



STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

January 15, 1997

The Honorable James M. Miles
Secretary of State
State of South Carolina
Post Office Box 11350
Columbia, S.C. 29211

Dear Mr. Secretary:

You have requested an opinion from this Office as to S.C. Code Ann. § 59-121-30 (1990) which provides that no member of the Board of Visitors of The Citadel "... shall be elected or re-elected either by the General Assembly or by the Association of Citadel Men to fill any term of office the duration of which shall extend beyond the member's seventy-fifth birthday." Your question is whether this provision is unconstitutional or violates the Federal Age Discrimination in Employment Act (ADEA), 29 U.S.C.A. §§ 621, et seq.

At the outset, I must note that this statute is entitled to a presumption of constitutionality. "Every legislative act must be presumed constitutional and should be declared unconstitutional only when its invalidity is manifest beyond a reasonable doubt." Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); citing Battle v. Willcox, 128 S.C. 500, 122 S.E. 516 (1924). In addition, several principles of statutory construction are relevant to your inquiry. First, in interpreting a statute, the primary objective is to ascertain and effectuate the intent of the Legislature. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). Moreover, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Where the terms of a statute are clear, the court must apply those

The Honorable James M. Miles
Page 2
January 15, 1997

terms according to their literal meaning. Paschal v. State Election Commission, 317 S.C. 434, 454 S.E.2d 890 (1995). Use of the word "shall" in a statute generally connotes mandatory compliance. S.C. Dept. of Highways and Public Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986).

The ADEA excludes from the definition of "employee" thereunder "... any person elected to public office in any State or political subdivision ... by the qualified voters thereof ... or an appointee on the policymaking level" 29 U.S.C.A. § 630. A previous opinion of this Office concluded that a magistrate would be exempt from ADEA coverage by this provision. Op. Atty. Gen. No. 93-49 (July 15, 1993) citing Gregory v. Ashcroft, 501 U. S. 452 (1991)¹. Similarly, because the Board of Visitors has broad powers including the authority to adopt regulations for the "organization ... good government and management" of The Citadel, Board members should be exempt from the ADEA as "appointee[s] on the policymaking level." Although a 1989 opinion concluded that the ADEA would override State law as to the mandatory retirement or reelection of the members of the Employment Security Commission, that opinion is hereby superseded to the extent that it would apply to the Board of Visitors.

The age limitation also does not appear to be unconstitutional under the Equal Protection Clause of the United States Constitution. See, Gregory v. Ashcroft, *supra*, (upholding a mandatory retirement provision for State judges); see also, Arritt v. Grisell, 567 F.2d 1267 (4th Cir. 1977)(upholding age restriction for applicants for police officer positions); Francke v. U.S. Department of the Treasury, 721 F. Supp. 47 (S.D.N.Y. 1989)(upholding maximum age requirement for application for law enforcement positions in U.S. Customs Service). As stated in Gregory, "[i]n cases where a classification burdens neither a suspect group [age is not a suspect classification] nor a fundamental interest [no fundamental interest exists in being a judge] 'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'" 501 U.S. at 470-71. Accordingly, a Court would be "quite reluctant" to overturn the age limitations for the Board of Visitors when neither a suspect class is involved nor a fundamental interest.

Based on the foregoing, it is the opinion of this Office that a court would uphold the constitutionality of the age restriction in §59-121-30 and its exemption from the ADEA. Therefore, unless and until this provision is overturned, repealed or amended, no

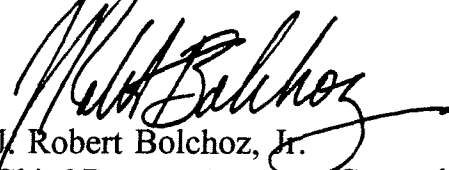
¹ Gregory held that the ADEA did not apply to State judges in Missouri.

The Honorable James M. Miles
Page 3
January 15, 1997

individual should be elected or reelected by either the General Assembly or the Association of Citadel Men to fill any term of office that would extend beyond the member's seventy-fifth birthday.

If you have additional questions, please do not hesitate to contact me.

Yours very truly,



J. Robert Bolchoz, Jr.
Chief Deputy Attorney General

JRB/ph