6455 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 12, 1998

The Honorable Molly M. Spearman
Member, House of Representatives
Route 1, Box 490
Saluda, South Carolina 29138

RE: Informal Opinion

Dear Representative Spearman:

Attorney General Condon has forwarded your opinion request to me for reply. You have asked for this Office's opinion on two questions.

QUESTION 1

You have informed this Office that the Saluda County Election and Voter Registration Commission (hereinafter "the Commission") is in the process of hiring a secretary. You have asked whether the Commission or the Saluda County Council has the final decision making authority in this hiring process.

The Commission was created by Act No. 183 of 1995. Pursuant to this Act, the Commission is to be comprised of seven members, appointed by the Governor upon recommendation of a majority of the Saluda County Legislative Delegation, including the Senator. Section 2 of the Act provides that the Commission "may employ those employees as are authorized by the Saluda County Council."

Request Letter

The main question revolves around the role of County Council in the employment of a Commission employee. Specifically, whether Council's role is limited to the approval of an individual presented to them by the Commission or if it is the more active role of searching out, interviewing, and hiring the Commission's employees. Thus, this is a question of statutory interpretation. The key phrase in such interpretation is "may employ those employees as are authorized by the Saluda County Council." (emphasis added).

In interpreting a statute, the primary purpose is to ascertain the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Bryant v. City of Charleston, 295 S.C. 408, 368 S.E.2d 899 (1988). The court must apply the clear and unambiguous terms of the statute according to their literal meaning. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991).

The ordinary meaning of the word "authorize" is "[t]o empower; to give a right or authority to act." Black's Law Dictionary 133 (6th ed. 1990). Thus, the terms "as are authorized" as used in their ordinary meaning support a conclusion that the Commission may hire an employee when empowered by the County Council to do so. The language does not lend itself to the conclusion that the County Council is the body which searches out, interviews, and hires a particular employee. I believe the correct interpretation of the Act is that the Commission is the body that searches out and interviews a potential employee and the County Council's role is to either approve of disapprove of the hiring of the employee. This conclusion is consistent with what I understand the present practice to be. I have been informed that the Commission interviews potential employees and then votes on which individual they would like to present for County Council approval.

A fair analogy to the present situation is appointments by the Governor requiring the advise and consent of the Senate. In those situations, the Governor chooses an individual for appointment and presents that individual to the Senate for confirmation. The Senate's role is to either confirm or not confirm the individual. The Senate does not have the authority to choose and confirm its own appointee for one of these position as such action would be outside of the framework provided by law.

In conclusion, the specific answer to your question would be that County Council does have the final decision making authority in the hiring of an employee of the Commission. However, this authority is in the form of the power to approve or disapprove of the employment of an individual presented to them by the Commission.

QUESTION 2

You have informed this Office that the Commission held a meeting to interview candidates for the position. At this meeting, 5 of the 7 members of the Commission were present and a vote was taken of the members present. The vote was 3-2 in favor of hiring a particular individual. Following the meeting, the chairman of the Commission called the two members of the Commission that were absent from the meeting and received their votes. With these two votes, the final tally was 4-3 in favor of hiring a different individual. You have asked whether the chairman's action violated the Freedom of Information Act (hereinafter "FOIA").

It is generally recognized that:

> A municipal or county council or a legislative body can act only as a body and when in legal session as such. And the powers of a municipal council or body must be exercised at a meeting which is legally called. Action of all the members of the council [or body] separately is not the action of the council [or body], and an agreement entered into separately by the members of the council [or body] outside a regular meeting is not binding.

Op. Atty. Gen. dated January 21, 1992 (citing 56 Am.Jur.2d Municipal Corporations § 155).

It has also been stated that:

> The powers and duties of boards and commissions may not be exercised by the individual members separately. Their acts and specifically acts involving discretion and judgment, particularly acts in a judicial and quasi-judicial capacity, are official only when done by the members formally convened in session, upon a concurrence of at least a majority, and with the presence of a quorum of the number designated by statute.

Op. Atty. Gen. dated January 21, 1992 (citing 2 Am.Jur.2d Administrative Law § 288).

The same general principles of law are almost universally adhered to by jurisdictions outside South Carolina. For instance, it was stated in State v. Kelly, (N.M.), 202 P. 524 (1921), that "where a duty is intrusted to a board composed of different individuals, that board can act officially only as such, in convened session, with the

members, or a quorum thereof, present." Moreover, the court in School Dist. No. 95 v. Marion Co. School Reorg. Comm., (Kan.), 208 P.2d 226 (1949), noted that ". . . any board, commission or committee should act as a body. That rule is recognized as being well established." Further, in Webster v. Texas Pacific Motor Transport Co., (Tex.), 166 S.W.2d 75 (1942), the Texas Supreme Court wrote:

> It is a well established rule in this State, as well as other States, that where the Legislature has committed a matter to a board, bureau or commission or other administrative agency, such . . . must act thereon as a body at a stated meeting, or one properly called, and of which all the members of such board have notice, or of which they are given an opportunity to attend . . .. [A]greement by the individual members acting separately, and not as a body . . . is not sufficient.

166 S.W.2d at 77. The Webster case cited a wealth of other authorities for the foregoing statement and indeed the cases are numerous in support thereof. See, e.g., State Tax Comm. v. El Paso Nat. Gas Co., 73 Ariz. 43, 236 P.2d 1026 (1951); Edsall v. Jersey State Borough, 220 Pa. 591, 70 A. 429 (1908); Moore v. Babb, (Ky.), 343 S.W.2d 373 (1960); Moskow v. Bost. Redev. Auth., (Mass.), 210 N.E.2d 699 (1965); Edwards v. Hylbert, (W.Va.), 118 S.E.2d 347 (1960); School Dist. v. Framlau Corp., (Pa.), 328 A.2d 866 (1974). Moreover, the Court in Webster explained the rationale for the rule that public bodies must act collectively in assembled meetings.

> The purpose of the rule . . . which requires the board to act as a body at a regular meeting or at its called meeting, upon proper notice, is to afford each member of the body an opportunity to be present and to impart to his associates the benefit of his experience, counsel, and judgment and to bring to bear upon them the weight of his argument on the matter to be decided by the Board, in order that the decision, when finally promulgated, may be the composite judgment of the body as a whole.

This Office has previously considered a situation similar to the one presented. In an opinion dated July 28, 1954, former Attorney General T.C. Callison reached the following conclusion:

> It is my opinion that when a board, or other deliberative body, is authorized to transact business such as making contracts where discretion is necessary, a meeting of the Commission or Board is contemplated for such purpose. When Such meeting is had and a Resolution passed not to enter into a certain contract, it is my opinion that such Resolution would be

> binding upon the Board of Commission unless the same should be rescinded in an open session of the Board.
>
> It is also my opinion, that after a Resolution has been passed in a regular meeting at which a quorum of the membership was present, that such Resolution could not be nullified by individual members being approached out of session and their signature procured nullifying or rescinding the legal action of the Board.
>
> I call your attention to the case of Gaskin v. Jones, 18 S.E.2d, page 454, 198 S.C. 508, and the case of McMahon v. Jones, 94 S.C., page 362.
>
> The latter case, you will note, holds that the public is entitled to the benefit of the judgment and discretion individually and collectively of a Commission of five members in the administration of its charity.
>
> It is my opinion that under the above decisions the County of Lancaster would be entitled to the combined judgment and discretion of the members of your Board of Directors in session with the majority present, which would preclude the circulation of a petition, contract or agreement to individuals separately for signature, unless such procedure had been authorized in a regular meeting with a quorum present. (emphasis added).

Based then upon the foregoing abundance of authority, we would conclude that general case law and common law requires that action taken by members of a public body be taken collectively in a meeting, particularly where as here such action would constitute the exercise of a discretionary function. When such a meeting takes place and a Resolution passed, the Resolution would be binding upon the Commission unless the same is rescinded in a manner provided by law. An agreement entered into separately by the members of the Commission outside a regular meeting is not an official act and is not binding. Accordingly, since it is my understanding that the meeting in which the 3-2 vote was taken was properly held, the 3-2 vote is binding upon the Commission until rescinded in a manner provided by law. Further, since the 4-3 vote was reached outside of a meeting, such is not an official act and is not binding on the Commission.

I must point out that the general law, rather than the FOIA, is the source of the requirement that a public body act collectively, in a meeting, to conduct its business. The FOIA reinforces that principle and provides the guidance as to quorum, notice, and such requirements. Thus, the foregoing conclusion that the 4-3 vote of the Commission is neither an official act nor binding is based on the general law, not the FOIA.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

Paul M. Koch

Paul M. Koch
Assistant Attorney General