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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

December 10, 1999

Gary H. Smith, III, Esquire  
Aiken City Attorney  
Post Office Box 519  
Aiken, South Carolina 29802

Dear Mr. Smith:

On October 21, 1999, this Office issued an informal opinion to you regarding a City of Aiken municipal election commissioner serving as a volunteer campaign chairman for a candidate for the State House of Representatives. By letter dated November 9, 1999, you have asked, on behalf of the Aiken City Council, that this informal opinion be made a formal opinion of this Office. You have also asked for this Office's opinion on several questions involving the political participation of municipal elections commissioners.

Formal opinions of this Office are not routinely issued. When issued, these opinions only address subjects of state-wide interest. In this case, we must respectfully decline to issue a formal opinion, but instead will reissue the October 21, 1999 opinion as reviewed and approved by the Chief of the Opinions Division. A copy of this opinion is enclosed for your review.

You have also asked whether the four situations described in your November 9<sup>th</sup> letter violate S.C. Code Ann. § 7-13-75. This Code section provides:

No member of a county or municipal election commission, voter registration board, or combined election and voter registration commission may participate in political management or in a political campaign during the member's term of office. No member may make a contribution to a candidate or knowingly attend a fundraiser held for the benefit of a candidate over whose

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election the member has jurisdiction. Violation of this section subjects the member to removal by the Governor or appropriate appointive authority.

As an initial matter, any act of the General Assembly must be presumed valid and constitutional. No statute shall be deemed to violate the Constitution unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court, and not this Office, may declare an act to be void for unconstitutionality. A statute "must continue to be followed until a court declares otherwise." Op. Atty. Gen. dated November 24, 1998.

I have been unable to locate any South Carolina cases addressing the constitutionality of Section 7-13-75. However, statutes restricting the political activity of public officers and employees have been widely challenged in other jurisdictions. United States Civil Service Commission v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Horstkoetter v. Department of Public Safety, 159 F.3d 1265 (10<sup>th</sup> Cir.1998); Wicker v. Goodwin, 813 F.Supp. 676 (E.D.Ark.1992); Connealy v. Walsh, 412 F.Supp 146 (W.D.Mo.1976); In the Matter of Randolph, 502 A.2d 533 (N.J. 1986); Ferguson Police Officers Association v. City of Ferguson, 670 S.W.2d 921 (Mo.Ct.App.1984). Courts upholding restrictions on the right of public officers and employees to engage in a wide range of political activities have concluded that such restrictions serve a legitimate government interest, including an interest in the efficiency, integrity, discipline, and morale of officers and employees, and therefore do not unconstitutionally infringe the officers' or employees' constitutionally guaranteed freedoms of speech and association. 51 ALR 4<sup>th</sup> 702 (1987).

Courts have found the government's interest in restricting the political activities of public officers and employees to be especially compelling when the impartiality of the government entity is paramount. For example, courts have concluded that a state's interest in preserving the public confidence in the fact and appearance of the integrity and impartiality of the judiciary is compelling and outweighs a judge's or judicial employee's interest in publicly expressing their political preferences. Connealy v. Walsh, *supra*; In the Matter of Randolph, *supra*. Courts have also concluded for high-profile public employees, such as law enforcement personnel, the government's interest in ensuring that police protection will be available to the public, free from political overtones, and that the police will deal impartially with all those who give them concern outweighs the individual officer's

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interest in engaging in certain kinds of political speech. Horstkoetter v. Department of Public Safety, supra; Wicker v. Goodwin, supra.

Prior to answering your questions, I advise that given the highly sensitive functions performed by election commissioners and the lack of controlling South Carolina case law, this Office advocates a cautious approach that will most likely preserve the sanctity of the election process.

#### QUESTION 1

May a municipal election commissioner participate in a Presidential Election campaign?

Section 7-13-75 is broadly written and prohibits a member of a municipal election commission from participating in political management or in a political campaign during the member's term of office. This section of the statute makes no distinction between local, state, or national political campaigns. Thus, Section 7-13-75 must be interpreted to prohibit participation in all political campaigns, including a presidential election campaign.

#### QUESTION 2

May a municipal election commissioner be active in the political party of his or her choice and not violate this statute?

Section 7-13-75 does not appear to prohibit a municipal election commissioner from being active in a political party. However, the extent of a commissioner's activities is not unlimited. If a commissioner's activities amount to participation in the political management of a political party, the statute would be violated.

Unfortunately, no South Carolina court has addressed the question of what party activities are permitted under the statute. Until this issue is decided, municipal election commissioners may want to be guided by the longstanding restrictions placed on employees of the Federal Election Commission. Pursuant to 5 C.F.R. § 734.409 (1999), entitled "Participation in political organizations; prohibitions," employees of the Federal Election Commission, and other Federal agencies, may not:

(a) Serve as an officer of a political party, a member of a national, State, or local committee of a political party, an officer or member of a committee of a partisan political group, or be a candidate for any of these positions;

(b) Organize or reorganize a political party organization or partisan political group;

(c) Serve as a delegate, alternate, or proxy to a political party convention; and

(d) Address a convention, caucus, rally, or similar gathering of a political party or partisan political group in support of or in opposition to a candidate for partisan political office or political party office, if such address is done in concert with such a candidate, political party, or partisan political group.

I must caution that until a South Carolina court rules on this issue, municipal election commissioners should only use this list as a guide. A court may find some activities not listed above constitute participation in the political management of a political party. Ultimately, whether an individual commissioner's activities violate the statute is a question of fact to be made by the reviewing body, whether the appointive authority or a court, after analyzing the particular circumstances involved.

### QUESTION 3

Is it a violation of this statute for a commissioner to place a bumper sticker on his or her car advocating a particular campaign?

Section 7-13-75 prohibits a member of a municipal election commission from participating in a political campaign during the member's term of office. Therefore, it must be determined whether the placement of a political bumper sticker on an automobile amounts to participation in a political campaign.

Courts and Attorneys General in other jurisdictions have concluded that the display of political bumper stickers, buttons and yard signs constitutes participation in political campaigns. For example, in Ferguson Police Officers Association v. City of Ferguson, *supra*, the city barred employees from electioneering for or against a candidate for council. Plaintiffs claimed that the restriction was unconstitutional for several reasons, including that

they had the right to speak both literally and figuratively through the display of buttons, yard signs and bumper stickers. The court defined the term "electioneer" as "taking an active part in an election campaign." The court then concluded that these activities constituted taking an active part in an election campaign. In addition, in Connealy v. Walsh, supra, employees of a juvenile court were not permitted to be involved in any way in partisan political activities. The court concluded that an employee who displayed a bumper sticker on her automobile violated this prohibition.

In an opinion dated August 27, 1979, the Attorney General of Louisiana addressed the question of whether civil service employees of the City of Lafayette were permitted to place election campaign names and/or campaign slogans and/or pictures in their yards and whether they were permitted to place a candidate's campaign sticker on their automobiles. The city prohibited employees from taking any part in the political campaign of any candidate for public office. The Attorney General concluded that the placing of a yard sign on the property of a classified civil service employee would certainly be construed as taking part in the political campaign of a candidate. The Attorney General further concluded that the placement of a bumper sticker on an automobile would violate the political activity prohibition. The Attorney General of Alabama has also held that the wearing of a button, badge or ribbon with a candidate's name on it is either a direct or indirect suggestion to the voter of how he should vote and, thus, constitutes campaigning or electioneering. Op. Ala. Atty. Gen. dated July 28, 1994.

As you can see, there is support for the conclusion that the display of a political bumper sticker on an automobile amounts to participation in a political campaign. However, this issue is far from settled. Therefore, until a South Carolina courts rules on this issue, it may be wise for a municipal election commissioner to refrain from such conduct.

#### QUESTION 4

Is it a violation of this statute for a commissioner to sign a petition for a candidate to be placed on an election ballot?

As with Question 3, it must be determined whether signing a petition for a candidate to be placed on an election ballot amounts to participation in a political campaign. Other states interpreting provisions similar to Section 7-13-75 have concluded that the signing of a political petition does not constitute participation in a political campaign. For example, the Attorney General of Arizona was asked whether the circulation and/or signing of a recall petition of a state officer by state employees constituted participation in a political campaign

in violation of the law.<sup>1</sup> In an opinion dated February 14, 1978, the Attorney General of Arizona stated:

We will first deal with the issue of a state employee who circulates a recall petition of a state officer. In our opinion, such activity constitutes taking part in a political campaign, which A.R.S. § 41-772 prohibits. Such an employee is taking affirmative action for the purpose of influencing public opinion and ultimately, a public election, and this is the essence of a "political campaign." We do not read the proscription of A.R.S. § 41-772.B. as being limited to a "political campaign" of an individual running for election for a specific office. The words themselves suggest a much broader scope, including any organized effort to promote a cause or secure some result through the political process. See *State ex rel. Green v. City of Cleveland*, 33 N.E.2d 35 (Ohio App.1940)

However, we think A.R.S. § 41-772 does not prohibit a state employee from signing a recall petition. The proscription of A.R.S. § 41-772 is aimed at active political activity by state employees. Subsection B. of that provision expressly reserves the right to vote to state employees, and to express an opinion. The signing of a petition is highly analogous to voting, i.e., it is a written expression of an opinion about a person which has legal and political significance. This fact, coupled with the well established doctrine that governmental restrictions on first amendment freedoms should not be broader than is necessary to accomplish a constitutionally permitted goal, persuades us

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<sup>1</sup> The statute in question was A.R.S. § 41-772, which provided in pertinent part:

B. No employee or member of the personnel board may be a member of any national, state or local committee of a political party, or an officer or chairman of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take any part in the management or affairs of any political party or in any political campaign, except that any employee may express his opinion, attend meetings for the purpose of becoming informed concerning the candidates for public office and the political issues, and cast his vote.

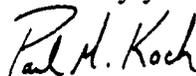
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that A.R.S. § 41-772 does not proscribe signing recall petitions. See *Huerta v. Flood*, 103 Ariz. 609, 611 [, 447 P.2d 866, 868] (1968).<sup>2</sup>

It is likely that if a court in South Carolina were asked whether Section 7-13-75 prohibits a municipal election commissioner from signing a petition for a candidate to be placed on an election ballot, it would reach a conclusion similar to the one reached by the Arizona Attorney General. It would not appear that the mere signing of such a petition by a municipal election commissioner would constitute participation in a political campaign in violation of the statute. However, it would appear that a more active role, such as advocating or circulating the petition, would constitute participation in a political campaign.

With best personal regards, I am

Sincerely yours,



Paul M. Koch  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
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Zeb C. Williams, III  
Deputy Attorney General

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<sup>2</sup> This opinion was reaffirmed by Az. Atty. Gen. Op. dated February 12, 1987.