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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 2, 1996

The Honorable David H. Wilkins
Speaker of the House of Representatives
508 Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Speaker Wilkins:

You have asked whether the resignation by a candidate for the House of Representatives is for a "legitimate non-political reason" as specified in S.C. Code Ann. Secs. 7-11-55 and 7-11-50 and the consequences thereof. You indicate that "[a] legislative candidate must, due to a personnel policy of his new employer prohibiting holding elective public office, resign his candidacy for his legislative district."

This question is controlled by Section 7-11-55 and 7-11-50. Section 7-11-55 provides in pertinent part as follows:

> [i]f a party nominee dies, becomes disqualified, or resigns his candidacy for a legitimate non-political reason as defined in Section 7-11-50 and was selected through a party primary election, the vacancy must be filled in a special primary election to be conducted as provided in this section.

The term "legitimate nonpolitical reason" is defined in Section 7-11-50. Subpart (c) of this definition would be applicable here, in my judgment. This provision states that a "legitimate nonpolitical reason" includes a

> (c) substantial business conflict, which includes the policy of an employer prohibiting employees being candidates

> for political offices and an employment change which would result in the ineligibility of the candidate or which would impair his capability to carry out properly the functions of the office being sought.

Section 7-11-50 requires that a candidate "who wishes to withdraw for a legitimate nonpolitical reason shall submit his reason by sworn affidavit." The affidavit is required to be filed with the state party chairman of the nominee's party and also with the election commission of the county if the office concerned is countywide or less included members of the General Assembly and with the State Election Commission if the office is statewide. Section 7-11-50 also states that "[a] candidate who withdraws based upon a legitimate nonpolitical reason which is not covered by the inclusions in (a), (b) or (c) has the strict burden of proof for his reason." (emphasis added).

You have asked what is the scope of discretion permitted the county election commission in an instance such as this where an affidavit valid on its face and regular in form clearly indicates that Section 7-11-50(c) is applicable. Our Supreme Court has stated that generally an administrative agency

> ... has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute.

S.C. Tax Comm. v. S.C. Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983), quoting 2 Am.Jur.2d Administrative Law, Sec. 188, p. 21. Moreover, an administrative agency has no discretion "to withhold its approval or authorization where statutory conditions to such approval are met." Id. at § 64. Although the agency "has the power to determine whether an application complies with statutory requisites, if it appears beyond doubt that the application does so apply, there is no discretion to reject the application." Id. at § 65.

In previous opinions of this Office, we have recognized these principles. In an opinion dated October 18, 1990, we addressed the question of whether the Secretary of State must file a proposed amendment to a charter of a domestic corporation regardless of the validity of the amendment. Referencing previous opinions dated August 31, 1984 and April 3, 1984 as well as Green v. Thornton, 265 S.C. 436, 219 S.E.2d 827 (1975), we concluded that "if the Secretary of State determines that the statutes which deal with filing of nonprofit corporate amendments have been met, he has no discretion in deciding

whether to file or not file the document." We noted that the Court in Green v. Thornton, supra had concluded that the Secretary of State's duties with respect to the issuance of a commission for election for municipal incorporation were primarily ministerial in nature even though the Secretary must determine whether the statutory requirements had been met. There, the Court stated:

> [w]e interpret Section 47-101 to require the petition be signed by freehold electors residing in the area to be incorporated. The fact some of the petitioners may be registered to vote in an adjacent poling place is of no legal consequence. The Petition on its face satisfied the statutory requirements. The Secretary's duty to issue the commission is mandatory and ministerial.

Thus, we concluded in the October 18, 1990 opinion that

> [l]ikewise, in this instance, the Secretary cannot judge the legal validity of the proposed amendment. If it appears valid on its face and comports with the filing requirements set forth in the Code with respect to domestic nonprofit corporations ... the Secretary is required by law to file the amendment.
>
> ... Your duty, quite apart from the legal validity or invalidity is simply to determine whether the document in question appears valid on its face and whether it meets the statutory requirements relative to domestic nonprofit corporations referenced above. If it does, you must file it.

The legal principles applicable in these opinions and cases would be applicable here as well. While clearly the authority to make the determination of the presence of a "legitimate nonpolitical reason" under the statute would rest with the county election commission, such must be made in accord with the statutory provisions contained in § 7-11-50. Of course, this Office possesses no authority to make factual findings in an opinion. Op. Atty. Gen., December 12, 1983. However, if an affidavit valid on its face and regular in form meets the requirement of § 7-11-50, the commission is required to find a "legitimate nonpolitical reason" in accord with Section 7-11-50(c).

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney

as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an