

The State of South Carolina



Office of the Attorney General

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November 19, 1990

The Honorable Michael T. Rose
Senator, District No. 38
314 Chessington Circle
Summerville, South Carolina 29485

Dear Senator Rose:

In a letter to this Office you questioned whether the Governor may make an appointment of a magistrate to replace a magistrate in holdover status while the State Senate is not in session provided the new appointment is confirmed by the Senate when that body reconvenes. You did not specify a particular magistrate by name or indicate when that magistrate's term expired.

Pursuant to Section 1-3-210 of the Code,

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

... (3) Magistrates ...

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

Pursuant to Article V, Section 26 of the State Constitution, magisterial appointments are made by the Governor "by and with the advice and consent of the Senate." Section 22-1-10(A) of the Code, enacted in 1988, states:

The Governor, by and with the advice and consent of the Senate, may appoint magistrates in each county of the State who shall hold their office

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for the term of four years and until their successors are appointed and qualified. 1/

Enclosed is a copy of a prior opinion of this Office dated May 12, 1987, along with its enclosure, which cites the decision of the State Supreme Court in State ex rel. Lyon v. Bowden, 92 S.C. 393 at 400, 75 S.E. 866 (1912), a copy of which is also enclosed, where it is stated

... 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 incumbent 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.

The Court also noted

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.

The referenced opinion of this Office concluded that inasmuch as magistrates are directed to holdover in office until their successors are appointed and qualified, Section 1-3-210 would not apply to a magistrate holding over in office. Therefore, as to the situation you addressed, the Governor would not be authorized to make an appointment to replace a magistrate in holdover status while the Senate is not in session.

1/ Such provision replaced former Section 22-1-10 of the Code which similarly provided for the appointment of magistrates by the Governor by and with the advice and consent of the Senate "who shall hold their office for the term of two years and until their successors are appointed and qualified."

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With kindest regards, I am

Very truly yours,



Charles H. Richardson
Assistant Attorney General

CHR/an

Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions