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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

December 16, 2004

The Honorable Edward H. Pitts, Jr.
Member, House of Representatives
112 Addison Court
Lexington, South Carolina 29072

Dear Representative Pitts:

You have requested an opinion concerning "the standing of commissioners serving on the Columbia Metropolitan Airport Commission." As you note, the "commission is appointed by the Lexington and Richland legislative delegations and the city of Columbia." By way of background, you provide the following information:

> [s]tate law says each commissioner shall serve no more [than] two four-year terms, and I believe it has been interpreted in the past that a commissioner can serve the remainder of an unexpired term and up to an additional two full four-year terms. There are commissioners currently serving who have served more than the allowed two four-year terms.

You have asked the following questions:

> [t]he first question is, are the members that are currently serving beyond the allowed time on the Columbia Metropolitan Airport Commission in good standing and what types of problems does their participation present as the commission votes and makes decisions?
>
> The second question is what needs to be done to enforce state law with regard to the term limits and appointment of commissioners.

Thus, your concern is, in essence, what is the procedural mechanism available to "oust" those members who have served beyond their lawfully permitted terms, and are, therefore, no longer legally qualified to serve. In addition, you wish to be advised as to the legal status of any votes rendered by these individuals as members of the Commission.

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Law/Analysis

The Richland-Lexington Airport Commission was created pursuant to S.C. Code Ann. Section 55-11-310 et seq. Section 55-11-320 sets forth the composition and method of appointment of Commission members in pertinent part as follows:

> [t]he corporate powers and duties of the Richland-Lexington Airport District must be exercised and performed by a commission to be known as Richland-Lexington Airport Commission. The commission must be composed of twelve members to be appointed by the Governor as follows: five members must be appointed upon the recommendation of a majority of the Lexington County Legislative Delegation, five members must be appointed upon the recommendation of a majority of the Richland County Legislative Delegation, and two members must be appointed upon the recommendation of the City Council of the City of Columbia. The members of the commission shall serve for terms of four years and until their successors are appointed and qualify. Members may not serve more than two consecutive terms. (emphasis added).

As you indicate in your letter, we have consistently construed the phrase "more than two consecutive terms" as two full terms. As was stated in Op. S.C. Atty. Gen., August 30, 1989,

> [t]his Office has advised previously that "the general weight of authority and a better rule is that a partially served term is not to be considered as a full term or as coming within the prohibition against the holding of more than two consecutive terms." Op. Atty. Gen. dated August 13, 1981. See also Ops. Atty. Gen. dated January 28, 1980 .... August 30, 1982; August 16, 1985; and April 11, 1984. Thus, one who has served a partial (i.e. the remainder of an unexpired term on the Florence City-County Airport Commission, would be eligible to serve two full terms on the Commission, under the terms of the ordinance.

Applying the foregoing legal principles, we thus assume from your letter that the individuals in question have exceeded their statutorily designated term limits. Your concern is what is the legal status of any votes taken by these individuals as persons ineligible to hold the office. Further, you question what is the mechanism available to enforce the statutory term limits set forth in § 55-11-320.

We first address the status of any votes taken by a presumptively ineligible member of the Commission. Section 55-11-320 provides that members "shall serve for terms of four years and until their successors are appointed and qualify." In an opinion dated June 5, 2003, we commented at length upon the legal status of those public officers whose terms have expired as a result of their term ending or as a result of being ineligible to hold the office because of a statutorily imposed term limit. That opinion related to the statutorily provided term limits of highway commissioners.

Certain commissioners had exceeded their term limits, and yet the legislative delegation continued to reappoint those individuals. In that opinion, we noted the following:

> The law distinguishes somewhat between an officer who holds over by statute and one holding over where no statute providing for holdover status is applicable. In Op. S.C. Atty. Gen., Op. No. 84-129 (November 5, 1984), we noted that "where a statute provides that an officer hold over until a successor is selected and qualifies, such period is as much a part of the incumbent's term of office as the fixed constitutional or statutory period." A person who by statute holds over until a successor is elected or appointed and qualifies is, in other words, a de jure officer. On the other hand, it was recognized by our Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) that
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> > ... in the absence of pertinent statutory or constitutional provision, public [officers] ... hold over de facto until their successors are appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the "holdovers" are entitled to retain the offices. As nature abhors a void, the law of government does not countenance an interregnum.
>
> Thus, where no statute authorizing an officer to hold over is present, that officer serves in a de facto capacity.
>
> A de jure officer is one who is in all respects legally appointed or elected to the office and has qualified to exercise the duties of the office. See, Op. S.C. Atty. Gen., February 10, 1984. A "de facto" officer, by contrast, 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." Heyward v. Long, 178 S. C. 351, 367, 183 S.E. 145 (1936).

With regard to the validity of such persons voting, even where they were improperly appointed in contravention of the statutory term limits, we further stated that

> [t]his 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 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. Accordingly, assuming these individuals are simply continuing to hold over without reappointment, their acts would, nevertheless, be valid.

Should the individuals in question be reappointed as commissioner without sitting out a term, and assuming the correctness of our earlier opinions, the law would deem these persons in question ineligible to hold office. It is well recognized under the general law that "in order to hold a public office, one must be eligible and possess the qualifications prescribed by law, and the appointment to office of a person who is ineligible or unqualified gives him no right to hold the office." Op. S.C. Atty Gen., January 14, 1999. In that same opinion, we noted that the "appointment of an individual not qualified to serve is void and an absolute nullity." Citing 67 C.J.S., Officers, § 19. This Office has previously stated that if a person is not qualified to hold office when he is appointed and begins to serve, that appointment is ineffective. Op. S.C. Atty. Gen., February 17, 1983.

However, the January 14, 1999 opinion also recognized that "[t]he fact that the appointment is an absolute nullity would not necessarily jeopardize the actions taken by the individual in question during his service on the board or commission." Just as the situation where the individual holds over beyond his or her statutory term or without statutory authorization to do so, "[i]t is well settled that one who holds office under an appointment giving color of title may be a de facto officer, although the appointment is irregular or invalid." Id. As the opinion stated, "[t]he acts of a de facto officer are valid and effectual so far as they concern the public or the rights of third parties."

And, as we stated in an opinion dated January 31, 1983,

[t]he 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 as 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, § 318 at 942.

Thus, the votes or official acts of members of the Richland-Lexington Airport Commission who might have been appointed in contravention of the statutory term limits, or who may be holding over beyond the statutorily authorized terms, would be valid with respect to third persons. Our courts have consistently upheld the actions of de facto officers as fully valid and binding. Such persons would be acting under "color of law" even though their appointment might be invalid.

As to your question concerning how the term limit provisions may be enforced, we have consistently advised that only a court may "oust" an individual presently holding office from such position. For example, in Op. S.C. Atty. Gen., July 27, 1987, we noted that

> [i]f it should be determined that an individual appointed to serve on the Authority's governing body does not actually live within the specified residency limitations, ... [o]nly a court could remove the affected individual from office, having first determined that the residency requirement has not been met. To bring the matter before the court, a declaratory judgment or quo warranto action could be commenced; there may be other appropriate causes of action as well.

Moreover, in an opinion of August 28, 1981, we commented that "[a]lthough there is substantial question whether or not this councilman was duly elected, it would appear that the best procedure would be for an action of quo warranto to be brought to try his right to this office. A quo warranto hearing would also allow a South Carolina court to decide this State's view as to the legal issue involved." And, in Op. No. 77-92 (March 30, 1977), we said that

> [w]ith respect to the procedure for determining eligibility of one elected, ... the only means of achieving this is by a court determination sought by an individual with standing to determine the issue. Most probably, an action in the nature of quo warranto or a declaratory action would be a feasible means of having such matter resolved.

A quo warranto action is one brought in circuit court to try title to an office allegedly held by an officeholder. State v Stickley, 80 S.C. 64, 61 S.E. 211 (1908). The procedure for bringing a quo warranto action is set forth in § 15-63-10 et seq. of the Code. Section 15-63-60 provides that

> [a]n action may be brought ... by a private party interested on leave granted by a circuit judge against the parties offending in the following cases:
>
> (1) When any person shall ... unlawfully hold or exercise any public office ... created by the authority of this State.

Conclusion

Thus, the votes or actions of the members of the Richland-Lexington Airport Commission in question would likely be deemed valid, notwithstanding the fact that such members may be appointed and serving in contravention of the statutory term limit. As members de facto, it has long been the law in South Carolina, as reflected in court decisions and the opinion of this Office that the official actions of these persons would be upheld with respect to third persons.

Secondly, only a court could enforce the term limits mandated by § 55-11-320. Such court action could be brought as a declaratory judgment action or more specifically as a quo warranto action to try title to the office. Section 15-63-60 authorizes a quo warranto action to be brought in the name of the State or upon the complaint of any private party on leave granted by a circuit judge against any person who "... shall usurp, intrude into, or unlawfully hold or exercise any public office ..." in South Carolina.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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