ALAN WILSON
ATTORNEY GENERAL

June 04, 2019

Mrs. Bonnie Knight
Acting Board Chairperson
Anderson County School District No. Two
10990 Belton-Honea Path HWY
Honea Path, South Carolina 29654

Dear Mrs. Knight:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter asks the following:

> The administrator of the Anderson County Board of Education received a letter [from an attorney], concluding that there was a vacancy on our Board.
>
> I believe [this] conclusion is incorrect under South Carolina law, and I am writing to you to request your opinion on this matter.
>
> The factual background is as follows: William "Stu" Shirley was elected in November 2018, to a four-year term on our Board. After a contentious Board meeting on May 13, 2019, Mr. Shirley, on May 14, submitted an email resignation to our Board Chair ... . On May 17, 2019, Mr. Shirley apparently had second thoughts about his tendered resignation and submitted to our Chairperson another letter rescinding his May 14 resignation. Both letters were sent to all members of our Board, and to the administrator, Mr. Nimmer of the Anderson County Board. On Wednesday, May 22, 2019, Mr. Nimmer received the attached letter ... stating under South Carolina law, the rescission of a resignation was not permitted and accordingly Mr. Shirley's seat was vacant.
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> [This] letter was provided to our Board at a special meeting on May 22, but our Board took no action on either of Mr. Shirley's letters.
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> It seems clear to me that [the letter's] conclusion is wrong. First, our Board has a policy BBBC ... providing that Board members may resign on thirty days' notice. Secondly, our Board never acted on Mr. Shirley's resignation or his letter of rescission. Thirdly, his rescission took place on May 17, only three days after the resignation letter.

> My questions simply stated under these facts are: (1) does a vacancy exist on our Anderson Two Board? and (2) was Mr. Shirley's rescission effective and does he remain a member of the Board?

**Law/Analysis**

It is this Office's opinion that a court likely would hold a member of a school district board of trustees may revoke a tendered resignation before it is accepted. Answering whether a particular board member has vacated his office would require this Office to make factual determinations which are beyond the scope of this Office's opinions. See Op. S.C. Att'y Gen., 2012 WL 1371025, at *2 (April 11, 2012). Instead, this opinion will generally assume facts as provided in the request letter for purposes of providing legal analysis.

The following additional facts recounted in the request letter and attached materials are pertinent to this opinion. Board member Stu Shirley submitted a resignation letter on May 14, 2019 which explicitly stated it was "effective immediately." This letter was sent via email to recipients which appear to board members of Anderson County School District No. Two. On May 17, 2019, Stu Shirley sent a rescission letter sent to Brenda Cooley, chairperson for the board, withdrawing his resignation and asked, "Will you please relay this decision to the Anderson County Board and advise their position?" Mrs. Brenda Cooley replied May 17, 2019 acknowledging receipt of the rescission letter and stating she would notify the members of Anderson County School District Two board of trustees and the Anderson County Board of Education. There is no indication that either the Anderson County School District Two board of trustees or the Anderson County Board of Education accepted Stu Shirley's resignation before receiving notification of its withdrawal. On May 22, 2019, Joey Nimmer, Administrator of the Anderson County Board of Education, received an email from an attorney that analyzed whether a vacancy exists on the Anderson County School District Two board of trustees as a result of the resignation and rescission letters. Ultimately, the email concluded:

> Relying on SC Code 8-1-145 and the plain language of the board member's May 14th resignation notice, it is fair to conclude that the resignation was effective as of May 14, 2019, and was irrevocable.* It then follows that there is a vacancy on Anderson School District Two's Board of Trustees, which must be filled by the Anderson County Board of Education.

It appears that the resolution to the questions presented in the request letter depends on whether S.C. Code Ann. § 8-1-145 does, in fact, mandate that the resignation letter is irrevocable such that Mr. Shirley could not withdraw it even before it was accepted. This Office has not identified any decisions of our state courts or prior opinions of this Office which have interpreted Section 8-1-145. Therefore, this opinion next examines how our state courts have addressed the issue of resignation and attempted rescission, this Office's prior opinions that have addressed similar circumstances, and relevant legislative acts, before applying the rules of statutory construction to interpret S.C. Code Ann. § 8-1-145.

In State v. Stickley, 80 S.C. 64, 61 S.E. 211 (1908), the South Carolina Supreme Court addressed the issue of which persons were authorized members of the town council of Port Royal in light of the resignations of several members, the withdraw of those resignations, and subsequent elections for those member's seats. The Court analyzed what the effect of an unconditional resignation is as follows:

> The remaining questions presented by the petition and return all depend upon whether a public officer, who has tendered his resignation unconditionally, can withdraw the same before acceptance; or what is the effect of an unconditional resignation. On this question the authorities are not in accord. There is a line of cases maintaining the proposition that an unconditional resignation tendered to the authority entitled to receive it cannot be withdrawn. State v. Fitts, 49 Ala. 402; State v. Hauss, 43 Ind. 105, 13 Am. Rep. 384; State ex rel. Kirtley v. Augustine, 113 Mo. 21, 20 S. W. 651, 35 Am. St. Rep. 696; State v. Clarke, 3 Nev. 566. On the other hand **at common law and in a great number of the states the doctrine prevails that the resignation of a public officer is not complete until it is either expressly or by implication accepted by the proper authorities.** State v. Clayton, 27 Kan. 442, 41 Am. Rep. 418; Coleman v. Snads, 87 Va. 689, 13 S. E. 148; State v. Ferguson, 31 N. J. Law, 107; Van Orsdall v. Hazard, 3 Hill (N. Y.) 243; Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314; Hoke v. Henderson, 15 N. C. 1, 25 Am. Dec. 677; 1 Dillon, Munic. Corp. (3d Ed.) 249. In the case of State v. Ancker, 2 Rich. Law, 245, this rule was applied to the resignation of certain officers and members of a church, the court saying: "The question is whether such a resignation has been made and accepted according to law, and in a way obligatory on all the parties to this controversy. To make it so there must have been both a resignation cum animo and an acceptance of it on the part of the acting and responsible government at the time." In the absence of statute this rule is supported by the better reasoning and the greater weight of authorities, and has been adopted by the Supreme Court of the United States. Edwards v. United States, 103 U. S. 471, 26 L. Ed. 314. **Until the tender or offer to resign is accepted by the proper authority, it can be withdrawn.** 1 Dillon, Munic. Corp. (3d Ed.) 249; State v. Clayton, 27 Kan. 442, 41 Am. Rep. 418, and note. Applying the foregoing principles of law to the undisputed facts of this case, **the resignation of Stickley as intendant was made to the proper authority to receive it**, the wardens of the town, and if it had been promptly accepted by them, it could not have been recalled; **but there was no attempted acceptance until nearly a month thereafter. In the meantime, certainly on the night of the third day after his resignation was tendered**, at the request of a majority of the qualified voters of the town in mass meeting, and in the presence of F. W. Scheper, Jr., clerk and treasurer, **he withdrew his resignation as intendant.** True he did not get possession of the paper on which his resignation was written. This was in the custody of Scheper, the clerk and treasurer; but the wardens of the town had notice of the public withdrawal of Stickley's resignation,

> and it was not necessary to make his withdrawal effectual that the formal paper resignation be secured by him. **Stickley having withdrawn his resignation before its acceptance by the wardens of which they had notice, under the principle heretofore announced he holds his position as intendant as against any election held after such withdrawal.**

Id. at 213 (emphasis added). The analysis above demonstrates that the Court considered and rejected the position that an unconditional resignation is irrevocable as soon as it is offered. Instead, the Court adopted the common law principle that resignations may be withdrawn at any time until the proper authority receives and accepts it. Further, in Rogers v. Coleman, 245 S.C. 32, 34, 138 S.E.2d 415, 417 (1964), the Court held that even when a public officer's resignation is accepted, he "continues in office until a successor is qualified where the statute or Constitution so provides."

This Office has repeatedly cited the Stickley decision when opining whether a resignation is effective or may still be revoked. This Office's July 10, 1986 opinion stated:

> To have an effective resignation, the resignation must be tendered by the official and accepted by the appropriate governmental body ... There must be an intent on the part of the individual to resign. Furthermore, a resignation may be revoked at any time before the date upon which the resignation was to take effect. See Ops. Atty. Gen. dated November 28, 1941 and December 1, 1965; (enclosed) Jernigan v. Stickley, supra.

1986 S.C. Op. Att'y Gen. 245 (July 10, 1986). While the opinion above stated that a resignation may be revoked at any time before the effective date of the resignation, the General Assembly subsequently passed legislation that provided authority for calling a special election to fill the pending vacancy if the officer submits an "irrevocable resignation." 1988 Act No. 294, §1. The Act provided the following procedure to permit a special election:

> Whenever any person holding an elective office in this State is elected or appointed to another office, the person may tender an irrevocable resignation to be effective at a future date, and an election may be held in accordance with applicable provisions of law to fill that office as if it had become vacant on the date the officeholder is certified to have won election to his new office. The newly elected official shall not take office until a vacancy occurs.

Id. A July 11, 1989 article published in The State newspaper described one such resignation and the legislative intent behind the Act as follows:

> Rep. Hearn wants to remain in her House seat until Nov. 1, when she is schedule to replace Julius Murray as a member of the Alcoholic Beverage Control Commission as an appointee of Gov. Carroll Campbell. She announced last

> month that she would officially resign her House seat "on or before Oct. 31," and sent a letter to [House Speaker] Sheheen with that information.
>
> It used to be that an officeholder had to resign outright before any election could take place. But under a law passed last year, sponsored chiefly by Sen. Sherry Martschink, R- Charleston, the special election process can begin to replace a resigning officeholder once the official issues an irrevocable resignation for a future date.
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> ...
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> Sen. Martschink said the intent was to apply to all people leaving elective office for another office, appointive or elective.
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> Rep. Hearn and the potential candidates for the House 76 seat say they don't want the district to go without representation.
>
> It takes 18 weeks from the time a "writ of election" is issued until a winner can be declared including time for primaries, the general election, certifications and appeals. ...

Clark Surratt, Special election remains on hold, The State, July 11, 1989, at 2-B. However, there were complaints that the Act was "ambiguous" because it created a vacancy that related back to the date an officeholder won election to a new office and did not provide when a vacancy would be deemed to occur if an office holder assumed an appointive position. Id. During the following legislative session, the General Assembly enacted 1990 Act No. 382 which repealed 1988 Act No. 294 and added Section 8-1-145 to the South Carolina Code.

Section 8-1-145 reads as follows:

> (A) A person holding an office in this State filled by a vote of qualified electors may submit a written irrevocable resignation from that office which is effective on a specific date.
> (B) An election must be held in accordance with the provisions of Section 7-13-190 or other applicable provisions of law to fill the office to be vacated as if the vacancy occurred on the date the written irrevocable resignation is submitted.
> (C) The newly elected official may not take office until the vacancy actually occurs.

S.C. Code Ann. § 8-1-145.

As stated above, this Office has not identified any decisions of our state courts or prior opinions of this Office which have interpreted Section 8-1-145 and therefore, will apply the rules

of statutory construction as a matter of first impression. Statutory construction of the South Carolina Code of Laws requires a determination of the General Assembly's intent. Mitchell v. City of Greenville, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015) ("The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible."). Where a statute's language is plain and unambiguous, "the text of a statute is considered the best evidence of the legislative intent or will." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The Supreme Court of South Carolina has stated, however, that where the plain meaning of the words in a statute "would lead to a result so plainly absurd that it could not have been intended by the General Assembly... the Court will construe a statute to escape the absurdity and carry the [legislative] intention into effect." Duke Energy Corp. v. S. Carolina Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016); Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[C]ourts are not confined to the literal meaning of a statute where the literal import of the words contradicts the real purpose and intent of the lawmakers."). "A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of lawmakers." State v. Henkel, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015), *reh'g denied* (Aug. 5, 2015).

Essentially, the question presented requires an interpretation of whether the phrase "may submit a written irrevocable resignation," in Section 8-1-145(A), prohibits an official from submitting a written resignation which may be rescinded prior to its acceptance by the proper authority as the Court upheld in State v. Stickley, supra. It is this Office's opinion that a court would likely find Section 8-1-145(A) does not prohibit an office holder from submitting a written resignation that is revocable prior to acceptance by the proper authority. First, the plain language of the subsection (A) uses the word "may" which is normally considered to be permissive, but can also be interpreted as "shall" in certain circumstances.

> Ordinarily, the use of the word "may" in a statute signifies permission and generally means the action spoken of is optional or discretionary. Robertson v. State, 276 S.C. 356, 278 S.E.2d 770 (1981). But, when the question arises whether "may" is to be interpreted as mandatory or permissive in a particular statute, legislative intent is controlling. Id. And the use of the word "may" in a statute can be interpreted to mean "shall" Id. This is especially so where the original statute used the term "shall" but a later amendment uses the term "may", and there is no explanation for the change in terminology. Id.

T.W. Morton Builders, Inc. v. von Buedingen, 316 S.C. 388, 402, 450 S.E.2d 87, 95 (Ct. App. 1994). Because 1988 Act No. 294, §1 originally used the word "may" in a manner that suggests it was intended to be permissive ("may tender an irrevocable resignation to be effective at a future date"), this tends to support the interpretation that the General Assembly intended to maintain the procedure as one which is permissive rather than mandatory when it codified Section 8-1-145(A).

In fact, 1988 Act No. 294 and the statements by Senator Martschink demonstrate that the procedures for calling a special election in Section 8-1-145 are not intended to address every resignation of a public official in all instances. Rather, the legislative intent behind the adoption of Section 8-1-145 appears to address the limited situation where a public officer who holds an elective office intends to accept another office and, in such a case, to develop a mechanism for initiating a special election at an earlier date than would have otherwise been authorized by law. Subsection (B) explicitly states that the elections called thereunder must comply with the provisions of Section 7-13-190. Section 7-13-190 establishes the schedule for filing, nominations, and holding a special election according to when the vacancy in office occurs. When an officer submits an irrevocable resignation, Section 8-1-145(B) allows the scheduled vacancy to be backdated to start "on the date the written irrevocable resignation is submitted." Section 7-13-190's schedule for holding a special election can begin at an earlier date and shorten or eliminate the vacancy in office caused by the resignation. Section 8-1-145(C) anticipates that the specific date set in an irrevocable resignation may be so far in advance that the special election may be held before the official has left his seat. In such a case, subsection (C) prohibits the newly elected official from taking office until the vacancy "actually occurs." When Section 8-1-145(A) is read in conjunction with these provisions, a court likely would conclude that the General Assembly did not mean to rewrite the common law[1] regarding the resignation of public officers, but instead, it merely intended to provide a way for those elective officers who want to accept a new office to resign prospectively and thereby shorten the length of the vacancies that would otherwise occur.

While this Office has not previously opined on Section 8-1-145, we have issued opinions regarding when a resignation is effective since its passage. In an October 10, 2013 opinion, more than twenty years after Section 8-1-145 was enacted, this Office explained:

> In order for a public officer's resignation to be legally effective, it must be tendered to and accepted by the person or entity authorized to receive it. See State v. Stickley, 80 S.C. 64, 61 S.E. 211 (1908) (adopting doctrine that "the resignation of a public officer is not complete until it is either expressly or by implication accepted by the proper authorities"); Op. S.C. Att'y Gen., 1996 WL

[1] See Hoogenboom v. City of Beaufort, 315 S.C. 306, 318, 433 S.E.2d 875, 884, n.5 (Ct. App. 1992), adhered to on reh'g (Apr. 29, 1993).

> The Legislature is presumed to enact legislation with reference to existing law, and there is a strong presumption that it does not intend by statute to change common law rules. See Columbia Real Estate & Trust Co. v. Royal Exchange Assurance, 132 S.C. 427, 128 S.E. 865 (1924). A statute is not to be construed as in derogation of common law rights if another interpretation is reasonable. See id. Statutes in derogation of common law are to be construed strictly to preserve vested rights. See Crowder v. Carroll, 251 S.C. 192, 161 S.E.2d 235 (1968).

> 549527 (Aug. 7, 1996) ("A written resignation is to be tendered to the entity or person authorized by law to receive it.... To be effective, the tendered resignation must be accepted by the appropriate entity or person."). Such a doctrine has been recognized by numerous other jurisdictions. Furthermore, the "[m]ere announcement of a public officer's intent to resign is insufficient to effectuate the resignation. Rather, the public officer must intend to resign, actually tender his resignation, and have the resignation accepted by the appropriate public body." 8 S.C. Jur. Public Officers and Public Employees § 45 (citing Op. S.C. Att'y Gen., 1986 WL 192036 (July 10, 1986) (county board member's announcement of intent to resign with no further action was ineffective; resignation must be tendered to and accepted by appropriate body, the county council, to be effective)).

Op. S.C. Atty. Gen., 2013 WL 5763372 (October 10, 2013). Because there has not been a change to the statute since this opinion was issued, it continues to be the opinion of this Office that a resignation submitted by a public officer is not effective until it has been accepted by the public body that is authorized to receive it. See Op. S.C. Att'y Gen., 2017 WL 5203263 (October 31, 2017) ("This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or there has been a change in applicable law.").

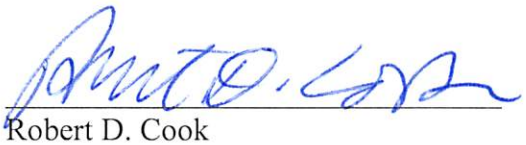
## Conclusion

It is this Office's opinion that a court likely would hold a member of a school district board of trustees may revoke a tendered resignation before it is accepted. As is discussed more fully above, the legislative intent behind the adoption of Section 8-1-145 appears to address the limited situation where a public officer who holds an elective office intends to accept another office and, in such a case, to develop a mechanism for initiating a special election at an earlier date than would have otherwise been authorized by law. It continues to be the opinion of this Office that a resignation submitted by a public officer is not effective until it has been accepted by the public body that is authorized to receive it. Op. S.C. Atty. Gen., 2013 WL 5763372 (October 10, 2013).

Sincerely,

Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General