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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

September 16, 2003

Mr. Ronald M. Davis
Member, Board of Trustees
John de la Howe School
115 LaPort Drive
Greenwood, South Carolina 29649

Ms. Frances P. Lindler
Member, Board of Trustees
John de la Howe School
300 Press Lindler Road
Columbia, South Carolina 29212

Alton T. Loftis, Ph.D.
Member, Board of Trustees
John de la Howe School
Post Office Box 5952
Columbia, South Carolina 29250

Dear Mr. Davis, Ms. Lindler and Dr. Loftis:

You note that the three of you are members of the Board of Trustees of the John de la Howe School in McCormick, appointed by the Governor to five-year terms with the advice and consent of the South Carolina Senate. Furthermore, you indicate that your terms expired April 1, 2003. However, no successors have been appointed by the Governor. It is your "understanding that under South Carolina law we continue to serve as members of the Board until our successors have been appointed and found qualified to serve."

You have requested an opinion "regarding whether our understanding of the law is correct." The next regularly scheduled meeting of the Board is October 8-9, 2003. Thus, you state that time is of the essence so that "the Agency is made aware" and in order "to make arrangements for our participation as Board members.

Law / Analysis

S.C. Code Ann. Section 59-49-10 et seq. establishes the John de la Howe School. Pursuant to § 59-49-20, nine trustees are to be appointed by the Governor subject to confirmation by the Senate. The "business, property, and affairs of the school must be under the control" of such Board of Trustees. Terms of the Board members are for five years. Vacancies on the Board are filled "in the same manner of original appointments." No provision contained in § 59-49-20 or elsewhere in the Act provides that Board members hold over or continue to serve until their successors are appointed and qualify.

Your question has been answered by previous opinions of this Office and by decisions of the South Carolina Supreme Court. Most recently, in an opinion dated June 5, 2003, we stated as follows:

> [t]he 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
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> > ... 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 avoid, the law of government does not countenance on interregnum.

Thus, where no statute authorizing an office 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).

The June 5, 2003 opinion also addressed the question of the legality of the acts of a de facto officer. We recognized in that opinion that even though the officer is serving in a de facto capacity, all acts taken by that officer are valid and legally binding upon third parties. We stated the following:

> [t]his Office has consistently recognized that "[a]s an officer de facto, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer de jure unless or until a court would declare such acts void or remove the de facto officer from office." Op. S.C. Atty. Gen., March 15, 2000. See for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848). In addition, we have opined on numerous occasions that an individual may continue performing the duties of a previously held office as a de facto, rather than de jure until a successor is duly selected. See, Ops. S.C. Atty. Gen., December 23, 1996 and September 5, 1995 as examples thereof. In other words, the acts of a de facto officer "would not be void ab initio, but would be valid, effectual and binding unless and until a court should declare otherwise. Op. S.C. Atty. Gen., December 31, 1992. Accordingly, assuming these individuals are simply continuing to hold over without reappointment, their acts would, nevertheless, be valid. (emphasis added).

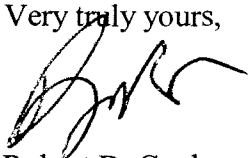
In State ex rel. McLeod v. Colleton County, supra, our Supreme Court held that the acts of the Probate Court were valid even though the Court struck down the law creating that court as unconstitutional. The Supreme Court concluded:

> [o]ur holding in State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967) is consistent with this view. The Constitution mandates a forty-six member Senate. We held in effect that notwithstanding the fact that a fifty member Senate was unconstitutional, the acts of the General Assembly, of which the Senate was a part, were not null and void although there was no Senate de jure. We held that there was a Senate De Facto and that the acts of the Senate, prior to our decision and until the next general election, were valid. The Senate was permitted to carry out its legislative functions as a de facto body even though the law which provided for its composition was invalid. Public policy considerations, which were influencing there, are equally present here. In like fashion, these four courts, and their judges were de facto.

Based upon the foregoing prior opinions of this Office and decisions of the South Carolina Supreme Court, your assumptions are correct. The three of you would continue to hold over as

Board members until your successors are appointed and qualify. Acts taken by you in your capacity as holdover Board members would be valid as to the public and third parties.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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