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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON  
ATTORNEY GENERAL

January 10, 2003

The Honorable André Bauer  
Senator, District No. 18  
604 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Bauer:

You have asked for our opinion regarding the re-appointment of a magistrate whose term is set to expire April 30, 2003. You state that "[d]ue to the excellent service this person has provided as a magistrate, I would like to re-appoint this person to the position for another term." However, you have submitted your resignation from the Senate effective January 15, 2003 and you are "unsure if there were a means to secure his re-appointment given the time frames mentioned above." Unfortunately, the law does not appear to permit you as Senator to make a prospective appointment to fill a vacancy when you will not hold the office of Senator when the vacancy occurs. I will elaborate below.

LAW / ANALYSIS

In Op. Atty. Gen., Op. No. 2519 (October 3, 1968), this Office referenced a previous opinion of the Office dated July 27, 1960 (1960 Atty. Gen. Op. 115) which noted that prospective appointments to fill vacancies which had not yet occurred were not necessarily invalid. In the context of whether a legislative delegation could make a prospective appointment which would take effect after the expiration of the terms of the delegation, the 1968 opinion stated the following:

[a]s indicated ... by the enclosed opinion, there is a limitation as to appointments by a group or other governmental body making appointments, which will take effect after the expiration of the term of office of such group or body. The rule in this State is that an appointing board cannot bind its successor board by making appointments extending beyond the term of the appointing body, unless there is specific permissive statutory authority authorizing appointments for definite terms of years. See: Sanders v. Belue, 78 S.C. 171; State ex rel. Aker v. Major, 94 S.C. 472.

The terms of office of the present members of the Spartanburg County Legislative Delegation will expire on Monday following the general election ... .

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An officer clothed with power of appointment to public office has no right to forestall the rights and prerogatives of his successors by making a prospective appointment to fill an office; the term of which is not to begin until his own term and power to appoint have expired. 67 C.J.S., Officers, Par. 30.

This rule was reaffirmed by our Supreme Court in Mullinax v. Garrison, 296 S.C. 370, 373 S.E.2d 471 (1988). There, the Court concluded that members of a county delegation committee could not prospectively fill an appointment which arose after the delegation's term expired. Opined the Mullinax Court:

[a]s a general rule, appointments which fill a prospective vacancy in an office before the actual vacancy occurs are valid. Morrison v. Michael, 98 Cal.App. 3d 507, 159 Cal. Repr. 568 (1979); Hansen v. Highland, 237 Ind. 516, 147 N.E.2d 221 (1958); Board of Education v. Nevels, 551 S.W.2d 15 (Ky. App. 1977); State ex rel. Koch v. Lexcen, 131 Mont. 161, 301 P.2d 974 (1957); People v. Dethloff, 283 N.Y.309, 28 N.E. 850 (1940); State ex rel. Oklahoma Tax Comm. v. Mourer, 596 P.2d 882 (Okl. 1979). However, a legislative body may not usurp the rights of its successor by making a prospective appointment to fill an anticipated vacancy in an office where the appointee's term will not begin until after the legislative body's own term has expired. State ex rel. Aker v. Major, 94 S.C. 472, 78 S.E. 896 (1913); Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Based on these rules we conclude that, should respondents fill the prospective vacancy on the Board of Education, their action would be contrary to our law.

296 S.C. at 371.

In Tenn. Op. Atty. Gen., No. 95-051, 1995 WL 309899 (May 15, 1995), the Tennessee Attorney General stated that "[a]s long as the appointing officer is empowered to fill the vacancy when it actually occurs and as long as there is no express law prohibiting such an appointment, these so-called 'prospective appointments' have been universally held valid by the courts." (emphasis added). Thus, the appointing official must have the power to make the appointment at the time the vacancy occurs. In this instance, based upon the factual scenario you have presented, such would not be the case.

Accordingly for the foregoing reasons, it is our opinion that the appointment in question cannot be made by you.

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

RDC/an