

1982 WL 189502 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 10, 1982

*1 Mr. Cary D. Chamblee
Deputy Director
Land Resources Conservation Commission
2221 Devine Street, Suite 222
Columbia, South Carolina 29205

Dear Mr. Chamblee:

You have requested the opinion of this office as to now to replace Conservation District Commissioners who intend to resign from office. You have presented two situations to me: (1) where a re-elected incumbent commissioner is resigning after the General Election, but prior to starting his new term on February 1, 1983; and (2) where a newly elected commissioner is attempting to resign prior to taking office.

[Section 48-9-1230, CODE OF LAWS OF SOUTH CAROLINA](#), as amended, provides for filling vacancies on the Commission as follows:

. . . Vacancies shall be filled for the unexpired term. The selection of successors to fill an unexpired term, or for a full term, shall be made in the same manner in which the retiring commissioners shall, respectively, have been selected, except that in the case of a vacancy in the unexpired term of an elected commissioner a successor may be appointed by the State Land Resources Conservation Commission upon the unanimous recommendation of the remaining commissioners . . . (emphasis added).

As you can see, a successor clearly may be appointed by the Land Resources Conservation Commission upon recommendation by the remaining commissioners to fill the unexpired portion of the present term of the re-elected incumbent commissioner who wishes to resign.

As to the term beginning February 1, 1983, the re-elected incumbent would ordinarily be required to take another oath of office and perform any other act necessary to qualify for the position before beginning his new term. (See enclosed opinion of this office dated September 9, 1981.) This indicates that the office beginning in 1983 is one to be treated distinctly from the present office, even though it may be held by the same person.

You are left with a situation where two persons would like to resign prior to taking office for the term beginning February 1, 1983. While there are no South Carolina cases construing the application of Section 48-9-1220 in this situation, the legal authorities seem to conclude that 'an attempt to resign before the officer has qualified and entered upon the discharge of his duties is considered abortive and ineffectual.' 63 AM. JUR. 2d [Public Officers and Employees](#) § 165. Accordingly, these two persons elected to serve the new term beginning February 1, 1983, should make resignation for that term effective immediately after their taking office. The Commission will then have vacancies in an unexpired term, and will follow the procedure for filling a vacancy in an unexpired term as provided in the CODE.

I have enclosed for your information, an opinion written by Treva Ashworth of this office dated August 1, 1978, stating that a person may tender a resignation to take effect at a future date. Please note that her letter appears to support the theory that the Commission should take steps to fill vacancies in the upcoming term after February 1, 1983.

*2 I trust this answers your questions. Please do not hesitate to contact me if you need further assistance.

Very truly yours,

Amy S. Gibson
Staff Attorney

ATTACHMENTS

September 9, 1981
Mr. Kenneth G. Goode

Fairfield County Attorney

Post Office Box 488

Winnsboro, South Carolina 29180

Dear Mr. Goode:

Mr. McLeod has referred your recent letter to me for reply. As the Fairfield County Attorney you have requested an opinion as to the procedure for swearing in a new county council member. You have stated that the new county council member was appointed by Governor Riley to fill the position of a member who pled guilty to voluntary manslaughter. You have inquired as to whether or not the interim council member would have to be sworn in again if he should be elected in the special election to the office he now holds by appointment.

Yes. The [South Carolina Constitution at Article VI, Section 4](#) provides that . . . all . . . officers of the State and its political subdivisions, before entering upon the duties of their respective offices, shall take and subscribe the oath of office as prescribed in Section 5 of this article.

[Article VI, Section 5](#) again states that the oath must be taken before an officer begins his duties and then sets out the oath of office.

It is stated in 63 Am.Jur.2d, Public Officers and Employees, § 123 that

[a] public officer who at the end of his term of office is again chosen for the office must generally qualify for his new term by furnishing the required bond, taking an oath of office, or performing whatever other acts may be necessary to qualify him for the position, and his failure to do so is accompanied by the same consequences as in the case of an original election or appointment.

Therefore, it would be necessary for whoever is elected in the special election, even if it is the interim appointed council member, to again take the oath of office before he begins his new term.

You have also inquired how soon after the special election the swearing in should take place. Pursuant to the [Constitution, Article VI, Sections 4 and 5](#), the person should be sworn in before he enters upon the duties of that office. Therefore, after the time for protest has elapsed and upon meeting all other requirements to be a qualified officer, he should be sworn into office in order to begin the new term of that office.

Sincerely,
Treva G. Ashworth

Senior Assistant Attorney General

August 1, 1978
Mr. James B. Ellisor

Executive Director

State Election Commission

P. O. Box 5987

Columbia, SC 29250

Dear Mr. Ellisor:

This letter is to confirm our conversation of July 31, 1978. You have informed me that Senator Harris is thinking of resigning prospectively from his Senate seat. The question has been raised if a resignation can be tendered now to become effective at some future date; and, if the election can be called now for a date after the effective date of his resignation.

*3 There would be no prohibition in a person tendering a prospective resignation. 63 Am.Jur.2d Public Officers and Employees, § 165 states that ‘ . . . a resignation to take effect on a certain day operates in the first moment of that day . . . ’ See also Sections 136 and 163; 29 C.J.S. Elections, 6 86(2).

An election cannot be called until after a vacancy exists. 29 C.J.S. Elections, § 70. Therefore, the actual election cannot be set for a date prior to the actual date that the resignation would be effective. However, this would apparently not prohibit the political parties from conducting primaries or conventions for candidates prior to the date set for the election. 1964-65 Att’y. Gen. Ops. 20, Opinion No. 1787; 1969-70 Att’y. Gen. Ops. 322, Opinion No. 3032.

Very truly yours,

Treva G. Ashworth
Assistant Attorney General

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