ALAN WILSON
ATTORNEY GENERAL

January 31, 2017

Ms. Marci Andino
Executive Director
State Election Commission
P.O. Box 5987
Columbia, SC 29250-5987

Dear Ms. Andino:

You request an opinion "in reference to eligible voters to be included on the voter registration list used when an election is overturned due to irregularities or illegalities and a new election is ordered following a protest or appeal." By way of background, you state the following:

> [f]ollowing a primary or election. South Carolina Code Ann. § 5-15-80, 5-15-130, 7-17-30 and 7-17-260 provides that unsuccessful candidates can contest the result of an election by filing a written notice with the authority charged by law with conducting the primary or election. While every reasonable presumption to sustain a contested election is employed, there are occurrences when an election is overturned and a new election is ordered.
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> South Carolina Code Ann. § 7-3-20(6) provides that the executive director of the State Election Commission furnish each county board of voter registration and elections with a master list of all registered voters in the county, together with a copy of all registered voters in each precinct of the county, at least 10 days prior to each election. The precinct copies shall be used as the official list of voters. In preparing the master list and precinct copies, South Carolina Code Ann. § 7-5-150 provides that the registration books shall be closed thirty days before each election, but only as to that election or any second race or runoff resulting from that election.
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> The term "second race" is not defined or used in other instances within Title 7. A question has been raised about whether only eligible voters in the first election should be included on the voter registration list for a new election or if eligible voters 30 days prior to the new election should be included on the voter registration list for the new election.
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> The only guidance concerning eligible voters for a new election is in South Carolina Code Ann. § 7-13-1140 that provides if the number of votes cast exceeds the number of voters listed on the poll list by ten percent or more, a new

> primary or election shall be ordered in the polling place concerned if the outcome of the election could be affected. This section further states only those who signed the poll list shall be permitted to vote in any such new primary or election. This section appears to apply only to the specific set of circumstances outlined in the statute.
>
> We have reviewed previous opinions from your office and understand a new election is not limited to only the voters who participated in the original election but is open to all eligible voters. The unanswered question is whether voter eligibility is based on the date of the original election or the date of the newly ordered election. In other words, is the cut-off for voter registration 30 days prior to the original election or the newly ordered election?

Law/Analysis

S.C. Code Ann. § 7-5-150 provides as follows:

> [t]he registration books shall be closed thirty days before each election, but only as to that election or any second race or runoff resulting from that election, and shall remain closed until the election has taken place, anything in this article to the contrary notwithstanding; provided, that the registration books shall be closed thirty days before the June primary and shall remain closed until after the second primary and shall likewise be closed thirty days before the November general election. They shall thereafter be opened from time to time in accordance with the provisions of this article. Any person eligible to register who has been discharged or separated from his service in the Armed Forces of the United States, and returned home too late to register at the time when registration is required, is entitled to register for the purpose of voting in the next ensuing election after the discharge or separation from service, up to 5:00 p.m. on the day of the election. This application for registration must be made at the office of the board of voter registration and elections in the county in which the person wishes to register, and if qualified, the person must be issued a registration notification stating the precinct in which he is entitled to vote and a certification to the managers of the precinct that he is entitled to vote and should be placed on the registration rolls of the precinct. Persons who become of age during this period of thirty days shall be entitled to register before the closing of the books if otherwise qualified.

(emphasis added). The issue here is whether an election which has been set aside because of invalidity or irregularity is an "election" such that no additional voters may be registered for the newly ordered election.

Only recently, in Op. S.C. Att'y Gen., 2016 WL 963705 (March 8, 2016), we quoted from the decision State of South Carolina v. U.S. et al., _____ F.Supp.2d ____, 2012 WL 48114084 (D.D.C. 2012), a case which upheld South Carolina's Voter ID law. There, the Court

noted that the "right to vote" is fundamental and that South Carolina will construe its laws in an effort to uphold the right to vote. Quoting from the Court's decision, we stated as follows:

> [t]he Attorney General of South Carolina and Ms. Andino have emphasized that a driving principle both at the polling place and in South Carolina State law more generally is erring in favor of the voter. See S.C. responses to the Court's Questions, Aug. 31, 2012 at 8 (Ms. Andino is also correct to resolve conflicting requirements in favor of the voter."); Op. S.C. Atty. Gen., Aug. 16, 2011, 2011 WL 39118168 at * 4 (reasonable impediment provision must be interpreted in light of "fundamental nature of the right to vote."); Op. S.C. Atty. Gen., Oct. 11, 1996, 1996 WL 679459 at * 2 ("[w]hen there is any doubt as to how a statute is to be interpreted and how that interpretation is to be applied in a given instance, it is the policy of this Office to construe such doubt in favor of the people's right to vote."). (quoting 898 F.Supp.2d at 36).

And, in Op. S.C. Atty. Gen., ____ WL ____, we noted that "laws relating to registration 'should be construed liberally and favorably to the right to vote.'" (quoting 29 C.J.S. Election, § 37).

In Broadhurst v. City of Myrtle Beach Election Comm., 342 S.C. 373, 537 S.E.2d at 543 (2000), our Supreme Court set aside a municipal election. The Court explained that it "will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful." 342 S.C. at 379, 537 S.E.2d at 546. However, in Broadhurst, a voting machine failed to operate properly and the Court ordered a new election. The Court rejected as a remedy § 7-13-1140, which in certain circumstances limits the voters who may vote in the re-vote to "those who signed the poll list. . . ." According to the Court, § 7-13-1140 only applies "when the votes cast exceed the number on the poll list by at least ten percent." That statute "does not apply where, as here, less votes are accounted for than the number on the poll." 342 S.C. at 384, 537 S.E.2d at 548. Therefore, according to the Court,

> [t]he circuit court did not have the statutory authority to order an election limited to those voters who had voted in Dunes I precinct on November 16, 1999. In authorizing a "new election" pursuant to § 5-15-130, we conclude the General Assembly intended to provide the electorate with a second opportunity to express its will through an election once a municipal election commission invalidates the original election.

Id. (emphasis added). Thus, a "new election" gives the "electorate" a "second chance" to decide.

Robinson v. McCown, 104 S.C. 285, 88 S.E. 807 (1916) is particularly instructive here. In that case, the issue was a provision in the Constitution which prohibited an "election" for the creation of a new county no more than once every four years. There, the election was set aside as void. A question arose as to whether a second election could be held within the four year period. The Supreme Court concluded that the first election did not constitute an "election" for purposes of the Constitution:

> [i]t is contended that the election of December 14, 1915 was in violation of this provision [of the Constitution, then Art. VII, § 2] because it was within four years of the previous election. That contention would be sound if the election of 1914 had not been contested and set aside. But it was adjudged to be null and void. Therefore it was no election. By the terms of the Constitution the intention as clearly appears that on compliance with the specified conditions, the people interested should have right to an election on the question of creating the new county as that they should not be annoyed by the agitation of that question oftener than once in four years. They complied with the conditions. They were entitled to an election. The opponents of the new county contended that the election of 1914 was no election. The court sustained that contention. The judgment was that the election was null and void. That means, if it means anything, that there was no election. Now they say it was an election, and, because it was, another election could not lawfully be held until after the lapse of four years from the date of the first. The bare statement of the contention shows its fallacy.

88 S.E. at 808-09 (emphasis added).

More recently, in George v. Mun. Election Com'n of City of Chas., 335 S.C. 182, 187, 516 S.e.2d 206, 208-09 (1999), our Supreme Court stated:

>]t]he Court still may deem such provisions to be mandatory after an election – and thus capable of nullifying the results – when the provisions substantially affect the free and intelligent casting of a vote, the determination of the results, an essential element of the election or the fundamental integrity of the election. Zbinden v. Bond County Community Unit School Dist. No. 2, 2 Ill.2d 232, 117 N.E.2d 765, 767 (1954); Lewis v. Griffith, 664 So.2d 177, 186 (Miss. 1995); O'Neal v. Simpson, 350 So.2d 998, 1005-09 (Miss. 1977); Mittelstadt v. Bender, 210 N.W.2d 89, 94 (N.D. 1973). Furthermore, "where there is a total disregard of the statute, it cannot be treated as an irregularity, but it must be held and adjudicated to because for declaring the election void and illegal." Moon v. Seymour, 182 Ga. 702, 186 S.E. 744, 745 (1936); accord, Lewis v. Griffith, supra." "The Court . . . will not sanction practices which circumvent the plain purposes of the law and open the door to fraud." May v. Wilson, 199 S.C. at 360, 19 S.E.2d at 470.

In other words, while the "Court will employ every reasonable presumption to sustain a contested election, and will not set aside an election due to mere irregularities or illegalities unless the result is changed or rendered doubtful . . .," once the election is set aside, it is deemed void and no "election." Robinson v. McCown, supra. The subsequent election is a "new election." Broadhurst, supra.

One other decision of the South Carolina supreme Court, Green v. James, 110 S.C. 263, 96 S.E. 400 (1918), deserves mention. In Green, an election was deemed void by the Green Town Council and the circuit court affirmed. No appeal form the circuit court order was made.

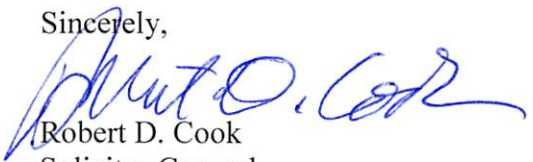
A question arose as to whether the voter registration should be opened. A new election was had, but council refused to allow the winner to be sworn in as mayor. In the return to the rule to show cause to order the mayor sworn in, council argued, among other things, "that the election held on the 27th was illegal and void . . . because the registration books were not opened to the register the voters as required by law. . . ." The circuit court overruled the defense because such was "not a special election as was contemplated by the statute, but that it was merely a substituted election in place of a void election, and, therefore it was not necessary to open the registration for it and (b) that, even if it was, enough legal voters had not been denied the privilege of voting at the election of the 27th to have affected the result." The Supreme Court stated that it was "satisfied with the conclusions of the circuit court upon the propositions of law decided."

This decision does not appear to be cited again by our Supreme Court. Moreover, it appears to rest upon its unique facts. In any event, the idea that an overturned election is "merely a substituted election in place of a void election" does not square with the cases quoted above, such as McCown, regarding the effect of a void election.

Conclusion

The question you have posed is difficult and a close question simply because we have been unable to locate any decisions dealing with the issue. However, this Office generally resolves all doubt in favor of the right to vote, which is a fundamental right. Moreover, a court will afford every benefit of the doubt to uphold an election. But when an election is set aside, and a new election ordered, our Supreme Court has held that it is no "election" at all, and is as if that election never occurred. Robinson v. McCown, supra. As the Supreme Court of Kentucky held in Robinson v. Ehrler, 691 S.W.2d 200, 204 (Ky. 1985), "[t]he distinction drawn is between a void election, and one merely voidable; between preconditions to a valid election, and an election with some latent insufficiency. An election is void where the conditions precedent to the holding of a valid election have not been met. In such case the election is not authorized by law." Moreover, our own Supreme Court, in Robinson v. McCown, supra stated that "when that which is voidable has been adjudged void as to all parties interested, it is, as to all rights or interests thereafter based upon it, as if it never existed." 88 S.E.at 809. Section 7-5-150 emphasizes that the 30 day deadline is only for "that election." As we read the statute, the deadline is for that election event, but a "new" election is a different election in that the first election was declared void. That being the case, while the issue is certainly not free from doubt, we believe that a court would conclude that the thirty day period for closing registration would date not from the invalidated election, but from the newly ordered election. It is our understanding that your current policy is in accord.

Sincerely,



Robert D. Cook
Solicitor General