

The State of South Carolina



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September 8, 1989

The Honorable Herbert U. Fielding
Senator, District No. 42
Post Office Box 994
Charleston, South Carolina 29402

The Honorable D. N. Holt, Jr.
Member, House of Representatives
Post Office Box 70093
North Charleston, South Carolina 29406

Gentlemen:

By respective letters and attachments, you have advised this Office of facts concerning purported appointments to the Charleston County election Commission made during the past twelve months. You wish to know which appointees should properly be in office.

We understand that on September 13, 1988, the Charleston County Legislative Delegation made certain recommendations as to appointees to the Charleston County Election Commission. On September 30, 1988, the Governor acted on these recommendations and appointed those persons to serve on the Charleston County election Commission. We further understand that on May 4, 1989, the Delegation again recommended to the Governor that certain persons be appointed to the Charleston County Election Commission; however, as of this date no new appointments have been made. Finally, we understand that on November 7, 1989, several elections are scheduled to be held within Charleston County: a referendum to decide how county council members should be selected; a county-wide bond question concerning an aquarium; and the City of Charleston and other local governments are holding general municipal elections.

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Section 7-13-70, Code of Laws of South Carolina (1988 Cum. Supp.), provides the following in relevant part:

For the purpose of carrying on general or special elections provided for in Section 7-13-10 the Governor shall, at least ninety days prior to any such election, appoint for each county not less than three nor more than five commissioners of election upon the recommendation of the Senator and at least half of the members of the House of Representatives from the respective counties. The Governor shall notify the State Election Commission in writing of the appointments. The commissioners shall continue in office until their successors are appointed and qualified....

Under 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 there has recently been set a special election to be held on November 7, the Code would authorize new members being appointed prior to the holding of the special election. 1/ The persons recommended to the Governor on May 4, would have been nominated prior to ninety days prior to the election but would not be appointed by the Governor, as required by the statute, ninety days before the special election.

In 82 C.J.S., Statutes, §379, the general law is stated 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

1/ To the extent that today's opinion is inconsistent with an opinion issued on October 27, 1988, concerning the appointment of election commission members for an intervening special election, today's opinion is deemed to be controlling.

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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.

See also, 73 Am.Jur.2d, Statutes, §§18;25.

This general law has been followed in several cases, especially it appears in Georgia where this issue has been litigated quite extensively. In the case of O'Neal v. Spencer, 47 S.E.2d 646 (Ga. 1948) the court was asked to determine if an appointment of an individual to the Board of Public Education for the City of Savannah and Chatham County was proper in that the statute mandated that "... during the last thirty-day period proceeding the expiration ... of the terms of Office of two members of said board the successors to said two members shall be chosen ..." and the appointment was made thirty-three days before the expiration. O'Neal, supra, at 646. The court held that

[t]here is no provision in the act which would render the respondent's appointment void unless made within the time fixed by the terms thereof. His appointment, being otherwise valid, is not void because the Mayor and Council made the appointment three days before they were authorized to do so under the directory terms of the act ... [.]

The court, therefore, found that the generally mandatory word "shall" as used in the Georgia statute was directory only, not mandatory. See also, Hardison v. Fayssoux, 309 S.E.2d 397, 398-399 (Ga. App. 1983); 82 C.J.S., Statutes, §380.

Another Georgia case, Middleton v. Moody, 115 S.E.2d 567 (Ga. 1960), which concerned the appointment of an election recount committee, was also decided in favor of the liberality of interpretation of the time requirements set out in the statute. See also, Lang v. State, 310 S.E.2d 276, (Ga. App. 1983); Sanchez v. Walker County Department of Family and Children Services, 229 S.E.2d 66, (Ga. 1976); Collins v. Nix, 188 S.E.2d 235 (Ga. 1972).

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As the South Carolina courts have apparently not determined this issue in South Carolina, it is difficult to predict what the courts may rule on this issue as there are various conflicting legal principles involved in this question.

Section 7-13-70 is written using the word "shall" which is generally understood to be a mandatory term. See, South Carolina Wildlife Foundation v. Alexander, 457 F. Supp. 118 (D.C. S.C. 1978); but see, State v. Blair, 273 S.E.2d 536 (S.C. 1981); O'Neal, supra; Hardison, supra.

Utilizing the general language of C.J.S. and Am. Jur. and the cases from Georgia, 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.

Therefore, although the conclusion cannot be free from doubt absent a definitive ruling of a court in South Carolina, by applying the substantial body of law cited above, it would appear that if the Governor would now appoint the persons nominated to him in May, this appointment would most probably be valid and proper in that an intervening special election authorizes the shortening of the existing Board's term of office.

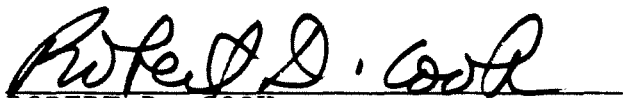
Very truly yours,



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REVIEWED AND APPROVED BY:



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