

1979 S.C. Op. Atty. Gen. 218 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-137, 1979 WL 29139

Office of the Attorney General

State of South Carolina

Opinion No. 79-137

December 13, 1979

***1 Subject: Education, State Board of Education**

(1) Members of the State Board of Education may legally holdover beyond the normal four year term, until a successor is elected and qualified.

(2) No specific statutory requirement exists for the recording of joint legislative delegation actions in appointing members to the State Board of Education.

(3) No agency or office in the State of South Carolina has specific responsibility to inform joint legislative delegations of the approaching end of a four year term of a member of the State Board, but this task could best be accomplished by the State Board itself.

(4) Members of the State Board of Education serve specific terms of office in accordance with the scheme outlined in § 59–5–10.

Director
Legislative Audit Council

Questions:

(1) Is there authority for a member of the State Board of Education to remain on the board beyond his four year term, without some action by the proper legislative delegations?

(2) Where are legislative delegation actions concerning state board membership to be recorded? Is there a requirement that the actions be recorded?

(3) What, if any, agency or office has the responsibility of informing the legislative delegation that a commission is terminating so that action can be taken?

(4) When a State Board member's letter of commission states the term of membership ‘. . . as provided by law,’ who determines this period? Should or can the aforementioned phrase be interpreted so as to return the timing of circuit appointments to a system begun in § 59–5–10?

Statutes and Cases:

Art. XI, § 1, Constitution of South Carolina, 1895, as revised; § 59–5–10, § 59–20–10, [§ 59–20–60\(6\), Code of Laws of South Carolina](#), 1976; [McCoy v. Curtis](#), 14 S.C. 367 (1880); [Jeter v. State](#), 1 McCord, 233 (1821); [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145 (1935); [State v. Coleman](#), 54 S.C. 282, 32 S.E. 406 (1889); [Verner v. Seibels](#), 60 S.C. 272, 39 S.E. 274 (1901); [Marbury v. Madison](#), 1 Cranch, 137, 2 L.Ed. 60 (1803); [Rogers v. Coleman](#), 245 S.C. 32, 138 S.E. 2d

415 (1964); [Gaskin v. Jones](#), 198 S.C. 508, 18 S.E. 2d 454 (1942); 67 C.J.S. Officers § 6; 60 Am. Jur. 2d Public Officers and Employees § 100.

Discussion:

You have posed several questions, which arose during the Legislative Audit Council's audit of the South Carolina Education Finance Act of 1977, concerning election to and constitution of the State Board of Education. See §§ 59–20–10 and 59–20–60(6), [Code of Laws of South Carolina](#), 1976, as amended. The questions, which are separately stated above, will be answered serially; however, at the outset, this opinion clearly finds and states that nothing contained in the Education Finance Act bears upon any of the questions posed.

The State Board of Education is a product of Article XI, § 1, Constitution of South Carolina, 1895, as revised, which states:

*2 There shall be a State Board of Education composed of one member from each of the judicial circuits of the State. The members shall be elected by the legislative delegations of the several counties within each circuit for terms and with such powers and duties as may be provided by law and shall be rotated among the several counties. One additional member shall be appointed by the Governor. The members of the Board shall serve such terms and the Board shall have such powers and duties as the General Assembly shall specify by law.

State Board members, whose offices are created by the constitution, must be elected in accordance with the above provision, except that the General Assembly is specifically directed to specify by law the terms. [McCoy v. Curtis](#), 14 S.C. 367 (1880), and [Jeter v. State](#), 1 McCord, 233 (1821).

Pursuant to the constitutional mandate, the legislature enacted § 59–5–10, entitled, ‘Composition and Organization of State Board of Education,’ a copy of which is attached hereto. This statute provides for one State Board member from each judicial circuit, each of whom ‘. . . shall serve terms of four years and until their successors are elected and qualify . . .’ (Emphasis added). Section 59–5–10 further specifies, ‘Representation of a given judicial circuit on the State Board of Education shall be rotated among the counties of the circuit, except by unanimous consent of all members of the county legislative delegations from the circuit.’ A current member of the Board is expressly authorized to succeed himself only by unanimous consent of the members of the circuit's county legislative delegations.

The first question presented is whether a member of the State Board of Education may holdover, following the expiration of a particular four year term, absent the unanimous action of the circuits legislative delegations? The key to this question is found in § 59–5–10 itself; wherein, the statutes delineates board members' terms as ‘. . . four years and until their successors are elected and qualify . . .’ Board members are not absolutely restricted to four year terms, for a board member may continue to serve in a de facto capacity until a successor is elected and qualifies. Two opinions of this office, which are enclosed, one of Attorney General Daniel R. McLeod, dated January 15, 1966, the other of Assistant Attorney General Frank H. DuRant, dated August 10, 1978, have addressed the precise question herein. In advising a member of the House of Representatives that a member of the State Board of Education, whose term had expired, could continue to act until election of his successor, the former opinion states:

I advise that Mr. Seals can continue to act and that he occupies the status of a de facto officer and that, as such, his acts and doings are valid. This is true irrespective to the statutory provision which specifies the date of determination of the term of office and that the incumbent is ineligible to succeed himself except by unanimous consent. The case cited below substantiates this position.

*3 The case to which the quotation alludes is [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145 (1935); wherein, the Supreme Court discussed at length the terms ‘de facto’ and ‘de jure’, as applied to public officers. See also [State v. Coleman](#), 54 S.C. 282, 32 S.E. 406 (1899), and 67 C.J.S. Officers § 6. Thus, quite clearly, absent some action by the proper legislative

delegations, a member of the State Board of Education remains on the Board beyond the usual four years. In fact, as a general principle of law in South Carolina, public officers holdover beyond a specific term of office, even though no express provision of law requires such. [Gaskin v. Jones](#), 198 S.C. 508, 18 S.E. 2d 454 (1942), and [Rogers v. Coleman](#), 245 S.C. 32, 138 S.E. 2d 415 (1964).

The validity of an appointment, or as here the election, is not dependent upon the formal recording of certain documents. South Carolina adheres to the long established principle that the right to hold a public office flows from the appointment and not the commission, as noted in [Verner v. Seibels](#), 60 S.C. 272, 39 S.E. 274 (1901), citing as authority then Chief Justice Marshall's landmark opinion in [Marbury v. Madison](#):

In the case of [Marbury v. Madison](#), 1 Cranch, 137, 2 L. ed. 60, the following language is used: 'They [the clause of the constitution and laws of the United States] seem to contemplate three distinct operations: (1) The nomination. This is the sole act of the president, and is completely voluntary. (2) The appointment. This is also the act of the president, and is also a voluntary act, through it can only be performed by and with the advice and consent of the senate. (3) The commission. To grant a commission to the person appointed might perhaps be deemed a duty enjoined by the constitution. 'He shall.' says that instrument, 'commission all the officers of the United States.'" Mr. Seibels held the office for the term of four years from the time of his appointment, and not for four years from the date of his commission.

Finally, as stated at 60 Am. Jur. 2d [Public Officers and Employees](#) § 100, a writing is necessary to evidence an appointment, but no formal requirement as to such writing is stated, absent statutory requirement:

There are cogent reasons why an appointment to a public office should be in writing, or that there be somewhere some written memorial of the fact of appointment signed and executed by the appointing power; an appointment to office affects the public, and not merely private rights, and so it should be authenticated in a way that the public may know when and in what manner the duty has been performed. As a general rule, a written instrument is necessary, and an oral appointment may not be sufficient.

It is only necessary that the person claiming the office show that the officer having the power to appoint has exercised that power by appointing him, and that his decision is evidenced by some open unequivocal act.

***4** The second and third questions asked are whether there is a requirement that county delegation's actions concerning State Board of Education membership be recorded, and if such actions much be recorded, where? Section 59–5–10, states in pertinent part:

When the election is completed, the chairman and the secretary of the joint county legislative delegations of each circuit shall immediately transmit the name of that person elected to the Secretary of State who shall forthwith issue to such person, after he has taken the usual oath of office, a certificate of election as a member of the State Board of Education.

The plain language of this statute indicates that a record must be made and presumably maintained of the legislative delegations' action by virtue of the required transmittal of information to the Secretary of State. Further, in that § 59–5–10 requires the joint county delegations in each circuit to organize by electing a chairman and secretary, one might legitimately presume that the function of such secretary would be to maintain a record of the proceeding and actions of a particular joint county delegation. So, there exists no specific statutory requirement that delegations' actions be recorded; however, in reality, strict compliance with § 59–5–10 will likely result in the maintenance of a record in the two manners described above.

Next, you ask what agency or office has the responsibility of informing the legislative delegation that a commission is terminating so that action can be taken. The simple answer to this question is that no such requirement exists in South Carolina. As discussed hereinafter, members of the State Board of Education serve four year terms, reckoned from a fixed date; therefore, the expiration date of a seat on the Board is readily calculable. Viewed thusly, each joint legislative delegation can easily keep track or determine the expiration date of the Board members from its circuit. However, the Board itself, appears to be in the best position to undertake the task of notification. Therefore, as the agency which likely maintains the most thorough records on its members, notification to delegations of the expiration of members terms should be performed by the State Board of Education.

Finally, a question is asked whether the phrase ‘ . . . as provided by law,’ contained in commissions issued persons elected to the State Board of Education, should or can be interpreted so as to return the timing of circuit appointments to the system begun in § 59–5–10. The two Attorney General's opinions cited previously address this point, as noted in the January 15, 1966, opinion of Attorney General McLeod:

A successor named to take the place of Mr. Seals will serve for the unexpired term into which Mr. Seals entered following the expiration of the term to which he had been appointed, so that the staggered terms of office among the Judicial Circuits will be preserved.

The August 10, 1978, opinion of Assistant Attorney General DuRant reflects the same position, moreover, Mr. DuRant considers a particular circuit seat and explains in detail how this seat has been and should be filled in the future. Conclusions:

***5** The Opinion of this Office is that members of the State Board of Education may legally holdover, following a four year term, under proper circumstances. There is no statutory requirement for recording the actions of joint legislative delegations, but records of such actions should be maintained by the delegations and the Secretary of State. No statutory requirement exists, creating a duty upon any agency or office to notify delegations that a Board members commission will soon terminate. Members of the Board serve terms reckoned in accordance with the scheme established in § 59–5–10.

Paul S. League
Assistant Attorney General

1979 S.C. Op. Atty. Gen. 218 (S.C.A.G.), 1979 S.C. Op. Atty. Gen. No. 79-137, 1979 WL 29139