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

August 20, 1986

The Honorable T. Moffatt Burriss
Member, House of Representatives
Box 55
Columbia, South Carolina 29202

Dear Representative Burriss:

Pursuant to your request by telephone, I am enclosing copies of the following: § 42-7-20 as it existed prior to the 1980 amendment; § 42-7-20 in its present form, following amendment in 1980; Act No. 509 of 1980 (original form of 1980 amendment of § 42-7-20); and available materials from the Secretary of State's office relative to the appointment of the Executive Director of the State Fund. From the Secretary of State's office are included a document dated March 29, 1979; a document dated August 1, 1986; and a document dated August 8, 1986. I am also informed that the Secretary of State maintains a "log" book which contains information pertinent to your inquiry, but which is too voluminous or bulky to copy. I am advised that the following notations relevant to the appointment of the Executive Director are contained therein: an appointment was made March 14, 1979 and a commission issued April 11, 1979; another notation indicates that an appointment was made August 12, 1983 and a commission issued August 24, 1983; a third notation is dated August 7, 1986 and apparently reads to the effect that "To 6-30-87 corrected appt. 8-1-86 begin 6-11-80 to 6-11-86."

With respect to copies of those materials requested by you from the Secretary of State's office, I would add that members of my staff have provided me with copies or an abstract thereof which I have provided you. Of course, the originals of such records are available for inspection and you may wish to see the records in original form as well.

You have also asked me to advise you as to when the term of office of the Executive Director of the State Fund begins and ends. Section 42-7-20 provides that "[t]he State Workers' Compensation Fund shall be administered by a director appointed

by the Governor for a term of six years with the advice and consent of the Senate." Nothing in Section 42-7-20 or the workers' compensation statute generally indicates when the Executive Director's term is to begin. It is the general rule that "where no time is fixed by the constitution or statute, the term begins, in the case of elective offices, on the day of election, and, in the case of appointive offices, on the day of appointment...." 67 C.J.S., Officer, § 68. See also 63A Am.Jur.2d, Public Officers and Employees, § 160; Throop on Public Officers, § 306 et seq. This also appears to be the general rule in South Carolina. See Macoy v. Curtis, 14 S.C. 371 (1880); Verner v. Seibels, 60 S.C. 572 (1901); Opinion of Attorney General, September 21, 1979. However, I would note that there is authority to the contrary, wherein the courts have refused to follow the general rule above stated and instead concluded that an officer's term begins on the effective date of the act in question, regardless of the appointment date. See Gardner v. McDonald, 281 S.C. 455, 316 S.E.2d 374 (1984); Bruce v. Matlock, 111 S.W. 990 (Ark. 1908); Boyd v. Huntington, 11 P.2d 383 (Cal. 1932) and People v. Hamrock, 222 P. 391 (Colo. 1924).

However, your question is more readily answered by the fact that it is our understanding that the appointment to the position of the Executive Director, pursuant to § 42-7-20 (as amended in 1980), has never been completed. It is well recognized that where the advice and consent of the Senate is required for an appointment, such appointment is not complete until Senate approval is obtained. Heyward v. Long, 183 S.E. 145, 156 (S. C. 1935); State ex rel. Lyon v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912); 67 C.J.S., Officers, § 42; 63A Am.Jur.2d, Public Officers and Employees, § 117. Thus, so long as the appointment is not complete, the former incumbent, originally appointed under a statute which has now been amended, simply has continued to hold over since 1980 as a de facto officer. 1/ Heyward v. Long, supra.

1/ We note that nothing contained in § 42-7-20, either before or after amendment, provides that the incumbent Executive Director is to serve until a successor is appointed and qualifies. Thus, it is more appropriate to characterize the Director's status after enactment of the 1980 statute as de facto, rather than de jure, unless validly appointed pursuant to § 42-7-20 as amended. See, Gaskins v. Jones, 198 S.C. 508, 18 S.E.2d 454 (1941).

Moreover, the fact that the Executive Director may have received a commission in 1983 is not controlling. Proof of confirmation or rejection is ordinarily to be shown by the journals of the senate.... 67 C.J.S., Officers, § 44.

The present Director was originally appointed pursuant to § 42-7-20 prior to its amendment in 1980; since no term was specified in the statute, it is evident that the original appointment was at the pleasure of the Governor. State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). 2/ Obviously, he could be bestowed no greater rights or tenure under the new law than he possessed under the Act pursuant to which he was originally appointed [former § 42-7-20], unless his appointment under the new law becomes complete. Therefore, it is our view that unless his appointment under the 1980 statute is complete, i.e. Senate confirmation has been obtained, the Executive Director continues to serve at the pleasure of the Governor. See, Comm. of Adm. v. Kelley, 223 N.E.2d 670 (Mass. 1967). 3/

You have also asked whether the Governor could appoint a new Executive Director while the Senate is not in session, subject to confirmation upon the Senate's return. In an opinion of this Office, dated June 28, 1984, it was concluded that the Governor did not possess the authority to make a recess appointment to fill a vacancy on the MUSC Board while the Senate was not in session. The opinion cited § 1-3-220 of the Code (as well as other relevant statutes) authorizing the Governor to make recess appointments to fill vacancies in the "executive department" and concluded that these statutes did not authorize the Governor to make recess appointments with respect to the vacancy on the MUSC Board. Citing a previous opinion, the opinion concluded that the MUSC Board was not part of the "executive department" of State government.

The conclusion reached in the 1984 opinion may be distinguishable from the present situation, however. Section 42-7-10

2/ In Wannamaker, the Court indicated that absent a specific statutory term, the general rule is that an officer may be removed at the will of the appointing authority. Generally, "pleasure" means that the employer possesses unrestricted control over the employee's appointment, including removal. Op. Atty. Gen. July 3, 1986.

3/ This conclusion is best illustrated as follows: The Governor immediately upon enactment of the new statute decided to appoint a different person than the incumbent Director to the position. There would be no doubt that the former incumbent would then serve as a de facto officer at the Governor's pleasure until Senate confirmation occurs. See, Gaskins v. Jones, supra.

expressly establishes the State Workers' Compensation Fund as an agency of State government; thus, reasonable arguments could be made that the State Fund is part of the "executive department of the State" pursuant to § 1-3-220, thereby authorizing the Governor to make an interim appointment which would have de jure status. Such arguments would be consistent with the obvious need to make interim appointments to fill vacancies where the head of a department rather than a member of a board or commission, is involved. Moreover, such would avoid an interpretation of the term "executive department" which would be limited to merely the officers listed in § 1-1-110. But see, State ex rel. Gasque v. Singleton, 100 S.C. 465, 84 S.E. 989 (1915).

Regardless of whether a recess appointment by the Governor falls within the specific authority provided by § 1-3-220 or any other statute, it is clear that one appointed by the Governor under color of such title would be a de facto officer and all acts performed by such appointee would be valid as to third parties. See, Miss. Marine Conserv. Comm. v. Misko, 347 So.2d 355 (Miss. 1977); see also, Heyward v. Long, supra; 67 C.J.S., Officers, § 269; 63A Am.Jur.2d, Officers, § 605. We can perceive of situations which would require an immediate filling of a vacancy in the interim even though the officer may not possess de jure status. The law generally abhors vacancies in public offices because "the policy of the law is to have someone always in place to discharge the duties of public officers ... ." Throop on Public Officers, 308; see also, 67 C.J.S., Officers, 74. Thus, if an interim appointment is made, the acts of that appointee would be considered valid.

You have also asked whether, assuming that the present Governor makes a new appointment to the position but such is not confirmed by the Senate, a successor Governor could revoke such appointment and appoint someone else. It is well established that an appointment to office may be revoked at any time before the appointment becomes final and complete ..." 67 C.J.S., Officers, § 43.

> For the purpose of this rule, an appointment to office is complete when the last act required of the person or body vested with the appointing power has been performed.

Id. As indicated above, an appointment to the position of Executive Director is not complete until Senate confirmation

occurs. Thus, an appointment could be revoked at any time prior to Senate confirmation. If I may be of further assistance, please let me know. With kindest personal regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

RDC/an

Enclosures