February 16, 2007

Mary Sonksen, Vice-Chair
SC Board of Commissioners
SC Commission for the Blind
Post Office Box 2467
Columbia, South Carolina 29202

Dear Ms. Sonksen:

You have raised questions regarding the recent removal of the chairman of the Commission for the Blind. S.C. Code Ann. § 43-25-10 provides for a seven member Commission. Such provision states in part that "[t]he members of the Commission shall elect one of its members as chairman for a term of two years or until his successor has been elected." You referenced that at the time of the removal of the chairman, the Commission consisted of only five members.

You have questioned whether relevant state statutes or the Commission bylaws have precedence as to the situation addressed in your opinion request. You have also asked whether if the state statutes have precedence, does the principle of right to appoint/right to removal apply and whether a majority vote of a quorum decides removal outcomes. You also questioned whether the bylaws have precedence. In particular, it is provided in the bylaws that "[a]ny officer of the Board may be removed by a two-thirds vote (five (5) affirmative votes) of the seven voting members of the Board, whenever in the judgment of the Board it would be best served thereby." Referencing such, you questioned whether if the bylaws take precedence, are the numbers stated in the bylaws mandatory when the Commission has vacant seats with only five of the seven filled. You further questioned whether the bylaw requirement of two-thirds vote applies to voting members in attendance. In the situation addressed, four members were present with three of the four voting affirmatively for removal. You indicated that such represented 75% of the present and voting members.

As stated, at the time of the removal of the chairman, the Commission consisted of only five active members. With regard to such, it must first be noted that with regard to any perceived vacancies on a board, a public official's service typically extends beyond the expiration of his or her term. The South Carolina Supreme Court, as well as numerous opinions of this Office, have determined that in the absence of pertinent statutory or constitutional provisions, public offices hold

over de facto until their successors are appointed or elected and qualify. While a vacancy nevertheless exists in the sense that successors may be appointed or elected as may be provided by law, qualify and take the offices, the 'holdovers' in the meantime are entitled to retain their offices. Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228, 232 (1952). See also, Gaskin v. Jones, 198 S.C. 508, 18 S.E.2d 454 (1942).

As to the situation that prompted your request, four members, including the chairman were present at the meeting when her removal came to a vote. Three members of the Commission voted to remove the chairman.

I have not found any case law in this State directly on point as to the removal of a chairman from his or her elected office where a specific term has been established by statute. However, in this instance, there is a set term established for the chairman position, i.e., "...a term of two years or until his successor has been elected." It appears that the language "or until his successor has been elected" should be read in association with the general rule referenced above that an officer holds over until his successor has been elected. See: Op. Atty. Gen. dated April 18, 1986. Such is also consistent with the general rule as expressed in an opinion of this office dated April 1, 1999 that "...statutes should not be construed to shorten the terms of incumbents." An opinion of this office dated July 25, 1980 dealt with the construction of a regulation that provided that a particular board was to elect a chairman "...who will serve for a two year term or until his successor is elected." That opinion recognized the holding over by the office holder until the election of a successor.

As to the removal of an officer, as stated in an opinion of this office dated June 27, 2005 "...[i]f an officer holds office for a fixed term, summary removal is not authorized...." That opinion also stated that

> [t]he right to hold an office during a fixed term unless removed for cause may be overcome only by an unequivocal grant of power from the Legislature to remove at pleasure.

As to the situation addressed by you, there is no specific grant of authority to remove the chairman at pleasure. Instead, a term of two years and until the successor has been elected is established. Inasmuch as a set term is provided, the chairman may be removed only for cause.

In several previous opinions we discussed removal of a public official or employee for cause. These opinions considered situations in which a statute allowing for removal was predicated on finding cause for such removal. An opinion of this office dated July 1, 1999 dealt with the removal of a member of the Georgetown County Planning Commission by the Georgetown County Council. It was noted that the act governing the creation of the Planning Commission, which allowed for the

removal of commissioners for cause, did not define the phrase "for cause." It was noted, however, that "...this is a phrase found in many removal statutes throughout the country and has developed a common and ordinary meaning over the years." It was stated that

> Cause is a flexible concept that relates to an employee's qualifications and implicates the public interest; cause for discharge has been defined as some substantial shortcoming that renders the person's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public policy recognizes as good cause for no longer holding the position; or, as sometimes stated, dismissal for cause is appropriate when an employee's conduct affects his or her ability and fitness to perform his or her duties. The phrase for cause in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause which the appointing power in the exercise of discretion may deem sufficient. Relatively minor acts of misconduct are insufficient to warrant removal or discharge for cause. The cause must relate to and affect qualifications appropriate to the office, or employment, or its administration, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. Neglect of duty, inefficiency, and the good faith abolition of a position for valid reasons are all legally sufficient causes for removal.

Id. (quoting 63C Am. Jur. 2d Public Officers and Employees § 183 (1997)). It was further stated that

> In addition to the common and ordinary meaning of the phrase for cause, County Council may also want to review portions of the South Carolina Constitution and statutes for examples of what may constitute cause for removal in various situations. Examples of such behavior include: embezzlement or appropriation of public or trust funds to private use, crimes of moral turpitude, malfeasance, misfeasance, incompetency, absenteeism, conflict of interest, misconduct, persistent neglect of duty in office, and incapacity. S.C. Const. art. VI, §§ 8, 9; S.C. Code Ann. §§ 1-3-240, 8-1-10 et seq. Further, other states have found that persistent absences from meetings of a board or commission constitute cause for removal. Ark. Op. Atty. Gen. dated November 5, 1990, Ky. Op. Atty. Gen. dated August 22, 1980, La. Op. Atty. Gen. dated August 11, 1978.

In our July 1, 1999 opinion cited above it was determined that, that prior to the removal of a public officer or employee for cause, such officer or employee must be afforded notice and an opportunity to be heard. As stated in that opinion,

> [w]here an officer...can be removed only for cause either for the reason that he holds for a term fixed by law, or during good behavior, or that a constitution or statute so provides, it is generally held that the power granted is not arbitrary to be exercised at pleasure, and the power can be exercised only after notice and opportunity to be heard.

That opinion cited the decision in Walker v. Grice, 162 S.C. 29, 159 S.E. 914 (1931), where the court concluded that

> ...[a] removal for cause operates as a limitation upon the power to remove, and, in our opinion, the party to be removed, or attempted to be removed, is entitled to a hearing as to the charge that he has failed to perform his duty.

Further support for this proposition is found in Williamson v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). See also: Op. Atty. Gen. dated April 1, 1999 ("...where a term of office is fixed by law, due process rights of notice and an opportunity to be heard attach to any decision to remove.). Consistent with such, it appears that the individual in question was elected as chairman for a fixed term, a term of two years and until her successor has been elected, and may be removed from such office only for cause. Included in any such removal is the requirement of notice and an opportunity to be heard. Of course, only a court is competent to review the Commission's decision in this regard.

With regard to the removal by only three members of the Commission, as stated in a prior opinion of this office dated April 27, 2006, it is generally recognized that "...the power of removal is incidental to the power to appoint." See also: Op. Atty. Gen. dated January 3, 2006 ("...the power to remove an officer is vested with the authority possessing the power to make the appointment....). In this instance, the Commission elected the chairman of the Commission pursuant to the provisions of Section 43-25-10 which in providing for a seven member Commission further stated that "[t]he members of the Commission shall elect one of its members as chairman for a term of two years or until his successor has been elected." Thus, the statute implies the election by the majority of a seven member Commission.

As stated at 62 C.J.S. Municipal Corporations Section 239

> [v]acancies in the municipal council or governing body do not diminish the number required to take action where the requirement is for the concurrence of a majority or other specified proportion of all the members elected to the council, but the required number is reduced by vacancies where the requirement is for the concurrence of a

> specified proportion of the council, or other phrase indicating its membership at the time action is taken.

Such conclusion is consistent with a prior opinion of this office dated January 17, 1985, where it is stated that "[i]n the absence of a specified number of members necessary to take action, the general rule is that a simple majority is assumed to be required." See also: 43 A.L.R.2d 698 ("Frequently at the time of a council meeting the original membership has been depleted by death or resignation, or some of the members absent. Even under these circumstances the total original membership of the council has been held in numerous cases to be the base on which a determination must be made as to whether a vote constitutes a majority, or the necessary percentage required for favorable action."). Consistent with such, with regard to a seven member Commission, an affirmative vote of four members would thus be necessary to take action. As stated in State ex rel. Peterson v. Hoppe, 260 N.W.2d 215 at 189-190 (Minn. 1935),

> [w]hen, however, the statute requires the vote of a majority or a greater proportion of "the members" of the council it has been held that a measure cannot be enacted by a majority of those present, unless they also constitute a majority of all the members of the council, both present and absent.

As to any issue as to whether the Commission bylaws would control, reference may be had to the decision of the New Jersey court in Matawan Regional Teachers Association v. Matawan-Aberdeen Regional School District Board of Education, 538 A.2d 1331 (N.J. 1988). In that case, the court recognized that at common law, a majority vote of a board or commission was sufficient to adopt a particular measure. However, a bylaw of the board before the court allowed adoption by a two-thirds vote of its full membership. The relevant statutes were silent as to the number of votes necessary to consider a measure. The court ruled that the bylaw would not be enforced. Instead, it was implied that the common law rule would apply, i.e., a majority vote was necessary. See also: Pearce v. Board of Liquor License Commissioners of Baltimore County, 180 A.2d 651 (Md. 1062) (rule concerning procedure did not supersede state statute).

As stated, the general rule is that the power of removal is incidental to the power to appoint. As noted above, even though there are perceived vacancies, in light of the rule that public offices hold over de facto until their successors are appointed or elected and qualify, there is a seven member Commission. Referencing the requirement of Section 43-25-10 that the members of the Commission elect the chairman, and the implication of an election by the majority of a seven member Commission, it appears that a vote of four Commissioners would be necessary to remove a chairman or any other officer. Of course, as specified earlier, inasmuch as the chairman is elected for a term of two years and until her successor is elected, summary removal is not authorized. There is no grant of power to remove at pleasure and, therefore, any removal would have to be for cause.

Inasmuch as the power of removal is incidental to the power to appoint, and, therefore, the majority statutory requirement would be relevant for purposes of removal as well as appointment, it does not appear that the bylaws of the Commission would take precedence. Therefore, it does not appear that a response to your questions regarding the interpretation of the bylaws would be necessary.

With kind regards, I am,

Very truly yours,

Henry McMaster
Attorney General

By: Charles H. Richardson
Senior Assistant Attorney General

cc: The Honorable James M. Kirby
Commissioner, SC Commission for the Blind

REVIEWED AND APPROVED BY:

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Robert D. Cook
Assistant Deputy Attorney General