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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 5, 2003

The Honorable Scott H. Richardson
Senator, District No. 46
52 North Calibogue Cay
Hilton Head, South Carolina 29928

Dear Senator Richardson:

You reference the fact that "there is an ongoing problem with the Highway Commission as to the ability of a commissioner to serve more than one term." As you indicate, this Office has addressed this issue on a number of occasions, the most recent, in an opinion dated June 8, 1999. See also, Op. S.C. Atty. Gen., dated May 15, 1997; May 9, 1997; February 25, 1996; and September 20, 1995. In your letter, you note that, notwithstanding these opinions, last May, "two commissioners decided to seek an additional term by procuring delegation signatures for such."

Your concern is that "these individuals may not supersede the law by engaging in an appointment procedure which is not allowed for in the law." You further state that

> [i]f I am correct, these two commissioners' terms expired November 15, 2002, as outlined in Code Section 57-1-330, which states "... commissioners may only serve in a hold-over capacity for a period not to exceed six months," and they must immediately vacate their seats. This situation creates a very serious situation in that any action voted on by these individuals since November 15, 2002 could be challenged because of their status. In a ["worst case"] scenario, every contract approved by the commission could be challenged. Who knows what other actions directed by the commission could be challenged. I appeal to you to address this as soon as possible so that we can find a remedy if my interpretation is correct.

Law / Analysis

In the June 8, 1999 opinion, this Office re-examined the question of the meaning of S.C. Code Ann. § 57-1-320(B) which provides that "[n]o county within a Department of Transportation district shall have a resident commissioner member for more than one consecutive term...." In that opinion, we reiterated that this statutory limitation means "that a district commissioner of the South Carolina Department of Transportation could not serve consecutive terms but would be limited to

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serving one term only, unless another commissioner's term intervenes." There, we quoted from an earlier opinion, dated February 20, 1996 which stated that

> ... the language in §57-1-320(B) relative to not serving more than one consecutive term means serving one term. By way of comparison, a municipal ordinance examined in Great South Fair v. City of Petal, 548 So.2d 1989 (Miss. 1989), provided that a carnival or fair could operate for only one day. Applying that reasoning to the instant case, ... the language of § 57-1-320(B) ... [means] that a county may have representation for one term and one term only, but that representation may return to that county after representation has rotated to another county for at least one term. Because representation is to rotate from county to county, the commissioner may not succeed oneself but may serve again at a later date, when the rotation returns to his or her county [assuming the delegations were to re-elect the individual].

As you note, § 57-1-330 provides in pertinent part as follows:

> (A) Beginning February 15, 1994, commissioners must be elected by the legislative delegation of each congressional district. For the purposes of electing a commission member, a legislator shall vote only in the congressional district in which he resides. All commission members must serve for a term of office of four years which expires on February fifteenth of the appropriate year. Commissioners shall continue to serve until their successors are elected and qualify, provided that a commissioner may only serve in a hold-over capacity for a period not to exceed six months. Any vacancy occurring in the office of commissioner shall be filled by election in the manner provided in this article for the unexpired term only. No person is eligible to serve as a commission member who is not a resident of that district at the time of his appointment, except that the at-large commission member may be appointed from any county in the State regardless of whether another commissioner is serving from that county. Failure by a commission member to maintain residency in the district for which he is elected shall result in the forfeiture of his office. ...

Clearly, it has been and continues to be the opinion of this Office that a DOT commissioner may serve only one term before being required to rotate off the Commission in deference to an appointee from another county in the congressional district. That former commissioner may then offer again after "another commissioner's term intervenes." Op. S.C. Atty. Gen., June 8, 1999.

Your letter is unclear as to whether the two individuals in question have yet been reappointed by the respective delegations. From the facts presented, however, we assume no such appointments have been finalized. Thus, your question is the legal status of an appointee whose term as well as the statutory holdover period has now expired. It is thus necessary briefly to review the applicable law in this area.

The law distinguishes somewhat between an officer who holds over by statute and one holding over where no statute providing for holdover status is applicable. In Op. S.C. Atty. Gen.,

Op. No. 84-129 (November 5, 1984), we noted that "where a statute provides that an officer hold over until a successor is selected and qualifies, such period is as much a part of the incumbent's term of office as the fixed constitutional or statutory period." A person who by statute holds over until a successor is elected or appointed and qualifies is, in other words, a de jure officer. On the other hand, it was recognized by our Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) that

> ... in the absence of pertinent statutory or constitutional provision, public [officers] ... hold over de facto until their successors are appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the "holdovers" are entitled to retain the offices. As nature abhors a void, the law of government does not countenance an interregnum.

Thus, where no statute authorizing an officer to hold over is present, that officer serves in a de facto capacity.

A de jure officer is one who is in all respects legally appointed or elected to the office and has qualified to exercise the duties of the office. See, Op. S.C. Atty. Gen., February 10, 1984. A "de facto" officer, by contrast, is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S. C. 351, 367, 183 S.E. 145 (1936).

Therefore, based upon the foregoing, it is apparent that during the six month period after a commissioner's term expires, the commissioner would serve in a de jure capacity. While § 57-1-330 provides that "[c]ommissioners shall continue to serve until their successors are elected and qualify," the proviso portion of the statute adds that "a commissioner may only serve in a hold-over capacity for a period not to exceed six months." See also, § 57-1-325 ("Each commissioner shall serve until his successor is elected and qualified.") In order to give effect to all parts of the statute, it would appear that the law would treat only this six month holdover period as de jure status. The issue here, however, is the status of a commissioner after this six month period has expired. As noted above, typically, the General Assembly provides simply that an officer hold over until his successor is elected or appointed and qualifies. It is a rare situation where the General Assembly specifies a very limited holdover period, as the case here.

In Op. S.C. Atty. Gen., February 20, 1996, this Office offered a reason for the limited hold-over period present in § 57-1-330. We noted in that opinion that

> ... § 57-1-330 was amended in 1955 by Act No. 120, to provide that commissioners of the Department of Transportation may not serve in a hold-over capacity, after their respective terms expire, for a period exceeding six months. This provision appears to prevent the evasion of the rotation system. Otherwise, the affected delegations could simply refuse to make the appointment to the commission of the Department of Transportation for an extended period of time, effectively permitting the incumbent commission to remain in office in a hold-over capacity for an extended or indefinite

> period of time. If such indefinite holding over were permitted, the net result would be succession in office without the benefit of official election, thus taking an action indirectly which could not be taken directly.

Clearly, then, the Legislature sought with the enactment of § 57-1-330 to insure that one commissioner does not continue to occupy his or her office indefinitely, thereby depriving another county or counties in the District of their turn.

Nevertheless, as recognized above, with respect to public offices, the law abhors a vacuum. Bradford v. Byrnes, supra, is a case which illustrates this point vividly. In Bradford, the Supreme Court addressed a situation not unlike the one presented by your letter. The case involved a suit by members of certain legislative delegations against the Governor in an effort to require appointments of members of the County Board of Directors. The pertinent statute mandated that the Governor make such appointments upon recommendation of a majority of the legislative delegation "including the Senator." However, the Governor's failure to appoint was not the principal difficulty in Bradford. Upon passage of the statute, the legislative delegation "including the Senator" failed to reach agreement as to recommendations which would be made to the Governor. Meanwhile, the incumbent members of the Board of Directors continued to hold over for about two years. The Court concluded that the failure of the Senator and enough House members in the delegation to constitute a majority so as to make a recommendation created a "vacancy" thereby enabling the Governor to make the appointments without the recommendation of the delegation under the general laws pertinent to that situation.

In reaching that conclusion, the Court was required to address the question of the status of the incumbent members who were holding over. At issue was whether a "vacancy" existed which could be filled by the Governor pursuant to a statute not relevant here. The Court noted that the enabling statute authorized the incumbent only to hold over until a particular date – as is the case in this instance. Bradford's reasoning was as follows:

> [p]roceeding to the second question, the offices are vacant in the meaning that they may be filled by de jure appointments. Almost two years have elapsed since passage of the Act of 1950 and a majority, including the Senator, of the legislative delegation, have failed to agree upon, and make recommendations for the appointments. Meanwhile the former commissioners have continued in office and exercised the powers and discharged the duties which were provided for the Board of Directors under the Act of 1950. By the proviso to Section 3 of the act this was expressly authorized and directed to continue until January 15, 1951; and since that date the commissioners have continued in office de facto. The incumbency of a de facto officer does not prevent or necessarily postpone the appointment and qualifications, according to law of a de jure successor. 67 C.J.S., Officers, § 141, p. 444, from which the following is taken: 'One who holds over after the expiration of his legal term, where no provision is made by law for his holding over, is generally regarded as a de facto officer, but on the office being filled either by appointment or election,

Atty Gen., January 14, 1999. In that same opinion, we noted that the "appointment of an individual not qualified to serve is void and an absolute nullity." Citing 67 C.J.S., Officers, § 19. This Office has previously stated that if a person is not qualified to hold office when he is appointed and begins to serve, that appointment is ineffective. Op. S.C. Atty. Gen., February 17, 1983.

However, the January 14, 1999 opinion also recognized that "[t]he fact that the appointment is an absolute nullity would not necessarily jeopardize the actions taken by the individual in question during his service on the board or commission." Just as the situation where the individual holds over beyond his or her statutory term or without statutory authorization to do so, "[i]t is well settled that one who holds office under an appointment giving color of title may be a de facto officer, although the appointment is irregular or invalid." Id. As the opinion stated, "[t]he acts of a de facto officer are valid and effectual so far as they concern the public or the rights of third parties."

Conclusion

Based upon the foregoing authorities, it is our opinion that the positions of DOT commissioner referenced in your letter may be immediately filled pursuant to § 57-1-330. In light of our previous opinions, the present incumbents may not be reappointed without sitting out an intervening term. However, even where individuals are serving beyond their statutory six month holdover period or even if they are reappointed to a new term, they would be considered to be de facto officers. Until a court removes them or declares their acts void, the law treats all official duties and acts performed by these incumbent commissioners as valid with respect to third parties. This conclusion is supported by the fact that even though the Legislature mandated that commissioners would serve in a hold-over capacity no more than six months, the statute also states that commissioners "shall continue to serve until their successors are elected and qualify ... ." Moreover, were the individuals to be reappointed to new terms without sitting out an intervening term, while such appointments would be invalid, the incumbents would nevertheless, be considered de facto officers. Their acts would be valid as to third parties just as if they were holding over.

We can certainly appreciate the dilemma presented in your letter. However, any action to resolve the problem must come from the legislative delegation for the applicable congressional districts pursuant to § 57-1-330 or from the court. As the Court stressed in Bradford v. Byrnes, supra, a de jure officer – someone eligible under § 57-1-330 – may be chosen to replace these officers who are serving in a de facto capacity. Again, only a court is empowered to remove the commissioners in question or require de jure appointments by the delegation to be made.

Very truly yours,

Robert D. Cook
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