



HENRY McMASTER
ATTORNEY GENERAL

January 13, 2009

William F. Halligan, Esquire
Childs & Halligan
Post Office Box 11367
Columbia, South Carolina 29211-1367

Dear Mr. Halligan:

We understand that you represent the Horry County School District Board of Education (the "Board") and would like to request an opinion of this Office on the Board's behalf. You ask that we address the installation of one of the Board's members given the situation explained in a previous letter to this Office dated November 17, 2008. According to this letter, an incumbent school board member was apparently unsuccessful in being reelected in the November general election. This member, Mr. Ronald Bessant, according to you "has filed a protest or election challenge over the recent election" You explained in your letter that you are of the opinion that due to Mr. Bessant's protest, "the proper course of action is for the incumbent of a contested Board seat to remain in office pending the resolution of the election process provided in State law, including protest provisions, until such time as the State Election Commission certifies a winner to the Secretary of State's office." You base your conclusion on an opinion of this Office issued in 1989. Thus, you seek guidance from this Office as to "the continued applicability of Opinion No. 89-12"

Law/Analysis

As you explained in your letter, the Board's enabling legislation provides that "[m]embers shall assume office when their election has been certified by the county election commission." 1973 S.C. Acts 212. The Legislature has since amended this provision of the Board's enabling legislation, which no longer contains a provision for when the Board's members shall take office. S.C. Acts 1683. However, as you point out, the Legislature passed section 59-19-315 of the South Carolina Code (2004), a general law provision, that provides "[t]he term of office of every elected trustee of a school district must commence one week following the certification of his election." Thus, according to State law, members of the Board shall take office upon certification of the election.

Certification is governed by our State election laws. Sections 7-17-20 and 7-17-80 of the South Carolina Code (1976) require county boards of canvassers to canvass the votes of that county and to make a statement of the results within a specified time period. However, in addition to the

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county board of canvassers, State law requires the Board of State Canvassers to meet within ten days of the general election to canvass the vote. S.C. Code Ann. § 7-17-220 (Supp. 2007). In addition, section 7-17-240 of the South Carolina Code (1976) requires the Board of State Canvassers, once certified statements from the county boards of canvassers are received, to certify a statement as to the results of the election. After such statements are certified, the Board of State Canvassers must “determine and declare what persons have been duly elected to such offices.” S.C. Code Ann. § 7-17-250 (1976). Once the Board of State Canvassers certifies the statement declaring the winner, section 7-17-290 of the South Carolina Code (1976) calls for the Board of State Canvassers to deliver the certified statement to the Secretary of State. Accordingly, in the case of the election of members to the Board, the Horry County Board of Canvassers must canvass and make a statement as to the results of the election. However, the Board of State Canvassers is the body charged with certifying the election results and declaring the winner of the election.

As you mentioned in your letter, this Office issued an opinion in 1989 addressing when the winner of an election may assume his or her office. Op. S.C. Atty. Gen., February 16, 1989. Particularly, this opinion addressed the viability of a previous opinion concluding that an individual may assume his or her office upon certification of a county board of canvassers prior to the determination of an appeal or protest of the election pending before the State Board of Canvassers. Id. (citing Op. S.C. Atty. Gen., November 16, 1984). In our 1989 opinion, we determined as follows:

The fallacy in [our previous opinion] is that the winners are not certified by the County Election Commission. South Carolina Code of Laws, 1976, Sections 7-17-80; 7-17-240. The winners of an election are certified by the State Election Commission to the Secretary of State. South Carolina Code of Laws, 1976, Sections 7-17-240; 7-17-250; 7-17-290. They may not take the oath of office until the Secretary of State has in his Office the certification that the person is the winner of the election. South Carolina Code of Laws, 1976, Sections 7-17-300, 7-17-340.

Therefore, a person should not be able to take the oath of office until he is certified to the Secretary of State as the winner of that race.

Id.

You ask us to consider whether the conclusion reached in this opinion remains valid. Based on our reading of State election laws, with regard to a county office, the Board of State Canvassers must certify the vote. While we understand that the Board of State Canvassers certifies the statements made by the county canvassing boards, certification must occur at the State level. Thus, while section 59-19-315 does not specify what entity must certify the results of the election, because

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State law requires State certification of the election results, we believe, consistent with our 1989 opinion, that State certification must be complete prior to the apparent winner taking office.

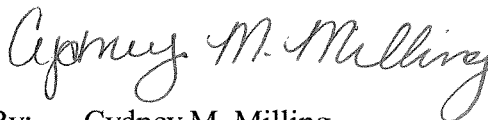
Although we continue to follow our previous opinion in determining what is required with regard to the certification of election results, we must note that our 1989 opinion does not address how an election protest affects the certification process. Nonetheless, if for whatever reason the Board of State Canvassers has yet to certify the results of the election, we believe consistent with our prior opinion, that the apparent winner cannot take office.

Conclusion

Based on our analysis above, we believe our 1989 opinion remains valid. If a statute calls for an individual dually elected to take office based on the date their election is certified, as does section 59-19-315, we believe certification at the State level is required. Accordingly, we believe a member of the Board must assume his or her office one week following certification by the Board of State Canvassers.

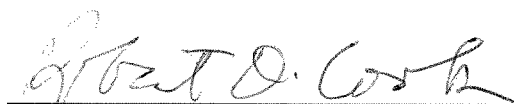
Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General