



9343-9893

ALAN WILSON
ATTORNEY GENERAL

February 20, 2015

Via Electronic Mail and U.S. Mail

Mr. Donald Hollingsworth, Chairman
James Island Public Service District
1739 Signal Point Road
Charleston, SC 29412

Dear Mr. Hollingsworth:

Attorney General Alan Wilson has referred your email dated January 28, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue:

The legal counsel for the James Island Public Service District (hereinafter "Counsel") resigned verbally to the board. No vote was taken on the resignation at that meeting. The next day Counsel withdrew his verbal resignation by letter. At the next board meeting, multiple motions were made concerning legal counsel for the board, but no motions passed. Therefore, we have been asked whether the verbal resignation, although later revoked in writing, was effective, or whether such a resignation would have to have been made in writing?

Short Answer:

Based solely on the legal questions you asked¹, without knowledge of the specific facts and without making any factual determinations, a resignation generally has to be accepted before it is final. Without a vote by the board of whether to receive the resignation or not, we think a court will likely find there was no acceptance of the resignation. In the alternative, there are no legal grounds for an independent contractor to resign, as they are not an employee. An independent contractor should give notice to terminate the contractual agreement, subject to the terms of the agreement, and such notice should preferably be given in writing. Since none of those things occurred here, there is no need to address further questions since the resignation (or termination) was not accepted by (or tendered to) the board based on the facts as presented.

Law/Analysis:

By way of background, it is this Office's understanding that Counsel for the James Island Public Service District is used on an as-needed basis and has been working under a non-written agreement for approximately twenty-five years. Using the four factors test (control, furnishing of equipment, method of

¹ See Op. S.C. Att'y. Gen., 2006 WL 2849809 (September 14, 2006) ("[I]nvestigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court").

payment, and right to fire) recognized in Wilkinson v. Palmetto State Transport Co. (382 S.C. 295, 676 S.E.2d 700 (2009)) and based on the information provided, it is our understanding Counsel's relationship with the James Island Public Service District would be consistent with an independent contractor relationship. See also Ops. S.C. Att'y Gen., 2014 WL 4953187 (September 19, 2014); 2014 WL 1398599 (January 14, 2014); 2006 WL 3199988 (October 11, 2006); 2002 WL 31341807 (August 16, 2002); 1998 WL 746925 (September 14, 1998); 1993 WL 720127 (June 11, 1993) (concluding legal counsel of certain agencies and political subdivisions to be more similar to an independent contractors rather than office holders). Traditionally, an employee would resign, whereas with an independent contractor, either party could terminate the agreement. Id. Therefore, while Counsel may have verbally "resigned," he would need to terminate the agreement consistent with the terms of the contract rather than "resign" as an employee would. Where there is no formal contract, we believe proper notice would be to the authority who has the right to contract with Counsel. In this case, we believe a court would likely determine that to be the board of the James Island Public Service District. Even if Counsel may have worked with the manager for the district, the termination would likely need to be to the board, as the board would likely be the one who votes concerning spending money to pay for Counsel, and the board is the one who has the legislative authority to appoint "officers, agents, employees and servants" in the District's enabling legislation. 1961 S.C. Acts 498 § 5(23).

Furthermore, we believe a court will determine that proper notification would need to be in writing to the board. As this Office has previously stated, "verbal resignations will only lead to difficulty." Op. S.C. Att'y Gen., 1979 WL 42842 (March 6, 1979). This Office has previously opined legal counsel to a public board would not likely be an office for honor or profit under the Crenshaw test.² See, e.g., Op. S.C. Att'y Gen., 2014 WL 7505272 (December 22, 2014) (citing State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980)). While we believe a court would find Counsel in this situation to be more akin to an independent contractor than a public officer, the resignation of a public officer must be accepted to be complete and may be withdrawn up until acceptance. State v. Stickley, 80 S.C. 64, 61 S.E. 211 (1908); Rogers v. Coleman, 245 S.C. 32 (1964) (where the law requires, a public officer continues even where his resignation is accepted until a successor is qualified). Moreover, while Counsel is probably an independent contractor, it is worth noting that those subject to the regulations for State employees (as found in S.C. Code Reg. 19-101 (1993), et seq.) may resign orally or in writing, but the resignation must be accepted and such acceptance should be confirmed in writing. S.C. Code Reg. 19-719.02 (2010). Furthermore, in as much as an independent contractor can resign (or we believe should give notice of termination of future services), a resignation generally must be accepted before it becomes effective, depending on the terms of the agreement between the parties. Therefore, it is for all these reasons we believe a court will likely find the board of the Public Service District would need to vote to accept the resignation of Counsel, or, if viewed as a termination of an independent contractor, such termination should be in writing.³

² Under Crenshaw, "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee." State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980) (quoting Sanders v. Bleue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907)).

³ See, e.g., S.C. Code § 32-3-10 (Statute of Frauds) requiring agreements not to be performed within one year to be in writing.

Mr. Donald Hollingsworth
Page 3
February 20, 2015

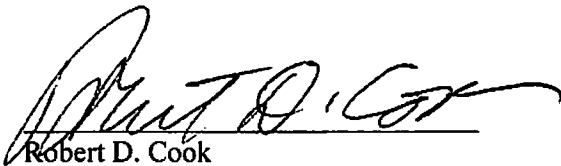
Conclusion: Based on the conclusion that the board of the James Island Public Service District would need to vote to accept the resignation of its legal counsel or, in the alternative, notice of termination of such a contractual relationship should be in writing, it appears the verbal resignation, if binding at all, was not properly tendered or accepted. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. For a binding determination, this Office would recommend seeking a declaratory judgment from a court on these matters. S.C. Code § 15-53-20. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General