were originally appointed on November 22, 1993, will the terms when put in place by the delegation be retroactive to November 1993, or will it be a prospective application from the date the terms are place into effect?

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Section 1(A) of Act No. 231 of 1993 required that the nine members of the Board be

appointed for terms of four years and until their successors are appointed and qualify, except that initially in order to stagger terms, four members must be appointed for terms of two years. At the expiration of these two-year terms, successors must be appointed for terms of four years.

Section 1(B) provides that "[b]etween the first day of January and the fifteenth day of March of every even-numbered year, the Governor shall appoint the members of the board." In Section 2 of the act, the former county election commission and voter registration boards are abolished, with the powers and duties of each devolved on the new Board. In Section 3 it is provided:

The current members of the Union County Election Commission and the Union County Registration Board shall act as the governing board of the new Board of Election and Registration of Union County established pursuant to the provisions of this act until the nine members of the board appointed in the manner provided by this act take office. At this time, the terms of these former commissioners of election and registration board members shall cease.

Nowhere is there a specific date on which the appointees would assume office. Thus, it is necessary to consider general law on the subject.

The universally accepted rule is expressed in 67 C.J.S. Officers §68 that

where no time is fixed by the constitution or statute, the term begins, in the case of elective offices, on the day of election, and, in the case of appointive offices, on the date of appointment, but it is only where the constitution or statute fails to prescribe when the term of office shall begin that it begins on election or appointment.

Moreover, "[w]here the office is newly created, the term begins when the office is first filled." Id. This general law is followed in South Carolina; in Macoy v. Curtis, 14 S.C. 371 (1880), it was stated that it is the selection of the officer to fill the office which constitutes the "essence of his appointment." Macoy, 14 S.C. at 378. Accordingly, unless otherwise specified, the term of office would commence upon appointment or election, the court stated in Verner v. Seibels, 60 S.C. 572 (1901). Thus, unless a contrary date can be found in the relevant statutes, I am of the opinion that the terms of office of members

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of the Board of Election and Registration of Union County would commence on the date or dates of their appointment.

Regardless of the date on which the appointments are made, assuming that such is accomplished in the near future, there may be some difficulty in complying with certain aspects of Act No. 231 of 1993. Certain members are to be appointed for two year terms and others for four year terms to establish a staggered scheme of appointments. Then, section 1(B), as discussed above, requires the Governor to appoint the members of the Board between the first day of January and the fifteenth day of March of every even-numbered year. Due to the timing and if appointments are made soon, by the time period for appointments to be made next, no terms will have expired nor will there be a vacancy for appointees to fill at that time (assuming that no vacancy has occurred due to death, resignation, or for some other reason). Clarification by the General Assembly might be helpful to resolve this potential difficulty.¹

One solution might be for the Union County Legislative Delegation to withdraw its appointees from the Governor, as the appointment process has not been completed and, from information provided to this Office, it may not be possible to complete the process due to difficulty in certifying party representation. The Delegation could review the list of appointees and perhaps recommend other appointees whose political party affiliation would be more readily ascertainable. When the names of the appointees should be resubmitted to the Governor for appointment, the Delegation could specify the appointees who are to serve two year and four year terms and when those terms will expire.

¹As stated in Ward v. Waters, 184 S.C. 353, 192 S.E. 410 (1937), citing State v. Hough, 103 S.C. 87, 87 S.E. 436 (1915),

Those holding offices created by the Legislature hold them subject to the legislative will. The power that creates an office can impose such limitations and conditions upon the manner of filling it, and the tenure and the exercise of the duties of the office, and may modify or abolish any of these, or the office itself as its wisdom may dictate, when no provision of the Constitution is contravened in doing so.

Ward, 184 S.C. at 360-361. Thus, the General Assembly would be in a position to lengthen or shorten terms of office to bring the appointments into synchronization with the appointment scheme envisioned by Act No. 231 of 1993.

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This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that the foregoing has responded as completely as is possible to your inquiries. Please advise if additional assistance or clarification should be needed.

With kindest regards, I am

Sincerely,



Patricia D. Petway
Assistant Attorney General

Enclosure