



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
 ATTORNEY GENERAL

July 7, 2005

The Honorable Michael A. Pitts
 Member, House of Representatives
 372 Bucks Point Road
 Laurens, South Carolina 29360

Dear Representative Pitts:

By letter, you have requested an opinion regarding the following four questions:

1. It is my understanding that a county election commission is created by State Law 7-13-70. Is that correct?
2. Does the appointment power rest with the Governor?
3. Is a county election commission a state commission for purposes of South Carolina Code 1-3-245?
4. [Is a county election commission a state commission for purposes of South Carolina Code 1-3-245....] [a]s opposed to a strictly local commission i.e. county commission on parks and recreation where the appointed power is with the governing body.

Law/Analysis

Question 1

Your first question is whether Section 7-13-70 statutorily creates county election commissions. Section 7-13-70 in part reads as follows:

For the purpose of carrying on general or special elections provided for in § 7-13-10, the Governor, at least ninety days before the election, must appoint for each county not less than three nor more than five commissioners of election upon the recommendation of the senatorial delegation and at least half of the members of the House of Representatives from the respective counties. The Governor must notify the State Election Commission in writing of the appointments. The State Election Commission must verify that at least one of the appointees represents the largest political party and one represents the second largest political party as determined by the composition of that county's delegation in the General Assembly or the makeup of the General Assembly as a whole if the county's delegation is composed of only

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one party's members. The commissioners shall continue in office until their successors are appointed and qualified. After their appointment the commissioners must take and subscribe, before any officer authorized to administer oaths, the following oath of office prescribed by Section 26 of Article III of the Constitution:

"I do solemnly swear (or affirm) that I am duly qualified, according to the Constitution of this State, to exercise the duties of the office to which I have been appointed, and that I will, to the best of my ability, discharge the duties thereof, and preserve, protect and defend the Constitution of this State and of the United States. So help me God".

(emphasis added)

In response to your question, we are guided by a number of well-recognized principles of statutory interpretation. First and foremost, is the cardinal rule of statutory construction – to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). The legislature's intent should be ascertained primarily from the statute's plain language. *Morgan, supra*. Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. When presented with an undefined statutory term, the usual and customary meaning must be applied. *Id.* When interpreting a statute, the word and its meaning together with the statute's purpose and the policy of the law must be considered. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). When a statute's language is plain and ambiguous, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose any other meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997).

It is our opinion that § 7-13-70 mandates the establishment of a county election commission. The statute employs mandatory language in stating that the Governor "must" appoint commissioners for each county. *See, Op. S.C. Atty. Gen.*, Op. No. 94-13 (February 1, 1994) [the word "must" as ordinarily used "indicate[s] a mandatory duty."] Moreover, in *Op. S.C. Atty. Gen.*, Op. No. 89-41 (April 6, 1989), we recognized that "Section 7-13-70 of the Code of Laws of South Carolina (1976 as amended) establishes county election commissions and provides for their method of appointment." In that same opinion, we noted that "... Section 7-13-70 specifically expresses as its purpose the appointment of county election commissioners in order to carry on the general or special elections provided for in Section 7-13-10" Accordingly, you are correct in saying that Section 7-13-70 mandates the formation of county election commissions.

Question 2

Your second question concerns whether the Governor possesses the power to appoint county election commissioners. Section 7-13-70 provides that the "Governor ... must appoint for each county ... commissioners of election upon the recommendation of the senatorial delegation and at

least half of the members of the House of Representatives from the respective counties.” Here, it is necessary to distinguish the Governor’s role in making the appointment from the role of the delegation (as defined by the statute) in making the recommendation. In an April 3, 2003 opinion, we referenced the decision of our Supreme Court in *Blalock v. Johnston*, 180 S.C. 105, 185 S.E. 51 (1936), which had recognized this distinction. We explained that when the Governor’s power to appoint is contingent upon a legislative recommendation, the Governor’s authority is ministerial only. In that opinion, we further noted:

[t]he law imposes the positive duty upon the Governor to make the appointment at a time and in a manner upon conditions which are specifically designated. It is a simple definite duty arising under conditions admitted or proved to exist, and it leaves nothing to his discretion. It is ministerial. [*Blalock*,] 185 S.E. at 53.

In *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996), the Court cited with approval the *Blalock* holding and stated that the language in the statute with regard to appointment “... vested the Governor with no discretion...” and that the Governor’s duty under such a statute was merely ministerial. 472 S.E.2d at 632 ... Therefore, the delegation should not submit for appointment several names and allow the Governor to choose the ultimate appointee.

Id.

Thus, these authorities, particularly *Blalock*, dictate that with respect to § 7-13-70, the Governor’s role in the appointment process is simply to make that appointment which the Delegation recommends. The Supreme Court’s decisions in *Fowler* and *Blalock* interpret the Governor’s function to be ministerial only, and he thus possesses no discretion in this process.

Question 3

Your third question is whether a county election commission is a state commission for purposes of Section 1-3-245. It is our opinion that it is not. Section 1-3-245 reads as follows:

(A) A member of a state board, council, commission, or committee who has three consecutive unexcused absences from regularly scheduled meetings held by the particular board, council, commission, or committee is considered removed from the board, council, commission, or committee and a vacancy is created. The chairman of the board, council, commission, or committee immediately shall notify the Governor or appropriate appointing authority of the member’s three consecutive unexcused absences and of the resulting vacancy. An unexcused absence must be defined by the respective board, council, commission, or committee in rules governing its operation.

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(B) This Section does not apply to an ex officio member of a state board, council, commission, or committee or to a designee of an ex officio member.

We have advised on occasion that county election commissioners are county officers despite the fact that an authority "outside county government" appoints them. *Op. S.C. Atty. Gen.*, April 6, 1989. We have further reasoned that "[t]he fact that the county government does not have the power to appoint members of the board does not change their identity as county officers." *Op. S.C. Atty. Gen.*, March 16, 1989. Typically, a "county officer" is one "whose territorial jurisdiction is coextensive with the county for which they are elected or appointed." See, *Op. S.C. Atty. Gen.*, April 27, 1978. Thus, we continue to be of the view that county election commissions are county offices rather than state offices.

The question becomes whether the provisions of Section 1-3-245 apply to county election commissions. We have interpreted § 1-3-245 in previous opinions. In *Op. S.C. Atty. Gen.*, July 28, 1998, we advised that "... Section 1-3-245 applies *only* to state boards, councils, commissions, and committees." (emphasis added). Accordingly, county election commissions are county offices, and are therefore not subject to the provisions of Section 1-3-245.

Question 4

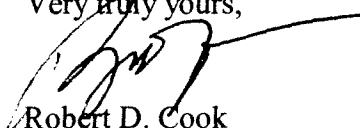
As for your fourth question regarding the whether a county election commission is a strictly local commission, we believe that this inquiry is addressed in Question 3.

Conclusion

Your questions are answered as follows:

1. We agree § 7-13-70 mandates the establishment of county boards of election.
2. With respect to the appointment of members of county boards of election, while the Governor makes the actual appointment, such function is ministerial only. The Governor possesses no discretion in this process and must appoint such person as is recommended by "the senatorial delegation and at least half of the members from the respective counties."
3. Section 1-3-245 is inapplicable to county boards of election as members of such bodies are county officers. Section 1-3-245 is applicable only to state boards.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General