



ALAN WILSON
ATTORNEY GENERAL

July 5, 2012

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Dear Mr. Chandler,

We received your letter requesting an opinion on behalf of your client, the Lancaster County School District (the "School District"), concerning the effect of a redistricting plan on the unexpired terms of two incumbent members of the Board of Trustees. By way of background, you explain that the County Council adopted a redistricting plan significantly altering the seven single-member districts from which members of the County Council and the Board of Trustees are elected.¹ See Lancaster County Ordinance No. 1117.² This redistricting plan was precleared by the United States Department of Justice by letter dated February 8, 2012. A review of the County maps depicting the current and newly drawn election districts reveals that the redistricting plan alters each of the current seven election districts to some degree; thus, none of the newly drawn election districts encompass the same area as the current election districts. Due to significant population growth in the northern panhandle of the County, the redistricting plan eliminates entirely the current District 7 from the southern portion of the County. A new district has been drawn in the northern panhandle and designated as the new District 7. The new District 5, while still encompassing a small portion of its former territory, now encompasses a portion of the old District 7. As a result, it is our understanding that the two incumbents from Districts 5 and 7, whose terms are set to expire in 2014, will both reside in the new District 5 as designated under the redistricting plan.

You ask whether, as a result of the redistricting plan, the two incumbents from current Districts 5 and 7 are entitled to complete the remainder of their unexpired terms or if a special election must be held in the newly drawn District 5. In the event a special election is required, you ask whether the election should be held exclusively between the two incumbents or if anyone may file as a candidate. Furthermore, you ask whether a special election is necessary if one of the incumbents voluntarily resigns. You note that while the effect of reapportionment on the terms and election of county council members appears to be clearly set forth pursuant to S.C. Code section 4-9-90, you are unaware of any similar provision applicable to the trustees of a school district.

¹ The redistricting plan does not expressly apply to the election districts from which members of the Board are elected. However, local legislation enacted by the General Assembly, discussed *infra*, dictates that alterations to the district lines from which members of County Council are elected also affect the district lines from which members of the Board are elected.

² The text of the ordinance indicates it became effective upon third reading on November 28, 2011.

Law/Analysis

With Act No. 777 of 1988, the Legislature created the School District, a body politic and corporate governed by the Board of Trustees. Id., § 1. Pursuant to Act No. 607 of 1992, significant changes were made to certain sections of Act No. 777. Together, these acts provide that “[t]he area and boundaries of the district are the same as the area and boundaries of the county.” Id. The Board of Trustees consists of seven members “who must be elected from each of the seven single-member election districts from which members of the Lancaster County Council are elected.” Act No. 607, § 1. Furthermore, “[i]f the district lines from which members of the county council are elected change, then the applicable district lines for the election of the board of trustees for the school district shall change accordingly.” Id.

Act No. 607 also provides that “[a]t the time of the 1996 general election and each election after that time, all members must be elected for terms of four years and until their successors are elected and qualify.” Id. The terms are staggered such that every two years members are either elected from even-numbered districts or odd-numbered districts. Id. The last election for even-numbered districts was held in 2008, and the terms of those elected expire in 2012. The last election for odd-numbered districts was held in 2010, and the terms of those elected are scheduled to expire in 2014. A vacancy on the Board of Trustees must be filled by special election if it occurs one hundred and twenty days or more before the general election, but may not be filled if it occurs less than one hundred and twenty days before the general election. Id. Section 5 of Act No. 777 states that “[i]f a member of the board moves his residence from the election area from which he was elected, his office becomes vacant automatically”

You ask whether the two incumbent members from Districts 5 and 7 are entitled to serve the remainder of their unexpired terms or if a special election should be held in the newly drawn District 5. Even though you do not specifically ask whether a special election should be held in the newly drawn District 7, in the interest of thoroughness we find it necessary to address this question as well.

Like you, we are unaware of any statutory provision similar to section 4-9-90³ setting forth the effect of redistricting on the unexpired terms of elected members of a school district board of trustees. We note that since the Board of Trustees was created by act of the Legislature, the Legislature has the authority to change the terms of its members. See 67 C.J.S. Officers § 93 (“The sovereign power creating an office may change its tenure in the absence of constitutional restriction Accordingly, the legislature

³ § 4-9-90 provides, in relevant part:

Any council member who is serving a four-year term in a district that has been reapportioned and whose term does not expire until two years after reapportionment becomes effective shall be allowed to continue to serve the balance of his unexpired term representing the people in the new reapportioned district if he is an elector in such reapportioned district. In the event that two or more council members, because of reapportionment, become electors in the same district, an election shall then be required. *Provided*, however, that if any seat should become vacant after election districts have been reapportioned but prior to the expiration of the incumbent's term of office due to death, resignation, removal, or any other cause, the resulting vacancy shall be filled under the new reapportionment plan in the manner provided by law for the district that has the same district number as the district from which the council member whose office is vacant was elected. For the purpose of this section, a council member will be deemed a resident of the district he represents as long as he resides in any part of the district as constituted at the time of his election.

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may change the term of an office during the term of an incumbent"). As stated by our Supreme Court in State v. Hough, 103 S.C. 87, 87 S.E. 436, 437 (1915):

Those holding offices created by the Legislature hold them subject to the legislative will. The power that creates an office can impose such limitations and conditions upon the manner of filling it, and the tenure and the exercise of the duties of the office, and may modify or abolish any of these, or the office itself, as its wisdom may dictate, when no provision of the Constitution is contravened in doing so....

See also Walpole v. Wall, 153 S.C. 106, 149 S.E. 760, 764 (1929) ("School trustees are legislative, not constitutional, officers whose terms may be ended or extended at the will of the Legislature"). Therefore, it may helpful to resolve any ambiguity in this area by enacting legislation clarifying what effect redistricting has on such offices.

In any event, it is well-established that a special election must be statutorily authorized. See Op. S.C. Att'y Gen., 1987 WL 342816 (Mar. 5, 1987) (finding no authority for calling a special election to fill vacancy on Board of North Greenville Fire District where "[i]t is well-recognized that an election held without statutory authorization ... will be invalid"). As previously mentioned, Act No. 607 requires the use of a special election to fill a vacancy on the Board of Trustees if the vacancy occurs one hundred and twenty days or more before the general election. Therefore, the question becomes whether the redistricting plan will create a vacancy in the office of either incumbent.

The statute generally governing the use of special elections to fill vacancies in an office, section 7-13-190, applies only when the "vacancy occurs in office by reason of death, resignation, or removal and the vacancy in office is one which is filled by a special election to complete the term of office" § 7-13-190(A). Under the facts you present, neither incumbent's office has become vacant due to death, resignation, or removal. Therefore, section 7-13-190 is inapposite here.

Article XVII, section 1 and Article VI, section 1 of the South Carolina Constitution require that an officeholder possess the qualifications of an elector. The qualifications of an elector are set forth in section 7-5-120 and include, *inter alia*, that an elector be "a resident of the county and in the polling precinct in which the elector offers to vote." § 7-5-120(A)(3). As previously mentioned, Act No. 607 provides that the members of the Board of Trustees "must be elected from each of the seven single-member districts from which members of the Lancaster County Council are elected."

Considering the above constitutional and statutory provisions, the law clearly requires a candidate for the Board of Trustees to be a resident of the district he or she is to represent. Here, the incumbent from District 5 will continue to reside in the new District 5 as designated under the redistricting plan and is thus entitled to continue representing that district until his or her term expires. Therefore, there is no statutory authorization for the calling of a special election in District 5 as a result of redistricting. The incumbent from District 7, however, will cease to reside in the new District 7 as designated. Thus, we must determine whether the Legislature intended for a vacancy to occur when redistricting places the residence of an incumbent member of the Board of Trustees outside the boundaries of the district from which he or she was elected.

As previously mentioned, Act No. 777 expressly provides that a vacancy occurs "[i]f a member of the board *moves* his residence from the election area from which he was elected" (emphasis added).

Other courts construing similar statutory provisions have concluded that when the boundaries of election districts within a political subdivision are altered such that an incumbent's residence is no longer located in the district from which he was elected, such incumbent is entitled to complete the unexpired remainder of the term he was elected to serve if he remains otherwise eligible. In State ex rel. Norwood v. Holden, 47 N.W. 971 (Minn. 1891), the Supreme Court of Minnesota addressed whether two individuals elected to a board of county commissioners in November of 1890 were disqualified from taking office the following January as a result of a December 1890 county redistricting ordinance. The redistricting ordinance effectively placed the residences of the two commissioner-elects into different districts than those they were elected from. Id. at 972. A relevant statute provided: "In each of said districts one commissioner shall be elected by the electors thereof, who shall at the time of his election be a resident of said district, and shall reside therein during his continuance in office." Id. at 972. In concluding that the commissioner-elects were qualified to take office commencing in January, the court construed the above statute as follows:

In our opinion, an order redistricting a county is merely prospective in its operation as to the election and qualification of members of the board of commissioners, and in no way affects the right to the office of those previously elected. There is nothing in the language of the statute to indicate that a redistricting is intended to have any retrospective operation. On the contrary, the language of section 94 favors the opposite view. The commissioner, it says, "must at the time of his election be a resident of said district and shall reside therein during his continuance in office." **What this last clause has reference to is an actual change of residence, and not a change of district boundaries.** The division of a county into districts is merely for election purposes. The duties of commissioners are not local, or to be performed in only a particular part of the county. On the contrary, they are merely members of an entire board which acts as such for the entire county. Any other construction would lead to the gravest abuses, and often entirely defeat the popular will as expressed at the polls. It certainly could not have been the intention of the legislature to permit a board of county commissioners, by redistricting after the election of their successors, but before their terms of office begin, to continue themselves in office, and exclude those whom the people have chosen....

Id. at 972-73 (emphasis added).

Likewise, in Olsen v. Merrill, 5 P.2d 226 (Utah 1931), the Supreme Court of Utah held the offices of several incumbent members of a city board of education did not become vacant when their residences became located in municipal wards different from those from which they were elected as a result of a city redistricting ordinance. A statute provided: "Every member of the board of education of the cities of the first and the second class shall be and remain a resident, qualified, registered voter in the municipal ward from which he is elected" Id. at 228. Relying heavily on the above-quoted reasoning of State ex rel. Norwood, supra, the court observed that the incumbents, "not having changed their residence since their election, may well be said to have remained residents of the municipal wards from which they were elected...." Id. at 229.

We believe a similar construction of Act No. 777 is appropriate here. The Legislature clearly intended for a vacancy to occur if a member of the Board of Trustees deliberately *moves* his or her residence, and not if the boundaries of the election districts are altered. In the absence of any legislation

establishing what effect redistricting has on the unexpired terms of members of the Board of Trustees, we find no statutory authority to cut short any such member's term. Assuming he or she remains otherwise eligible to hold office, we conclude the incumbent from District 7 is entitled to continue representing the new District 7 as designated under the redistricting plan for the remainder of the term he or she was elected to serve. Thus, we find no statutory authority for the calling of a special election to replace the incumbent from District 7. Once his or her term expires, however, the incumbent from District 7 would be ineligible to run for re-election in the new District 7. But, assuming his or residence remains at its current location within the boundaries of the new District 5, the incumbent from District 7 could seek office in the new District 5 at the time of the 2014 general election. If this is not the result the Legislature intended, we again advise that legislation should be enacted to clarify the effect of redistricting on the unexpired terms of members of the Board of Trustees.

We note that the implementation of the redistricting plan as described above could be subject to constitutional challenge on the basis it violates the one person, one vote requirement of the Equal Protection Clause as recognized by the Supreme Court of the United States. See Reynolds v. Sims, 377 U.S. 533, 577, 84 S. Ct. 1362, 1390 (1964) ("the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"). In extending this rule to local governments, the Court has further explained as follows:

[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials....

Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50, 56, 90 S. Ct. 791, 795 (1970); see also Reynolds, 377 U.S. at 555, 84 S.Ct. at 1378 ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise").

Here, the argument could be made that the voting rights of certain residents of the School District will be diluted or infringed upon if the redistricting plan is implemented in the manner described above. As previously mentioned, residents of even-numbered districts are scheduled to vote for a member of the Board of Trustees in the 2012 general election, while residents of odd-numbered districts are scheduled to vote in the 2014 general election. The County maps depicting the current and newly-drawn district lines reveal that some residents currently residing in an even-numbered district will be moved to an odd-numbered district under the redistricting plan. Such residents will be temporarily disenfranchised in that they will not be able to vote for a member of the Board of Trustees for an additional two years. Furthermore, the residents of the new District 7 will be represented for up to two years by an incumbent member of the Board of Trustees whom they did not elect.

However, numerous courts from various jurisdictions have concluded that no violation of the Equal Protection Clause occurs where some voters are temporarily disenfranchised as a result of the combined effect of reapportionment and a staggered election plan. See Donatelli v. Mitchell, 2 F.3d 508, 515-16 (3d Cir. 1993) (reapportionment plan which assigned incumbent senator to entirely new district

for remaining two years of term and shifted some voters, under staggered election system, from odd-numbered to even-numbered districts such that, under staggered election system, they would not vote for state senator for additional two years did not violate equal protection); Republican Party of Oregon v. Keisling, 959 F.2d 144 (9th Cir.1992) (temporary dilution of voting power resulting from combination of redistricting and staggered election plan that does not unduly burden a particular group does not violate equal protection); Mader v. Crowell, 498 F.Supp. 226 (M.D. Tenn. 1980) (combination of reapportionment and staggered election system that caused some voters to wait extra two years to vote for state senator did not violate equal protection).

In support of its decision in Donatelli, the Third Circuit Court of Appeals observed that "temporary disenfranchisement is inevitable, at least to some degree, whenever a reapportionment is combined with a staggered system of elections." Id., 2 F.3d at 516. In addition, the court noted that the state has legitimate interests in not ousting a senator in the middle of the four-year term which he was elected to serve and in avoiding the expense and inconvenience of a special election. Id. at 519. In Mader, the District Court reasoned that the deprivation suffered by voters disenfranchised for two years was de minimis as "[t]he disenfranchisement is temporary in nature and is no different from that experienced by new registrants who reach the age of 18 years shortly after an election and by people moving from one area to another." Id., 498 F.Supp. at 231 (quotations omitted).

Furthermore, in French v. Boner, 963 F.2d 890 (6th Cir. 1992), the Sixth Circuit held the Equal Protection Clause did not require City of Nashville to immediately conduct new elections for district council members who were elected to four year terms after the decennial census data became available but before a new apportionment plan could be put into effect. Although noting that "representation may be unequal in the sense that the districts no longer meet a one-person-one-vote test under the new census," the court observed that "[v]alues other than mathematical equality in preserving majority rule are also at stake." Id. at 891. The court identified these other values as follows:

Values other than mathematical equality in preserving majority rule are also at stake. In order to maintain relative mathematical equality in a population constantly on the move, we would have to have short terms of office and annual census updates. Short terms would sacrifice the stability and experience in office that longer terms contribute. Refusal to honor the preference of state and local bodies for longer terms would increase the costs of elections for taxpayers and candidates and would make it more difficult for citizens of limited means to participate in local elective politics. If new elections were ordered here, the process would undermine the settled expectations that both voters and elected officials hold as a result of the election last year.

Id. at 891-92. Finding the above considerations outweighed "considerations of mathematical equality in representation or the presumption in favor of redistricting every ten years," the court concluded the council members were entitled to serve the remainder of their four-year terms. Id. at 892.

The conclusions and reasoning of the abovementioned cases provide considerable guidance in determining whether the implementation of the redistricting plan as set forth in this opinion violates the Equal Protection Clause. Although the changing of district lines will cause some voters to be disenfranchised for two years or represented for two years by an incumbent they did not elect, the deprivation suffered by such voters is insignificant and analogous to that suffered by voters who simply move from one district to another. Allowing the incumbent members to serve their full four-year terms,

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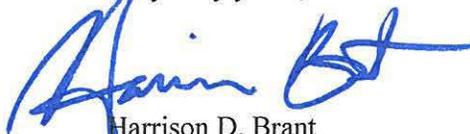
as opposed to having them cut short after two, would maintain stability and experience in office, avoid the inconvenience and increased costs of a special election, and maintain the expectations that voters and elected officials hold from the previous election. For the above reasons, we believe the implementation of the redistricting plan in the manner set forth in this opinion meets the requirements of the one person, one vote requirement of the Equal Protection Clause.

In light of our conclusion that the incumbent members of the Board of Trustees are entitled to complete the terms they were elected to serve despite redistricting, we find it unnecessary to address your remaining questions.

Conclusion

It is the opinion of this Office that the incumbent members of the Board of Trustees are not disqualified from continuing to hold office as a result of the redistricting plan. In construing Act No. 777, we find the General Assembly intended for a member's office to become vacant if he or she deliberately moves his or her residence, and not if the alteration of boundaries lines causes his or her residence to be located in a different district. In the absence of the enactment of legislation clarifying what happens to members of the Board of Trustees following redistricting, we find no statutory authority for cutting short a member's term as a result of redistricting. Thus, we believe the incumbents from Districts 5 and 7 are entitled to complete the terms they elected to serve after redistricting. If they remain otherwise eligible to continue holding office, the incumbent from District 5 will serve the remaining two years of his or her term representing the new District 5, and the incumbent from District 7 will likewise serve the remainder of his or her term representing the new District 7. Assuming both incumbents continue to reside in their current locations, they will both be residents of the new District 5 when their terms expire in 2014. Therefore, at the time of the 2014 general election the incumbent from District 7 will be ineligible to run for re-election in the new District 7. However, both members will be eligible to seek office in the new District 5.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



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