

1984 WL 249919 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 28, 1984

*1 Ms. Helen T. Zeigler
Special Assistant for Legal Affairs
Office of the Governor
Post Office Box 11450
Columbia, South Carolina 29211

Dear Ms. Zeigler:

Attorney General Medlock has referred your letter of June 4, 1984, to the Opinion Section for response. You have asked whether and how a vacancy on the board of trustees for the Medical University of South Carolina may be filled if such vacancy occurs while the legislature is not in session.¹ You have advised that a member of that board is running for a position on a county council and further that he intends to resign from the board if he is elected to county council.

Membership on the board of trustees is provided for by [Sections 59-123-40](#) and -50, Code of Laws of South Carolina (1983 Cum.Supp.). Section 59-123-50 provides in pertinent part that '[t]heir successors shall be elected for terms of four years or until their successors are elected and qualify. Any vacancy on the board of trustees shall be filled in the manner of the original election for the unexpired portion of the term.' Where, as here, the terms of a statute are clear and unambiguous, the terms must be employed according to their literal meaning. [McCollum v. Snipes](#), 213 S.C. 254, 49 S.E.2d 12 (1948). Thus, it is our opinion that a vacancy in an elected position on the board of trustees should be filled by election by the legislature, which was the original manner of selection for board members, as required by statute.

Generally speaking, the Governor must have constitutional or statutory power to make appointments. [State v. Bowden](#), 92 S.C. 393, 75 S.E. 866 (1912). [Sections 1-3-210](#) and -220 of the Code provide authority for the Governor to appoint persons to fill vacancies in certain offices. In particular, Section 1-3-220(1) would permit the Governor to appoint '[a]n officer to fill any vacancy in an office of the executive department occurring during a recess of the General Assembly. The term of such appointment shall be until the vacancy be filled by a general election or by the General Assembly in the mode provided by law.' Composition of the executive department is specifically provided for in [Section 1-1-110 of the Code](#):

The executive department of this State is hereby declared to consist of the following officers, that is to say: The Governor and Lieutenant Governor, the Secretary of State, the State Treasurer, the Attorney General and the solicitors, the Adjutant General, the Comptroller General, the State Superintendent of Education, the Commissioner of Agriculture and the Chief Insurance Commissioner.²

Specific mention of these members of the Executive Department would, by implication, exclude all others not mentioned specifically. See, 2A [Sutherland Statutory Construction](#) § 47.23; [Home Building & Loan Association v. City of Spartanburg](#), 185 S.C. 313, 194 S.E. 139 (1938). See also [State v. Singleton](#), 100 S.C. 465, 84 S.E. 989 (1915) (discussion of Executive Department). Moreover, in [Op. Atty. Gen.](#) No. 2625, dated January 24, 1969 (copy enclosed), it was stated that the Medical College [now University] of South Carolina is not a department of State government. Thus, it is the opinion of this Office that the provisions of Section 1-3-220(1) would not be applicable to the filling of a vacancy on the board of trustees of the Medical University during a recess of the General Assembly.

*2 As noted above, [Sections 1-3-210 and 1-3-220 of the Code](#) provide authority for the Governor to fill certain vacancies during a recess of the legislature. Such statutes are in pari materia and must be considered together and reconciled, to render both operative if possible. [Lewis v. Gaddy, 254 S.C. 66, 173 S.E.2d 376 \(1970\)](#). In addition to vacancies within the executive department, the Governor, by [Section 1-3-220\(3\)](#), is empowered to fill vacancies on the State

Board of Corrections occurring during a recess of the General Assembly. By [Section 1-3-210\(7\) and \(8\)](#), the Governor may fill such vacancies on the State Tax Commission and the State Development Board.³ If the legislature had intended, that all agencies, boards, or commissions be included in the Governor's recess appointment powers, there would be no need to specify the State Board of Corrections, the Tax Commission, and the Development Board in these statutes. Furthermore, enumeration of these boards or commissions implies exclusion of all other boards or commissions not so specified. 2A [Sutherland Statutory Construction](#) § 47.23; [Home Building & Loan Association v. City of Spartanburg, supra](#). To render both statutes operative, it would appear that the Governor's recess appointment power would be limited to vacancies occurring in those positions of the executive department specified in [Section 1-1-110](#), the boards and commissions specified in [Sections 1-3-210 and -220](#), and the other vacancies not relevant herein. Vacancies in the membership of the board of trustees of the Medical University would be excluded from such recess appointment powers.

This opinion is consistent with the Supreme Court's ruling in [Heyward v. Long, 178 S.C. 351, 183 S.E. 145 \(1936\)](#). The court considered the Highway Act and the predecessor statutes to [Sections 1-3-210 and 1-3-220 of the Code](#) to determine that the Governor did not have power to make a recess appointment of State Highway Commissioners; the court stated: There is no provision in the section of the Code under consideration empowering the Governor to make recess appointments to fill vacancies while the Senate is not in session; nor do we find such power conferred by the Constitution. Other sections of the Code (2351, 3083, 3093, 3094)⁴ give the Governor certain powers with respect to making recess appointments, but in none of these is the right given to make recess appointments of State Highway Commissioners. If any legal presumption may be drawn from this state of facts, it would be that the Legislature intended to withhold from the Governor this power in regard to State Highway Commissioners.

[178 S.C. at 376-377](#). The Attorney General has discussed the Governor's power to make recess appointments to the Industrial Commission, as well by [Ops. Atty. Gen.](#) dated August 28, 1947 and March 18, 1964 (Op. No. 1644) (copies enclosed), this Office, citing [Heyward v. Long, supra](#), advised that the Governor was without power to make recess appointments to the Industrial Commission. The circumstances and statutes concerning appointment of the trustee to the Medical University are so similar that a conclusion consistent with our prior opinions and [Heyward v. Long](#) must be reached.

*3 We would further advise that [Section 59-123-50](#) would require a board member to continue to serve until his successor has been elected and qualified. Although the right of public officials to resign from office has been recognized generally, a South Carolina case has held ineffective the attempted resignation of certain public officials prior to the appointment and qualification of their successors. 63 Am.Jur.2d [Public Officers and Employees](#) §§ 136 and 162; [Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 \(1964\)](#). The [Rogers](#) decision was based on statutory language requiring the officers to continue in office until selection of their successors. It also found authority in 'the general rule that a public officer does not cease to be such even when his resignation is accepted but [that he] continues in office until a successor is qualified where the statute or constitution so provides [citation omitted].' [245 S.C. at 34](#). See also [Op. Atty. Gen.](#) dated September 27, 1983 (copy enclosed). Thus, if the board member should attempt to resign from the board upon his election to county council, he would nevertheless continue to serve on the board until his successor has been elected and qualified.

In your letter, you mentioned the dual office holding provisions of the [Constitution of the State of South Carolina, Article XVII, Section 1A](#) provides in part that 'no person shall hold two offices of honor or profit at the same time.'⁵ As you correctly pointed out, when a person holding one office accepts the second office,⁶ he is deemed to have vacated the first office and a vacancy would therefore exist. However, that person may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office. See, [Walker v. Harris,](#)

170 S.C. 242 (1933) [Dove v. Kirkland](#), 92 S.C. 313 (1912); [State v. Coleman](#), 54 S.C. 282 (1898); [State v. Buttz](#), 9 S.C. 156 (1877). As to the county council, the individual would be a de jure officer; as to the board of trustees, he would be a de facto officer. See also [Op. Atty. Gen.](#) dated February 10, 1984 (copy enclosed). He could continue to serve as a de facto trustee until his successor has been elected and qualified.

In conclusion, it is the opinion of this Office that successors to members of the board of trustees of the Medical University of South Carolina must be elected by the General Assembly and that the Governor would not have authority to appoint a successor should a vacancy occur on the board during a recess of the General Assembly. Should a trustee be elected to a second office, such as county council member, he would vacate the first office and continue to serve (as a trustee) as a de facto officer when he assumes the second office (as county council member) as a de jure officer. Furthermore, because a trustee must serve until his successor has been elected and qualified, he could not effectively resign from that office.

*4 We trust that the above will satisfactorily respond to your question. Please advise us if you need additional information or clarification.

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 [Section 59-123-40](#) provides for the appointment by the Governor of a member at large for the board, and [Section 59-123-50](#) provides for filling such a vacancy. In this opinion, only the filling of a vacancy in one of the positions filled by election by the General Assembly is addressed.
- 2 Filling vacancies in executive department positions is, provided for by [Section 1-1-120](#) and is consistent with [Section 1-3-220\(1\)](#) as to the Governor's appointment power.
- 3 Other portions of these Code sections are not relevant to this discussion and thus are not considered herein.
- 4 1932 Code Section 3093 is now [Section 1-3-210](#); Section 3094 is now [Section 1-3-220](#).
- 5 This Office has stated on numerous occasions that a county council member would hold an office. See, for example, [Ops. Atty. Gen.](#) dated December 10, 1982 and March 29, 1982. From the guidelines established in [Sanders v. Belue](#), 78 S.C. 171, 58 S.E. 762 (1907), and [State v. Crenshaw](#), 274 S.C. 475, 266 S.E.2d 61 (1980), a member of the board of trustees of the Medical University would appear to hold an office. The position of trustee is created by statute; a term of years is specified; duties and qualifications are specified; and a portion of the sovereign powers of the State, particularly relating to education and eminent domain, would be exercised by the trustees.
- 6 Upon taking the oath of office as a county council member, as required by [Article III, Section 26 of the State Constitution](#), he would accept the second office, thereby vacating the first office. See, 67 C.J.S. [Officers](#) § 46.

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