1981 WL 157938 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
August 27, 1981

***1 RE: Opinion on H2999 (R-257)**

The Honorable Richard W. Riley
Governor of South Carolina
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:
You have requested an opinion as to whether H2999 (R-257) suffers from any 'constitutional weakness'. Based upon the discussion to follow, the opinion of this office is that the constitutionality of R-257 is suspect.

R-257 is simply an attempt by the General Assembly to validate a prior legislative enactment, specifically Act No. 152, Acts and Joint Resolutions of South Carolina, 1959. Apparently, the purpose for enacting R-257 is an attempt by the Legislature to validate the creation of Florence County School District No. 5, which district was authorized to be created in 1959 following a favorable election by the qualified freeholders within the proposed area of the district. Since the enactment of Act No. 152 in 1959, both the Federal District Court for South Carolina and the United States Fourth Circuit Court of Appeals, as well as the United States Supreme Court, have rendered decisions generally striking down provisions similar to those in the 1959 Act. Kramer v. Union Free School District No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969), and Hayward v. Clay, 573 F.2d 187 (4th Cir. 1978). These cases hold that a state may not limit eligibility to vote in matters of general public interest without the existence of a compelling state interest. Such matters as residency, age, and citizenship are deemed matters of compelling state interest; however, the courts have looked with great disfavor upon provisions restricting eligibility to vote in city, county, and school matters based upon a requirement of property ownership.

While the decisions in the cases cited herein were rendered a significant length of time after the enactment of Act No. 152 of 1959, these decisions would most likely render invalid provisions such as the one in the Act limiting the election to freeholders. See the attached opinion of James Holly, Assistant Attorney General, as to the potential effect of the decision in Hayward Ward v. Clay, supra, in South Carolina.

R-257 is validating or curative legislation, in that it seeks to correct a defect in prior law as perceived by the General Assembly. Curative legislation is defined in Sutherland, Statutory Construction, Vol. 3, § 41.11 as follows, 'A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities which in the absence of such an act would be void for want of conformity with existing legal requirements, but which would have been valid if the statute had so provided at the time of enacting.' Further, the General Assembly may generally validate the corporate existence of a political subdivision; however, the General Assembly may only cure a defect that it originally could have enacted without defect, as noted in the following quotation:
***2** The corporate existence and the legislative and administrative actions of municipal corporations, including cities and towns, school districts . . . may be validated by properly enacted curative statutes. Because there is apparent legislative cognizance of the fact that most political subdivisions must be administered by personnel unfamiliar with the intricacies of the law, and because the courts generally afford liberal interpretation to action taken for the public benefit, there is a mutual legislative and judicial willingness to forgive, forget, and legalize. The Legislature cannot, however, validate that which it could not previously have authorized or make immaterial matters which are jurisdictional and could not have been dispensed with antecedently.

Sutherland, supra, at § 41.15, citing State v. Harper, 30 S.C. 586, 9 S.E. 664 (1889). In a case involving tax execution sales, Dunham v. Davis, 229 S.C. 29, 91 S.E.2d 716 (1956), the Court relied upon the same principle enunciated herein-above in Sutherland as to the limitation of authority of the General Assembly with regard to validating legislation. The Court in Dunham stated, 'We recognize the oft-cited general rule, which appellant pleads here, that the Legislature, by a curative or validating statute which is necessarily retrospective in character and retroactive in effect, can validate any act which it might originally have authorized, Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, but this rule is subject to the constitutional limitation before mentioned.' The constitutional limitation in Dunham concerned the retrospective application of a validating statute that impaired vested rights.

Whether state or federal courts would have upheld Act No. 152 of 1959, insofar as it only allowed freeholders to participate in the election, is a matter of speculation; however, that provision certainly could not stand today. In any event, R-257 seeks to validate the creation of Florence County School District No. 5, regardless of the provision for a referendum of the freeholders within the areas affected. Thus, the question becomes whether the General Assembly in 1981 may create the school district in question without such a referendum.

R-257 possibly can be construed as an attempt by the General Assembly in incorporate a school district. Section 1 of R-257 states that Act No. 152 of 1959 is validated '. . . notwithstanding the limitation contained in that Act that only qualified electors who are freeholders within the school district were entitled to vote in the election held thereunder . . ..' Thus, the General Assembly is validating the creation of Florence County School District No. 5 in spite of the election, which, if held today, would most likely be invalid. The essence of R-257 is to confirm the creation of the school district by special act of the General Assembly, as though no election had ever been conducted. As set forth previously, the General Assembly may not validate a previous action that was originally beyond its powers.

***3** A review of the Code of Laws of South Carolina, 1962, as amended, and later Acts of the General Assembly reveal that, apparently, Florence County consists of four (4) school districts. The Code reveals that only School District No. 5 was created by legislative enactment. Act No. 152 of 1959. In that School District No. 5 was created by combining earlier existing school districts that were part of School District No. 2 in 1959, it appears that Act No. 152 of 1959 does not merely consolidate, but incorporates a new school district. This office has recently issued an opinion, finding that the General Assembly may not enact a special act to incorporate a school district based upon the prohibition stated in Article 3, § 34(IV), Constitution of South Carolina, 1895, as revised. This constitutional provision supersedes § 59-17-20, Code of Laws of South Carolina, 1976, which purports to authorize the General Assembly to alter or divide school districts. A copy of the June 8, 1981 opinion of Paul S. League, Assistant Attorney General, is attached hereto. At the time Act No. 152 of 1959 was enacted, the State Constitution contained no provision specifically authorizing the General Assembly to create, alter, or divide school districts; whereas, the prohibition stated in Article 3, § 34(IV) of the Constitution has been contained in the Constitution from 1895 until the present.

In that R-257 appears to be an attempt to validate the creation, that is incorporation, of a school district, notwithstanding the provision for a referendum in the 1959 Act, this is an action that appears to be in contravention of Article 3, § 34(IV) of the State Constitution. Therefore, the opinion of this office is that R-257 is of suspect constitutionality.
Sincerely,

Paul S. League
Assistant Attorney General

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