ALAN WILSON
ATTORNEY GENERAL

November 6, 2012

Darra James Coleman, Chief Advice Counsel
SC Department of Labor, Licensing and Regulation
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Ms. Coleman:

Attorney General Alan Wilson has referred your letter of October 29, 2012 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Is a candidate for a seat on the SC Board of Medical Examiners in a particular Congressional District eligible for inclusion on the ballot for that District when he has 50 signatures, but one of those signatures was from a physician whose license was lapsed and other signatures were from physicians who reside outside the candidate's Congressional District?

Short Answer: This Office only issues legal opinions, so this Office will not address the resolution of the factual issues. See Ops. S.C. Atty. Gen., 2012 WL 428913 (September 12, 2012); 2012 WL 4009948 (September 5, 2012); 2004 WL 885188 (April 16, 2004); 2000 WL 655462 (March 15, 2000); 1996 WL 599391 (September 6, 1996); 1983 WL 182076 (December 12, 1983), et al. However, this Office is able to give a legal opinion as to the law that may apply to the situation based on the given information.

Law/Analysis: South Carolina Code of Laws § 40-47-10 (1976, as amended) establishes the requirements for all members of the Board of Medical Examiners (hereinafter "Board"). The question presented in your letter regards a candidate who wishes to be elected to the Board to represent one of the Congressional Districts. The statute specifies candidates who will represent the six Congressional Districts must be chosen with an election within each district with participation by all permanently licensed physicians residing in that District. It gives no provision for petitions or any other method of selecting candidates to be placed on the ballot for each district. After an election, the Governor is then given authority to reject any or all of the nominees upon satisfactory showing of unfitness of those rejected, as quoted below:

> (A)(1) There is created the State Board of Medical Examiners to be composed of twelve members, three of whom must be lay members, one of whom must be a doctor of osteopathic medicine, two of whom must be physicians from the State at large, and six of whom must be physicians, each representing one of the six congressional districts. All members of the board must be residents of this State, and each member representing a congressional district shall reside in the district the member represents. All

> physician members of the board must be licensed by the board, must be without prior disciplinary action or conviction of a felony or other crime of moral turpitude, and must be practicing their profession in this State. ...
>
> (2) The members of the board shall serve for terms of four years or until their successors are appointed and qualify. Members of the board may only serve three consecutive terms.
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> (3) All members of the board have full voting rights.
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> ....
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> (5) ... To nominate the physicians who will represent the six congressional districts, the board shall conduct an election within each district. These elections must provide for participation by all permanently licensed physicians residing in the particular district. ... The board shall certify in writing to the Governor the results of each election. The Governor may reject any or all of the nominees upon satisfactory showing of the unfitness of those rejected. If the Governor declines to appoint any of the nominees submitted, additional nominees must be submitted in the same manner following another election. Vacancies must be filled in the same manner of the original appointment for the unexpired portion of the term.
>
> (6) Vacancies that occur when the General Assembly is not in session may be filled by an interim appointment of the Governor in the manner provided by Section 1-3-210.

SC Code § 40-47-10.

While the applicable statute is clear, the issues presented in your letter relate to the rules concerning the petitions for candidates. As noted in your letter, the petition process for candidates desiring to be on the State Board of Medical Examiners is governed by SC Code of Regulations R.81-91.

This Office has previously opined "an administrative body cannot make a rule which would materially alter or add to the law, but to be valid, a rule must only implement the law. Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943). On the other hand, administrative agencies may be authorized to fill up details by prescribing rules and regulations for complete operation and enforcement of law within its expressed general purpose. Young v. S.C. Dept. of Highways and Public Transp., 287 S.C. 108, 336 S.E.2d 879 (S.C. App. 1985). Thus, an administrative regulation is valid as long as it is reasonably related to the purpose of the enabling legislation. Hunter and Welden Co., Inc. v. S.C. State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E.2d 186 (1978). Moreover, an agency's regulations are presumed valid until challenged. Op. Atty. Gen., November 27, 1995, referencing U.S.C. v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978) (Littlejohn, J. concurring). And this Office possesses 'no authority to declare either a statute or administrative regulation invalid. At most, we may simply comment upon and point to any

constitutional or legal problems which may be encountered as a result of the enforcement of such laws.' Id." Op. S.C. Atty. Gen., 1996 WL 679478 (October 15, 1996).

As this Office has previously stated, the same general rules of statutory construction and interpretation apply to rules and regulations of State administrative agencies. Those rules include a predisposition to uphold the validity of a regulation, ascertainment of the legislative intent and purpose, harmonization of provisions in the same sections, interpretation according to the natural and plain meaning of the words, partiality of more specific provisions over more general ones, liberal construction of remedial provisions while giving a more strict construction for exemptions or conduct for which sanctions are imposed, and other such customs of statutory interpretation. Ops. S.C. Atty. Gen., 2011 WL 3346431 (July 22, 2011); 2006 WL 981700 (March 17, 2006); 1989 WL 406124 (March 24, 1989). Additionally, the construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986). "Where the administrative interpretation has been formally promulgated as an interpretative regulation or has been consistently followed, this required deference is highlighted and the administrative interpretation is entitled to great weight." Op. S.C. Atty. Gen., 1990 WL 482427 (May 1, 1990) (citing Marchant v. Hamilton, 279 S.C. 497, 309 S.E.2d 781 (1983)).

Keeping these principles in mind, the regulation states:

> Notice of the election of Board Members shall be mailed to each physician possessing a permanent license and eligible to vote, according to records of the Board. Physicians wishing to offer their candidacy for the Board must submit a written petition signed by not less than fifty (50) physicians possessing a permanent license and eligible to vote in the particular election contest which the petitioner seeks to enter; provided however, this provision does not apply to the election for the doctor of osteopathy at-large. All signatures must be on petitions provided by the Board; physicians eligible to vote in the election may sign the petition of more than one candidate. Petitions must be received by the Board within thirty-five days of the date of the notice announcing the election. Any person submitting the required number of petition signatures may subsequently withdraw his name upon written notice to the Board. If only one candidate receives the required number of petition signatures, he shall be declared the winner in that particular contest, and certified as nominee to the Governor. If more than one candidate submits the required number of petition signatures, ballots shall be prepared with the names of the candidates in alphabetical order. Ballots and return envelopes shall be mailed to every physician possessing a permanent license and qualified to vote in that particular election. The candidate receiving a majority of the ballots received by the Board in the allotted time period shall be certified as nominee to the Governor. If no candidate receives a majority of the votes cast, a run-off election involving the two candidates receiving the most votes will be held. Voters shall be allowed fifteen days to return their ballots to the Board.

...

SC Code of Regulations R.81-91. In reading the regulation itself, the language is clear in requiring fifty signatures from physicians licensed permanently and eligible to vote (with eligibility determined according to the Board's records) in the same election in which the candidate wishes to run. A plain reading of the regulation would require the signatures of fifty licensed physicians who are in the same Congressional District as the candidate seeking the nomination. Since the regulation appears clear and unambiguous, this Office will not look further to determine the meaning of the language in the regulation. This Office looks at the plain meaning of the words, rather than analyzing statutes within the same subject matter when the meaning of the statute appears to be clear and unambiguous. Sloan v. SC Board of Physical Therapy Exam., 370 S.C. 452, 636 S.E.2d 598 (2006). However, as far as other requirements that would make a physician eligible to vote in that Congressional District, the regulation directs one to the Board.

Since that same clear reading of regulation leaves the determination of eligibility to vote with the Board, it would appear any issues in that regards would need to be resolved by the Board. While the courts will have any final determination of the interpretation of a rule or regulation, they will give strong consideration to the interpretation by the regulating agency. Op. S.C. Atty. Gen., 1978 WL 35165 (October 12, 1978). Therefore, any issues involving the statute or regulation should be resolved by your office initially.

However, this Office would be remiss if it did not bring to your attention that S.C. Code § 40-47-10 lists six Congressional Districts. At this time South Carolina has Act 222 (S.B. No. 1127) which provides for an amendment to § 40-47-10 adding a seventh Congressional District board member. 2012 S.C. Laws Act 222 (S.B. 1127). The candidate may have a legal argument that if some of the signatures obtained from physicians outside of his District were obtained from members in his district that will be in the new Congressional District seven, that those signatures to nominate him are valid based on current South Carolina law § 40-47-10. However, it is our understanding from you that the signatures obtained from the candidate were from Districts other than his own or the new seventh District. That would preclude an argument about the pending seventh Congressional District. Even if the legal argument were to apply to this situation (which it does not appear to), it is up to a court to determine the validity of such an argument based on the facts. This Office is not attempting to address one way or the other the validity of such an argument.

Another issue presented in your letter regards the signature from a physician with a lapsed license. If one holds himself out to be a licensed physician and a reasonable person would have no reason to doubt that standing and no knowledge of a license that was lapsed, especially when the person was previously licensed, then the candidate who received such a signature may be able to present evidence of fraud, misrepresentation or other such allegations could be considered when determining whether or not to count the signature. This same issue would apply if the candidates residing in the Districts other than the candidate's District held themselves out to be residing in the candidate's District. However, the court system would be the ultimate determiner of the factual issue presented by this scenario and all others issues, as stated above.

There are other factual issues to consider, such as the consistency in the review process. Your letter indicates the candidate at issue turned in his petition three days early. The factual issues, which are not addressed here, may include when the petitions are reviewed and if candidates are given an opportunity to submit corrected signatures before the deadline.

As an aside, in researching these issues one case this Office reviewed (among others) was Gold v. SC Board of Chiropractic Examiners, 271 S.C. 74, 245 S.E.2d 117 (1978), which concluded the South Carolina Constitution does not allow appointive power to be delegated to a private person or organization. Additionally, as you are well aware, § 1-23-380 of the Administrative Procedures Act outlines the standards for judicial review of actions by regulating agencies. SC Dept. of LLR v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (1998).

Conclusion: The Board should make the factual determination of whether the candidate met the Board's own requirements to run for nomination as a Board member for a Congressional District. Any further issues should be resolved or interpreted by the regulating agency. If the issues are not resolved or there is an appeal, the court should ultimately make the determination. As previously stated, this office is only issuing a legal opinion. Until a court specifically addresses the issues presented in your letter, this Office hopes to guide you in how it interprets the law. If it is later determined otherwise or if you have any additional questions or issues, please let me know.

Sincerely,

Anita Smith Fair

Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General