

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

December 6, 1989

The Honorable Carroll A. Campbell, Jr.
Governor of the State of South Carolina
Post Office Box 11369
Columbia, South Carolina 29211

Dear Governor Campbell:

You have advised that a member of the Old Exchange Building Commission has tendered his resignation and have asked for the opinion of this Office as to how the vacancy should be filled.

The Old Exchange Building Commission was created pursuant to Section 51-19-10, Code of Laws of South Carolina (1988 Cum. Supp.). Appointment of members is specified as follows:

Three members must be elected by the House of Representatives and Senate in joint assembly; two members must be elected by the Rebecca Motte Chapter of the Daughters of the American Revolution; two members, who must not be residents of Charleston County, must be elected by the South Carolina Society of the Daughters of the American Revolution; and the chairmen of the South Carolina Department of Parks, Recreation and Tourism and the Department of Archives and History or their respective designees serve ex officio with voting privileges. The appointed members shall serve terms of six years and until their successors are appointed and qualify. [Two legislators are also appointed to serve on the Commission.]...

This statute makes no provision for the filling of a vacancy on the Commission, however.

Generally speaking, the Governor must have constitutional or statutory power to make appointments. State v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912). Sections 1-3-210 and 1-3-220 of the Code provide authority for the Governor to appoint persons to fill vacancies in certain offices. In particular, Section 1-3-220(1) would permit the Governor to appoint "[a]n officer to fill any vacancy in an office of the executive department occurring during a recess of the General Assembly. ..." 1/ By an opinion of this Office dated June 28, 1984, this Office opined that the Section 1-3-220(1) appointment powers were limited to vacancies in the executive department as defined in Section 1-1-110 of the Code. For the reasons following, it is the opinion of this Office that the previous opinion may have been too narrowly drawn and that a broader reading of "executive department" may be warranted.

Section 1-1-120 of the Code provides a mechanism for filling vacancies in the "executive department," which term is defined in Section 1-1-110. 2/ That section provides:

In case any vacancy shall occur in the office of Secretary of State, State Treasurer, Comptroller General, Attorney General or Adjutant General, such vacancy shall be filled by election by the General Assembly, a majority of the votes cast being necessary to a choice. If such vacancy occur during the recess of the General Assembly, the Governor shall fill the vacancy by appointment until an election by the General Assembly at the session next ensuing such vacancy.

Not all vacancies in the "executive department" would be filled pursuant to this statute or to Section 1-3-220(1). For instance, a vacancy in the office of Governor would be filled by the Lieutenant

1/ That section continues: "The term of such appointment shall be until the vacancy be filled by a general election or by the General Assembly in the mode provided by law."

2/ Section 1-1-110 provides that the "executive department" is to consist of the Governor, Lieutenant Governor, Secretary of State, State Treasurer, Attorney General and solicitors, Adjutant General, Comptroller General, State Superintendent of Education, Commissioner of Agriculture, and Chief Insurance Commissioner.

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Governor pursuant to Article IV, Section 11 of the State Constitution. Vacancies in the office of circuit solicitor would be filled by following Section 1-3-210(6). The Commissioner of Agriculture's successor, should a vacancy occur, would be appointed pursuant to Section 46-3-40. A vacancy in the office of State Superintendent of Education is filled pursuant to Section 59-3-20. Thus, neither Section 1-1-120 nor Section 1-3-220(1) provide the same or exclusive mechanisms for filling vacancies in the statutorily defined "executive department."

The terms "executive department" and "executive branch" appear to be used interchangeably to mean that branch or department of government which executes laws made by the legislative branch or department. In Re Railroad Commissioners, 15 Neb. 679, 50 N.W. 276 (1884); In Re Davis, 168 N.Y. 89, 61 N.E. 118 (1901). Article I, Section 8 of our State Constitution, the separation of powers clause, refers to the three governmental powers and then uses the term "departments." Article IV, Section 17 begins, "All State officers, agencies, and institutions within the Executive Branch... ." It would appear appropriate to interpret the term "executive department" expansively, as meaning either "branch" or "department" but not limited to those officials listed in Section 1-1-110.

Another concern which warrants a broader reading of "executive department" is the fact that no mechanism for filling vacancies on the Old Exchange Building Commission is provided for in the relevant statutes. As stated in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952), "As nature abhors a void, the law of government does not ordinarily countenance an interregnum." While of course there is only one vacancy on the Commission at this time and thus, no interregnum, there should be a mechanism to fill such vacancy to avoid future problems in conducting the business of the Commission.

Based on the foregoing, this Office advises that you, as Governor, may make an appointment pursuant to Section 1-3-220(1) of the Code to fill a vacancy on the Old Exchange Building Commission caused by the resignation of one of the commissioners. The General Assembly might wish to consider legislation to provide a mechanism for filling vacancies on the Commission, as its enabling legislation is silent as to the filling of vacancies. To the extent that today's opinion is inconsistent with the opinion of this Office dated June 28, 1984, today's opinion is deemed controlling.

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With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions