

From: Schimsa, Rebecca <RebeccaSchimsa@gov.sc.gov>
To: Pisarik, Holly <HollyPisarik@gov.sc.gov>
Date: 3/2/2016 5:48:43 PM
Subject: RE: More research on Kelvin Washington issue

AG Opinion 3/11/1974 – Referring to the Governor’s duty to declare a vacancy as mandatory

It is my opinion that the provisions of Article VI, Section 8, of the Constitution of this State are therefore applicable. This section provides, in pertinent part:

‘Any officer of the State or its political subdivisions—who has been indicted by a grand jury for a crime involving moral turpitude—may be suspended by the Governor until he shall have been acquitted. In case of conviction, the office shall be declared vacant and the vacancy filled as may be provided by law.’

The above constitutional provision appears clearly to vest in the Governor discretionary authority to suspend an officer of a political subdivision following his indictment for a crime involving moral turpitude. Where, however, such an officer has been convicted of such a crime, the constitutional provision uses the word ‘shall’ and equally clearly places upon the Governor the mandatory duty of declaring that the office is vacant. The discretionary function of the Governor with respect to suspension, at least, is shown by reference to the comments of the Committee which formulated the new constitutional provision. Committee Report, p. 117.

It is not necessary that prior suspension has been made in order for the Governor to declare a vacancy in office consequent upon a conviction for an offense involving moral turpitude.

This constitutional provision appears clearly self-executing and, in my view, it is incumbent upon the Governor to declare a vacancy in the office upon it being made known to him that an officer has been convicted of an offense involving moral turpitude. The provisions of the Constitution are to be construed to be mandatory and prohibitory, except where expressly made directory. Article I, Section 23.

From: Schimsa, Rebecca
Sent: Wednesday, March 02, 2016 5:34 PM
To: Pisarik, Holly
Subject: More research on Kelvin Washington issue

Kelvin Washington was elected to Richland County Council District 10 in November 2012. Therefore, his term is set to expire following the general election in November 2016.

The Governor is given statutory authority to fill vacancies of County Council pursuant to Sections 1-3-220, 4-9-90, and 4-11-20, which must be read together as follows.

- If the vacancy occurs more than 180 days before the term expires, then a special election must be ordered to fill the vacancy for the unexpired term, and accordingly, the Governor does not have authority to fill the vacancy pending the holding of a special election.
- Conversely, if the vacancy occurs less than 180 days before the term expires, then the Governor would make an appointment to fill the vacancy until the next general election.

In this case, since Washington’s term is set to expire in more than 180 days, then a special election must be ordered. The process for holding a special election is found in Section 7-13-190, and if the officials charged with ordering the election fail to order the election, then the Governor can order the election pursuant to Section

If Washington pled guilty to a crime of moral turpitude, then the Governor is authorized to declare the office vacant pursuant to Article VI, Section 8 (see AG Opinion 2/3/1998). The fact that no order of suspension has been entered, but that a public officer has pled guilty of an offense involving moral turpitude, the last sentence of Article VI, Section 8 is brought into play, and therefore, it is appropriate that the Governor issue an order declaring the position vacant and directing the vacancy be filled as provided by law (see AG Opinion 3/7/1980).

AG Opinion 6/16/2003

You next asked whether the circumstances of the vacated seat of Councilperson Strom require an election or an appointment to fill the vacancy. The next general election is in 2004. [Section 4-9-90](#) provides that “(v)acancies on the governing body shall be filled in the manner of original election for the unexpired terms in the next general election after the vacancy occurs or by special election if the vacancy occurs one hundred eighty days or more prior to the next general election.” An opinion of this office dated March 3, 1987 concluded that consistent with such provision, “(b)ecause more than 180 days would remain before the next general election, the individual's successor would be elected in a special election.” The referenced October 18, 1993 opinion further indicated:

Where there are fewer than one hundred eighty days remaining on the term, it is my opinion that the Governor has the authority, pursuant to Sections 4-11-20 and 1-3-220, to fill the vacancy for the reason that it is then being filled by the Governor until the next general election, in precise accordance with the wording of the statutes to which reference is made.

Should more than one hundred eighty days remain on the term, the special election must be ordered to fill the vacancy for the unexpired term and I do not think that the Governor has the authority under the cited statutes to fill the vacancy pending the holding of the special election....

In accordance with the prior opinion of this office, we would advise that the Governor would not appoint someone to serve until the special election could be held....(T)he individual would continue to serve in a de facto capacity until his successor is elected and qualifies.

***4** Inasmuch as there are more than 180 days prior to the next general election, the vacancy would be filled by a special election.

AG Opinion 10/18/1993

As to the Governor's power to appoint a successor when an individual resigns or must remove himself from a county council, we have previously advised in Op.Atty.Gen. No. 81-42:

Where there are fewer than one hundred eighty days remaining on the term, it is my opinion that the Governor has the authority, pursuant to Sections 4-11-20 and 1-3-220, to fill the vacancy for the reason that it is then being filled by the Governor until the next general election, in precise accordance with the wording of the statutes to which reference is made.

***3** Should more than one hundred eighty days remain on the term, the special election must be ordered to fill the vacancy for the unexpired term and I do not think that the Governor has the authority under the cited statutes to fill the vacancy pending the holding of the special election....

In accordance with the prior opinion of this Office, we would advise that the governor would not appoint someone to serve until the special election could be held. As concluded within the response to your second question, the

individual would continue to serve in a de facto capacity until his successor is elected and qualifies.

AG Opinion 4/24/1981

*2 Your final question is:

Does the Governor have temporary appointive powers to fill a vacancy if the councilman resigns before he is suspended?

If the councilman's term expires within one hundred eighty days after the vacancy by resignation occurs, it 'shall be filled in the manner of original election for the unexpired term in the next general election—. ' If the term will expire more than one hundred eighty days after the vacancy, it shall be filled by special election for the unexpired term.

[Section 4-9-90](#), [Code of Laws](#), 1976. I do not have any information regarding the date of expiration of the official about whom you inquire but the foregoing criteria will, in my opinion, control.

Where there are fewer than one hundred eighty days remaining on the term, it is my opinion that the Governor has the authority, pursuant to Sections 4-11-20 and 1-3-220, to fill the vacancy for the reason that it is then being filled by the Governor until the next general election, in precise accordance with the wording of the statutes to which reference is made.

Should more than one hundred eighty days remain on the term, a special election must be ordered to fill the vacancy for the unexpired term and I do not think that the Governor has the authority under the cited statutes to fill the vacancy pending the holding of the special election. The opinion of this Office dated April 28, 1980, and cited below, states the previous position of this Office in this respect.

In my opinion, a vacancy would occur upon receipt of a resignation and its acceptance by the appropriate authority. The cases of *Bradford v. Byrnes* and cases cited from the Southern Reports, S.E. and S.E.2d, cited below, are in substantiation of this conclusion.

Of concern also is the fact that Colleton County is now under an order of the federal court precluding the holding of any elections and the consent of that court must be obtained prior to the conduct of any election contemplated by the statutes.

AG Opinion 4/28/1980

1. When the Governor declares a county office vacant (i.e., council seat) after an officer has been convicted of a crime involving moral turpitude, and county council or the appropriate officials refuse to order a special election as provided under [Section 4-9-90 of the 1976 South Carolina Code of Laws](#), is the Governor then authorized under [Section 7-13-1170](#) so order an election?

The Governor has the authority to order a special election when the authority charged with conducting the election has neglected, failed or refused to order such election at the time appointed therefor. [Section 7-13-1170](#), [Code of Laws](#), 1976. The answer to this question is, therefore, in the affirmative.

2. When the Governor declares a county office vacant, can he then appoint an individual to the office until a special election is held? Or, can the interim appointment hold over after the office is declared vacant?

Should the Governor order a special election, the holding of that election would be at a fixed and determinable date which the Governor can enforce by mandamus proceedings should he consider it necessary. In such event, there is no authority vested in the Governor to fill a vacancy pending the holding of the special election. If, however, there

has been a previous order of suspension because of the charge of a crime involving moral turpitude, any interim appointee at the time of the ordering of the special election will continue to hold office until a successor has been elected and has qualified. The foregoing conclusion is reached in consideration of the provisions of [Sections 4-9-90, 4-11-20 and 1-3-220](#) and appear to this Office to be consonant with the decisions of the Supreme Court of this State in [Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228](#); [Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415](#); 63 Am.Jur.2d Public Officers ¶138, and [19 A.L.R. 39](#). With respect to the office of member of county council, the first two statutes cited above make no provision for appointment by the Governor following the occurrence of a vacancy before a special election nor does [Article VI, Section 8, of the Constitution of this State](#). As stated, it is our opinion that any previous appointments to take the place of a suspended officer would continue to run until the successor of that person has been elected and has qualified.