



ALAN WILSON
ATTORNEY GENERAL

September 24, 2019

Ms. Mary Poole
State Director
South Carolina Department of Disabilities and Special Needs
P.O. Box 4706
Columbia, SC 29240

Dear Director Poole:

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

The South Carolina Department of Disabilities and Special Needs (DDSN) is governed by a Commission, defined in SC Code Ann. § 44-20-210 (Supp.2018). The DDSN Commission consists of seven members, from each of the South Carolina Congressional Districts, who are appointed by the Governor upon advice and consent of the Senate.

Currently, due to recent resignations, ... the DDSN Commission has only three members. In addition to planned and known Commission departures, a fourth vacancy occurred when the Commissioner from the 3rd District abruptly resigned on August 19, 2019. ...

As indicated in the statute, normally four members of the DDSN Commission would constitute a quorum so that a meeting could be convened pursuant to SC Code 30-4-20(d) (1986).

According to SC Code 30-4-20(e) (1986):

"Quorum" unless otherwise defined by applicable law means a simple majority of the constituent membership of a public body.

Thus it would appear that unless there are four members of the seven who are designated by the statute, there is no quorum for the Commission and no action can be taken.

Director Mary Poole
Page 2
September 24, 2019

DDSN respectfully requests an opinion from your office which would inform us as to whether the DDSN Commission can calculate a quorum based on the number of members currently appointed, three, which would mean that two members would be considered a quorum. Or is a quorum four members, based on the total number of seven, as required in the statute.

Law/Analysis

It is this Office's opinion that a court likely would hold that a minimum of four members of the DDSN Commission ("Commission") are required to constitute a quorum. As noted in the request letter, Section 44-20-210 created the Commission and outlined the terms of office for its members as follows:

There is created the South Carolina Commission on Disabilities and Special Needs. The commission consists of seven members. One member must be a resident of each congressional district appointed by the Governor upon the advice and consent of the Senate. They shall serve for four years and until their successors are appointed and qualify. Members of the commission are subject to removal by the Governor pursuant to the provisions of Section 1-3-240. A vacancy may be filled by the Governor for the unexpired portion of the term.

S.C. Code Ann. § 44-20-210 (emphasis added).

In Williams v. Benet, 35 S.C. 150, 14 S.E. 311 (1892), the Court expressed that the purpose of a quorum requirement is to allow a public body to conduct its business with less than the entire membership present.

The very purpose in providing for the transaction of business of any given body or tribunal by a quorum is to prevent the stoppage of the public business when a portion of the whole membership may, from any cause, fail to attend at the time appointed; and whether such failure results from death or some temporary cause cannot affect the question.

14 S.E. at 312 (emphasis added). This Office has not identified authority specific to the Commission's quorum requirements. The South Carolina Supreme Court has articulated that in the absence of such authority, the common law requires the presence of a majority of a public body to constitute a quorum.

In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. A member who recuses himself or is disqualified to participate in a matter due to a conflict of

interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (citations omitted).

In Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575 (Aug. 7, 2019), the Court reaffirmed Garris when it declared a severance agreement approved by a county council to be null and void. The Court held that when the council approved the severance agreement, it did so without a quorum because four members of its seven member council were disqualified due to conflicts of interest. The Court concluded, “A majority of the seven-member Council requires four members to constitute a quorum. After removing the disqualified votes, however, only three of the Council members could count towards the quorum. Id. As such, a quorum did not exist.” Id. at 9. These cases can be read to stand for the proposition that a public body is allowed to conduct its business on behalf of the public with less than its full body present. However, if a majority of that public body is unable to participate, whether because of death, resignation, or any other cause, it is unable to act.

This Office has previously opined regarding how to calculate the number of members necessary to constitute a quorum of a public body when there are vacancies on its governing body. This Office’s August 6, 1979 opinion addressed the quorum requirements for the South Carolina Museum Commission when multiple members had resigned. Op. S.C. Att’y Gen., 1979 WL 43501 (August 6, 1979). The Museum Commission’s enabling statute states it is “composed of nine (9) members who shall serve four (4) years terms and ‘until successors are appointed and qualified.’” Id.

A question has been raised as to whether members who have resigned, but for whom successors have not been appointed, must be counted in determining if a quorum is present. It is my opinion that since a member cannot vacate his office until his successor is appointed and qualified, members who have submitted their resignations are still members of the Commission for the purposes of determining if a quorum is present.

Id. The opinion concluded by noting a Florida Supreme Court decision prohibited deducting “vacancies from death, resignation, or failure to elect” from the total membership of a body to determine if a quorum is present. Id. Based on the authorities discussed above, it is this Office’s opinion that a court likely would hold that four members of the Commission are the minimum number which must be present to constitute a quorum.

Please note that the Governor is authorized to fill vacancies which occur on the Commission as “interim appointments” to allow the Commission to reach a quorum. When a vacancy occurs “in an office filled by an appointment of the Governor with the advice and consent of the Senate” during a recess of the Senate, the Governor is permitted to fill such a seat

and must report the interim appointment to the Senate and also forward a formal appointment at the Senate's next regular session. S.C. Code Ann. § 1-3-210; see Senate by & through Leatherman v. McMaster, 425 S.C. 315, 334, 821 S.E.2d 908, 918 (2018) (holding S.C. Code Ann. § 1-3-210 authorizes the Governor to make an interim appointment during "any recess of the Senate in which the vacancy existed."). As cited above, membership on the Commission is such an office because its members are "appointed by the Governor upon the advice and consent of the Senate." S.C. Code Ann. § 44-20-210. Such interim appointments would be a potential avenue for the Commission to meet its minimum membership level to constitute a quorum.

Alternatively, a court may well find that the Commission members' resignations were ineffective and compel their attendance until successors are qualified. In Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415, 417 (1964), the South Carolina Supreme Court interpreted a similar statute applicable to county election commissioner's terms of office as follows:

The foregoing statute provides that officers qualified thereunder 'shall continue in office until their successors are appointed and qualified.' The legislative intent to make provision against a situation where there would be no qualified commissioners to conduct and hold elections is clear. A proper interpretation of the statute makes it mandatory on the part of election commissioners to serve until their successors are appointed and qualify. Therefore the attempted resigned [sic] of these respondents was of no effect and their tenure in office, together with the duties and responsibilities thereof, must be held to continue, since no successors have qualified. This is in accord with the general rule that a public officer does not cease to be such even when his resignation is accepted, but continues in office until a successor is qualified where the statute or Constitution so provides.

245 S.C. at 34, 138 S.E.2d at 417; see also Op. S.C. Att'y Gen., 2013 WL 5763372, at 3 (October 10, 2013) (discussing Rogers to find that even after resigning his office, a magistrate was "required to continue discharging the duties of his office until his successor is appointed and qualified"); 1987 S.C. Op. Att'y Gen. 20 (January 12, 1987) (opining that S.C. Code § 14-23-1020 required a probate judge to continue in office until his successor qualifies); 8 S.C. Jur. Public Officers and Public Employees § 45 ("Even after his resignation is accepted, a public officer continues in office until a successor is qualified."). In reliance on Rogers, this Office's May 26, 1978 opinion discussed the impact of resignations on the Consumer Affairs Commission:

[M]embers who have resigned and have ceased participating in Commission affairs should be informed that they should remain upon the Commission. If they do not accede to this request, legal proceedings may be instituted to seek compliance. Those members who do, however, act in a continuing capacity will,

in my opinion, constitute the governing body of the South Carolina Consumer Affairs Commission.

I therefore advise that efforts should be made at once to secure the participation on the Commission of those members who have previously resigned. The assistance of this Office may be called upon in the securance of such attendance. If this is unavailing, the five present acting members may function in the conduct of the affairs of the South Carolina Consumer Affairs Commission in order to avoid a lapse of governmental functions.

1978 S.C. Op. Att'y Gen. 139 (1978).

This Office has addressed the seeming inconsistency of advising that resigning members of a public body can be held to continue in office and, at the same time, permit their seats to be filled by appointment. In a May 26, 1976 opinion, Attorney General McLeod advised Governor McNair that while such offices are not vacant, the officers only continue in office until their successors are appointed.

The members of the board presently serving are required to continue in office until their successors have been appointed and have qualified. Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415. After the expiration of their terms of office, they continue to serve in a de facto capacity, which is recognized as a 'vacancy' in office in the sense that it may be filled although there is a physical occupant of the office. Bradford v. Byrnes, 221 S.C. 255, 70 S.E. 228.

Accordingly, I advise that, in the opinion of this office, vacancies exist in the offices held by members of the board of registration who were appointed two years ago, and who have not subsequently been appointed, and that you may fill these vacancies at any time.

1970 S.C. Op. Att'y Gen. 99 (1970).

Conclusion

It is this Office's opinion that a court likely would hold that a minimum of four members of the DDSN Commission ("Commission") are required to constitute a quorum. As is discussed more fully above, to the extent that vacancies exist on the Commission, such vacancies do not reduce the count of members necessary to constitute a quorum. Because S.C. Code Ann. § 44-20-210 established the Commission as a seven member body, four members must be present to constitute a quorum. See Anderson Cty. v. Preston, No. 2017-001898, 2019 WL 3683575, at 9 ("A majority of the seven-member Council requires four members to constitute a quorum."). In

Director Mary Poole
Page 6
September 24, 2019

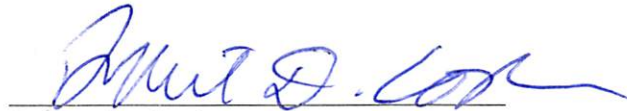
Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415, 417 (1964), the South Carolina Supreme Court admonished that “it [is] mandatory on the part of ... commissioners to serve until their successors are appointed and qualify.” See also 1978 S.C. Op. Att’y Gen. 139 (1978) (“[M]embers who have resigned and have ceased participating in Commission affairs should be informed that they should remain upon the Commission. If they do not accede to this request, legal proceedings may be instituted to seek compliance.”). Alternatively, such vacancies may be filled by the Governor as interim appointments during a recess of the Senate. See Senate by & through Leatherman v. McMaster, *supra*.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General