



ALAN WILSON  
ATTORNEY GENERAL

October 4, 2018

Richelle Taylor, Chief Legal Counsel  
to the Governor of South Carolina  
State House  
1100 Gervais Street  
Columbia, SC 29201

Dear Ms. Taylor:

You have raised a question regarding “the governor’s authority to appoint a commissioner to an elected seat of the Bath Water and Sewer District.” By way of background, you state the following:

As background, the enabling legislation for the Langley, Bath, Clearwater Sewer/Water District is found in Act 1006 of 1958 (Act attached). Act 1006 defines how commissioners will govern, along with the election process for commissioners. In 1962, legislation was enacted to uniformly govern special purpose districts. Section 6-11-80 of the South Carolina Code of Laws provided that should a vacancy exist, remaining board members may select a person to fill a vacancy of an unexpired term. After this legislation was passed, [in 1976] the General Assembly passed Act 516, amending Act 1006 and providing that in the event of a vacancy, the governor, upon recommendation of the Aiken County Legislative Delegation, shall fill the vacancy “for the remainder of the unexpired term.” (Act attached).

Currently, the Bath Water and Sewer District has a vacant seat, but there is no “unexpired term.” During the last election, no individual filed as a candidate for the seat. Accordingly, there is no unexpired term, but a vacant seat in which no one was elected. Act 516, as well as the special purpose district statute, only provides appointment powers for the remainder of an unexpired term. This is consistent with what the law often provides, the authority for the governor to fill an unexpired term, i.e. a set limited period, until a new election occurs or, in the case of an appointment needing confirmation by the Senate, until the General Assembly returns for its next legislative session.

Available options when there is no appointment power is to direct the Bath Water and Sewer District to hold an election, either as allowed under the Act, or possibly ordered by the governor under section 7-13-1170 of the South Carolina Code of Laws. However, section 7-13-1170 may not be on point either as there was no failure to hold an election; there was simply no candidate for the seat.

Ms. Richelle Taylor  
Page 2  
October 4, 2018

The Bath Water and Sewer District needs to fill the open seat on its board, and we seek guidance on the appropriate manner to assist. Thank you. in advance, for your consideration and assistance with this matter.

It is our understanding that there has been much confusion regarding the date upon which the election for commissioner of the Bath Water and Sewer District is to be held. Apparently, for some time, perhaps dating back to 1990, the assumption has been that the date for election is November of each even-numbered year, rather than May. Regardless of the facts, however, it is clear that no election for the vacant commissioner seat was held on the first Tuesday of May, 2016 as is required by law. Moreover, it is also our understanding that no election for a second seat was conducted on the first Tuesday in May of this year, even though Act No. 1006 of 1958 clearly states that the election must be conducted on the “first Tuesday in May of each even numbered year thereafter.”

#### Law/Analysis

It is well recognized in South Carolina that the Governor “has no inherent power of appointment to office and that his power must be found in the Constitution or statutes of the State.” Op. S.C. Att’y Gen., 1994 WL 377992 (No. 94-39) (June 21, 1994) (quoting State ex rel. Lyon v. Bowden, 92 S.C. 393, 75 S.E.866 (1912)). See also State ex rel. Huckabee v. Hough, 103 S.C. 87, 87 S.E. 436, 437 (1915) [“the power of appointing to office is not a prerogative of the Governor’s office.”]. Moreover, where the Governor is given the statutory authority to appoint, upon recommendation of the legislative delegation, such authority is deemed ministerial. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936). See also Op. S.C. Att’y Gen., 2006 WL 148721 (January 3, 2006) [“. . . it is true that in instances such as this, the Governor acts in a ministerial capacity in making the appointment which . . . the Legislative Delegation . . . recommends.”].

Ordinarily, our analysis would default to filling the vacancy by special election, if so authorized, since the commissioners of Bath are elected. However, we cautioned in Op. S.C. Att’y Gen., 1987 WL 342816 (March 5, 1987), in somewhat similar circumstances as follows:

[o]ne suggested method of filling the vacancy is to hold a special election. Since the board is elected by the voters of the District, it would be preferable to fill any vacancies by special election if at all possible. However, there appears to be no authority for calling a special election in this instance. It is well-recognized that an election held without statutory authorization therefor will be held invalid. 29 C.J.S. Elections § 81. Section 7-13-190 of the Code of Laws of South Carolina (1986 Cum. Supp.) provides a mechanism for holding a special election but does not apply unless the holding of a special election is authorized by some other statute.

Moreover, § 7-13-190, a statute authorizing special elections, is further limited by the language “unless otherwise provided” as well as the fact that its applicability is dependent upon the criteria

Ms. Richelle Taylor  
Page 3  
October 4, 2018

of death, resignation or removal, none of which are applicable here. Subsection (2) of Section 1 of Act 516 of 1976 provides that

[n]otwithstanding the provisions of article 1 of this chapter, in the event of a vacancy on the commissions of any of the above district, it shall be filled for the remainder of the unexpired term by appointment of the Governor upon the recommendation of a majority of the resident members of the Aiken County Legislative Delegation.

(emphasis added). Acts 516 and 1006 of 1976 “otherwise” provide for the filling of vacancies. Thus, we do not believe § 7-13-190 applies.

Also relevant is § 7-13-1170. Such provision states:

When any election official of any political subdivision of this State charged with ordering, providing for, or holding an election has neglected, failed, or refused to order, provide for, or hold the election at the time appointed, or if for any reason the election is declared void by competent authority, and these facts are made to appear to the satisfaction of the Governor, he shall, should the law not otherwise provide for this contingency, order an election or a new election to be held at the time and place, and upon the notice being given which to him appears adequate to insure the will of the electorate being fairly expressed. To that end, he may designate the existing election official or other person as he may appoint to perform the necessary official duties pertaining to the election and to declare the result.

S.C. Code Ann. § 7-13-1170. Here, it is unclear whether § 7-13-1170 is applicable. The failure to call an election must be due to “neglect” or failure or refusal to order an election or the election must be declared void by a “competent authority.” Apparently, as noted, there was the mistaken belief for some time that the election should be conducted in November of every other year rather than in May. It would be a factual issue as to whether § 7-13-1170 thus would apply, as the Governor would have to determine that the Board of Elections “neglected, failed or refused to order” the election at the proper time, as Act No. 1006 mandates; or determine whether any election was declared void by “competent authority,” as § 7-13-1170 requires. Thus, as you indicate in your letter, the applicability of § 7-13-1170 is questionable.

With respect to appointment authority, in this instance, the appointment to fill the vacancy, pursuant to Act 516 of 1976, is only for the “remainder of the unexpired term.” As is well recognized, “[i]f a vacancy occurs in the term of any state or county office, it is filled by appointment of the Governor, except as otherwise provided, but the appointee holds his office only for the unexpired term, and until his successor is elected and qualified.” Clark v. State, 59 So. 259, 261 (Ala. 1912). Thus, under ordinary circumstances, any vacancy in the office of commissioner would be filled by appointment of the Governor upon recommendation of a majority of the members of the Aiken County Legislative Delegation for the remainder of that term. Of course, here, we have the unusual and novel circumstances that no election was held

Ms. Richelle Taylor  
Page 4  
October 4, 2018

for the new term in May, 2016, as the law requires. Why that was, we cannot determine, but we believe it is consistent with a mistaken practice dating back many years.

In Dobkins v. Reece, 17 S.W.2d 81 (Ct. of Civil App. 1929), the Court dealt with a situation in which a sheriff died after being reelected for a new term, but before that new term began. The sheriff, having been reelected on November 6, 1928, died on December 12, 1928 with the new term to begin on January 1, 1929. The Court, in addressing such a circumstance, stated:

[w]hen the duration or term of an office is a question of death or uncertainty, the interpretation should be followed which limits such office to the shortest term. Wright v. Adams, 45 Tex. 134. Other authorities might be cited, but we believe in the discussion heretofore sufficient has been said to show that in our opinion the appellant's term under his appointment in December, 1928 had expired at the time the election was had by the commissioner's on January 2, 1929. If such view be correct, then it follows that a vacancy existed for the new term of two years for which the deceased, Jake Wright had been elected by the voters of Cooke County, and that the commissioners' court had authority to fill such vacancy.

17 S.W.2d at 84. See also People ex rel. Green v. Black, 241 N.Y.S. 244, 246 (N.Y. 1930) ["We hold that there were two separate and distinct vacancies caused by the death of Walter Brooks, one for the remainder of his unexpired term and another for the new term beginning January 1, 1930."]. And, as was stated in State ex rel. Landis v. Bird, 163 So. 248, 254 (1935) "[w]here an office with stated terms is to be filled by executive appointment without confirmation by the Senate, the Governor appoints for the term and may appoint to fill a vacancy until the end of the term, and may appoint a successor at any time after the expiration of a term for the whole or for the remainder of the new term or a part of such term has passed when the appointment is made."

Here, the commissioner for the term ending June 30, 2016, served out the entire term, but apparently did not offer for a new term. More importantly, no election was held in May, 2016 to fill the new term. Two years have passed since. Thus, certainly there is a "remainder of the unexpired term" in the present term (beginning July 1, 2016), regardless of these unique circumstances. The same holds true for the office whose term ended on June 30, 2018. As seen from the authorities referenced above, even when there is no one to fill the office at the beginning of the term, due to death or, in this instance, failure to hold the election on the statutorily mandated date, there is a "vacancy" and, as well, the "remainder of an unexpired term." People ex rel. Green v. Black, *supra*, emphasized that when the incumbent died prior to the end of his old term, and before the beginning of the new term, there were "two separate and distinct vacancies," one "for the remainder of his unexpired term and another for the new term...." (emphasis added).

As noted above, our 1987 Opinion concerned the question as to the manner of filling a vacancy on a special purpose district board when the enabling Act contained "no provision [as to

Ms. Richelle Taylor  
Page 5  
October 4, 2018

how] . . . to fill any vacancy which might occur.” Here, the issue is how to fill a vacancy when there was no election to fill the term as required by law.

As indicated, the Opinion stated that the preference of this Office is to fill the vacancy by special election since the position of commissioner was elected. However, the Opinion also emphasized that “an election held without statutory authorization will be invalid. . . .” In that Opinion, we concluded:

. . . this Office cannot locate any authority for election or appointment of an individual to fill a vacancy on the Board of Fire Control of the North Greenville Fire District. The best way to resolve the dilemma may be the adoption of a general law by the General Assembly providing for the filling of vacancies in situations for which no such provision has been made.

Thus, regardless of how this specific circumstance is handled by the Governor’s Office in filling the vacancy (or vacancies), our advice stated in this Opinion remains prudent. The situation in Aiken County is in great need of clarification.

### Conclusion

Your question of how the vacancy (or vacancies) is filled in this unique situation is a difficult one. Apparently, there has been the mistaken belief for some time that the election may be held in November of every alternate year rather than in May as the law requires. Even though members of the Bath Water and Sewer Commission are elected, there is no provision for a special election in the enabling act (Act No. 516 of 1976 or Act No. 1006 of 1958) to fill a vacancy by a special election. One special election provision in the general law, Section 7-13-190, appears inapplicable for reasons discussed. With respect to Section 7-13-1170, also relating to special elections, it must be determined whether there was “neglect” or “refusal” in failing to hold the election in May of each even numbered year as the statute (Act 1006) requires, but on some other date, or there must have been a declaration “for any reason” that any election was declared “void” by “competent authority.” Such a factual determination is beyond the scope of an opinion of this Office.

Nevertheless, Act 516 of 1976 clearly states that “in the event of a vacancy . . . it shall be filled for the remainder of the unexpired term by appointment of the Governor upon the recommendation of a majority of the resident members of the Aiken County Legislative delegation.” Such broad language seems to cover any “vacancy”, no matter the circumstances.

In this instance, it is our understanding that the 2016 holder of the office finished out his term ending on June 30, 2016. There was apparently the mistaken belief the election could be held in November, rather than May, as Act 1006 requires. As a result, no election for the seat was held in May, 2016. No election for that seat has been held since. The same may also be true for the 2018 seat; no election was held in May of 2018. Terms for the commissioners are, according to Act 1006 of 1958, for six years and are staggered with the new term beginning “on

Ms. Richelle Taylor  
Page 6  
October 4, 2018

July first of the year in which such commissioners are elected....” Act No. 1006 of 1958 clearly requires that the election should have been held “on the first Tuesday in May” of 2016.<sup>1</sup>

Regardless, even though there was no election, the law creates the term, mandating that it begin on July 1, 2016 (or in the second instance, July 1, 2018). As this Office has emphasized repeatedly, the term of office “is distinct from the tenure of an officer” and is not altered or changed by unanticipated situations, such as, in this instance, the failure to hold an election to fill the office beginning on July 1, 2016 (or July 1, 2018 in the second instance). See Op. S.C. Att’y Gen., 2013 WL 2450881 (May 29, 2013).<sup>2</sup> Thus, regardless of circumstances, there is, in each instance, a remainder of an unexpired term, consistent with Act No. 516 of 1976. Accordingly, a court could well conclude here that the Governor may appoint the commissioner upon the recommendation of a majority of the Aiken County Delegation to fill the “remainder of the unexpired term” of the commissioner (or commissioners). In such situations, our Supreme Court has held that the appointment by the Governor is ministerial once the Delegation makes its recommendation. Blalock v. Johnston, supra.

Here, we see no distinction for purposes of analysis, between this vacancy (or vacancies) and any other. Thus, our conclusion is that a court would likely find that the vacancy may lawfully be filled through this appointment procedure, referenced above. However, we recognize that this situation is quite novel, and that in so concluding, the voters would be and have been deprived of the opportunity to elect a new commissioner for some considerable time. The only option for a special election, however, is § 7-13-1170. Such is dependent upon the Governor concluding that there was “neglect” in failing to hold the election at the proper time as mandated by Act No. 1006 – the first Tuesday in May of each even-numbered year. Considering that the 2016 seat has remained unfilled for over two years, the Delegation and Governor may determine that the vacancy (or vacancies in the case of the 2018 position) should be filled through the appointment process, discussed above, because in each instance, there is a “remainder of an unexpired term.” It may be prudent to proceed in this way, seeking to clarify the entire process going forward. Such is a matter for the Delegation and Governor to determine, however.

---

<sup>1</sup> Any previous determinations to hold the election in November, rather than in May of even-numbered years, does not make the actions of the officers elected on the wrong date invalid. These previous officeholders (apparently dating back to 1990) would hold “de facto” status, making all of their actions valid as to third parties. See Op. S.C. Att’y Gen., 2007 WL 1031442 (March 28, 2007) [a person holding office under “color of title” is a de facto officer and his acts “are valid and effectual so far as they concern the public or the rights of third parties.”].

<sup>2</sup> Under the common law, “public officers held over until their successor are appointed and qualify.” Op. S.C. Att’y Gen., 2007 WL 1034442 (March 28, 2007), supra (citing Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935)). Nothing in the relevant Acts (Act No. 1006 of 1958 or Act No. 516 of 1976) contradicts the common law rule. Thus, the acts of the person holding over from July 1, 2018, when the new term began, until today, are also valid.

Ms. Richelle Taylor  
Page 7  
October 4, 2018

This Opinion attempts to sort through the law in this confused and muddled matter. The recommendation of the 1987 opinion in a somewhat similar situation is still well applicable here: in the long run, “[t]he best way to resolve the dilemma may be the adoption of a general law by the General Assembly providing for the filling of vacancies” in these unique circumstances.

Sincerely,

A handwritten signature in blue ink, appearing to read "Robert D. Cook". The signature is fluid and cursive, with a large initial "R" and a long, sweeping underline.

Robert D. Cook  
Solicitor General