The State of South Carolina

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March 1, 1991

The Honorable D. N. Holt, Jr., Chairman
Charleston County Joint Legislative Delegation
2 Courthouse Square, Room 317-A
Charleston, South Carolina 29401

Dear Representative Holt:

This letter serves to confirm my telephone conversation with you of February 28 and March 1, 1991, regarding the authority of the Legislative Delegation to make appoints to the Charleston County Board of Elections prior to the special election scheduled for April 2, 1991. In a letter to you dated January 30, 1991, in response to your question concerning this issue we cited the provisions of S.C. Code Ann. §7-13-70 (Supp. 1990) that require appointments to be made ninety days prior to a general or special election. We then went on to state that

> [u]nder the provisions of this statute, persons appointed to the Board have implied two year terms unless shortened by appointments of new members prior to an intervening special election. As a special election has been set for April 2, the Code would authorize new members of the Board to be appointed prior to the holding of this special election.

We understood your opinion request to just concern whether or not new appointments could be made to the Board prior to a special election, we did not specifically consider the date of the special election. The statute, which we did cite, requires the appointment to be made at least ninety days prior to an election. At the time the letter was written on January 30 there already did not exist ninety days prior to the special election and, therefore, there was never enough time to make appointments to the Board by the April 2 special election date.

In 1989 you presented a similar question in which the Legislative Delegation had made appointments to the Board in May and as of September the Governor had not made the appointments. The two issues differ only in that the Delegation had presented its nominees to the Governor substantially prior to the ninety day period for nomination and the Governor had not made the appointments within time. This letter cited the general law regarding the timely performance of acts as follows:

> [s]tatutory provisions fixing the time for performance of acts may be either mandatory or directory, in accordance with the legislative intent, and will ordinarily be held directory where there are no negative words restraining the doing of the act after the time specified, and no penalty is imposed for delay. On the other hand, statutory provisions with respect to the time of performing an act are to be taken as mandatory where consequences attach to the failure to comply; and where the act to be performed concerns vested rights, procedure, or other similar matters, such as the imposition of a lien on land, the statute is generally mandatory.

82 C.J.S., Statutes, §379; See also, 73 Am.Jur.2d, Statutes, §§18;25.

We concluded in that 1989 letter, a copy of which is attached, that although the conclusion cannot be free from doubt absent a ruling of the Court

> ... it would appear that although the statute states that the recommendations and appointment should be made ninety days before the election, there is no negative prohibitive result from not meeting this deadline. Although the specific deadline for making appointments ninety days before the special election would not be met there would have been substantial compliance with the statute. 73 Am.Jur.2d, Statutes, §15.

Again, although the conclusion cannot be free from doubt the same rationale of the 1989 letter would be applicable to the present situation. Although a ninety day time period is envisioned by the statute, there are no negative consequences provided in the statute for the failure to make the appointment.

The language of the statute may only be directory. In 1970, then Attorney General McLeod issued an opinion on what is now codified as §7-5-10 and which are the provisions for appointing members to the Board of Registration. This statute provides specifically that the persons be appointed between January 1st and March 15 in every even numbered year. Mr. McLeod held that this language was directory and not mandatory. 1/ Copy attached. In Nesbitt v. Coburn, 143 S.W.2d 229, 232, (1940) the Court held that

> [t]he rule seems to be that the statutes with reference to the manner of appointing election officers are directory and that irregularities therein will not affect the validity of the election.

See also, 29 C.J.S., Elections, §59, p.143; 25 Am.Jur.2d, Elections, §41, p.726.

The South Carolina Courts have not ruled on the specific question of if a person appointed after the statutory time period is properly appointed since our earlier 1989 opinion and the issue is still, therefore, not free from doubt. Although the preferred appointive procedure would be for the Governor to make his appointments ninety days prior to the election as Section 7-13-70 envisions, it would appear that for the reasons set above and in the attached opinions nominations made after that time would most probably be valid.

Very truly yours,

Treva G. Ashworth
Senior Assistant Attorney General

TGA:bvc
Attachments

1/ Mr. McLeod additionally found that after the persons had served their term they were holding over in office and a vacancy existed that could be filled at anytime. Similarly any person on a County Election Commission has only an implied two year term unless shortened by an intervening special election and holds office until a successor is appointed and qualified. Under the rationale of Mr. McLeod's opinion, it could be argued that any person or the County Election Commission holding office more than two years is actually holding over and could be replaced at anytime.

REVIEWED AND APPROVED BY:

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