

The State of South Carolina

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July 2, 1990

The Honorable Edward E. Saleeby
Senator, District No. 29
Post Office Box 519
Hartsville, South Carolina 29550

Dear Senator Saleeby:

By your letter of June 12, 1990, you have requested the opinion of this Office as to whether a gubernatorial appointee to fill a vacancy in the office of Darlington County Auditor will serve the entire unexpired portion of the term, or whether a successor should be chosen by election. If an election is required, you have asked about the timing of such election.

By way of background, you have advised that the position of Darlington County Auditor was filled in the general election of 1988 for a term to commence July 1, 1989 and end June 30, 1993. The office became vacant by resignation of the incumbent effective May 1, 1990 and was filled by appointment of the Governor on that date.

A number of statutes must be reconciled to respond to your inquiry, as well as several prior opinions of this Office and an order of the Honorable James E. Moore in a similar case. Each will be examined, as follows.

The office of auditor was established generally pursuant to Section 12-39-10 of the South Carolina Code of Laws, which provides for appointment of a county auditor by the governor with the advice and consent of the Senate. Legislative history following that section indicates that local laws were adopted for many counties with respect to the auditor. With the advent of home rule, auditors were required to be elected in counties governed by the council, council-supervisor, and council-administrator forms of government, by Section 4-9-60. Darlington County is governed by the council-administrator form and thus has an elected auditor.

Should a vacancy occur in the office of county auditor, Section 12-39-10 provides: "When any auditor for any reason fails to complete his term of office, his successor shall be appointed initially for the unexpired portion of the term for which his predecessor was appointed." Though Section 4-9-60 requires election of many county auditors rather than appointment, there is no provision in Section 4-9-60 or the Home Rule Act generally (Act No. 283 of 1975) which would govern the filling of a vacancy in the office of county auditor for an unexpired term.

Consistent with Section 12-39-10, Section 1-3-210 provides:

Any vacancies which may happen in any of the following officers during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session:

(1) County auditors;

....

If the Senate does not advise and consent thereto at such next session, the office shall be vacant.

Because a county auditor is unquestionably a county officer, two other statutes relative to filling vacancies must also be considered. Section 1-3-220 provides in relevant part:

The following officers shall be appointed by the Governor in addition to those for whose appointment by the Governor provision is elsewhere made in this Code:

....

(2) An officer to fill any vacancy in a county office. The person so appointed shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify;

Similarly, Section 4-11-20 provides:

In the event of a vacancy at any time in any of the offices of any county of the State the Governor may appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, he shall be entitled to enter upon and hold the office to which he has been appointed:

- (1) If it be an elective office, until the next general election if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed, in which latter case an election shall then be held to fill the unexpired term and in either such event such person shall hold office until his successor shall qualify;

Any officer so appointed shall be subject to all the duties and liabilities incident to his office during the term of his service therein. Any officer elected to fill an unexpired term under the provisions of this section shall hold office for such term and until his successor shall qualify.

These Code sections would suggest that a gubernatorial appointee serve on an interim basis, until the next general election, at which time a successor would be elected to serve the unexpired portion of the term. As is readily apparent, this scheme to fill a vacancy would conflict with the scheme contemplated by Sections 12-39-10 and 1-3-210.

In considering the issue previously, this Office has reached varying conclusions. An opinion dated July 20, 1976, concluded that a successor to the Beaufort County Auditor be appointed by the Governor for the remainder of the term; this opinion construed a local law and failed to consider Sections 4-11-20, 1-3-220, and 12-39-10 of the Code. An opinion dated November 26, 1975, concluded that the Governor would appoint an interim successor to the Edgefield County Auditor, who would serve until a successor could be elected in the next general election to serve the remainder of the term; this opinion construed a local act and Section 4-11-20 but failed to consider Sections 1-3-210 and 12-39-10. By an opinion dated March 17, 1978

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construing all of the relevant Code sections, former Attorney General McLeod concluded that the interim successor to the Greenwood County Auditor should be appointed by the Governor for the unexpired portion of the term. Noting the difficulty in reaching a conclusion since there are a number of potentially applicable statutes, as stated in Op. Atty. Gen. No. 2680 dated May 29, 1969, Attorney General McLeod suggested that a declaratory judgment be sought to resolve the uncertainty.

It has come to our attention that a quo warranto-type action was indeed initiated in Greenwood County in April 1978 by the chairman of the Executive Committee of the Greenwood County Democratic Party and two individuals who were candidates for nomination by the Democratic Party for election to the office of Auditor of Greenwood County, asking the court to determine, essentially, the extent of the term of the interim appointee of the Governor. Copies of the pleadings are enclosed herewith. After reviewing the facts and relevant statutes, the Honorable James E. Moore concluded that the interim gubernatorial appointee would serve only until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term. Judge Moore reviewed all relevant statutes and observed the fact that the language concerning appointment of an auditor has no applicability in the Greenwood County situation.

Judge Moore determined that Section 4-11-20 was the applicable statute, a result reinforced by the provisions of Section 1-3-220. Thus, the interim appointee would hold office until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term. Judge Moore continued:

Furthermore, while the statutes, of course, control my decision, I am confident that my decision is supported by reasons of sound public policy. When an elective office is rendered vacant by death or other reasons, it seems apparent to me that the people should have the right to elect the successor as soon as possible, which the Legislature has determined to be at the next general election. Conversely, when the office was filled by appointment in the first instance, no reason appears why the replacement appointment should not be made to last as long as the original appointment. No reason appears why a replacement appointment for an elective office should be permitted to continue any longer than necessary.

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Applying this court decision and the reasoning therein to the circumstances in Darlington County mandates the conclusion that Sections 4-11-20 and 1-3-220 should prevail over Sections 12-39-10 and 1-3-210 with respect to county auditors elected pursuant to Section 4-9-60. Because a court has ruled pursuant to the suggestion made by former Attorney General McLeod, no further examination by this Office is necessary. Thus, consistent with Judge Moore's earlier decision, the gubernatorial appointee would serve until a successor is elected in the general election in November 1990, the successor being elected to serve the remainder of the term for which the auditor was elected in November 1988. To the extent that today's opinion is deemed inconsistent with other opinions of this Office concerning the selection of a successor to an elected auditor, today's opinion will be deemed controlling, as being in conformity with Judge Moore's ruling.

Since a successor should be elected, you have inquired about the time for such an election. No statute exists which would establish a time-table in this instance. Section 7-13-190 would not be applicable since the vacancy in this office is not one being filled by a special election; though the statute is not applicable, it could serve as a model to establish a reasonable timetable allowing notice, opportunity for declaring candidacy, primary elections, and so forth, toward the actual election in November 1990. In addition, the appropriate county officials should contact the Department of Justice to determine whether preclearance would be required in this instance and, if so, whether such may be given expeditious consideration in light of time constraints.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions