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ALAN WILSON
ATTORNEY GENERAL

September 29, 2014

The Honorable Dennis Moss
Representative, House District 29
418 Blatt Building
Columbia, SC 29201

Dear Representative Moss:

Attorney General Alan Wilson has referred your letter dated August 21, 2014 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issues (as quoted from your letter):

- 1) *Is it a violation for people who do not live inside of a town's limits to cast ballots in an election for a town official?*
- 2) *What if the people were by some error included on the town's approved voting lists when they cast their ballots?*

Short Answers:

- 1) This Office believes a court will find South Carolina's Constitution and Code of Laws require an elector to reside within the limits of municipality at least thirty days before he is allowed to cast ballots in an election for a municipal official, but if the elector votes in an election he is not entitled to vote in, he could be charged with a misdemeanor, a felony and/or perjury, depending on the circumstances.
- 2) As to what to do if people were incorrectly included on the town's voting list is a factual determination depending on the circumstances.

Law/Analysis:

By way of background, the South Carolina Constitution grants the General Assembly the authority to regulate elections and the contest of an election when it states:

The General Assembly shall provide for the nomination of candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.

S.C. Const. Article II, § 10. Moreover, South Carolina's Constitution states:

Municipal electors shall possess the qualifications prescribed in this Constitution, but each such elector must have resided in the municipality in which he offers to vote for thirty days next preceding the election.

S.C. Const. Art. II, § 5 (emphasis added). South Carolina law is clear in requiring a voter in a municipal election to be (in addition to other things) at least eighteen years old, a citizen of this State, a citizen of the United States, residing within the limits of the incorporated municipality for at least thirty days prior to a municipal election, and also meeting the qualifications in South Carolina Code § 7-5-120. S.C. Code § 7-5-610. South Carolina Code § 7-5-120 states:

(A) Every citizen of this State and the United States who applies for registration must be registered if he meets the following qualifications:

- (1) meets the age qualification as provided in Section 4, Article II of the Constitution of this State;
- (2) is not laboring under disabilities named in the Constitution of 1895 of this State; and
- (3) is a resident in the county and in the polling precinct in which the elector offers to vote.

(B) A person is disqualified from being registered or voting if he:

- (1) is mentally incompetent as adjudicated by a court of competent jurisdiction; or
- (2) is serving a term of imprisonment resulting from a conviction of a crime; or
- (3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

S.C. Code § 7-5-120 (1976 Code, as amended).¹ Furthermore, this Office previously opined that a person must be registered to vote at least thirty days before a municipal election to vote. Op. S.C. Atty. Gen., 1984 WL 159878 (June 21, 1984).

As a condition for registering to vote, a voter must file a written or electronic application pursuant to South Carolina Code § 7-5-185. S.C. Code § 7-5-170. The application includes an oath which states, in part:

I, do solemnly swear (or affirm) that... [I] am a resident of South Carolina, this county, and of my precinct. I further swear (or affirm) that the present residence address listed herein is my sole legal place of residence and that I claim no other place as my legal residence.

S.C. Code § 7-5-170. A person's registration may be challenged in writing to the board of registration pursuant to South Carolina Code §§ 7-13-810, 7-13-820, and 7-15-420. S.C. Code § 7-5-230. As to the consequence for an individual voter for violating voting laws, there are many State laws addressing that issue. One such law states:

¹ This opinion addresses South Carolina state law and does not address federal law (see, e.g., the Voting Rights Act, 52 U.S.C.A. § 10101ff (formerly 42 U.S.C.A. § 1971ff), etc.). Please also note this is only intended to be a brief overview of a municipal election and voter registration, as there are many other applicable cases and statutes not listed in this opinion. This Office does not review voting lists for a legal opinion, nor do we make any other such factual determinations. This Office issues legal, not factual opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., 1983 WL 182076 (December 12, 1983)), et al. Additionally, we do not comment on pending investigations, where applicable, in a legal opinion.

Any voter who shall swear falsely at any election, general, special or primary, in taking the prescribed oath or shall impersonate another person and take the oath in his name in order to vote shall be guilty of perjury and be punished, upon conviction, as for perjury.

S.C. Code §7-25-150. Additionally, South Carolina law makes it a crime to fraudulently register to vote and to vote fraudulently when it states:

It is unlawful for a person to fraudulently:

- (1) procure the registration of a name on the books of registration;
- (2) offer or attempt to vote that name;
- (3) offer or attempt to vote in violation of this title or under any false pretense as to circumstances affecting his qualifications to vote; or
- (4) aid, counsel, or abet another in fraudulent registration or fraudulent offer or attempt to vote.

A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not less than one hundred dollars nor more than five hundred dollars or imprisoned not more than one year, or both.

S.C. Code § 7-25-20. Moreover, it is unlawful and a misdemeanor for someone to falsely swear in their application for voter registration. S.C. Code § 7-25-10. While pursuant to South Carolina Code § 7-5-186 the State Elections office is charged with establishing and maintain a statewide voter registration database, an error on their end would not excuse a voter who knowingly votes in an election in which they are not entitled to vote. South Carolina Code § 7-25-190 makes some illegal voting a felony when it states:

A person who votes at any general, special, or primary election who is not entitled to vote, or who by force, intimidation, deception, fraud, bribery, or undue influence obtains, procures, or controls the vote of any voter to be cast for any candidate or measure other than as intended or desired by such voter, or who violates any of the provisions of this title in regard to general, special, or primary elections is guilty of a felony. Upon conviction, the person must be fined not less than one hundred nor more than one thousand dollars or imprisoned not more than five years, or both.

Therefore, this Office believes a court will determine the answer to your first question is that South Carolina's Constitution and Code of Laws require an elector to reside within the limits of municipality at least thirty days before he is allowed to cast ballots in an election for a municipal official, but if the elector votes in an election he is not entitled to vote in, he could be charged with a misdemeanor, a felony and/or perjury, depending on the circumstances.

In regards to your second question, our court has made it clear that there is no common law right to contest an election and that any contest to a municipal election is a privilege given by state law. Butler v. Town of Edgefield, 328 S.C. 238, 493 S.C.2d 838 (1997). As you are likely aware, a candidate may contest a municipal election within forty-eight hours after the polls close. S.C. Code § 5-15-130. South Carolina Code § 5-15-130 outlines the procedure for a candidate to contest the results of a municipal

election within forty-eight hours after the election.² The Municipal Election Commission then makes a determination which may be appealed to the court of common pleas within ten days. S.C. Code § 5-15-140.³ The court of common pleas may only rule based on errors of law by the Municipal Election Commission and must accept all factual findings unless they are unsupported. Taylor v. Town of Atlantic Beach Election Commission, 363 S.C. 8, 16, 609 S.E.2d 500, 504 (2005). We also note that our courts have been clear in their effort to sustain an election and will not set aside an election “due to mere irregularities or illegalities unless the result is changed or rendered doubtful. In the absence of fraud, a constitutional violation, or a statute providing that an irregularity or illegality invalidates an election, we will not set aside an election for a mere irregularity.” Id. at 12, 502. Moreover, our court has outlined two requirements to contest an election, which are:

- 1) The notice to contest the election must allege irregularities or illegalities; and
- 2) The alleged irregularities or illegalities must have changed or rendered doubtful the result of the election in the absence of fraud, a constitutional violation, or a statute providing that such irregularity or illegality shall invalidate the election.

Id. at 16, 504 (quoting Butler v. Town of Edgefield, 328 S.C. 238, 246, 493 S.E.2d 838, 842 (1997)).

In a 1914 opinion, our court stated that:

Where the private or property rights of the citizens are invaded or threatened by the illegal action of a public body or board, he is entitled to relief, and the courts will not deny him a remedy.

...It has been well said that before an election all provisions of the statute should be deemed and held by the officers of the election to be mandatory. (quoting Davis v. Board, 86 S.C. 451, 68 S.E. 676 (1910)).

... Every reasonable presumption will be indulged to sustain an election.

Rawl et al. v. McCown et al., 97 S.C. 1, 81 S.E. 958, 960, 961 (1914). Conversely in a 1972 opinion our State Supreme Court held the deletion of four hundred ninety-three names from the voter registration list an election to incorporate in an election base of over five thousand where a majority won after was of no legal consequence. Brisben v. Thornton, 258 S.C. 524, 189 S.E.2d 827 (1972). Our courts have also stated a similar position concerning upholding elections when they stated:

Every reasonable presumption in favor of sustaining a contested election will be employed and irregularities or illegalities which do not appear to have affected the result of the election will not be allowed to overturn it.

Greene v. S.C. Election Commission, 314 S.C. 449, 451, 445 S.E.2d 451, 453 (1994) (quoting Fielding v. S.C. Election Commission, 305 S.C. 313, 317, 408 S.E.2d 232, 234 (1991)). In 2000 our State Supreme Court determined two hundred thirty-one votes that went uncounted due to a voting machine error was sufficient to require a new election pursuant to S.C. Code § 5-15-130 as challenged by one of the

² Please note pursuant to S.C. Code § 5-15-145 a municipality may transfer its authority to conduct an election to the county elections commission, whose procedures one would follow to contest an election. See, e.g., In re November 4, 2008 Bluffton Town Council Election, 385 S.C. 632, 686 S.E.2d 683 (2009).

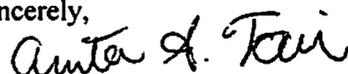
³ Please note S.C. Code § 7-13-1170 also authorizes the Governor to order a new election where the law does not otherwise provide for such a contingency.

candidates. Broadhurst v. City of Myrtle Beach Election Commission, 342 S.C. 373, 537 S.E.2d 543 (2000). Moreover, in a 2004 elections case our State Supreme Court ruled that since there were voters who were not residents of a municipality who voted in a municipal election and those votes could have changed the outcome of the election, the result of the election was doubtful. They also ruled that the protest by the candidate was based on evidence discovered after the election and thus was not procedurally barred. Dukes v. Redmond, 357 S.C. 454, 593 S.E.2d 606 (2004). The Supreme Court of South Carolina decided a similar question to yours in 2007 where votes were cast in a municipal election by people who did not live in the municipality. In that case the court held that the votes cast by the electors no longer residing in the municipality were illegal and that a new election should be held. Gecy v. Bagwell, 372 S.C. 237, 642 S.E.2d 569 (2007). As that case stated, “[t]he Court will not sanction practices which circumvent the plain purposes of the law and open the door to fraud.” Id. at 242 (quoting May v. Wilson, 199 S.C. 354, 19 S.E.2d 467 (1942)). However, the facts in that case were that the candidate was the one who challenged the election. A 2008 case held that four eligible voters who were denied the right to vote in an election won by one vote authorized a new election. Armstrong v. Atlantic Beach Municipal Election Commission, 380 S.C. 47, 668 S.E.2d 400 (2008).

The managers of an election are tasked with preventing anyone from voting more than once. They also are required to refuse to allow anyone to vote who is not a registered elector or who has become disqualified. S.C. Code § 7-13-810. Any individual may also challenge a voter by notifying a manager. However, all challenges must be made before a vote is cast with the exception of fraud, evidence discovered after the election, or a candidate protest pursuant to South Carolina Code § 7-17-30. Id. Our court has previously clarified that a vote may be challenged by a watcher, elector or election manager. Greene v. S.C. Election Commission, 314 S.C. 449, 445 S.E.2d 451 (1994) rehearing denied, cert. denied 115 S.Ct. 580, 513 U.S. 1017, 130 L.Ed.2d 495, rehearing denied 115 S.Ct. 1179, 513 U.S. 1185, 130 L.Ed.2d 1131. Moreover, a poll manager who willfully violates any of his duties, commits fraud or assists corruption in the management of an election is guilty of a misdemeanor. S.C. Code § 7-25-160.

Conclusion: This Office believes a court will determine the answer to your first question is that South Carolina’s Constitution and Code of Laws require an elector to reside within the limits of municipality at least thirty days before he is allowed to cast ballots in an election for a municipal official, but if the elector votes in an election he is not entitled to vote in, he could be charged with a misdemeanor, a felony and/or perjury, depending on the circumstances. As to how to proceed depends on who is appealing the election and whether the deadlines have passed. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. For a binding determination, this Office would recommend seeking a declaratory judgment from a court on these matters, as only a court of law may interpret statutes. S.C. Code § 15-53-20, et al. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

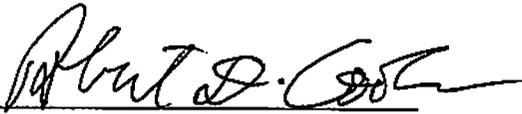
Sincerely,



Anita S. Fair
Assistant Attorney General

The Honorable Dennis Moss
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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General