

1981 WL 157815 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 15, 1981

*1 Honorable Francis X. Archibald
Representative
District No. 99
House Floor
Desk 30

Dear Representative Archibald:

You have sent me a copy of a proposed bill, S407, regarding an amendment of South Carolina Code of Laws, 1976, Section 4-9-90. The proposed bill would require any county that must be reapportioned to have a new election following the reapportionment for the county council offices. You have inquired if this provision is necessary or proper and if the legislation would be legally correct without this provision.

The legislation would be legally correct without this provision. However, without the provision it will leave an ambiguity in the law as to the proper procedure for handling the possible contingency of persons being reapportioned out of the area they were elected to represent.

The General Assembly does have the power to change the term of any office that is not governed by constitutional provisions. In 67 C.J.S., Officers § 70, it is stated that [t]he sovereign power creating an office may change its tenure in the absence of constitutional restriction . . . Accordingly, the legislature may change the term of an office during the term of an incumbent . . .

In Ward v. Waters, 184 S.C. 353, 192 S.E. 410 (1937), the Supreme Court quoting with approval from State v. Hough, 103 S.C. 87, 87 S.E. 437, held that the term of office in the county government in Florence County could be extended by the Legislature as [t]hose holding offices created by the legislature hold them subject to the legislative will. The power that creates an office can impose such limitations and conditions upon the manner of filling it, and the tenure and the exercise of the duties of the office, and may modify or abolish any of these . . . Ward, supra, at 360-361.

And in Walpole v. Wall, 153 S.C. 106, 150 S.E. 760 (1929), a suit was brought contesting whether or not members of a board of trustees had been legislated out of office by newly enacted legislation. The court stated that [s]chool trustees are legislative, not constitutional, officers whose terms may be ended or extended at the will of the Legislature. Walpole, supra at 117. See also 1936 Att'y Gen. Op. 137.

Therefore, the Legislature can amend by ending or extending the term of any office created pursuant to the power of the Legislature.

If the General Assembly should decide that it does not want to shorten the terms of the affected members of the county councils, another possible alternative would be to follow the procedure utilized following the passage of the Home Rule Act. The procedure used during this transition was to allow for 'super boards'. This in effect meant that the persons who had additional years to serve in their elective offices were allowed to continue to serve while a new board was elected under the new form

of government. There did appear to be some drawbacks in this approach in that some boards proved to be unwieldy in terms of numbers of members and salaries.

*2 It may be presumed that to avoid future litigation and to provide guidance to the counties it would be beneficial to establish some procedure for electing new members of the reapportioned councils. If the counties are reapportioned and the old council members are allowed to continue to serve without new persons being elected to represent these areas, possible suits could be brought questioning, inter alia, ordinances and tax levies passed by these councils.

I hope this letter has been of assistance to you and if I can be of any further assistance, please inform me.

Very truly yours,

Treva G. Ashworth
Senior Assistant Attorney General

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