

8083 Liberty



HENRY McMASTER
ATTORNEY GENERAL

March 20, 2006

J. Martin Harvey, Board Chairman
Board of Trustees for Barnwell School District No. 45
660 Hagood Avenue
Barnwell, South Carolina 29812

Dear Mr. Harvey:

We received your letter inquiring as to Barnwell School District No. 45's responsibility with regard to legal expenses incurred in the protest of an election for its Board of Trustees. In your letter, you provide the following information:

Barnwell School District 45 [(the "School District")] conducts annual non-partisan elections for seats on the District's Board of Trustees every April. The elections are conducted and supervised by the Barnwell County Election Commission [(the "Election Commission")].

Our April 2005 election resulted in a contest that was ultimately resolved by the State Election Commission. The losing candidate filed his protest after he determined that one voting machine had been incorrectly tabulated such that the precinct reported zero total votes. A correctly counted vote would have changed the outcome of the election.

When the protest was filed, the School District was not cited for having done anything improper. Barnwell County filed a response with the Election Commission admitting that the results from the machine were improperly tabulated and reported incorrectly.

The State Election Commission ruled that the protest had not been timely filed and upheld the reported results. The Election Commission thereafter billed the Barnwell County Election Commission \$12,017.84 for legal services [rendered by private attorneys] to the Barnwell County Election Commission in handling the protest. The County has requested that the School District pay the

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bill because it was a school election. The District believes that because the County Election Commission, through the County Attorney, admitted it made a mistake, that the County should pay the bill.

Based on our analysis as follows, regardless of who may be responsible for the protest of an election for the School District's Board of Trustees, the Election Commission, not the School District, is obligated to pay the legal expenses incurred as a result of the protest.

Law/Analysis

In an opinion of this Office dated November 6, 1995, we addressed a similar issue to the one posed in your letter. The request, submitted by the Superintendent of Schools for Orangeburg School District No. 1, asked: "whether Orangeburg County School District One would be compelled to pay for legal expenses incurred by the Orangeburg County Election Commission which resulted from a ruling rendered by the Orangeburg County Election Commission in a recent run-off school board election." Op. S.C. Atty. Gen., November 6, 1995. In responding to this inquiry, we referred to the legislation creating the board of trustees for the Orangeburg County school districts and a subsequent amendment abolishing the Orangeburg County Board of Education. Id. In amending the enabling legislation, the Legislature transferred all of the Orangeburg County Board of Education's powers and duties to the boards of trustees of the school districts, except, in pertinent part, for: "(1) those powers and duties related to the election of trustees of the boards for the school districts of the county devolve upon the Orangeburg County Election Commission" Id.

We determined, in addition to any powers and duties transferred to the Orangeburg County Election Commission from the Orangeburg County Board of Education, the Orangeburg County Election Commission also "derives its authority and jurisdiction from the statutes creating it" We cited section 7-17-30 of the South Carolina Code (Supp. 1995), which read: "The county boards shall decide all cases under protest or contest that may arise in their respective counties in the case of county officers and less than county offices." Id. Based on these findings, we presumed "[w]ith respect to the protest or contest of election results, no responsibility appears to have been left to the various school districts in Orangeburg County." Id. We acknowledged the enabling legislation for the county election commission did not provide for costs. Id. However, "The General Assembly could have provided that the school districts pay the costs of the election but apparently did not keep any of the responsibilities for the conduct of the election with the school districts." Id.

In further support of our position, we cited section 7-23-40 of the South Carolina Code (1976) pertaining to expenses payable by counties. Op. S.C. Atty. Gen., November 6, 1995. "The governing bodies of the several counties shall audit and pay all accounts for necessary expenses incurred by the commissioners and managers of election for stationery, the making of election boxes, rents and similar expenses in elections held in this State." S.C. Code Ann. § 7-23-40.

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Thus, we were “of the opinion that the burden of the costs of the election protest in question would be considered a part of the powers and duties to conduct the election which have been reposed in the Orangeburg County Election Commission.” Id. But, we recognized our conclusion was “by no means clear or free from doubt, due to the fact that the General Assembly has not specifically addressed the issue other than in § 7-23-40.” Op. S.C. Atty. Gen., November 6, 1995. Therefore, we suggested “[t]o resolve any doubt as to the matter, a declaratory judgment might be sought; or clarification by the General Assembly might be considered, through such clarification would most probably not affect the election under consideration herein.” Id.

In our analysis of the issue presented in your request, we were unable to uncover any further guidance on the issue subsequent to our November 6, 1995 opinion. Giving deference to the longstanding principle that “this Office does not withdraw or overrule a prior opinion unless it is clearly erroneous or unless intervening circumstances warrant such,” we find no reason to depart from the conclusions made in our prior opinion. Op. S.C. Atty. Gen., May 22, 2001.

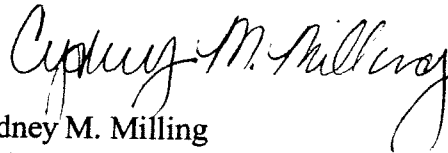
Although the Legislature amended section 7-17-30 of the South Carolina Code subsequent to the issuance of our November 6, 1995 opinion, we find the changes made to this statute inconsequential for purposes of this opinion. The only changes made to the portion of this statute relied upon in our 1995 opinion consisted of the deletion of the word “may” just before prior to the word “arise” and the addition of an exclusion for application of this statute to primaries and municipal elections. S.C. Code Ann. 7-17-30 (Supp. 2005). Thus, the amended statute reads, in pertinent part: “The county boards shall decide all cases under protest or contest that arise in their respective counties in the case of county officers and less than county offices, except for primaries and municipal elections.” Id. Furthermore, the Legislature did not amend or change section 7-23-40, which we also relied on in rendering our opinion, since the issuance of our opinion. Accordingly, we find no significant change in the law underlying our November 6, 1995 that would necessitate a departure from our conclusions made in that opinion.

Additionally, in our opinion, the enabling legislation for the creation of the School District is significantly similar to the Orangeburg School District’s enabling legislation. Act No. 2 of 1963 initially provided for the election of the Board of Trustees for the School District. 1963 S.C. Acts 2. As originally enacted, the legislation placed responsibility for holding the election and appointing box managers and other election officials as necessary to conduct the election on the County Superintendent of Education. Id. Subsequently, in 1969, the Legislature amended the 1963 provision to require the Commissioners of Election for Barnwell County, which we now presume is the Barnwell County Election Commission, to appoint box managers and other election officials as necessary for the conduct of the election. 1969 S.C. Acts 251. Thus, the enabling legislation and the enactment of section 7-17-30 indicate, as was the case in our opinion involving Orangeburg School District One, the Legislature transferred the responsibility for the election to the Election Commission, with no evidence of the Legislature’s intent to for the Schools District to pay the cost of the election. Furthermore, as we found in our November 6, 1995 opinion, section 7-23-40 provides additional evidence of the Elections Commission’s responsibility to pay expenses incurred as a result of an election administered by Election Commission.

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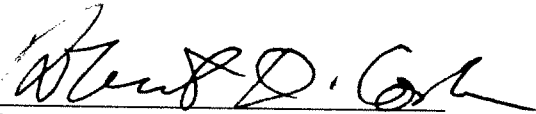
Although we stated our 1995 opinion was not free from doubt and we are inclined to offer the same caution in this opinion, we find it relevant that the Legislature, which is presumably aware of our 1995 opinion, made no effort to clarify our opinion to the contrary or otherwise. See Op. S.C. Atty. Gen., April 5, 2005 (stating "it is well established that the General Assembly is presumptively aware of opinions of the Attorney General and, absent changes in the law following the issuance thereof, the legislature is deemed to have acquiesced in the Attorney General's interpretation."). Thus, based on our conclusions in our 1995 opinion and the legislative history pertaining to the School District, the Election Commission, rather than the School District, is responsible for paying the expenses related to the election of the School District's Board of Trustees. Accordingly, in our opinion, the Election Commission is also responsible for expenses relating to the protest or contest of such an election.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General