

The State of South Carolina



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July 17, 1989

The Honorable Joyce C. Hearn
Member, House of Representatives
503B Blatt Building
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Dear Representative Hearn:

You have asked whether §8-1-140 is applicable to a particular situation and, if so, when a special election is triggered pursuant to that statute. It is our understanding that you are to become a member of the ABC Commission within the next several months. To date, you have been nominated by the Governor and on February 23, 1989, you were confirmed by the Senate. As yet, a commission has not been issued by the Governor.

Section 8-1-140 provides as follows:

Whenever any person holding an elective office in this State is elected or appointed to another office, the person may tender an irrevocable resignation to be effective at a future date, and an election may be held in accordance with applicable provisions of law to fill that office as if it had become vacant on the date the officeholder is certified to have won election to his new office. The newly elected official shall not take office until a vacancy occurs.

Your first question involves the applicability of § 8-1-140 to the above factual situation. It has been argued that this provision is inapplicable because it uses the phrase "certified to have won election to his new office" and that an ABC Commissioner is appointed by the Governor with the advice and consent of the Senate, not elected.

In construing a statute, the intent of the Legislature must prevail. State v. Harris, 268 S.C. 117, 232 S.E.2d 231 (1977).

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The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967). In applying the rule of strict construction, courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent. Id. The title or caption of an act may be used in aid of construction to show the intent of the Legislature. University of South Carolina v. Elliott, 248 S.C. 218, 149 S.E.2d 433 (1966).

While it is true that Section 8-1-140 states that an elective office is deemed to become vacant on the date "the officeholder is certified to have won election," the statute also clearly makes reference elsewhere to the time whenever any person holding an elective office "is elected or appointed to another office" Moreover, the title to the original act, Act No. 294 of 1988, provides as follows:

AN ACT TO PROVIDE A PROCEDURE FOR AN OFFICEHOLDER TO TENDER AN IRREVOCABLE RESIGNATION AND FOR AN ELECTION TO BE HELD TO FILL HIS OFFICE WHENEVER THE OFFICEHOLDER IS ELECTED OR APPOINTED TO ANOTHER OFFICE, AND TO PROHIBIT THE NEWLY ELECTED OFFICIAL FROM TAKING OFFICE UNTIL A VACANCY OCCURS.

The title seems to clarify the patent ambiguity present in that it states that the Act applies "whenever the officeholder is elected or appointed to another office" Thus, we believe § 8-1-140 is applicable to the foregoing situation.

The more difficult question is when the statute is triggered for holding a special election. Reference must first be made to the general procedure whereby a special election is held in the event of a vacancy. Section 7-13-190 provides in pertinent part:

(A) Except as otherwise provided in this Code as to specific offices, whenever a vacancy occurs in office by reason of death, resignation, or removal and the vacancy in office is one which is filled by a special election to complete the term of office, this section applies.

(B) In partisan elections, whether seeking nomination by political party primary, political party convention, or by petition, filing by all candidates shall open for the office at noon on the third Friday after the vacancy occurs for a

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period to close ten days later after noon. If seeking nomination by political party primary or political party convention, filing with the appropriate official is the same as provided in Section 7-11-15(1) and if seeking nomination by petition, filing with the appropriate official is the same as provided in Section 7-11-15(2)(3).

A primary must be held on the eleventh Tuesday after the vacancy occurs. A runoff primary must be held on the thirteenth Tuesday after the vacancy occurs. The special election must be on the eighteenth Tuesday after the vacancy occurs. If the filing period closes on a state holiday, then filing must be held open through the succeeding weekday. If the date for an election falls on a state holiday, it must be set for the next succeeding Tuesday.

It would appear that Section 7-13-190 may be easily read in conjunction with Section 8-1-140 which simply states that "an election may be held in accordance with applicable provisions of law" Section 7-13-190 provides that such provision is applicable whenever a vacancy occurs by reason of death, resignation or removal" Since Section 8-1-140 provides that a vacancy occurs by resignation on the "date the officeholder is certified to have won election to his new office", the critical question becomes the meaning of that phrase.

As noted, the title to Act No. 294 states that the office is deemed vacant for purposes of setting the election "whenever the officeholder is elected or appointed to another office" At first blush, it would appear that because the office of ABC Commissioner is appointed by the Governor with the advice and consent of the Senate, the date when the appointment became final would be the date when the Senate confirmed the appointment, or February 23, 1989. If indeed this is the date intended by the General Assembly, the election should have already been held, pursuant to Section 7-13-190.

As a general rule, "an appointment to office is made and is complete when the last act required of the person or body vested with the appointing power has been performed." Op. Atty. Gen., February 19, 1980, quoting 63 Am.Jur.2d, Public Officers and Employees, § 99. See also, Op. Atty. Gen., December 7, 1987. The rule is equally applicable to the situation where an appointment is made upon the advice and consent of the Senate. In that specific context, it has been written:

Where an appointment is made as the result of a nomination by one authority and confirmation by another, the appointment is not valid and complete until the action of all bodies concerned has been taken.

67 C.J.S., Officers, § 42.

The following rule must also be remembered, however:

Confirmation of an appointment is distinguishable from the appointment itself in that the confirming body does not in any sense choose the appointee; the power of appointment is exercised and exhausted by the initial naming of a party to the office, and the confirming authority by rejecting the appointment, does not exercise a power of appointment.

67 C.J.S., Officers, supra. Furthermore, when an appointment is made, there "must be some open unequivocal act of appointment on the part of the appointing authority empowered to make it" Id.

We must also consider another rule, recognized by this Office in the February 19, 1980 opinion:

There seems to be a distinction as to when the appointment becomes complete, in cases where the commission is to be signed by the appointing power, and those where it is signed and issued by another. If the commission is to be signed by the appointing power, the issuance of the same is essential to a complete appointment. If, however, such formal act is to be performed by someone other than the appointment power, it constitutes no part of the appointing power.

The landmark case of Marbury v. Madison, 2 L.Ed. 60, best illustrates this rule. There, a federal statute required that notaries public be appointed by the President of the United States with the advice and consent of the Senate. The statute also required the President to commission all officers of the United States. The Supreme Court determined that one of the principal issues in the case was whether Marbury had been finally appointed to his office.

The Supreme Court first noted the general distinction between "the acts of appointing to office and commissioning the person appointed ..." As a general rule, said the Court, the commission is not necessarily the appointment, "though conclusive evidence of

it." However, application of this general rule is particularly problematical in the situation where the appointment included concurrence by another body. Although the Senate was required to concur, the appointment, nevertheless, remained with the President. The Supreme Court eloquently stated the fundamental issue and resolved it this way:

But at what stage does ... [the commission] amount to ... conclusive evidence [of the appointment]?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. (emphasis added).

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the Constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the last person possessing the power, has been performed. This last act is the signature of the commission.

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This same reasoning was conclusive in the subsequent United States Supreme Court decision, United States v. LeBaron, 60 L.Ed. 525. There, the Court reasoned:

When a person has been nominated to an office by the President, confirmed by the Senate and his Commission has been signed by the President and the seal of the United States affixed thereto, his appointment to that office is complete. (emphasis added).

The Court further observed that "all the Executive can do to invest the person with his office has been completed when the commission has been signed and sealed." Id.

Other cases are in accord. For example, in State v. Hagemeister, 73 N.W.2d 625, 631 (1955), the Court stated:

This constitutional provision contemplates a nomination, confirmation by the Legislature, and pursuant thereto, appointment by the Governor. In such instances the appointment, which would include the commission, is the third and final act in the appointment procedure.

And in Harrington v. Pardee, 1 Cal. App. 278, 82 P. 83, the Court was of the view:

As to the trustees of this home, the Governor cannot appoint, when the Senate is in session, without the 'advice and consent' of that body. In all such appointments the first step to be taken is the suggestion by the Governor to the Senate of the name of a person for the office, and to ask the advice of the Senate, and for its consent for him to appoint such person; the second step is the advice and consent of the Senate which is manifested by a resolution certified to the Governor and to the Secretary of State, and the third and last step is the issuing of the Commission signed by the Governor, and this is the evidence of such appointment.

South Carolina cases do not decide the precise issue present, but we have found none which are in direct conflict with the foregoing authority. It is true that the Court in State ex rel. Coleman v. Lewis, 181 S.C. 10, 186 S.E. 625 (1936) observed:

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... the Governor in issuing a commission acts merely ministerially; the commission does not confer the office nor the term or time for which it exists depends upon the commission, which is only evidence of the appointment or election. 181 S.C. at 37.

However, neither Coleman, nor any other South Carolina case, of which we are aware, has considered the applicability of this general rule to this situation, where the Governor makes an appointment with the advice and consent of the Senate. Indeed, Coleman goes on to say that "the choice of a person to fill an office constitutes the essence of his appointment." 181 S.C. at 35.

Moreover, other South Carolina decisions appear to be entirely consistent with Marbury v. Madison. As stated in Kottman v. Ayer, 3 Strob. 92,

It is the appointment that confers the office as was decided by the Supreme Court of the United States in the case of Marbury v. Madison.

Of course, as noted, Marbury indicates that, where a chief executive makes an appointment with the advice and consent of the Senate, it is the executive, not the Senate, who makes the appointment, and therefore, the appointment is not final until the chief executive's commission is signed and sealed. And in State v. Toomer, 7 Rich. 216, our Court noted that Marbury represented the "leading case on this subject", holding that a commission was not necessary to finalize an appointment. As already stated, Marbury did set forth this general rule, but the Court went on to recognize an exception where an executive appointment required Senate concurrence. In Toomer, the court did not need to go further than the statement of the general rule, because the facts in Toomer did not involve an executive appointment upon the advice and consent of the Senate.

As our February 19, 1980 opinion indicated, the question here is "a close one." Certainly, Section 8-1-140 is ambiguous as to when the Legislature intended that a vacancy is deemed to have been created for purposes of setting an election in this precise situation. We would have little trouble resolving the issue if, for example, the appointment were being made solely by the Legislature or if the individual were simply elected to another office. There, the date upon which Section 8-1-140 would be triggered would be fairly clear -- in the two examples given, the date upon which the Legislature made the appointment in the former instance (Op. Atty. Gen., December 7, 1987) and, in the latter, the date upon which the individual was certified as the winner of the election.

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However, where as in this case, an officeholder is appointed by the Governor upon the advice and consent of the Senate, the date of the "appointment" is far more problematical. As noted, the title to the Act really lends no guidance beyond the fact that the procedure for setting the special election is to begin "whenever the officeholder is elected or appointed to another office." That merely restates the question: when is the "appointment" final?

We also note the fact that if the key date is the date upon which the Senate gave its concurrence, then the election should have already been held by now. If that is the date intended by the General Assembly, the applicability of the statute would be negated in this particular instance. Furthermore, it is evident that the Legislature's intent was to have a successor to the original office in place and ready to take office at the time the irrevocable resignation is effective. In enacting this legislation, the General Assembly simply wished to avoid the necessity of having to wait roughly eighteen weeks from the date of a resignation until the special election was conducted and a successor to the elective office chosen.

Of course, as with any opinion of this Office, only a court could resolve the legal issue raised with finality. However, with respect to the narrow circumstances here, we prefer to read this obviously ambiguous statute as being triggered for purposes of starting the election process upon the date when the Governor issues his commission under seal. Section 8-3-10 requires the Governor to issue a commission prior to the public officer being able to take office. Normally, as noted, such a requirement is merely ministerial and is only evidence of the appointment. But in this instance, where the advice and consent of the Senate is necessary, the commission takes on far greater significance. As the United States Supreme Court held in Marbury, the commission is the last act of appointment. It is the one "open, unequivocal act" taken by the chief executive, indicating that he has "acted on the advice and consent of the Senate concurring with his nomination"

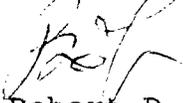
We would emphasize, however, that our construction herein is limited to these particular circumstances. As stated, generally speaking, the issuance of a commission is not relevant to the date of appointment. The two are entirely separate occurrences. Thus, our opinion is limited to those instances where the Governor appoints to a particular office with the advice and consent of the Senate; although only a court could construe the statute with certainty, we believe that, for purposes of Section 8-1-140, a gubernatorial appointment with the concurrence of the Senate is not final until the commission is issued by the Governor. Our opinion herein

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relates only to the interpretation of Section 8-1-140. Finally, we would further note that Section 8-1-140.1/ sorely needs legislative clarification for the future in order to clear up the ambiguities addressed herein.

If I can be of further assistance, please let me know. With kind regards, I remain

Very truly yours,



Robert D. Cook
Executive Assistant for Opinions

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1/ Nor does this opinion affect the term of the ABC Commissioner. We note that, although the tenure will not begin until November 1, 1989, the term of office of the incumbent technically ends on June 30 and the new commissioner's term begins on July 1, 1989. This opinion does not affect either the term or tenure, but merely interprets the trigger date for beginning the election process.