



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

August 22, 2003

The Honorable Walter M. Bailey, Jr.  
Solicitor, First Judicial Circuit  
Post Office Box 1525  
Orangeburg, South Carolina 29116

Dear Solicitor Bailey:

You state that you "will have enough time in the Solicitors and Judges Retirement System to receive full retirement prior to the end of [your] current term." However, you do not "want to put three counties to the expense of a special election." You further note by way of background that

Section 7-13-190 provides for both a primary and special election when vacancies occur in certain offices. Section 1-7-390 provides when the Solicitor's Office is vacated, the position is filled by the Governor by and with the consent of the Senate. This statute is silent as to whether the Governor's appointee would complete the entire term or be subject to the special election provision of Section 7-13-190. I have discussed this situation with Marcie Andino, Executive Director of the Election Commission. It is Ms. Andino's opinion that Section 7-13-190 would not apply and since there is no provision for a special election in Section 1-7-390, the Governor's appointee would complete the balance of the four year term.

You thus seek an opinion from this Office "interpreting these code sections as it pertains to a vacancy in the Solicitor's Office.

**Law / Analysis**

S.C. Code Ann. Sec. 1-7-390 provides as follows:

[i]n case any circuit solicitor shall cease to reside in his circuit, his office shall become vacant. In case any vacancy shall occur in such office by death, resignation or otherwise, the vacancy created shall be filled by the Governor, by and with the advice and consent of the Senate. The judge residing in the circuit of the solicitor, whose office shall thus become vacant, shall certify such vacancy to the Governor.

Section 7-13-190(A) further provides for the holding of special elections, stating that “[e]xcept as otherwise provided in this code as to specific offices, whenever a vacancy occurs 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, this section applies.”

The office of Solicitor is a constitutional office pursuant to Article V, § 24 of the South Carolina Constitution. Section 1-1-110 of the Code deems the Solicitor as part of the executive department of the State providing that

[t]he executive department of this State is hereby declared to consist of the following officers, that is to say: the Governor and Lieutenant Governor, the Secretary of State, the State Treasurer, the Attorney General and the solicitors, the Adjutant General, the Comptroller General, the State Superintendent of Education, the Commissioner of Agriculture and the Director of the Department of Insurance.

Section 1-3-220(1) specifies that the Governor is to make an appointment “to fill any vacancy in an office of the executive department as defined in Section 1-1-110 occurring during a recess of the General Assembly.” Such subsection further provides that “[t]he term of such appointment shall be until the vacancy be filled by a general election or by the General Assembly in the manner provided by law.”

It is evident from the foregoing statutes that the Governor fills the vacancy which may occur in the Office of Solicitor. As you indicate, the crucial question is whether such appointment by the Governor is for the remainder of the term.

This precise question was addressed by our Supreme Court in State ex rel. Gasque v. Singleton, 100 S.C. 465, 84 S.E. 989 (1915). There, the Court reviewed the foregoing statutes which have, for all practical purposes, remained the same since the Singleton case was decided. Included in the Court’s analysis was the predecessor to § 1-7-390 as well as §§ 1-1-110 and 1-1-120. The Court concluded that the existing statutes only authorized the Governor’s appointee as Solicitor to serve until the next general election. In the Court’s view,

These statutory provisions must be construed together, and, if possible, such a construction should be placed upon them as will give force and effect to all. The solicitor is an officer of the executive department, and therefore the provisions of section 695 are applicable to him. Neither section 694 nor section 695 prescribes the length of time for which the appointment is to be made by the Governor. This, however, is fixed by section 695, which limits the duration of the appointment as to solicitors until the vacancy can be filled by a general election, as it is an elective office. When the foregoing sections are construed together, it is manifest that the Legislature did not intend to confer upon the Governor power to appoint a solicitor for such a length of time as would extend beyond the first general election held after

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the vacancy occurred. This is the only construction by which all the sections can be harmonized.

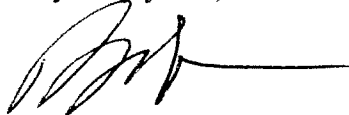
But even if it was intended by the statutes to empower the Governor to appoint a solicitor for the full unexpired term, when a vacancy arose, such an enactment would be void. When an office is made elective by the Constitution and a vacancy arises, the Governor cannot fill it by appointment, except temporarily, unless the Constitution gives him such power. And there is no such provision in the Constitution as to the office of solicitor. If the Legislature had attempted to empower the Governor to appoint for a term extending beyond the first general election after the office became vacant, such a statute would contravene the provisions of the Constitution in two respects. It would be an attempt to make an office appointive, which the Constitution had declared to be elective; and it would be an attempt to change the term of office, as the appointment for the full unexpired term of office would necessarily be less than four years; yet, if the vacancy was filled by a general election, the term of office would be for four years. It would be against the letter as well as the spirit of the Constitution to hold that the Governor's appointment to an elective office should continue of force after the vacancy had been filled in the manner contemplated by the Constitution, to wit, by an election expressing the choice of the qualified electors of the circuit. The propositions herein announced are fully sustained by the case of Smith v. McConnell, 44 S.C. 491, 22 S.E. 721, and the cases therein mentioned.

84 S.E. at 990.

As indicated, the statutes in question relating to Solicitors remain basically the same as when Singleton was decided.<sup>1</sup>

Accordingly, it is our opinion that the person appointed by the Governor to fill the Office of Solicitor which you presently hold would serve until the next general election. In this instance, the next general election would be November, 2004.

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/an

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<sup>1</sup> Section 7-13-190 was amended by Act No. 3 of 2002. However, it does not appear that the amendment is pertinent to this question.