

1980 WL 120677 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

February 19, 1980

\*1 Robert P. Lusk, Esquire  
Anderson County Attorney  
Post Office Box 1286  
Anderson, South Carolina 29622

Dear Mr. Lusk:

You have requested an opinion from this Office as to whether or not a member of the Anderson County Planning and Development Board (Board) who was recently appointed to serve the unexpired term of a deceased member is validly holding office. As I understand the facts, on December 29, 1979, the Anderson County Legislative Delegation, acting pursuant to its recommendatory power under Section I of Act No. 91 of 1959 [51 STAT. 93 (1959)], recommended its nominee to the Governor for appointment. On January 3, 1980, the Governor sent the nominee's name to the Secretary of State stating that he had appointed the nominee 'this day' and on January 11, 1980, the Governor commissioned him. Nevertheless, on January 1, 1980, an Anderson County ordinance which places the power to appoint members to the Board in the Anderson County Council became effective pursuant to [Section 4-9-170, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended.

The authorities appear to be split on the question of when an appointment to public office becomes effective, to wit:

. . . It may be said that 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 . . . 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. 63 AM.JUR.2d [Public Officers and Employees](#) § 99 at 692.

In South Carolina, the Governor signs the commission pursuant to [Section 8-3-10, CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended, and so, according to the above-quoted authority, the appointment was not complete until January 11, 1980. Nevertheless, in [State, ex rel. Coleman v. Lewis](#), 181 S.C. 10, 186 S.E. 625 (1936), the South Carolina Supreme Court noted that: . . . 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.

Assuming, then, that the Governor's act in commissioning the new Board member was not necessary in order to make the appointment complete, it became complete at least by January 3, 1980, and perhaps earlier, again depending upon which authority is relied upon. There is authority to the effect that a written instrument is necessary and that an oral appointment may not be sufficient. 63 AM.JUR.2d [Public Officers and Employees](#) § 100 (citing [Marbury v. Madison](#), 1 Cranch (U.S.) 137, 2 L.Ed.60); 67 C.J.S. [Officers](#) § 44. Other cases have held that it is necessary only that the appointing authority's decision is evidenced by some open unequivocal act. [Id.](#) (citing [Hoke v. Field](#), 10 Bush (Ky.) 144); 67 C.J.S. [Officers](#) § 40. My understanding from one of the members of the Anderson County Legislative Delegation is that the Governor may have orally appointed the new Board member on the date that he received the recommendation, *i.e.*, on December 29, 1979, in which case, assuming an oral appointment to be effective, the appointment is indisputably valid because the ordinance by its own terms was not yet effective.

\*2 The foregoing analysis of the question which you have posed indicates its complexity. Because the question is a close one, I would suggest that a judicial resolution sought pursuant to [Sections 15-53-10 et seq.](#), [CODE OF LAWS OF SOUTH CAROLINA](#), 1976, as amended (the Uniform Declaratory Judgments Act) is the only means by which a definitive answer can be obtained.

With kind regards,

Karen LeCraft Henderson  
Senior Assistant Attorney General

1980 WL 120677 (S.C.A.G.)

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.