ALAN WILSON
ATTORNEY GENERAL

October 11, 2022

Brian D. Lamkin
Inspector General
State of South Carolina
110 Centerview Drive
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Columbia, South Carolina 29210

Dear Mr. Lamkin:

We received your letter requesting an opinion of this Office concerning the requirement that all public officials file a statement of economic interest prior to taking an oath of office or acting upon his or her official responsibilities. Specifically, you request us to opine on the following questions:

1) Whether an oath of office taken by an elected school district board member prior to the filing of that member's statement of economic interests is valid;
2) Whether votes and other acts undertaken as official responsibilities by an elected school district board member prior to that member's filing of a statement of economic interests are valid;
3) Whether an oath must be taken by an elected school district board member during each new term of office; and
4) Whether votes and actions taken prior to the filing of that member's statement of economic interest is curable.

Law/Analysis

A. Validity of taking an oath of office prior to filing a statement of economic interest

Section 8-13-1110(A) of the South Carolina Code (2019), contained in the South Carolina Ethics Reform Act, mandates

> [n]o public official, regardless of compensation, and no public member or public employee as designated in subsection (B) may take the oath of office or enter upon his official responsibilities unless he has filed a statement of economic interests in accordance with the provisions of this chapter with the appropriate supervisory office.

When interpreting a statute, this Office espouses to the primary rule of statutory construction, which is "'to ascertain and give effect to the intent of the legislature.'" Bryant v. State, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009) (quoting Mid–State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996)).

> Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). In Tempel v. South Carolina State Election Commission, 400 S.C. 374, 377, 735 S.E.2d 453, 455 (2012) our Supreme Court considered section 8-13-1110(B) stating: "Public officials are required, under section 8–13–1110(B), to file an SEI with the appropriate supervisory office prior to taking office." As you mentioned in your letter, section 8-13-1110(B) lists school district board members as public officials who must file a statement of economic interest. Based on a plain reading of the statute, section 8-13-1110 requires school board members to file a statement of economic interest prior to taking their oath of office. However, you question whether an oath taken by an elected school board member is valid if he or she did not first file a statement of economic interest.

Our courts have yet to address this specific question, but tend to take a strict view of statutes that require the filing of statements of economic interest. In in Anderson v. South Carolina Election Commission, 397 S.C. 551, 725 S.E.2d 704 (2012), our Supreme Court considered section 8-13-1356(B) of the South Carolina Code (2019), which mandates that candidates who are not otherwise exempt must file a statement of economic interest at the same time as their declaration of candidacy. Our Supreme Court concluded:

> We hold the unambiguous language and expression of legislative intent of § 8–13–1356(B) and (E) require an individual to file an SEI at the same time and with the same official with whom an SIC is filed, and prohibit political party officials from accepting an SIC which is not accompanied by an SEI. Accordingly, the names of any non-exempt individuals who did not file with the appropriate political party an SEI simultaneously with an SIC were improperly placed on the party primary ballots and must be removed.

Id. at 558, 725 S.E.2d at 707-08. Our Supreme Court came to a similar conclusion in Tempel v. South Carolina State Election Commission, 400 S.C. 374, 735 S.E.2d 453 (2012), finding a candidate who was not otherwise exempt and filed their statement of economic interest prior to

their statement of intention of candidacy was disqualified pursuant to section 8-13-1356(B) and the circuit court's order to conduct a special primary election was appropriate.

Unlike in Anderson and Tempel, your question involves an individual who is no longer a candidate for office, but who has taken an oath and assumed the duties of the office prior to filing a statement of economic interest. This situation certainly runs afoul of section 8-13-1110, but we believe your concern relates the consequences of this violation. In 2008, we considered a similar situation in which a person failed to file a statement of economic interest prior to being sworn in as a member of a school board of trustees. Op. Att'y Gen., 2008 WL 1960281 (S.C.A.G. Apr. 2, 2008). We were asked whether she was qualified to hold that position and whether she could continue in her capacity as a member of the board. Id. We noted, the Ethics Reform Act did not give the Ethics Commission authority to remove the board member despite her violation of section 8-13-1110. We explained:

> Article 15 of the Ethics Reform Act contains the penalties for violation of the Act's provisions. Section 8-13-1510 of the South Carolina Code (Supp. 2007) states a person who is required under the Act to file a report or statement, but fails to do so or files such a report or statement late may be assessed a civil penalty. However, this provision does not give the Ethics Commission the authority to remove the individual from office for failure to file. Nor do we find any other provision of the Ethics Reform Act giving the Commission such permission. Thus, we do not believe that Causby's failure to file results in an automatic removal from office under the provisions of the Ethics Reform Act.

Id. The opinion continued on to state that while we do not believe the Ethics Commission has authority to remove a school board member for violating section 8-13-1110, if another provision allows for the removal of the board member for cause, as did the enabling legislation for this particular school board, then violating the Ethics Reform Act could be seen as cause for removal by a court. Furthermore, we noted:

> Even though we do not believe Causby may be removed from office based on a violation of section 8-13-110(A), we believe this provision does create some question as to whether Causby properly entered into her position. Section 8-13-1110(A) mandates the filing of a statement of economic interest as a condition of entering office. Your letter indicates that Causby did not file such a statement, but appears to have assumed her position on the Board. In our research, we were unable to find a court decision or opinion of this Office considering the effect of a violation of this provision on an individual's ability to continue to hold an office. However, we suggest this may be a situation in which an individual concerned about Causby's qualification for her position on the Board may consider filing a *quo warranto* action to determine Causby's eligibility to hold office. See S.C. Code Ann. § 15-63-60 (2005).

Id.

Based on the reasoning in our 2008 opinion, we continue to believe the Ethics Commission does not have the authority to remove someone from office for failing to comply with 8-13-1110, but may enforce such a provision through the use of civil and criminal penalties as provided under the Ethics Reform Act. However, if the school board's enabling legislation or some other authority allows for removal for cause, a court may find this violation as sufficient cause for removal. Additionally, considering the Supreme Court's decisions in Anderson and Tempel, a *quo warranto* or declaratory judgment action brought by an appropriate party could result in a court determination that such an individual is ineligible to hold office and must be removed.[1]

B. Validity of acts taken by an elected school board member who did not file a statement of economic interest

Next, you inquire as to whether actions taken by an elected school board member who did not file a statement of economic interest prior to taking his or her oath of office are valid. As explained above, a court would have to determine an individual is ineligible to hold office for violating section 8-13-1110. However, assuming a court makes this determination, we do not believe such ineligibility would invalidate the actions taken by the school board member. In a 2004 opinion addressing a situation in which member of an airport commission served beyond their term limit and therefore was ineligible to hold the office, we determined that because a statute authorizing the officer to hold over did not exist, that officer serves in a *de facto* capacity. Op. Att'y Gen., 2004 WL 3058236 (S.C.A.G. Dec. 16, 2004). "A '*de facto*' officer . . . is 'one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority.'" Id. (quoting Heyward v. Long, 178 S. C. 351, 367, 183 S.E. 145 (1936)). Quoting a 1992 opinion, we stated:

> This Office has consistently recognized that "[a]s an officer *de facto*, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer *de jure* unless or until a court would declare such acts void or remove the *de facto* officer from office." Op. S.C. Atty. Gen., March 15, 2000. See for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848). In addition, we have opined on numerous occasions that an individual may continue performing the duties of a previously held office as a *de facto* officer, rather than *de jure* until a successor is duly selected. See Ops. S.C. Atty. Gen., December 23, 1996 and September 5, 1995 as examples

[1] A writ of *quo warranto*, now codified at section 15-63-60 of the South Carolina Code (2005), has traditionally served as the means to try title to an office and to remove those serving illegally. Pursuant to section 15-63-60, a *quo warranto* action may be initiated by the Attorney General or "by a private party interested on leave granted by a circuit judge . . . ." S.C. Code Ann. § 15-63-60. However, "it is now the majority rule that a declaratory judgment may serve the same function as a writ of *quo warranto*." Op. Att'y Gen., 2007 WL 419410 (S.C.A.G. Jan. 17, 2007).

> thereof. In other words, the acts of a *de facto* officer "would not be void *ab initio*, but would be valid, effectual and binding unless and until a court should declare otherwise." Op. S.C. Atty. Gen., December 31, 1992.

Id. Other opinions similarly recognize the *de facto* status of officers invalidly appointed. See Ops. Att'y Gen., 2007 WL 1031442 (S.C.A.G. Mar. 28, 2007); 2004 WL 2745664 (S.C.A.G. Nov. 15, 2004). Accordingly, if a court were to find an elected school board member who failed to file a statement of economic interest prior to taking his or her oath is ineligible to hold office, we believe that individual serves as a *de facto* officer until removed. As a *de facto* officer, any actions taken as to the public or third parties would be valid unless and until a court declares such acts void or removes the member from office.

C. Oath requirement after reelection

Next, you inquire as to whether a school board member who is reelected must take an oath before each new term of office. Article VI, section 4 of the South Carolina Constitution (2009) requires "[t]he Governor, Lieutenant Governor, and all other officers of the State and its political subdivisions, before entering upon the duties of their respective offices, shall take and subscribe the oath of office as prescribed in Section 5 of this article." Section 8-3-10 of the South Carolina Code (2019) provides: "It shall be unlawful for any person to assume the duties of any public office until he has taken the oath provided by the Constitution and been regularly commissioned by the Governor." While neither the South Carolina Constitution nor section 8-3-10 specifically address officers who are reelected, this Office takes the position that an oath is required prior to every new term. In a 1981 opinion considering this question, we cited American Jurisprudence, stating:

> [a] public officer who at the end of his term of office is again chosen for the office must generally qualify for his new term by furnishing the required bond, taking an oath of office, or performing whatever other acts may be necessary to qualify him for the position, and his failure to do so is accompanied by the same consequences as in the case of an original election or appointment.

Op. Att'y Gen., 1981 WL 157957 (S.C.A.G. Sept. 9, 1981) (quoting 63 Am.Jur.2d Public Officers and Employees § 123). We believe this opinion is correct and continue to advise public officers to take an oath prior to each new term of office.

D. Ability to cure votes and other actions prior to filing a statement of economic interest

Lastly, you ask whether votes and actions taken by an elected school board member prior to filing his or her statement of economic interest may be cured, presumably by filing the statement of economic interest. As we discussed in part B above, if a court were to find an elected school board member is ineligible to hold office for failing to file his or her statement of economic interest prior to taking the oath of office, actions and votes take by that individual would be in their *de facto*

capacity. Therefore, the board member's actions would be valid as to the public and third parties unless or until a court declares otherwise or removes such individual from office.

Conclusion

Section 8-13-1110 makes clear a public official, including an elected member of a school district board of trustees, must file a statement of economic interest prior to taking their oath of office. While we do not believe the Ethics Reform Act allows the Ethics Commission to remove a board member from office, failure to satisfy this requirement could result in civil and possibly criminal charges brought by the Ethics Commission. Additionally, such a violation may be sufficient cause for removal if allowed under the board's enabling legislation. Moreover, given that our courts take a strict view of statutes that require candidates to file a statement of economic interest, a court could declare such an individual ineligible to hold office and remove them.

If a court were to find a board member who fails to file a statement of economic interest prior to taking his or her oath of office ineligible, we believe the board member would serve in a *de facto* capacity. As such, votes and other actions taken by the board member remain valid unless and until a court removes them from office. Furthermore, we believe elected school board members, just like other public officers, must take an oath of office prior to the start of every new term.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General