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HENRY MCMASTER
ATTORNEY GENERAL

July 27, 2006

The Honorable Ernest G. Trammell
Member, Laurens County Council
477 Compton Road
Clinton, South Carolina 29325

Dear Mr. Trammell:

We issue this opinion in response to your letter concerning the eligibility of a write-in candidate to take office. You informed us that "[a]fter serving 16 years on the Laurens County Council District 5, I was defeated in the June 13, 2006 Republican primary. For whatever reason my longtime supporters wish to initiate a write-in campaign for me in the November 7, 2006 General Election." Accordingly, you ask: "If I receive the most votes as a write-in candidate in the November General Election, can I legally take office?"

Law/Analysis

Initially, we answer your question affirmatively. Section 7-13-360 of the South Carolina Code (Supp. 2005), contained in the South Carolina Election Law (the "Election Law"), requires ballots "contain a place for voters to write in the name of any other person for whom they wish to vote except on ballots for the election of the President and Vice President." Furthermore, as we noted in a 1980 opinion, "if a write-in candidate receives more votes than any other candidate and is otherwise legally qualified, he would win that election. This would be true if there was or was not a specific candidate listed on the ballot for the office for which the write in received the most votes." Op. S.C. Atty. Gen., September 24, 1980. Thus, assuming you receive the most votes, you legally may take office.

In addition to answering your request, we are compelled to alert you to certain legal principles you should consider due to your prior effort to gain the Republican nomination. We note no statute prohibits a defeated primary candidate from participating as a write-in candidate in the general election. Furthermore, in Redfearn v. Board of State Canvassers of South Carolina, 234 S.C. 113, 107 S.E.2d 10 (1959), our Supreme Court considered the issue of whether the Board of State Canvassers properly certified the election of a write-in candidate for probate judge who was defeated in Democratic primary. The Court stated: "We are not here concerned with whether Mrs. Pusser's position, as a 'write-in' candidate in the general election, should or should not be considered as morally or ethically improper. Our function is to determine her eligibility as a matter of law." Thus,

Request Letter

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the Court's decision established "the right of any qualified elector to be voted upon as a write-in candidate, irrespective of what procedure may have taken place prior to the election, such as participation in a primary, oath to support nominees of a primary, etc." Op. S.C. Atty. Gen., March 21, 1961 (citing Redfearn, 234 S.C. 113, 107 S.E.2d 10).

Although in accordance with the Election Law and Redfearn, you may be elected as a write-in candidate, certain provisions of the Election Law impose limitations on your candidacy. Section 7-11-10 of the South Carolina Code (Supp. 2005) calls for the method of nominating candidates. This provisions, however, also states in pertinent part:

> no person who was defeated as a candidate for nomination to an office in a party primary or party convention shall have his name placed on the ballot for the ensuing general or special election, except that this proviso shall not prevent a defeated candidate from later becoming his party's nominee for that office in that election if the candidate first selected as the party's nominee dies, resigns, is disqualified, or otherwise ceases to become the party's nominee for such office before the election is held.

S.C. Code Ann. § 7-11-10. According to this provision, because you participated in the primary, your name may not be placed on the general election ballot. Therefore, as you stated in your request, you may only seek election to Laurens County Council ("County Council") as a write-in candidate.

Moreover, section 7-11-210 of the South Carolina Code (Supp. 2005) requires candidates for all county offices to file a notice and pledge. This provision states such notice and pledge shall be worded as follows:

> "I hereby file my notice as a candidate for the nomination as _____ in the primary election or convention to be held on _____. I affiliate with the _____ Party, and I hereby pledge myself to abide by the results of the primary or convention. I shall not authorize my name to be placed on the general election ballot by petition and will not offer or campaign as a write-in candidate for this office or any other office for which the party has a nominee. I authorize the issuance of an injunction upon ex parte application by the party chairman, as provided by law, should I violate this pledge by offering or campaigning in the ensuing general election for election to this office or any other office for which a nominee has been elected in the party primary election, unless the nominee for the office has become deceased or otherwise disqualified for election in the ensuing general election. I hereby affirm that I

> meet, or will meet by the time of the general or special election, or as otherwise required by law, the qualifications for this office".
>
> . . . .
>
> In the event that a person who was defeated as a candidate for nomination to an office in a party's primary election shall thereafter offer or campaign as a candidate against any nominee for election to any office in the ensuing general election, the state chairman of the party which held the primary (if the office involved is one voted for in the general election by the electors of more than one county), or the county chairman of the party which held the primary (in the case of all other offices), shall forthwith institute an action in a court of competent jurisdiction for an order enjoining the person from so offering or campaigning in the general election, and the court is hereby empowered upon proof of these facts to issue an order.

S.C. Code Ann. § 7-11-210 (emphasis added).

In Florence County Democratic Party by Moore v. Johnson, 281 S.C. 218, 314 S.E.2d 335 (1984), the South Carolina Supreme Court considered the constitutionality of this statute. In that case, a candidate for city council appealed a ruling by the trial court awarding Florence City Democratic Party an injunction prohibiting the candidate, who participated in the Democratic primary, from commencing a petition drive to place his name on the ballot and restraining him from offering or campaigning in the election. Id. The Court distinguished its prior opinion in Redfearn stating:

> The issue before the Court was whether the defeated candidate was eligible as a matter of law to be elected to the office in controversy, not whether the defeated candidate should be allowed to offer or campaign for the office. The holding in Redfearn would only allow Johnson to be elected as a write-in candidate, not as a petition candidate.

The Court concluded "the pledge's restriction on offering or campaigning in a general election for an office for which there is a party nominee after a candidate has been defeated in the primary election is constitutional and reasonable, necessary to preserve the integrity of the electoral process." Id. at 222-23, 314 S.E.2d at 338.

The Legislature amended section 7-11-210 in 2000, after the Court issued its opinion. We reviewed this amendment in an opinion dated July 13, 2000 and determined "it does not appear that

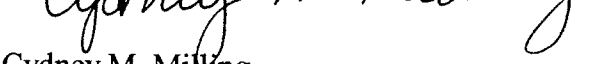
this amendment alters the conclusions reached by the court in [Florence County Democratic Party]." Op. S.C. Atty. Gen., July 13, 2000.

We presume, in accordance section 7-11-210, you filed the notice and pledge with "the county chairman or other officer as may be named by the county committee of the county in which [you] reside . . . . " S.C. Code Ann. § 7-11-210. Thus, we caution you that in accordance with this section, you are prohibited from offering as a write -in candidate and from campaigning for write-in votes.

Conclusion

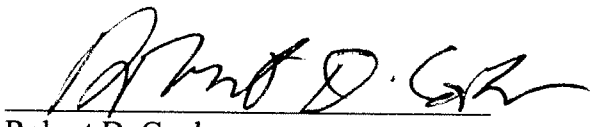
Although you participated in the primary election, there is no prohibition against serving on County Council if elected in the general election, presuming you receive the most votes as a write-in candidate. However, as explained above, your name may not be placed on the ballot. Furthermore, in accordance with section 7-11-210, you may not offer or campaign for the position.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General