

1990 WL 599319 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 2, 1990

\*1 The Honorable Phil Leventis

Senator

District No. 35

Post Office Box 1592

Sumter, South Carolina 29151

Dear Senator Leventis:

The Sumter County Legislative Delegation has requested an opinion from our Office as to whether an individual is lawfully serving on the Sumter County Mental Retardation Board, Inc. The Delegation has apparently never received a written request from the Board or from the individual requesting that her membership be dropped. A number of legal issues are thus raised.

A letter from the Board attached to the Delegation's letter enclosed a policy of the Board which provides that "[a]ny Board member who is absent three (3) consecutive meetings without reason shall be withdrawn from the Board." According to that letter, the individual resigned in February 1990 (how the resignation was effected was not stated). Prior to that, she is said to have missed three consecutive meetings; subsequently, she missed five consecutive meetings. In July 1990 she returned, saying she had not officially resigned. She then missed the September 1990 meeting. For purposes of this opinion, the foregoing will be accepted as the factual basis to form the legal conclusions to be reached below.

We understand that the Sumter County Mental Retardation Board, as long ago as 1977, was appointed by the Governor upon the recommendation of the Sumter County Legislative Delegation, pursuant to Section 44-21-830 of the South Carolina Code of Laws. Also in existence at that time was the Sumter Developmental Learning Center, incorporated as an eleemosynary corporation through the Secretary of State on June 29, 1976; this corporation held an Internal Revenue Service tax exemption granted in November 1977. In 1978, these two entities merged by agreement among themselves; the same board of directors (appointed for the Sumter County Mental Retardation Board) served both entities. On February 24, 1986, the County Board incorporated as an eleemosynary corporation. On April 9, 1987, the County Board's corporate existence was dissolved through the Secretary of State; on the same date, the Sumter Developmental Learning Center's corporate charter was amended so that the entity became known as the Sumter County Mental Retardation Board, Inc. The governing body of this entity is still appointed by the Governor upon the recommendation or nomination of the Sumter County Legislative Delegation.

The present Sumter County Mental Retardation Board, Inc., is the agency in Sumter County which provides mental retardation services to the county's residents, according to information provided by the South Carolina Department of Mental Retardation. Because the governing body is appointed by the Governor upon recommendation of the Delegation, the entity is deemed to be under the mandates of Section 44-20-375 (formerly 44-21-830) of the Code. That Code section provides in part:

A member may be removed by the appointing authority for neglect of duty, misconduct, or malfeasance in office after being given a written statement of reasons and an opportunity to be heard.

Attempted Resignation

\*2 The statutes relative to county mental retardation boards are silent as to with whom a resignation should be filed. In the absence of any statute so directing, the law generally is that a public officer's resignation should be submitted to the tribunal or person having the authority to appoint the official's successor or to call an election to fill the office. Op.Atty.Gen. dated September 28, 1983; 63A Am.Jur.2d Public Officers and Employees § 172.<sup>1</sup>

We are advised that the Sumter County Delegation has received no resignation from the member in question. In checking with the staff of the Governor's office handling gubernatorial appointments, we found that that office was not aware of a resignation having been submitted to the Governor from a member of the Sumter County Mental Retardation Board, Inc. It thus appears that the individual has not submitted her resignation to the tribunal or person or other entity who would be in a position to fill the vacancy occasioned by the resignation.

#### Board Policy

As noted earlier, the Board has a policy providing that any Board member who is absent from three consecutive meetings without reason shall be withdrawn from the Board.

A review of the statutes relative to county mental retardation boards does not reveal an express grant of authority to county boards to adopt this type of rule, nor can such grant of authority be readily inferred. See Section 44-20-380 of the Code as to authority of county boards, generally. The only removal mechanism is that cited earlier in Section 44-20-375. It is questionable that such a county board would have the authority to adopt and enforce such a rule.

This Office, in an opinion dated March 20, 1980, reviewing a proposed, similar policy for a state agency's governing body, stated:

... you requested an opinion concerning the possibility of including a provision in the Board by-laws pertaining to the removal of a Board member for not attending the Board meetings. Please be advised that the power of removal of a Board member is not among the powers of the Board enumerated in Section 60-1-50 of the Code of Laws of South Carolina (1976), and that power cannot reasonably be implied. Furthermore, Section 1-3-240 gives the Governor the power to remove any public officer (for example, a State Library Board member) who is guilty of persistent neglect of duty in office. A provision in the by-laws of the State Library Board requiring the removal of a Board member for non-attendance would be a usurpation of the Governor's power and would have no legal effect.

However, the Board may promulgate a rule authorizing or requiring the Board to recommend to the Governor the removal of any Board member who is absent from a specified number or percentage of regularly-scheduled Board meetings. This type of provision would be consistent with due process standards, giving individual Board members notice of the Board's official position on the matter of non-attendance of meetings.

\*3 For the reasons stated in our previous opinion, we would conclude that the Board's policy would most likely have no legal effect.

#### Conclusion

Summarizing the foregoing, it is likely that the individual in question is still a member of the Sumter County Mental Retardation Board, Inc. She has apparently not submitted her resignation to the Governor or the Sumter County Legislative Delegation, who would fill the vacancy occasioned by a resignation, pursuant to Section 44-20-375. Too, the Board policy requiring withdrawal from the Board by a member who does not attend three consecutive meetings without reason, is likely of no legal effect. There may be other circumstances which were not presented to this Office, which could affect this matter; thus, our analysis is restricted to the legal principles discussed above and is based on the facts presented to this Office.

With kindest regards, I am  
Sincerely,

Patricia D. Petway  
Assistant Attorney General

**Footnotes**

- 1 Section 44-20-375 provides in relevant part that a vacancy on a county mental retardation board is to be filled for the unexpired portion of the term "in the same manner as original appointment[ ]."  
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