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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 26, 2004

The Honorable H. B. Limehouse
Chairman
Charleston County Legislative Delegation
4 Courthouse Square
Charleston, South Carolina 29401

Dear Representative Limehouse:

You have provided certain information relative to the nomination of the Democratic candidate for that House District. On August 26, 2004, you note in your letter that the Charleston County Election Commission "will hold a special meeting to determine if an additional candidate can be certified on the ballot for S.C. House District 115." By way of background, you state:

1. On March 16, 2004 Representative Wallace Scarborough properly filed a Statement of Candidacy with the Charleston County Republican Party to be a candidate for S. C. House District 115 and later certified by the Charleston Election Commission.
2. On March 30, 2004 Larissa Julia Mason properly filed a Statement of Candidacy with the Charleston County Democratic Party to be a candidate for S.C. House District 115 and was never certified by the Charleston Election Commission.
3. One day later, by affidavit, dated March 31, 2004, Julia Mason withdrew her intention of candidacy.
4. On April 20, 2004 the Democratic Party held a convention in Charleston. During that Convention, according to newspaper accounts, they did not appoint a Democrat to take the place of Ms. Mason.
5. On May 1, 2004 the State Democratic Party held a convention in Columbia S.C. During that Convention, according to newspaper accounts, they did not appoint a Democrat to take the place of Ms. Mason.
6. On May 19, 2004 the S.C. Democratic Party advised the Charleston County Election Commission by letter that it had certified Frank Procaccini as the sole Democratic Candidate for S.C. House District 115.

You further reference S.C. Code Ann. Section 7-13-40 as possibly controlling because, as you observe, such statute provides that "[w]ritten certification of the names of all candidates to be

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placed on primary ballots must be made by the political party chairman, vice chairman, or secretary to the State Election Commission or the county election commission, whichever is responsible under the law for preparing the ballot, not later than twelve o'clock on April 9th ...." Thus, you ask "[i]s April 9th the applicable deadline for this election as referenced by statute as to whether a candidate appears on the ballot?" It is our opinion that § 7-11-15, rather than § 7-13-40, is controlling. Accordingly the Charleston County Election Commission should determine, based upon all the facts and circumstances, whether the State Democratic Party exercised its discretion pursuant to § 7-11-15 within a reasonable time period and whether it reasonably afforded an "opportunity for the entry of other candidates," as set forth below.

Law / Analysis

S.C. Code Ann. Section 7-13-40 reads in pertinent part:

> In the event that a party nominates candidates by party primary, a party primary must be held by the party and conducted by the State Election Commission and the respective county election commissions on the second Tuesday in June of each general election year, and a second and third primary each two weeks successively thereafter, if necessary. Written certification of the names of all candidates to be placed on primary ballots must be made by the political party chairman, vice chairman, or secretary to the State Election Commission or the county election commission, whichever is responsible under law for preparing the ballot, not later than twelve o'clock noon on April ninth, or if April ninth falls on a Saturday or Sunday, not later than twelve o'clock noon on the following Monday....

Section 7-11-15(2) also states:

> [c]andidates seeking nomination for the State Senate or House of Representatives must file their statements of intention of candidacy with the county executive committee of their respective party in the county of their residence. The county committees must, within five days of the receipt of the statements, transmit the statements along with the applicable filing fees, to the respective state executive committees. However, the county committees must report all filings to the state committees no later than five p.m. on March 30th. The state executive committees must certify candidates pursuant to Section 7-13-40.

Another part of § 7-11-15 addresses the procedure in which a political party may provide a substitute candidate upon the death or withdrawal of a candidate after filing has closed. Such provision sates:

> [i]f, after the closing of the time for filing statements of intention of candidacy, there are not more than two candidates for any one office and one or more of the

> candidates dies, or withdraws, the state or county committee, as the case may be, if the nomination is by political party primary or political party convention only may, in its discretion, afford opportunity for the entry of other candidates for the office involved; however, for the office of State House of Representatives or State Senator, the discretion must be exercised by the state committee.

Section 7-11-15 also states that "[i]n order to qualify as a candidate to run in the general election, all candidates seeking nomination by political party primary or political party convention must file a statement of intention of candidacy between noon March sixteenth and noon on March thirtieth as provided in this section."

Based upon the information you have provided, the Democratic candidate – Ms. Mason – filed a Statement of Candidacy with the Charleston County Democratic Party as a candidate for House District 115 on March 30. This filing met the deadline for candidacy established by § 7-11-15. Pursuant to § 7-13-40, the time for certifying Ms. Mason – had she remained a candidate – would have been April 9. However, you state that Ms. Mason withdrew as a candidate on March 31, after the filing period had ended.

In previous opinions, we have concluded that § 7-11-15 is controlling as to situations in which there are no more than two candidates seeking a party's nomination and one or more of these persons withdraws from candidacy after filing, but before the primary is held. For example, in Op. S.C. Atty. Gen., April 18, 1996, we found that "[i]f the candidate's withdrawal comes before the primary and there are only two candidates for that position, the party has discretion to reopen filing ..." pursuant to § 7-11-15. We further noted that this conclusion was consistent with an earlier opinion – Op. No. 88-25 (March 16, 1988).

The 1996 opinion also addressed in detail whether any time limits are placed upon the political party in providing a substitute candidate pursuant to § 7-11-15. There, we reasoned that

> [w]hile Section 7-11-15 would be applicable where withdrawal occurs prior to the primary, and the decision to reopen filing is a matter of discretion with "the state or county committee ... [t]o afford the opportunity for the entry of other candidates," I would advise that it would be expected that the political parties would act reasonably in the exercise of such discretion. As stated in Op. No. 2858 (March 17, 1970), the exercise of discretion "is not absolute." We noted in an opinion dated April 11, 1968 that "[i]f the committee decides to open the entries for additional candidates, it should afford a reasonable time for their entry." In an opinion of March 30, 1972, we advised that "[a] two week period, the length of the original filing period, would be an appropriate period, in our opinion, to re-open the filing ... ."
>
> It is a well recognized principle of law that where discretion is given by statute, the exercise of that discretion must be done within a reasonable period of

> time .... The need for such expedition is patently obvious in election matters where time is almost always at a premium. Thus, while § 7-11-15 grants discretion to determine whether or not to allow additional filing for the primary, that decision, one way or the other should be made expeditiously and with due diligence. (emphasis added).

Consistent with this reasoning, the Court of Appeals, in Montgomery v. Mullins, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997), emphasized that the determination as to "[w]hether or not an action has been accomplished within a reasonable period of time depends on the circumstances of the case." (citing Beacham v. Ross, 190 S.C. 219, 2 S.E.2d 690 (1939)).

Of course, this Office cannot make factual determinations in its issuance of a legal opinion. Thus, we cannot ascertain that a certification by the Democratic Party on May 19 following withdrawal of its candidate on March 31 is or is not reasonable. See, Op. S.C. Atty. Gen., December 12, 1983. However, the printing and distribution of ballots for election to the House of Representatives is the responsibility of a county election commission. See, § 7-13-340. Thus, any determination as to whether the South Carolina Democratic Party's certification of Mr. Procaccini as its substituted candidate to the Charleston County Election Commission on May 19 was within a reasonable period of time would, in the first instance, rest with the Charleston County Election Commission.

As noted above, § 7-11-15 expressly provides that a statement of intention of candidacy is necessary to qualify as a candidate to run in the general election for candidates "seeking nomination by political party primary or political party convention ... ." Assuming for purposes herein that Ms. Mason indeed filed her statement of intention of candidacy on March 30, it is obvious that the method of nomination employed was most likely the political party primary. If that is true, the typical method of providing for a substitute candidate is by re-opening filing immediately upon the first candidate's withdrawal. As we advised both in the 1996 opinion, as well as in an earlier 1972 opinion, "[a] two week period, the length of the original filing period [pursuant to § 7-11-15] would be an appropriate period, in our opinion, to re-open filing."

Moreover, the express language of § 7-11-15 provides that "if the nomination is by political party primary or political party convention only [the state committee] may, in its discretion, afford opportunity for the entry of other candidates for the office involved ...." (emphasis added). While we have apparently not attempted to delineate the precise meaning of this language, we have consistently concluded that such wording usually envisions the reopening of filing under the political party primary method. For example, in Op. S.C. Atty. Gen., May 8, 1980, we stated:

> [t]herefore, if a Senator should withdraw his candidacy for office, it would be in the discretion of the State committee as to whether or not they desire to reopen filing for this office. Should they decide to reopen filing, I am not aware of any State law that would prohibit the Senator from refiling for this same office.

And, in our opinion, dated April 7, 1978, we observed that "[t]his Office has previously interpreted this statute [predecessor to § 7-11-15] to mean that after a candidate's withdrawal, if there are less than two candidates vying for the party's nomination for any one seat, the filing can be reopened." Moreover, in Op. S.C. Atty. Gen., Op. No. 1314 (April 25, 1962), we commented that § 7-11-15's earlier version "was designed to give the County or State Executive Committee an opportunity to permit candidates to enter a race where the withdrawal or death of a candidate would result in a declared candidate to be nominated without opposition." Thus, we have consistently interpreted § 7-11-15 as contemplating a reopening of filing, should a political party exercise the discretion to find a substitute nominee following a candidate's withdrawal.

We note also that a reopening of filing is indeed consistent with the specific language of § 7-11-15. Such provision uses the word "entry." One meaning of "entry" is "one in a competition." American Heritage College Dictionary (3d ed.). Section 7-11-15 also speaks of "candidates," – in the plural. Moreover, § 7-11-15 uses the language "if the nomination is by political party primary or political party convention only ...." (emphasis added).

Clearly, the language and spirit of § 7-11-15 is to require open competition for new candidates to replace the withdrawn candidate or candidate. As former Attorney General McLeod stated in an opinion of April 11, 1968 "[i]f the committee decides to open the entries for additional candidates, it should afford a reasonable time for their entry." (emphasis added).

In bestowing discretion upon the party committee to "afford opportunity for the entry of other candidates," § 7-11-15 thus clearly promotes open competition in obtaining a candidate if the original candidate dies or withdraws. As we observed in the March 30, 1972 opinion, referenced above, if the party decides to reopen filing, "the Party should [advertise] the re-opening so that all qualified Party members who might be interested in running will have the opportunity to file."

Conclusion

It is our opinion that § 7-11-15, rather than § 7-13-40, is controlling with respect to the situation where the only Democratic Party candidate for House District 115 withdraws after the close of filing, but before the primary. Section 7-13-40 deals with the deadline (April 9) for certifying candidates after filing has closed. Section 7-11-15, on the other hand, specifically addresses death or withdrawal of a candidate where there are two candidates or fewer for that party's nomination to that office. The latter statute bestows discretion upon the State Party Executive Committee to "afford opportunity for the entry of other candidates for the office involved" if the nomination process is by political party primary or political party convention.

This Office has consistently interpreted § 7-11-15 as bestowing discretion upon the political parties to reopen filing in a situation in which withdrawal of a candidate occurs after filing has closed, but before the primary has been held. Our reasoning is based upon the fact that the major political parties have typically nominated their candidates by party primary. Also, the underlying

purpose of § 7-11-15 is to promote open competition for the nomination of candidates by a party to run in the general election. Over the years, we have also concluded that a Party's exercise of discretion in providing the opportunity to select a successor nominee must be done within a "reasonable" period of time so as to insure that the replacement process operates smoothly and expeditiously. Thus, we have recommended that a two week period for reopening filing be held – the same period as is provided by § 7-11-15 for the original nominating process.

Of course, this Office cannot make factual findings regarding the situation about which you inquire. However, the Charleston County Election Commission possesses the duty, pursuant to § 7-13-340, to make a determination as to which names appear on the ballot. With respect to any such determination by the election commission which is adverse to a particular candidate, other avenues are available for review of the determination, including judicial review, if necessary.

Based upon the authorities set forth herein, it would be a matter of legitimate inquiry for the Charleston County Election Commission to determine whether the name of the new candidate for House District 115 was certified within a "reasonable" period of time. Such inquiry would obviously include whether the Party reopened filing so that an "opportunity for the entry of other candidates for the office involved" was provided. Further, such inquiry by the Election Commission could determine whether any reopening of filing by the Party was limited to a two week period as this Office has recommended, consistent with § 7-11-15's two week period for the original filing period.

The purpose of a political primary is to allow citizens to have a direct role in the selection of a particular party's candidates. No party affiliation is necessary in South Carolina to vote in a party primary. Since the 1890s, political parties have used the primary method of nomination to insure open competition among candidates and citizen participation.

In short, the County Election Commission should determine, based upon all the facts and circumstances here, whether the requirements of § 7-11-15 have been met. The issue which the Commission must determine under § 7-11-15 is whether the Party afforded the "opportunity for the entry of other candidates," and did so within a reasonable period of time by reopening filing for a two week period as the opinions, referenced above, have concluded. Such inquiry by the Commission would enable it to determine the proper composition of the ballot for House District 115.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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