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The State of South Carolina

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June 21, 1994

The Honorable McKinley Washington, Jr.
Senator, District No. 45
Post Office Box 247
Ravenel, South Carolina 29470

Dear Senator Washington:

We have been advised that the terms of office of several members of the South Carolina Commission for the Blind have expired. Due to the Senate's failure to advise and consent to gubernatorial nominees to replace those members, you have inquired as to the status of those members, as well as the Governor's authority to make interim appointments since the legislature has now adjourned sine die.

We have been advised that the term of one member expired May 29, 1992 and that the member has been serving in a hold-over, de facto capacity since that time. The terms of three other members all expired May 19, 1994, during this recent legislative session.

The first statute to be considered is S.C. Code Ann. §43-25-10, which provides in relevant part: "The Governor shall, with the advice and consent of the Senate, appoint the members of the Commission [for the Blind] for terms of four years and until their successors are appointed and qualify." (Emphasis added.) Giving the emphasized words their plain and ordinary meanings, Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980), the statute clearly contemplates that members of the Commission will serve terms of four years and until their successors are appointed and have qualified to serve. Because the successors to these four members have not yet been appointed, the four members would continue to serve.

A similar situation was present in State ex rel. Lyon v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912). Magistrates were to be appointed by the governor with advice and consent of the Senate to terms of two years and until their successors were

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appointed and qualified. The governor in 1911 attempted to appoint successors to several magistrates, whose two-year terms had expired, after adjournment of the Senate; no appointments were submitted in 1911 prior to adjournment. Appointments (those persons allegedly appointed in 1911) were submitted to the Senate in 1912, but the Senate refused to confirm the nominees. The court invalidated the attempted appointments from 1911 and decided that the magistrates whose terms had supposedly expired in 1911 would continue to serve until their successors had been appointed by the governor and confirmed by the Senate.

The court in Bowden recognized the principle that "the Governor of a State has no inherent power of appointment to office and that his power must be found in the Constitution or statutes of the State." Id., 92 S.C. at 395-96. The court stated that, because the Constitution did not provide for the filing of vacancies in the office of magistrate, the General Assembly had the authority to provide for filling such vacancies occurring when the Senate was not in session. Reviewing the relevant statutes, the court determined that the governor's appointment power was limited to vacancies arising during a recess in the Senate, which appointments would cease to be of force should the Senate fail to confirm at its next session.

The court stated:

> The appointments in the cases now under consideration were made by the Governor without the advice and consent of the Senate; and they were without effect because when they were made there were no vacancies in the office. The length of the term of office of magistrate is specifically ordained by the Constitution to be "two years and until their successors are appointed and qualified." Therefore, one who is appointed to the office of magistrate by and with the advice and consent of the Senate holds the office until the expiration of two years, and until his successor has been appointed by the Governor by and with the advice and consent of the Senate and has qualified. Unless the words "until their successors have been appointed and qualified" are to be erased from the Constitution, the time which may elapse between the expiration of the two years and the actual appointment by and with the advice and consent of the Senate and the qualification of the successor is as much a part of the specific term of office fixed by the Constitution as the two years. The failure of the Governor to appoint, or of the Senate to act upon the

> appointment, or the rejection by the Senate of the appointment of the Governor does not create a vacancy. On the contrary, it was the clear intention of the framers of the Constitution to provide against the inconvenience to the people of a vacancy arising from the failure of due appointment by the Governor and confirmation by the Senate of a successor in the office at the expiration of the two years.
>
> To take any other view would be not only to erase words from the Constitution, but to attribute to the constitutional convention and the General Assembly the purpose to empower, the Governor to exercise sole control of the appointment of magistrates of the State in total disregard of the constitutional safeguard that his appointment shall be subject to the advice and consent of the Senate.
>
> The manner in which such sole control could be exercised is obvious. Upon the expiration of the term of two years, the Governor could refuse to appoint and submit to the Senate for confirmation. If it were true that the office then became vacant on the adjournment of the Senate, the Governor could, under the statutes, appoint to the vacancy and the appointee would hold until the Senate should act upon the appointment at its next session. If the appointment should be rejected by the Senate or not submitted to the Senate, the Governor could again refuse to submit an appointment to the Senate, and again after its adjournment, appoint to the vacancy. This process could be continued indefinitely to the complete subversion of the Constitution and the destruction of the checks on the executive power which the Constitution has so clearly ordained.
>
> No citation of authority can make the matter plainer than the words of the Constitution, but we think it safe to say that the Courts have held with complete unanimity that, when a term of office is fixed by law at a term of years and until the appointment or election and qualification of a successor, the term of the encumbent does not end and there is no vacancy until the expiration of the time named and the appointment or election and qualification of his successor. [Cites omitted.]

Bowden, 92 S.C. at 398-400.

Applying the reasoning of Bowden to the instant situation, it is our opinion that, while the terms of the four members have expired, those members would continue to serve until their successors have been duly appointed and have qualified. The same conclusion has been reached previously with respect to other offices by opinions of this Office dated November 19, 1990; December 9, 1988; Op. Atty. Gen. No. 87-123; June 30, 1980; and others, relying on Bowden and other similar cases.

Another statute providing a mechanism for gubernatorial appointments to fill certain vacancies, §1-3-210, must be mentioned. This statute provides the means for a governor to fill vacancies occurring "[d]uring the recess of the Senate...". It is not relevant in this instance because the vacancies arose, in each case, while the Senate was in session. To interpret §1-3-210 otherwise would be to create the mischief to be guarded against as stated in Bowden, supra. The Governor could submit nominees' names to the Senate when that body next convenes in January 1995, for the Senate to advise and consent thereto.

Conclusion

In conclusion, it is the opinion of this Office that the four members of the Commission for the Blind, whose terms have otherwise expired, would be required by §43-25-10 to continue to serve in their offices until such time(s) as their successors have been appointed and have qualified. Based on the Bowden decision and the language of §1-3-210, it is our opinion that the Governor would not have the authority to make an "interim" type of appointment.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

REVIEWED AND APPROVED BY:

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