

1977 S.C. Op. Atty. Gen. 29 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-21, 1977 WL 24364

Office of the Attorney General

State of South Carolina

Opinion No. 77-21

January 18, 1977

*1 David W. Goldman, Esquire
Sumter County Attorney
Bryan, Bahnmuller, King, Coldman & McElveen
Post Office Box 2038
Sumter, South Carolina 29150

Dear Mr. Goldman:

You have requested an opinion from this Office as to the present status of the members of the Sumter County Board of Education (Board). In my opinion, they are at least de facto officers who can continue to perform the functions of their office until their successors are appointed and qualify.

As I understand the facts, since approximately 1967, the Sumter County Commission (Commission) has been appointing the members of the Board pursuant, purportedly, to the authority vested in it by the provisions of Act No. 371 of 1967. 55 STAT. 371 (1967). Section 9(1) of that Act provided in part:

. . . the commission shall perform all functions related to the recommendation or appointment of boards or commissions or officials of Sumter County as were formerly vested in the Sumter County Legislative Delegation, or in the Sumter County Legislative Delegation, including the Senator, or in the Senator or any other words of similar import, as provided by law; . . .

Pursuant to Section 21-4050, CODE OF LAWS OF SOUTH CAROLINA, 1962, as amended, the Sumter County Legislative Delegation, including the Senator, had been empowered to recommend the appointment by the Governor of the Board members; it had not been vested with the appointment power. Therefore, the only power vis a vis the appointment of the Board members which passed from the Legislative Delegation to the Commission by virtues of the provisions of Act No. 371 of 1967 was the power to recommend their appointment by the Governor.

The general rule as to a public officer who holds office pursuant to an invalid appointment is stated as follows: One of the important classes of de facto officers consists of those who enter into possession of an office and exercise its functions by reason of an appointment which is informal or defective. . . . the defective appointment constitutes color of title or color of appointment. Therefore, the general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner. 63 AM JUR 2d Public Officers and Employees § 504 at 936-7.

In view of the above-quoted authority, my opinion is that the Board members are de facto officers.

The general rule as to the validity of acts taken by a de facto officer is stated as follows:

The general rule is that the acts of a de facto officer are valid as to third persons and the public until his title to office is adjudged insufficient, and such officer's authority may not be collaterally attacked or inquired into by third persons affected. The practical effect of the rule is that there is no difference between the acts of de facto and de jure officers so far as the public and third persons are concerned. The principle is placed on the high ground of public policy, and for the protection of those

having official business to transact, and to prevent a failure of public justice. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office. They have a right to assume that officials apparently qualified and in office are legally such, even though a contest is pending. 63 AM JUR 2d Public Officers and Employees § 518 at 942. [Emphasis added.]

*2 Applying the above-quoted language to the members of the Board, I am of the opinion that they can continue to function until their successors are appointed and qualify or until their right to hold office is successfully challenged. Cf., State, ex rel. McLeod v. Court of Probate of Colleton County, et al., 223 S. E. 2d 166 (Supplemental Opinion dated February 10, 1976).

With kind regards,

Karen LeCraft Henderson
Assistant Attorney General

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