STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

April 1, 1999

The Honorable Larry K. Grooms
Senator, District No. 37
Gressette Senate Building
Columbia, South Carolina 29202

Dear Senator Grooms:

You have asked whether "... the Governor [has]... the authority to remove members of the Public Service Authority prior to the expiration of their terms." In my opinion, he does not.

LAW / ANALYSIS

The South Carolina Public Service Authority, also known as "Santee Cooper," is established pursuant to S.C. Code Ann. Sec. 58-31-10 et seq. Section 58-31-20 provides that the Authority "shall consist of a board of eleven directors to be appointed by the Governor with the advice and consent of the Senate as follows...." This Code Section further specifies that

> [e]ach director shall serve for a term of seven years and until his successor is appointed and qualifies.... At the expiration of the term of each director and of each succeeding director the Governor shall appoint with the advice and consent of the Senate a successor, who shall hold office for a term of seven years, or until his successor has been appointed and qualifies. (emphasis added).

Such Section also creates an advisory board of the South Carolina Public Service Authority, consisting of the Governor, State Treasurer, Attorney General, and Secretary of State as ex

(803) 734-3970 (803) 734-3646 Facsimile

officio members. Section 58-31-20 expressly provides that "[m]embers of the board of directors may be removed for cause by the advisory board or a majority thereof."

Until recently, this provision controlled without question. Governor Hodges is now apparently placing reliance upon a little-known provision enacted as part of the Restructuring Law in 1993 to conclude that he may now remove all members of the Santee-Cooper governing board en masse. Section 1-3-240 (B) provides as follows:

> (B) Any person appointed to a state office by a Governor, either with or without the advice and consent of the Senate, other than those officers enumerated in subsection (C), may be removed from office by the Governor at his discretion by an Executive Order removing the officer.

Thus, the issue here is whether § 1-3-240 (B) now controls over § 58-31-20. If so, the Governor may remove in wholesale fashion all members of the Santee-Cooper governing board, notwithstanding that a particular member's term has not yet expired or that there is a substantial amount of time remaining in such term.

A number of principles of statutory construction must be consulted in resolving this question. First and foremost, the cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. Bankers Trust of SC v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). A repeal of a statute by implication is to be resorted to only in event of irreconcilable conflict between provisions of two statutes; and if the statutes can be construed so that both can stand, the Supreme Court will so construe them. In Interest of Shaw, 274 S.C. 534, 265 S.E.2d 522 (1980). In order to repeal a statute on account of asserted conflict or repugnancy with another statute, the repugnancy must be plain and the two statutes must be incapable of any reasonable reconcilement. City of Rock Hill v. S.C. Dept. of Health and Env. Control, 302 S.C. 161, 394 S.E.2d 327 (1990). Furthermore,

> ...(i)t is a canon of statutory construction that a later statute general in its terms and not expressly repealing a prior special or specific statute will be considered as not intended to effect the special or specific provisions of the earlier statute, unless the intention to effect the repeal is clearly manifested or unavoidably implied by the irreconcilability of the continued operation of both.

1989 Op. Atty. Gen., No. 89-82 (August 17, 1989).

Applying those principles, it is possible to reconcile §§ 1-3-240(B) and 58-31-20. It is not at all clear that Santee-Cooper board members would hold a "state office" for purposes of § 1-3-240(B). Our Supreme Court has stated with respect to the Public Service Authority that

> ... the South Carolina Public Service Authority was created by the General Assembly for the purpose, among others, of producing and selling electric power.... This Court has held that the Public Service Authority is a quasi-municipal corporation. (emphasis added).

Boyce v. Lancaster Co. Nat. Gas Auth., 266 S.C. 398, 223 S.E.2d 769 (1976). See also, Rice Hope Plantation v. S.C. Pub. Serv. Auth., 216 S.C. 500, 59 S.E.2d 132 (1950).

Relying upon these authorities, this Office has concluded in several circumstances that the Public Service Authority is not a "state agency" in the typical sense of the word. In Op. Atty. Gen., Op. No. 77-161 (May 25, 1977), for example, we concluded that while "the Public Service Authority is a state agency in the general meaning of such term, it is not included in the special definition of state agencies required to comply with Act No. 561." Act No. 561 defined a "state agency" for that purpose as funded in whole or part by funds from the General Assembly. The opinion quoted from Creech v. S.C. Public Service Auth., 200 S.C. 127, 20 S.E.2d 645, 648 (1942), which had described Santee-Cooper as "a public corporation in the routine of a quasi-municipal corporation, exercising certain governmental functions as an agency of the state...."

And, in Op. Atty. Gen., Op. No. 78-210 (Dec. 21, 1978), we found that "[t]he South Carolina Ports Authority and the South Carolina Public Service Authority do not come within the definition of state agency as that term is used by the General Assembly in § 24 of the General Appropriations Bill 1978-1979." Even though the provision in question included within the definition of "state agency" any agency "operated pursuant to authority granted by the state", nevertheless, we concluded it to be inapplicable to Santee-Cooper. We noted that "when the courts have held the SCPA (Ports Authority) and SCPSA (Santee-Cooper) to be state agencies, they have used the term state agency as a term of art." Further, we stated that

> [i]n every decision that has labeled the SCPA and the SCPSA as state agencies, the court has gone on to point out the fact that these authorities are independent, quasi-municipal corporations; designed and created with the idea that they will be self-satisfying in terms of financial operation and internal management.

In other words, this characterization was "only used to show that these authorities are embodied with certain governmental powers, e.g. eminent domain." In our view, the purpose of § 24 of the Appropriations Act was "achievement of maximum cost effective management of state-owned vehicles with the resulting reduction in cost to the taxpayers of South Carolina." Accordingly, such provision was applicable neither to the Ports Authority or Santee-Cooper because the "power and responsibility regarding the internal management operations is granted exclusively to the authorities themselves with the General Assembly requiring the right to offer, award or respect the laws pertaining to these authorities." Thus, we concluded:

> ... it would be incongruous to contend that the specific enabling provisions [of Ports Authority and Santee-Cooper] are to be overridden by general law applicable to all state agencies unless the law specifically so provides.

The analysis of this Opinion is controlling here. In addition, it is well-recognized that "[a]s a rule, statutes should not be construed to shorten the terms of incumbents." 63C Am. Jur. 2d, Public Officers and Employees, § 141. Moreover, our Supreme Court has held that 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. State v. Wannamaker, 213 S.C. 48 S.E.2d 601 (1948). See also, 63 Am. Jur. 2d, Public Officers and Employees, § 138. [due process attaches where right of expectancy to continued employment]. Further, the Governor possesses no prerogative powers but is confined to the exercise of powers conferred upon him by the Constitution and statutes. Heyward v. Long, 178 S.C. 351, 183 S.E. 145 (1935). Pursuant to these principles, the Governor cannot discharge in wholesale fashion an entire board or commission where there is no authority to do so. Such blanket dismissal violates due process of law. Hearon v. Calus, 178 S.C. 381, 183 S.E.13 (1936). [Governor Olin Johnston's removal of Highway Commission without authority "deprived plaintiffs of the offices of State Highway Commissioners of which they were in peaceful possession...."] Typically, the terms of members of a governing board or commission are staggered to

preserve stability, promote experience and expertise and avoid en masse partisan, political ouster.

Based upon these authorities, it is my opinion that the General Assembly did not intend to repeal or limit § 58-31-20 by the enactment of § 1-3-240(B). The purpose of the Restructuring Act is to make state government more responsible to an elected chief executive. However, as Op. No. 78-210 stressed, the Public Service Authority has always been considered as an independent, quasi-governmental corporation, run and managed by its own governing board. Moreover, in enacting § 58-31-20, the Legislature emphasized that removal of "directors" should be effectuated only by the Santee-Cooper Advisory Board. Therefore, for the same reasons as we found in Op. No. 78-210, it would be "incongruous" to conclude that the specific enabling provision of Santee-Cooper is overridden by the Restructuring provision "unless the law specifically so provides." Because no such provision is present, we advise that directors of the Public Service Authority are not "state officers" for purposes of § 1-3-240(B). While members are "state officers" for other purposes such as dual office holding, see, e.g. Op. Atty. Gen., Jan.13, 1983, there is no evidence that the Legislature intended to include Santee-Cooper board members within the scope of § 1-3-240(B).

CONCLUSION

It is our opinion that the Governor possesses doubtful authority to cut short the terms of the present Santee-Cooper board members and replace those members with his own appointees prior to the expiration of their terms. The Governor possesses no inherent or prerogative powers. Those powers which he has must be expressly given to him by the Constitution and statutes. Moreover, it is the general rule that statutes should not be interpreted to shorten the terms of incumbents. While we have no doubt that the Legislature may shorten or abolish statutory terms of office, we do not believe it has done so with respect to Santee-Cooper. Every presumption must be that the General Assembly has not.

Furthermore, there is no evidence that the Legislature intended to apply § 1-3-240(B) to the Santee-Cooper board members. The statute requires that board members be "state officers" for purpose of the Restructuring provision. This Office has previously concluded that similar statutes do not override the Santee-Cooper law because the Santee-Cooper board is an independent, quasi-governmental corporation, rather than a "state agency" in the

traditional sense. It is important to note that the Public Service Authority is not treated as other agencies in the State Appropriations Act.

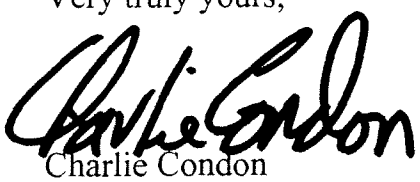
Important policy reasons underlie our interpretation herein as well. Santee-Cooper was created to provide electrical power, not feel the shock of the Governor's political power. Performing political purges or dictating disruptive dismissals is counter-productive to the public interest. A similar mass dismissal of the Highway Commissioners by Governor Olin D. Johnston without authority was struck down by our Supreme Court as violative of due process. To shorten the terms of Santee-Cooper board members where the authority to do so is dubious at best broadens the potential for abuse and widens suspicions that raw politics is at work.

Accordingly, the systematic sacking of term-protected Santee-Cooper board members promotes instability and unleashes political disharmony. The purpose of the Legislature's establishment of the Santee-Cooper board as an independent, quasi-governmental body is obvious. Reference by the Legislature to board members as "directors" is distinctive. In creating Santee-Cooper, the Legislature intended that electric power be provided South Carolina citizens in a stable, uninterrupted manner. The General Assembly did not intend for Santee-Cooper's power lines to be buffeted by the gales of partisan rancor or snapped by political windstorms. The terms of Santee-Cooper board members are not like a light switch to be turned on and off at the whim of the Governor.

For the foregoing reasons, it is our opinion that the Restructuring Act does not affect the terms of Santee-Cooper board members.

With kind regards, I remain

Very truly yours,



Charlie Condon
Attorney General