4603 Library

The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

September 17, 1991

The Honorable D. N. Holt, Jr.
Chairman, Joint Legislative Delegation
Room 307
2 Courthouse Square
Charleston, South Carolina 29401

Dear Representative Holt:

On behalf of the Charleston County Legislative Delegation, you have asked that this Office review newly amended § 44-20-375, S.C. Code Ann., and advise you whether this law transfers recommending authority for members of the Charleston County Mental Retardation Board from the Delegation to Charleston County Council. 1/

Section 44-20-375 was amended by Act No. 32 of 1991; subsection (A) now provides:

> Before July 1, 1992, county boards of mental retardation must be created within a county or within a combination of counties by ordinance of the governing bodies of the counties con

---

1/ Precisely how the Charleston County Mental Retardation Board was originally established has not been presented to this Office. We understand that members were appointed by the Governor upon nomination or recommendation of a majority of the Charleston County Legislative Delegation, as of January 1, 1991.

We recognize that mental retardation boards were created and members appointed in a variety of ways, as of January 1, 1991, some pursuant to legislative act and others in various other ways. Today's opinion does not hinge on the status of a particular board but instead looks only at the "appointing authority" existing on January 1, 1991. The legislature is presumed to have been cognizant of the variances in mental retardation boards in adopting Act No. 32 of 1991. Bell v. S.C. State Hwy. Dep't, 204 S.C. 462, 30 S.E.2d 65 (1944).

> cerned. The ordinance must establish the number, terms, appointment, and removal of board members and provide for their powers and duties in compliance with state law; however, the appointing authority for board members which existed on January 1, 1991, must be preserved in the ordinance.

(Emphasis added.) Further guidance as to the number of members, terms, filling vacancies, and removal of members of county mental retardation boards is given by newly-amended § 44-20-378. This question to be addressed is whether the "appointing authority," in those counties whose mental retardation board members are appointed by the Governor upon recommendation of a majority of the county legislative delegation, encompasses only the Governor or the Governor and the legislative delegation.

In interpreting any statute, the primary objection of a court or this Office is to ascertain and effectuate legislative intent if at all possible. Belk v. Nationwide Mut. Ins. Co., 271 S.C. 24, 244 S.E.2d 744 (1978). Words used in a statute are to be given their plain and ordinary meanings. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). One may depart from the literal language of a statute where the true intent of the statute is obvious but is not expressed. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). However, resort cannot be had, to determine legislative intent, to the opinions of legislators or others concerned in the adoption of an act. Id.; Tallevast v. Kaminski, 146 S.C. 225, 143 S.E. 796 (1928).

What constitutes the "appointing authority" is susceptible of at least two interpretations. One interpretation separates the power of nominating a suitable candidate for appointment from the power of appointment itself. Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60 (1803). To nominate or recommend is to propose a candidate. To appoint would be the exercise of official authority to place a nominee in office. Opinion of the Justices, 115 N.H. 385, 341 A.2d 758 (1975). The bifurcated process has been recognized in South Carolina in cases such as Blalock v. Johnston, 180 S.C. 40, 185 S.E. 51 (1936). Applying these principles to § 44-20-375, it could be concluded that the actual appointing authority (i.e., the Governor's authority) is to remain as it was on January 1, 1991, though the nominating or recommending authority could be placed with county council or the delegation or other appropriate entities. If county council exercised the nominating or recommending authority, such would likely be consistent with § 4-9-170, as council could exercise its judgment as to nomination or recommendation of members of the mental retardation board and the

Governor would exercise the actual, though ministerial, appointing power. 2/

In examining the act as a whole and giving effect to all its parts, Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952), we note that the term "appointing authority" is used in several places in §§ 44-20-375 and 44-20-378. In § 44-20-375(c), the phrase "including those [boards] whose members are appointed by the Governor" seems to contemplate the distinction between nomination or recommendation, on one hand, and appointment, on the other. In addition, § 44-20-378 provides for members' removal "by the appointing authority" for the specified reasons, by providing notice and an opportunity to be heard. Upon consideration of similar statutes permitting public officials to be removed under similar circumstances (notably § 1-3-240), it would seem incongruous (and also burdensome and unwieldy) that the General Assembly meant the power of removal to be exercised jointly by the Governor and the delegation or the Governor and county council as may be the case. Construing together all references to the "appointing authority" urges the conclusion that the "appointing authority" is intended to refer to the Governor in those counties in which mental retardation board members are appointed by the Governor upon nomination or recommendation of a majority of the county legislative delegation.

On the other hand, there is some authority for the notion that "appointment" includes the act of selecting the appointee to fill the position in question (actually exercising the discretion), rather than exercising only the ministerial function of confirming the individual nominated or recommended. See, for examples, Carney v. N.Y. Life Ins. Co., 19 App. Div. 160, 45 N.Y.S. 1103 (1897); State ex rel. Brothers v. Zellar, 7 Ohio St. 2d 109, 218 N.E.2d 729 (1966); Corbett v. Hospelhorn, 172 Md. 257, 191 A. 691 (1937); and State v. Provenzano, 34 N.J. 318, 169 A.2d 135 (1961), among others. Thus, an ambiguity exists in this statute. The ambiguity is further compounded upon consideration of whether an entity, calling itself a county board but established as an eleemosynary corporation or in some fashion other than by legislative act, is actually a "county board" as contemplated by § 44-20-385, as such would likely not be a political subdivision or county agency.

2/ Even if § 44-20-375 should be viewed as conflicting with § 4-9-170, which permits a county council to provide for appointments to county boards, § 44-20-375 would likely be viewed as prevailing as it is the later expression of legislative intent. S.C.E. & G. v. S.C.P.S.A., 215 S.C. 193, 54 S.E.2d 777 (1949).

After reviewing as much legislative history as is possible about this enactment and discussing the issues with persons involved in the enactment process, it appears that the intent of the proviso under discussion was to leave the appointment process exactly as it was on January 1, 1991. As noted above, however, opinions of individual legislators or others concerned with enactment of a specific act are not to be considered in construing an act. Unfortunately, applying the rules of statutory construction to the choice of language in the statute does not yield the hoped-for result. Had the actual intent been officially expressed or language selected which would have reflected that intent, it would be easier to depart from the literal language of the statute, to declare unequivocably that the term "appointing authority" encompassed the entire process rather than the actual appointment as distinguished from the nomination or recommendation phase.

In conclusion, the ambiguity notwithstanding, the language of § 44-20-375 seems to suggest that the appointing authority, in the circumstances described in your letter, would remain with the Governor, though the nominating or recommending power could be transferred to county council from the county legislative delegation. While such transfer is not mandated by § 44-20-375, neither is it prohibited. Because this construction may not fulfill the legislative intent unofficially expressed to the undersigned attorney, it may be desirable to seek legislative or judicial clarification to resolve the seeming ambiguity.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/klw

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions