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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 6, 2006

The Honorable Lewis R. Vaughn
Member, House of Representatives
623 Ashley Commons Court
Greer, South Carolina 29651

Dear Representative Vaughn:

You have requested our opinion regarding the constitutionality of using Judicial Circuits for appointing board members. You are of the view that "this procedure violates the one-man-one vote ruling by the U.S. Supreme Court." You further indicate that you have "drafted legislation to change the appointment process from the Judicial Circuit method to the Congressional District method."

Law / Analysis

In an opinion dated March 4, 2003, we addressed at some length the constitutional requirements of "one-person, one vote." We considered the issue in the context of "election" (appointment) of public officers in joint assembly of the Legislature, concluding in that opinion that the requirement of "one person, one vote" did not apply to such appointments. We noted that this constitutional requirement originated with the Supreme Court decision of *Reynolds v. Sims*, 377 U.S. 533 (1964), which held that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment as much as invidious discrimination based upon factors such as race." 377 U.S. at 565.

However, in the opinion, we stated that subsequent decisions by the United States Supreme Court distinguished appointments to office from those offices selected by popular election. We cited *Hadley v. Jr. College Dist. of Metro. Kansas City*, 397 U.S. 50 (1970); *Fortson v. Morris*, 385 U.S. 231 (1966) and *Sailors v. Bd. of Ed. of County of Kent*, 387 U.S. 105 (1967) in support of this distinction. In *Hadley, supra*, we quoted the Supreme Court as concluding that

> where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people the equal protection of the laws.

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377 U.S. at 58. And in *Sailors*, we quoted the Court's language that "[s]ince the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man one vote' has no relevancy." 387 U.S. at 107.

Our 2003 Opinion also distinguished the Fourth Circuit decision of *Vander Linden v. Hodges*, 193 F.3d 268 (4th Cir. 1999). In *Vander Linden*, the Fourth Circuit held that the county legislative delegation is subject to the requirements of "one person, one vote." Because the votes of the members of county delegations were not proportionately weighted in terms of the number of voters represented, the Fourth Circuit found the delegation system "to be unconstitutional." In the majority's mind, the legislative delegations performed numerous important governmental functions, including the power to make appointments, to approve payment of certain funds, as well as budget approval in particular instances and the power to initiate referenda in limited circumstances. Thus, in view of the fact that the votes of the members of the legislative delegations were not weighted in accordance with their corresponding populations, the Fourth Circuit concluded that the composition of these delegations violated the Equal Protection Clause.

Our earlier referenced opinion also distinguished *Vander Linden* in the context of appointments made by the General Assembly in joint assembly. There, we stated as follows:

> [i]t is undeniable, as you point out, that in *Vander Linden v. Hodges, supra*, the Fourth Circuit imposed the "one person, one vote" requirements of the Equal Protection Clause upon South Carolina legislative delegations. As you suggest, the *Vander Linden* situation might be likened to the full Legislature's convening in joint assembly to make judicial and other appointments. However, the United States Supreme Court has never ventured nearly as far as the Fourth Circuit did in *Vander Linden*. Moreover, by following the *Sailors* case and concluding that "one person, one vote" principles were irrelevant to appointments made by legislative delegations, our own Supreme Court in *Moore v. Wilson* [296 S.C. 321, 372 S.E.2d 357 (1988)] took the same path as did Judge Neimeyer in *Vander Linden*. In our opinion, the courts would deem the situation you raise to be much closer to the Supreme Court's decision in *Fortson* than to the Fourth Circuit's decision in *Vander Linden*.

We note that other authority has concluded that the appointment (or "election") of members of the state Dental Board by geographic district does not violate the "one person, one vote" requirement. *Plowman v. Massad*, 61 F.3d 796 (10th Cir. 1995), citing *Sullivan v. Alabama State Bar*, 295 F.Supp. 1216 (M.D. Ala), *affd. without opinion*, 394 U.S. 812 (1969); *City of St. Albans*, 167 Vt. 466, 708 A.2d 194 (1998) [state may constitutionally provide for appointment of commissioners of regional planning commission as representatives of each participating municipality without violating equal protection principle of "one person, one vote"]; *Warden v. Pataki*, 35 F.Supp.2d 354 (S.D.N.Y. 1999) ["one person, one vote" principle did not apply to composition of appointed boards]; *Eastern v. Canty*, 75 Ill.2d 566, 389 N.E.2d 1160 (1979) [there is no constitutional requirement that appointed governing body of sanitary district be so constituted that majority of its members "represent" more populous of areas which comprise district]; *Van Zanen v. Keydel*, 89 Mich. App. 377, 280 N.W.2d 535 (1979) [equal protection one person - one vote doctrine applies to state and local government units which are composed of members elected by

voters, but state or local government may select some government officials by appointment and, where appointment is permissible, the one person - one vote doctrine does not apply]; *J.B. VanSlyke v. Bd. of Trustees of State Institutions of Higher Learning*, 613 So.2d 872 (1993) [one-man, one vote rule is not applicable to members of Board of Trustees of State Institutions of Higher Learning; rule does not apply to appointed positions].

There exists authority somewhat to the contrary, however. For example, in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994), the Tenth Circuit concluded that principles of "one person, one vote" require that a statutory system for election of Board of Agriculture delegates from private agricultural associations violates the "one person, one vote" requirement of the Equal Protection Clause. The Court noted that the Board's powers were extensive, stating that the district court had found that the Board's powers ranged

> ... from regulating the healthfulness of milk and meat sold in the state to generally regulating all weights and measures including those commercially used by entities outside the agricultural industry.

42 F.3d at 1334. In the Court's view,

> [o]nce a state agency has the authority to affect every resident in matters arising in their daily lives, its powers are not disproportionate to those who vote for its officials. The quality of meat and dairy products consumed by everyone in the state; the accuracy of the scales upon which people are charged for consumer goods; the right to divert and use water; the use of pesticides on residential lawns, city parks, and farmlands are not services disproportionate to those who attend the annual meeting of the Board. Those matters unremittingly influence every person within the State of Kansas.

Id. at 1335. Thus, the Tenth Circuit upheld the District Court's conclusion that selection of members of the twelve person Board by the agricultural organizations and societies violated the Equal Protection Clause of the Constitution.

And, in *Fumarolo v. Chicago Bd. of Education*, 142 Ill.2d 54, 566 N.E.2d 1283 (1991), the Illinois Supreme Court concluded that appointments of members of a board of education violated "one person, one vote" requirements. There, the Court found that even though the nominating commission was an appointed body, it was made up of and selected by members of the local school council who were elected in violation of Equal Protection. The Court distinguished *Sailors v. Bd. of Ed., supra.* on the basis that in *Sailors* "... there was no question that the members of the bodies responsible for making the appointments were constitutionally selected." According to the Court, the situation in *Fumarolo*, however, was different because

> [h]ere, however, both the subdistrict councils and the nominating commission are made up of and selected by members of an unconstitutionally elected body, the local school council. We conclude, therefore, that the *Sailors* principle does not extend to a situation such as this where the members who are responsible for selecting the

> appointed body are not constitutionally selected. The nominating commission is simply too closely connected local school councils to conclude that it has been properly selected or that it can properly select candidates for the board of education.

566 N.E.2d at 1303.

Several state statutes authorize the appointment of board members by judicial circuits. *See, e.g.* S.C. Code Ann. Sec. 20-7-2385 [local foster care review boards to be appointed by Governor upon recommendation of legislative delegation of each county within circuit]; § 46-5-10 [Agriculture Commission to be composed of one member from each judicial circuit to be "elected" by the legislative delegations representing the counties of each judicial circuit]; § 59-5-10 [State Board of Education to be composed of one member of each judicial circuit, to be "elected" by a majority of the members of delegations of each judicial circuit]. In each of these, the legislative delegations of the counties of each judicial circuit, in essence, make the appointment. Like the situation addressed in *Vander Linden*, the county delegations are made up of "South Carolina legislators [who] are elected from districts that contain parts of more than one county...." Here, the appointing power would consist of legislators from districts contained in a number of counties because in South Carolina, the judicial circuits are comprised of several counties.

Conclusion

The members of the boards appointed from judicial circuits are, of course, appointed rather than elected by the populations at large. As discussed above, generally speaking, appointive offices are not subject to the "one person, one vote" requirement. *Sailors, supra.*

Nevertheless, in light of *Vander Linden* and the other authorities referenced above, the appointments of statewide boards by the county legislative delegations on the basis of judicial circuits is legally problematical. Although the membership of these boards is appointed rather than elected by the people, still, the possibility exists that the disparate populations of judicial circuits invokes the "one person, one vote" requirement. Moreover, it is not clear that the appointments of officers on the basis of judicial circuits is being done in compliance with *Vander Linden*. If not, the reasoning of cases such a *Fumarolo* could be used in any legal action brought. Of course, only a court could make such a determination. However, as you indicate, legislation could be enacted by the General Assembly to correct this situation. Obviously, this would be a policy matter for the General Assembly.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General