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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

January 3, 2006

Mark W. Tollison, Esquire
Greenville County Attorney
301 University Ridge, Suite 2400
Greenville, South Carolina 29601

Dear Mr. Tollison:

By letter, you request our opinion regarding removal of a member of the Greenville County Board of Special Needs and Disabilities. Specifically, you inquire as to which individual or entity may properly conduct the hearing, pursuant to Section 44-20-378, for the removal of a member of the Board. Furthermore, you request our opinion concerning which individual or entity acts as the "appointing authority" for purposes of the South Carolina Code Annotated Sections 44-20-375 and 40-20-378.

In your letter, you provide the following pertinent information:

Pursuant to the provisions contained in S.C. Code Ann. § 44-20-375, Greenville County Council adopted Ordinance No. 2378. Greenville County Ordinance No. 2378 provides that "[t]he Board shall be appointed by the Governor of the State of South Carolina upon the recommendation of Greenville County Council" which is in compliance with S.C. Code Ann. § 44-20-375.... Ordinance No. 2378 originally created the Greenville County Mental Retardation Board. Greenville County Council, by Ordinance No. 2552 adopted March 15, 1994, changed the name of the Greenville County Mental Retardation Board to the Greenville County Disabilities and Special Needs Board ("DSN Board")....

Specifically, Ordinance 2378 tracks the State law removal provision (§ 44-20-378) and provides that "[a]ny member may be removed by the appointing authority for neglect of duty, misconduct or malfeasance in office after being given a written statement of reasons and an opportunity to be heard, or for missing three (3) consecutive meetings."

Greenville County has received a request from the DSN Board's Legal Counsel to remove a member of the DSN Board based on the DSN Board's finding

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“following the presentation of written statement of reasons for their action to (to the board member) and an opportunity for (the board member) to be heard, and upon the conclusions that the actions of (the board member) constitute sufficient neglect of duty, misconduct, and malfeasance.”

The current process for serving on the DSN Board is based on an appointment by the Governor upon recommendation of Greenville County Council...

Following review, and based upon previous opinions, we advise that the Governor, although acting ministerially in his appointment power, is, nevertheless, intended as the “appointing authority” for purposes of Sections 44-20-375 and 44-20-378.

Law / Analysis

S.C. Code Ann. Sections 44-20-375 and 44-20-378 provide for the appointment and removal of members of county boards of disabilities and special needs. In relevant part, Section 44-20-375 specifies the following:

(A) Before July 1, 1992, county boards of disabilities and special needs must be created within a county or within a combination of counties by ordinance of the governing bodies of the counties concerned. The ordinance must establish the number, terms, appointments, and removal of board members and provide for their powers and duties in compliance with state law and the process for appointing board members which existed on January 1, 1991, must be preserved in the ordinance. However, where the county legislative delegation or county council recommends board members to the appointing authority, the delegation may transfer its authority to recommend to the council or the council may transfer its authority to the delegation. If there is a transfer, preservation of the authority to recommend existing on January 1, 1991, is not required, and the new recommending authority must be contained in the ordinance.

(B) County boards of disabilities and special needs established before January 1, 1991, shall continue to exist, operate, and function as they existed on January 1, 1991, until created by ordinance pursuant to subsection (A).

(C) After June 30, 1992, the department shall recognize only county boards of disabilities and special needs that plan, administer, or provide services to persons with mental retardation, related disabilities, head injuries, spinal cord injuries within a county or combination of counties which are created or established pursuant to this section, including those whose members are appointed by the Governor. A county board of disabilities and special needs created by ordinance before January 1, 1991, is considered created pursuant to this section, provided the ordinance includes and complies with the provisions of subsection (A).

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Furthermore, Section, 44-20-378 states in relevant part:

...Vacancies for unexpired terms must be filled in the same manner as the original appointments. A member may be removed by the appointing authority for neglect of duty, misconduct, or malfeasance in office after being given written statement of reasons and an opportunity to heard.

In order to answer your questions, we first address the question of which individual or entity acts as the "appointing authority" for purposes of the above-cited statutes. We have previously addressed this issue in earlier opinions. In an opinion dated September 17, 1991, we advised that where members of the mental retardation board are appointed by the Governor upon the recommendation of a majority of the legislative delegation, "the Governor would exercise the actual, though ministerial, appointing power." *See, Ops. S.C. Atty. Gen.*, September 17, 1991 (Charleston County Mental Retardation Board). In that same opinion, we commented as to our inability to include both the power to nominate and recommend as part of the literal meaning of "appointing authority" as provided by Section 44-20-375:

Had the actual intent been officially expressed or language selected which would have reflected that intent, it would have been easier to depart from the literal language of the statute, to declare unequivocally that the term "appointing authority" encompassed the entire process rather than the actual appointment as distinguished from the nomination or recommendation phase.

Id. In addition, a subsequent opinion, dated October 21, 1992, we advised as follows:

The plain language of § 44-20-375, which must be applied literally in absence of ambiguity, *Infinger v. Edward*, 268 S.C. 375, 234 S.E.2d 214 (1977), clearly requires that the process used to appoint board members, which existed on January 1, 1991, be preserved in the ordinance which the county council must have adopted by July 1, 1992. The process which existed in Bamberg County on January 1, 1991, was appointment by the Governor upon recommendation of the legislative delegation; because the delegation has not transferred the recommending authority to Bamberg County Council, § 44-20-375 requires the delegation to retain the process of appointing members to the Bamberg County Mental Retardation Board.

Based on the foregoing, it is the opinion of this Office that § 44-20-375 requires the Bamberg County Legislative Delegation to continue to recommend for appointment (*and the Governor to appoint*) members of the Bamberg County Mental Retardation Board, until such time as the Delegation should transfer its appointment authority to Bamberg County Council (emphasis added).

As you state in your letter, in Greenville County, the power to recommend members to the Board resides with the County Council. Section 44-20-375 permits the nomination power to reside with either the County Legislative Delegation or County Council. Nevertheless, the reasoning set

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forth in the above-referenced opinions is still the same. In the situations involved in the prior opinions, as well as here, the Governor would be the "appointing authority" for purposes of §§ 44-20-375 and -378. As was noted in our 1991 opinion, the "appointment" stage does not include the nomination and recommendation phase, but only the actual appointment. Thus, we advise that in the case of the Greenville County Board of Special Needs and Disabilities, the Governor, though ministerial in his power to make appointments, is the "appointing authority" for purposes of Sections 44-20-375 and 44-20-378.

With respect to your question the appropriate individual or entity for conducting removal hearings, we first note that Section 44-20-378 requires notice and a hearing. However, the provision is silent as to which entity should hold the hearing. Section 44-20-375 requires that the local ordinance establishing the county disabilities and special needs board include a description of the process by which board members are removed. However, examination of the Greenville County Ordinance Nos. 2378 and 2552 does not specify the process by which a board member may be removed except to say that a "member may be removed by the *appointing authority* for neglect of duty, misconduct or malfeasance in office after being given a written statement of reasons and an opportunity to be heard, or for missing three (3) consecutive meetings." (emphasis added).

As you indicate in your letter, the Greenville County Disabilities and Special Needs Board (DSN) had provided the affected member with notice and a removal hearing. Subsequent to that hearing, the Board apparently concluded that the grounds for removal had been adequately met, thereby authorizing the member's dismissal from the Board. However, neither the statute nor ordinance bestows upon the Greenville County DSN Board the authority to conduct such a hearing because the Board itself clearly is not the "appointing authority" of the member. Instead, as stated above, and as our earlier opinions indicate, it is the Governor who is the "appointing authority."

As a general rule, the power to remove an officer is vested with the authority possessing the power to make the appointment. *See, Ops. S.C. Atty. Gen.*, March 15, 2000; June 3, 1962. When the term is not fixed by law, and the removal power is not governed by constitutional or statutory provision, the power of removal is incident to the power to appoint. *State ex rel. Williamson v. Wannamaker*, 213 S.C. 1, 48 S.E.2d 601 (1948).

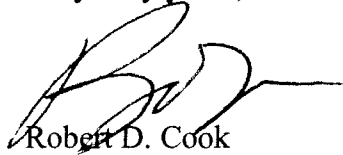
While it is true that in instances such as this, the Governor acts in a ministerial capacity in making the appointment which either the Legislative Delegation or in this instance, county council, recommends, see, *Blalock v. Johnston*, 180 S.C. 105, 185 S.E. 51 (1936), *Fowler v. Beasley*, 322 S.C. 463, 472 S.E.2d 630 (1996), such rule is not determinative in this instance. As we concluded in an opinion, dated November 8, 1993, a legislative delegation possesses no removal authority even though it might make the recommendation for appointment because it is the Governor who "exercises the final step to complete the appointment process." *See also*, § 1-3-240(A) [Governor may remove any State or county officer after notice and an opportunity to be heard]; *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997).

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Conclusion

Accordingly, we reaffirm our prior opinions advising that the Governor, although ministerial, is the "appointing authority" for purposes of §§ 44-20-375 and -378. Thus, in the case of the Greenville County Disabilities and Special Needs Board, where the Governor makes the appointment to the Board upon recommendation of the Greenville County Council, it would be the Governor who would conduct removal proceedings pursuant to § 44-20-378. Such conclusion is consistent with the general rule that in the absence of authority otherwise the power to appoint includes the power to remove and § 1-3-240(A) which empowers the Governor, upon notice and an opportunity to be heard, to remove any state or county officer in certain instances. Of course, the Governor could undoubtedly receive input from the Delegation, but we consider the Governor to be the "appointing authority" for purposes of the statutes and thus the official to conduct the hearing.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General