



ALAN WILSON
ATTORNEY GENERAL

February 28, 2017

W. Marshall Taylor, Jr.
Chief Counsel to the Board
S.C. Department of Health Environmental Control
2600 Bull Street
Columbia, SC 29201

Dear Mr. Taylor:

You seek our opinion “regarding the term of the Director of the Department of Health and Environmental Control (‘DHEC’ or the ‘Department’).” Your question is whether “upon appointment and confirmation, does a new Director serve only the unexpired portion of the previous Director's term or does the new Director serve a new, full term as provided for by statute?”

You argue in your letter that the new director serves a full term. By way of background, you state:

The procedures for appointment of the Department's Board Members and Director are established by statute. Board Members are appointed by the Governor upon advice and consent of the Senate. S.C. Code Ann. 44-1-20. The terms of the Board members are “four years and until their successors are appointed and qualify.” Id. “All vacancies shall be filled in the manner of the original appointment for the unexpired portion of the term only.” Id.

The DHEC Director is selected by the Board after consultation with and approval by the Governor, and submitted for the Senate's advice and consent. S.C. Code Ann. 44-1-40. The statute provides, “The board shall select a director for the department who shall serve a four-year term and who shall have such authority and perform such duties as may be directed by the board.” Id. Unlike the statute for Board Member appointment, there is no language in S.C. Code Ann. 44-1-40 regarding a “vacancy” in the Director's office or the effect of the expiration of the four year term. That is, the statute makes no provision for service of an unexpired term, but appears to require the Director be appointed to a term of four years.

When merely the length of the term is fixed by law, without reference to an unexpired term or to a vacancy in the term of office, the office reverts to the sovereign in the event of a vacancy, and when the office is once again vested, it is not for the unexpired term but for the full term. Op. S.C. Attv. Gen., 1961 WL 8277 (Feb. 14, 1961) (statute governing term of office of Chief Highway Commissioner

provides the Commissioner shall be appointed by the State Highway Commission to serve a four year term and makes no provision for service of an unexpired term).

This principle was stated by the State Supreme Court in Simpson v. Willard, 14 S.C. 191 (1880). That case concerned whether a chief justice elected to fill a vacancy created by his predecessor's death was entitled to hold office only for the remainder of the predecessor's unexpired term, or for the full six year term of office. The Court found the plain language of the South Carolina Constitution provides that Supreme Court justices hold six year terms of office and are classified so that one justice goes out of office every two years. The Court reasoned that due to the specific limiting language of the Constitutional provision, a justice elected or appointed to fill a vacancy in an unexpired term serves for the remainder of the unexpired term and not for the entire six year term, since the obvious intent was to provide for a rotation in the offices. The Court noted that in contrast, the constitutional provisions for elections of clerks of the Courts of Common Pleas and circuit judges merely state the individual holds office for a term of four years without any limiting language. Individuals duly elected to these positions, therefore, serve for a full four years and not for the remainder of a predecessor's unexpired term.

We wish to confirm our understanding, based on the authorities cited above, that since S.C. Code Ann. 44-1-40 does not fix the beginning or ending of the Director's term or contain any limiting language, but merely states the duration of the appointment, an appointment made to fill a vacancy in the Director's office is for the full term of four years effective upon confirmation by the Senate, and not for the remainder of any predecessor's unexpired term.

Law/Analysis

We agree with the analysis which you set forth in your letter. In our opinion, we believe a court is likely to conclude that the new Director would serve a new, full term as provided for by the statute.

We note, as you indicate, that "there is no language in S.C. Code Ann. 44-1-40 regarding a 'vacancy' in the director's office or the effect of the expiration of the four year term." As you state, "the statute makes no provision for service of an unexpired term, but appears to require the Director be appointed to term of four years." As we stated in Op. S.C. Att'y Gen., 1963 WL 8309 (August 1, 1963),

[i]t appears to be well settled under the legal authorities that vacancies in public offices may be filled only in the manner provided by law and elections to fill vacancies may be held only under constitutional or statutory provisions authorizing them.

Thus, even though § 44-1-40 does not authorize the filling of the vacancy for director of DHEC, nor provide a mechanism for doing so, we need to examine other statutes to determine if they may be applicable.

Section 1-3-220 provides in pertinent part as follows:

[t]he following appointments shall be made by the governor and are in addition to those appointments by the governor authorized in other provisions of the Code:

- (1) An appointment to fill any vacancy in an office of the executive department as defined in Section 1-1-110 occurring during the recess of the General Assembly in the manner provided by law.

(emphasis added). Section 1-1-110 defines the “Executive Department” for certain purposes. For purposes of § 1-3-220, the Executive Department consists of

. . . the following officers, that is to say: The Governor, the Secretary of State, the State Treasurer, the Attorney General and the Solicitors, the Adjutant General, the Comptroller General, the State Superintendent of Education, the Commissioner of Agriculture and the director of the Department of Insurance.

Noticeably absent is the Director of DHEC.

We addressed § 1-3-220(1) in a 1984 opinion, Op. S.C. Att’y Gen., 1984 WL 249919 (June 28, 1984). There, we stated as follows:

[g]enerally speaking, the Governor must have constitutional or statutory power to make appointments. State v. Bowden, 92 S.C. 393, 75 S.E. 866 (1912). Sections 1-3-210 and -220 of the Code provide authority for the Governor to appoint persons to fill vacancies in certain offices. In particular, Section 1-3-220(1) would permit the Governor to appoint “[a]n officer to fill any vacancy in the office of the executive department occurring during a recess of the General Assembly. . . . Composition of the executive department is particularly provided for in Section 1-1-110 of the Code.

We further explained that “[s]pecific mention of these members of the Executive Department would, by implication, exclude all others not mentioned explicitly.” (citing authorities). In addition, we noted that “in Op. Att’y Gen., No. 2625, dated January 24, 1969 . . . it was stated that the Medical College (now University) of South Carolina is not a department of State government.” Accordingly, we concluded that “the provision of Section 1-3-220(1) would not be applicable to the filling of a vacancy on the board of trustees of the Medical University during a recess of the General Assembly.” Thus, based upon this analysis, it would most likely be concluded by a court that § 1-3-220(1) would be inapplicable to your situation.

As you note, there is a well-recognized doctrine, which we have adopted in some of our previous opinions, which was summarized by former Attorney General McLeod, as follows:

[w]hen merely the length of the term is fixed, without reference to an unexpired term, or to a vacancy in the term of office, in happening of a vacancy, the office reverts to

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[the] sovereign, and when again vested, it is not for the unexpired term, but for the full term.

Op. S.C. Att’y Gen., 1965 WL 10763 (January 20, 1965). We referenced the same rule in Op. S.C. Att’y Gen., 1961 WL 8277 (February 14, 1961). There, Attorney General McLeod interpreted a statute relating to the Chief Highway Commissioner which made “no provision for the service of an unexpired term, but requires only that the chief Highway Commissioner shall be appointed for a term of four years.” Attorney General McLeod concluded as follows:

I am of the opinion that the statute relating to the Chief Highway Commissioner does not fix the beginning or ending of the term, but relates merely to the duration thereof, and that when a vacancy occurs in the Office of Chief Highway Commissioner an appointment made to fill such vacancy is for the full term of four years.

I advise that Mr. Pearman’s term of office runs for a period of four years from the date of his assumption of office on February 12, 1961.

Case law supports this rule. In Boyton v. Hart, 158 N.C. 488, 74 S.E. 470 (1912), the supreme Court of North Carolina recognized the rule as virtually universal. In Boyton, the question was the beginning and ending of the term of the public administrator. As the Court summarized,

[t]he petitioners contend on these facts that the term of the public administrator is eight years; that as the said Marcom was appointed on the 24th day of April 1902, and died July, 1903, that the appointment of the said Heartt was for the unexpired term of Marcom, ending April 24, 1910, and therefore he was not the public administrator at the time of his application on the estate of said Bannister; while the said Heartt contends he was appointed for a full term of eight years.

74 S.E. at 471. The North Carolina Supreme Court decided this question according to the above-referenced rule, recognized in our opinions. In the words of the Court in Boynton,

[a]n examination of the section of the Revisal (sections 18 to 21, inclusive) relating to the appointment of a public administrator, shows that he was appointed for a term of eight years and that no period is fixed when the term shall begin or end, and no provision is made for filling a vacancy, or for making an appointment for an unexpired term. Under these circumstances, the courts hold with practical unanimity that an appointee to a public office holds for the full term, although the prior occupant had only held for a part of his term, and in our opinion, the principle applies with greater force to one who is not strictly a public officer, as is the case of a public administrator. State v. Smith, 145 N.C. 476, 59 S.E. 649. The cases are collected in the note to State v. Corcoran, 206 Mo. 1, 103 S.W. 1044, as reported in 12 Ann. Cas. 573. The fact that the clerk was mistaken as to the effect of the appointment, and said it would expire April 24, 1910, cannot affect the title of the administrator.

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Id. But see Op. S.C. Att'y Gen., 1962 WL 8956 (June 26, 1962) [with respect to statute which does not set forth filling of vacancy, vacancy is filled by method of appointment].

Conclusion

Based upon the foregoing authorities, we concur in your analysis. In our opinion, a court is most likely to determine that the new Director would hold a full four year term, rather than the remainder of the unexpired term.

Sincerely,



Robert D. Cook
Solicitor General