



ALAN WILSON
ATTORNEY GENERAL

April 27, 2020

The Honorable Jeff Bradley
Member
South Carolina House of Representatives
306B Blatt Bldg.
Columbia, South Carolina 29201

Dear Representative Bradley:

We received your request for an opinion regarding appointments to the Technical College of the Lowcountry. From your letter, we understand you have two members who wish to leave the Commission for the Technical College of the Lowcountry. Further, you state as follows:

In light of the COVID-19 pandemic, I respectfully request an opinion relative to some type of interim appointment that we could make. I am very cognizant and appreciative of the Public process by which these commission appointments are to be made. However, in light of the current pandemic extraordinary steps may need to be taken in order to fill these vacancies prior to a Delegation meeting at which time a commission appointment could be made. As Delegation Chair I could greatly benefit from an understanding of what we as a delegation are able to do in the absence of a public meeting relative to appointing Technical College of the Lowcountry commission board members or interim board members.”

Law/Analysis

Section 59-53-910 of the South Carolina Code (2020) governs the appointment of members to the Technical College of the Lowcountry Area Commission (the “Commission”). This provision states:

There is created the Technical College of the Lowcountry Area Commission which shall serve as the governing body of the Technical College of the Lowcountry. The commission is a body politic and corporate consisting of seven members who must be appointed in the manner provided in this section. Four members must be residents of Beaufort County, one member must be a resident of Colleton County, one member must be a resident of Hampton County, and one member must be a resident of Jasper County, all of whom must be appointed by the Governor upon the recommendation of a majority of the members of the General Assembly representing that county. The members

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of the commission must be appointed for terms of four years each and until their successors are appointed and qualify.

A vacancy must be filled in the manner of the original appointment for the unexpired portion of the term only. The commission shall organize by electing one of its members as chairman, one as vice-chairman, and one as secretary. The terms of appointees expire on the first of July of the appropriate year.

(emphasis added).

Section 59-53-910 clearly mandates the method of appointing members to the Commission and requires appointments by the governor upon the recommendation of a majority of the members of the respective county's delegation. This provision does not give the delegation or the governor the authority to make appointments outside of the procedures provided. Additionally, we did not find any other provision allowing for "interim" appointments. Therefore, we believe appointments to the Commission may only be made by the governor upon the recommendation of the delegation.

Furthermore, making a recommendation requires collective action by the delegation. As we determined in a 1984 opinion, the powers and duties of political bodies may not be exercised by their individual members, but must be exercised collectively in a meeting. Op. Att'y Gen., 1984 WL 159918 (Sept. 6, 1984). This understanding of the common law is supported by the Supreme Court's decision in In re Matthews, 345 S.C. 638, 646, 550 S.E.2d 311, 314-15 (2001) quoting Garris v. Governing Bd. of the State Reinsurance Facility, 333 S.C. 432, 453, 511 S.E.2d 48, 58 (1998), "In the absence of any statutory or other controlling provision, the common-law rule that a majority of the whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum." Absent a statutory amendment, we believe the delegation must act collectively to recommend an individual for a position on the Commission.

Additionally, as you alluded to in your request, the delegation must comply with the South Carolina Freedom of Information Act ("FOIA") when holding a meeting. In numerous opinions, this Office concluded a legislative delegation is a public body subject to FOIA. Ops. Att'y Gen., 1984 WL 159918 (S.C.A.G. Sept. 6, 1984); 1998 WL 747070 (S.C.A.G. Sept. 30, 1998). Our Supreme Court confirmed this understanding in Fowler v. Beasley, 322 S.C. 463, 468, n.5 472 S.E.2d 630, 633 n.5 (1996), stating "[t]he Delegation falls within the definition of 'public body' as set forth in § 30-4-20(a), so as to render the FOIA applicable." Accordingly, delegations must adhere to the open meeting requirement under section 30-4-60 of the South Carolina Code (2007) requiring "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to § 30-4-70 of this chapter."

We understand your concern with holding a public meeting during the COVID-19 pandemic. Thus, we point you to section 30-4-20(d) defining "meeting" for purposes of FOIA as "the

convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment, to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” (emphasis added). In prior opinions, this Office interpreted section 30-4-20(d) as allowing the use of telephone conference calls to conduct meetings in compliance with FOIA. In 1992, we explained:

A telephone conference call would appear to be one means of handling a matter in an emergency situation such as your letter describes. A meeting is defined by § 30-4-20(d) to be “the convening of a quorum of the constituent membership of a public body, whether corporal or by means of electronic equipment to discuss or act upon a matter over which the public body has supervision, control, jurisdiction or advisory power.” (Emphasis added.) This Office has advised previously that such language authorizes a meeting to be convened by means of a telephone conference call, Ops. Atty. Gen., dated March 25, 1981 and November 17, 1980, apparently at least in the absence of a statute requiring a public body to meet physically in a certain place. . . Thus, if JARC were to convene via a telephone conference call set up as described in these two opinions, with public notice requirements of § 30-4-80(b) observed, so that it may act collectively rather than its members acting individually and independently of each other, such would appear to comply with the requirements of the Freedom of Information Act.

Op. Att’y Gen., 1992 WL 575608 (S.C.A.G. Jan. 21, 1992). We reiterated these finding in subsequent opinions. See Ops. Att’y Gen., 2005 WL 2250207 (S.C.A.G. Aug. 25, 2005); 2012 WL 3875118 (S.C.A.G. Aug. 28, 2012).

We are not aware of a requirement that delegations meet at a certain location, but suggest you look to the particular delegations rules. Barring a requirement that the delegation meet in a particular location, we believe it would be able to use electronic means to conduct its meetings in compliance with FOIA. While our opinions namely address meetings over conference call, there have been advancements in technology that allow meeting to be conducted with video via the internet, which may satisfy the meeting requirement as well. Regardless of the means used to conduct the meeting, we again caution that other aspects of FOIA, including the notice requirements under section 30-4-80 of the South Carolina Code (Supp. 2019), must be met if a meeting is conducted by means of electronic equipment. Nonetheless, we hope this will provide the delegation with a means a making a recommendation while avoiding personal contact during the COVID-19 pandemic.

Conclusion

Section 59-53-910 of the South Carolina Code governs appointments to the Commission and requires any vacancies on the Commission be filled through appointment by the governor upon the recommendation of the appropriate county legislative delegation. In order for the legislative

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delegation to make such a recommendation, we are of the opinion that it must do so collectively with a quorum of its members. Additionally, we believe the open meeting requirements under FOIA must be satisfied. However, as we stated in past opinions, absent a requirement that the delegation meet at a particular location, we believe the delegation can meet by electronic means in order to avoid personal contact due to COVID-19 so long as the other FOIA requirements are satisfied, including the notice requirement contained in section 30-4-80 of the South Carolina Code.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook / cmm
Robert D. Cook
Solicitor General