ALAN WILSON
ATTORNEY GENERAL

March 25, 2024

Thomas A. Limehouse, Esq.
Chief Legal Counsel
Office of the Governor
1100 Gervis Street
Columbia, South Carolina 29201

Dear Mr. Limehouse:

We received your letter requesting an opinion of this Office on behalf of the Office of the Governor concerning "certain matters pertaining to section 59-103-10 of the South Carolina Code of Laws and the composition of the State Commission on Higher Education ('CHE')." Specifically, you ask the five questions regarding section 59-103-10 of the South Carolina Code and the appointment or service of the members of the CHE, which we will address in turn.

Law/Analysis

1. Does "[t]hese members" refer to the seven congressional-district seats or all ten seats, including the three gubernatorial appointees, addressed in subsection (1)?

As you mentioned in your letter, section 59-103-10 of the South Carolina Code (2020) creates the CHE and establishes its membership. This provision states, "[t]he commission shall consist of fifteen members appointed by the Governor" and specifies the membership as follows:

> (1) Ten members, seven to represent each of the congressional districts of this State appointed by the Governor upon the recommendation of a majority of the senators and a majority of the members of the House of Representatives comprising the legislative delegation from the district and three members appointed from the State at large upon the advice and consent of the Senate. Each representative of a congressional district must be a resident of the congressional district he represents. In order to qualify for appointment, the representatives from the congressional districts and those appointed at large must have experience in at least one of the following areas: business, the education of future leaders and teachers, management, or policy. A member representing the congressional districts or appointed at large must not have been, during the succeeding five years, a member of a governing body of a public institution of higher learning in this State and must not be employed or have immediate family members employed by any of the public colleges and

universities of this State. These members must be appointed for terms of four years and shall not serve on the commission for more than two consecutive terms. However, the initial term of office for a member appointed from an even-numbered congressional district shall be two years.

If the boundaries of the congressional districts are changed, members serving on the commission shall continue to serve until the expiration of their current terms, but successors to members whose terms expire must be appointed from the newly defined congressional districts. If a congressional district is added, the commission must be enlarged to include a representative from that district.

(2) Three members to serve ex officio to represent the public colleges and universities appointed by the Governor with the advice and consent of the Senate. It shall not be a conflict of interest for any voting ex officio member to vote on matters pertaining to their individual college or university. One member must be serving on the board of trustees of one of the public senior research institutions, one member must be serving on the board of trustees of one of the four-year public institutions of higher learning, and one member must be a member of one of the local area technical education commissions or the State Board for Technical and Comprehensive Education to represent the State Board for Technical and Comprehensive Education. These members must be appointed to serve terms of two years with terms to rotate among the institutions.

(3) One ex officio member to represent the independent colleges and universities by the Governor upon the advice and consent of the Senate. The individual appointed must be serving as a member of the Advisory Council of Private College Presidents. This member must be appointed for a term of two years and shall serve as a nonvoting member.

(4) One at-large member to serve as chairman appointed by the Governor with the advice and consent of the Senate. This member must be appointed for a term of four years and may be reappointed for one additional term; however, he may serve only one term as chairman.

The Governor, by his appointments, shall assure that various economic interests and minority groups, especially women and blacks, are fairly represented on the commission and shall attempt to assure that the graduates of no one public or private college or technical college are dominant on the commission. Vacancies must be filled in the manner of the original appointment for the unexpired portion of the term. All members of the commission shall serve until their successors are appointed and qualify.

S.C. Code Ann. § 59-103-10 (emphasis added). In your letter, you question whether "these members" in subsection (1) refers to the seven congressional-district seats or all ten seats appointed by the Governor pursuant to this subsection.

To answer your question, we employ the rules of statutory interpretation the primary of which is to effectuate the intent of the Legislature. Gordon v. Phillips Utilities, Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) ("The primary purpose in construing a statute is to ascertain legislative intent."). "'If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.'" Id. at 406; 608 S.E.2d at 427 (quoting Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995)). "In ascertaining legislative intent, 'a court should not focus on any single section or provision but should consider the language of the statute as a whole.'" Town of Mt. Pleasant v. Roberts, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) (quoting Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)). "Moreover, it is well settled that statutes dealing with the same subject matter are in *pari materia* and must be construed together, if possible, to produce a single, harmonious result." Beaufort Cnty. v. S.C. State Election Comm'n, 395 S.C. 366, 371, 718 S.E.2d 432, 435 (2011).

Reading section 59-103-10 as a whole, subsection (1) pertains to the appointment of ten of the members of the CHE by the Governor. The statute provides that seven of those ten members must represent the seven congressional districts and three members serve at large. While this statute specifies a residency requirement for those members representing the congressional districts, it sets forth additional requirements that apply to both types of appointments including experience in certain areas as well as a prohibition on individuals who recently served on the boards of public colleges and universities in South Carolina. As emphasized above, section 59-103-10(1) also contains a term limit. It does not specify that the term limit applies to both members representing congressional districts and those serving at large. However, from the context of this subsection, we believe the Legislature intended for it to apply to both types of members. Subsection (1) applies generally to both the seven congressional district appointees and the at large appointees. Therefore, the use of the term "these members" indicates it applies to all the members appointed pursuant to this subsection. Additionally, while this subsection makes certain requirements applicable to only the congressional district appointees, it does not specify that the term limit only applies to the seven congressional districts appointees. Thus, reading section 59-103-10(1) as a whole, we believe the term limit applies to all ten of the members appointed by the Governor pursuant to this subsection.

2. **Does completion of a predecessor's unexpired term count as a "term" for purposes of the statute's limitation that "[t]hese members . . . shall not serve on the commission for more than two consecutive terms"?**

In prior opinions, we considered how serving a partial term impacts a statutorily imposed term limit. In 2007 opinion, we addressed whether serving a partial term on the South Carolina

Department of Transportation Commission would prevent an individual from serving a full term when section 57-1-320 prevented a commission member from serving "more than one consecutive term." We issued this opinion subsequent to the South Carolina Supreme Court's decision in Sloan v. Hardee, 271 S.C. 495, 640 S.E.2d 457 (2007), which interpreted a provision preventing service on the commission "for more than one consecutive term" as limiting service on the commission to one term. S.C. Code Ann. § 57-1-320). Citing several prior opinions, we opined: "we continue to believe serving a portion of an unexpired term is distinguishable from serving full term in office and therefore, does not count toward a term limit imposed by statute." Op. Att'y Gen., 2007 WL 3244889 (S.C.A.G. Aug. 16, 2007). As we stated on numerous occasions "this Office will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law." Op. Att'y Gen., 2013 WL 3762706 (S.C.A.G. July 1, 2013). As such, we believe the two consecutive term limitation provided in section 59-103-10(1) means two full terms. Therefore, it is our opinion that a person serving a partial term is eligible to serve two full terms after the expiration of their partial term.

3. **Does service in a holdover capacity count towards "two consecutive terms"? If so, is a member of the CHE who has served "more than two consecutive terms," when including service in a holdover capacity, eligible for reappointment?**

In a 2003 opinion, we discussed the law pertaining to the legal status of those serving in a holdover capacity as follows:

> The law distinguishes somewhat between an officer who holds over by statute and one holding over where no statute providing for holdover status is applicable. In Op. S.C. Atty. Gen., Op. No. 84-129 (November 5, 1984), we noted that "where a statute provides that an officer hold over until a successor is selected and qualifies, such period is as much a part of the incumbent's term of office as the fixed constitutional or statutory period."
>
> A person who by statute holds over until a successor is elected or appointed and qualifies is, in other words, a *de jure* officer. On the other hand, it was recognized by our Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) that
>
> > ... in the absence of pertinent statutory or constitutional provision, public [officers] ... hold over *de facto* until their successors are appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the "holdovers" are entitled to retain the offices. As nature abhors a void, the law of government does not countenance an interregnum.

Op. Att'y Gen., 2003 WL 21471510 (S.C.A.G. June 5, 2003). In a 2013 opinion, we further explained:

> [I]t is also well established that a situation where an officer holds over beyond his term does not serve to vary the term because of the delay of the successor's election or appointment. As our Supreme Court recognized in Heyward v. Long, supra,
>
> > "since the term of an office is distinct from the tenure of an officer, the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term but merely shortens the term of the successor."
>
> 183 S.E.2d at 156. (emphasis added).

Op. Att'y Gen., 2013 WL 2450881 (S.C.A.G. May 29, 2013).

As quoted above, section 59-103-10 specifies: "All members of the commission shall serve until their successors are appointed and qualify." This statute specifically permits members to serve in a holdover capacity until their successors are appointed and qualify. As such, a CHE member who holds over until their successor is appointed and qualifies is a *de jure* officer and the holdover period is part of their original term of office as opposed to a new term of office. Accordingly, the holdover period would not count as an additional term of office, potentially preventing the individual from serving another term of office.

4. **Is a member of the CHE who has served two consecutive terms in a congressional-district seat eligible for appointment to serve in an at-large seat on the CHE (or vice-versa)?**

As explained above, we are of the opinion that the provision in section 59-103-10(1) limiting members to serving no more than "two consecutive terms," applies to all CHE members appointed by the Governor pursuant to section 59-103-10(1). Therefore, we believe this term limit would prohibit members appointed pursuant to this provision from serving more than two terms regardless of whether they served in a congressional district seat or an at-large seat.

5. **If a congressional district's legislative delegation recommends that the Governor reappoint an individual who has already served on the CHE for "more than two consecutive terms," does the Governor have a ministerial duty to reappoint the individual recommended by the delegation?**

As quoted above, section 59-103-10(1) gives the Governor authority to appoint seven members to the CHE representing each congressional district "upon the recommendation of a majority of the senators and a majority of the members of the House of Representatives comprising the legislative delegation from the district . . . ." While we have not opined specifically on the Governor's

authority regarding this provision, we described the Governor's appointment authority as ministerial under similar circumstances in which his or her authority to appoint is based upon the recommendation of a legislative delegation. For example, in a 2015 opinion we interpreted section 6-13-30 of the South Carolina Code giving the Governor authority to appointment members to boards of rural water districts "upon the recommendation of a majority of the county legislative delegation." Op. Att'y Gen., 2015 WL 4042030 (S.C.A.G. June 17, 2015). Quoting a 1987 opinion, we explained: "'[i]t should be noted that . . . the actual exercise of discretion in choosing persons for appointment rests with the Delegation. The Governor's role in the appointment procedure is ministerial and involves no exercise of discretion. Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936)." Id. (quoting Op. S.C. Atty. Gen., February 5, 1987 (1987 WL 342791)). We provided a similar explanation in a 1988 opinion discussing appointments to county boards of social services which are made by the Governor upon the recommendation of a majority of the county legislative delegation. Op. Att'y Gen., 1988 WL 383494 (S.C.A.G. Jan. 27, 1988).

> The role of the Governor in this appointment process is ministerial; he would be required to appoint those individuals whose names have been submitted to him by a county legislative delegation. As stated in Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936), construing an appointment statute similar to Section 43-3-10 of the Code:
>
> > The law imposes the positive duty upon the Governor to make the appointment at a time and in a manner or upon conditions which are specifically designated. It is a simple definite duty arising under conditions admitted or proved to exist, and it leaves nothing to his discretion. It is ministerial.
>
> Id., 180 S.C. at 47-48. Thus, the Governor's role would be limited to appointment of those individuals as named by the delegation; the Governor would not be the decision-maker as to the number of individuals to be appointed.

Id.

Section 59-103-10(1) provides that the Governor's authority to appoint the seven members of the CHE representing each congressional district is upon the recommendation of the legislative delegation representing that district. Therefore, the Governor's role is ministerial and leaves him or her no discretion in who to appoint. As such, we do not believe the Governor has authority to judge the qualifications of the person or persons recommended to him or her. It is the responsibility of the legislative delegation to determine who meets the qualifications to serve on the CHE, including whether reappointing them will violate the two-term limit established in section 59-103-103(1).

Conclusion

Based on our analysis above, we believe the use of the term "[t]hese members" in section 59-103-10(1) refers to all ten members of the CHE appointed pursuant to this subsection and therefore prohibits both the seven members who represent congressional districts and three at-large members from severing more than two consecutive terms. We also believe this provision would prevent someone who has served two consecutive terms as a congressional district member from being reappointed to serve at-large and vice versa. However, based on prior opinions of this Office determining an individual may occupy an office without serving for a term, we believe the appointment an individual to complete a predecessor's unexpired term on the CHE would not count against the two consecutive term limitation. Moreover, section 59-103-10(1) specifies that "[a]ll members of the commission shall serve until their successors are appointed and qualify." As such, any member who holds over until their successor is appointed and qualifies would be a *de jure* officer and a court will likely treat the holdover period as part of their original term of office as opposed to a new term of office. Accordingly, the holdover period would not count against the two consecutive term limitation.

While section 59-103-10(1) gives the Governor authority to appoint members to the CHE, he or she must do so upon the recommendation of that district's legislative delegation. As we have similarly opined in previous opinions, this authority is ministerial and involves no exercise of discretion by the Governor. Therefore, we do not believe the Governor has authority to judge the qualifications of a member recommended by a district's legislative delegation, including whether reappointing that person would violate the two consecutive term limitation. A district's legislative delegation is responsible for determining whether an individual meets the qualifications to serve as a congressional district representative on the CHE.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General