

From: Taylor, Richele
To: tdavis@harveyandbattey.com <tdavis@harveyandbattey.com>
CC: Patel, Swati <SwatiPatel@gov.sc.gov>
Date: 9/14/2016 5:02:01 PM
Subject: FW: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resigna...

Senator Davis -

Under 1-3-210 we can fill the vacancy during a recess with an interim appointment. Under the *sine die* resolution we are still in the recess appointment period. When regular session begins, we would then forward a formal appointment. We did receive her resignation this past March. If you would like to recommend her again we can provide an interim appointment.

Richele

Richele K. Taylor
Chief Legal Counsel
Office of the Governor
O: 803-734-8465
C: 803-231-9763

It's a great day in South Carolina

Safe Place SC – www.safeplaceSC.sc.gov

From: Patel, Swati
Sent: Wednesday, September 14, 2016 4:42 PM
To: Taylor, Richele
Subject: Fwd: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resigna...

Sent from my iPhone

Begin forwarded message:

From: Tom Davis <tdavis@harveyandbattey.com>
Date: September 14, 2016 at 3:58:26 PM EDT
To: "Patel, Swati" <SwatiPatel@gov.sc.gov>
Subject: RE: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resigna...

When you get the chance, please let me know. Thanks. Tom

From: Patel, Swati [<mailto:SwatiPatel@gov.sc.gov>]
Sent: Tuesday, September 06, 2016 12:50 PM
To: Tom Davis
Subject: RE: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's

Office did not receive notice of the resigna...

Tom - We'll look into it and let you know soon.

Swati

From: Tom Davis [<mailto:tdavis@harveyandbattey.com>]

Sent: Tuesday, September 06, 2016 10:14 AM

To: Patel, Swati

Subject: Fwd: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resigna...

Swati, see below. Angie stepped down as magistrate last April to run for solicitor. She lost. Do I have to wait until next session to reappoint her?

Tom

Begin forwarded message:

From: "McElynn, Lawrence P." <lmcelynn@bcgov.net>

Date: September 6, 2016 at 10:08:27 AM EDT

To: Davis Prvt <tdavis@harveyandbattey.com>

Subject: Fwd: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resigna...

Regards,

Lawrence P McElynn
Chief Judge
Magistrate Court
Beaufort County SC

Sent from my Verizon 4G LTE smartphone

----- Original message -----

From: "McCurdy, Robert L." <RMcCurdy@sccourts.org>

Date: 8/2/16 3:40 PM (GMT-05:00)

To: "McElynn, Lawrence P." <lmcelynn@bcgov.net>

Subject: FW: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resignation

Hopefully this is clear enough. Bob

From: noreply@fastcase.com [<mailto:noreply@fastcase.com>]

Sent: Tuesday, August 02, 2016 3:25 PM

To: McCurdy, Robert L.

Subject: Fastcase Document - Opinion as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resignation ...

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October 10, 2013

The Honorable Floyd Nicholson
Senator, District No. 10
P.O. Box 142
Columbia, S.C. 29202

Dear Senator Nicholson,

You seek an opinion of this Office as to whether the Governor has the power to appoint someone to replace a magistrate who resigned in April of this year when the Legislature was in session, but the Governor's Office did not receive notice of the resignation until the legislative session had ended. By way of background, you state: In Abbeville County, G. Thomas Ferguson was a full time magistrate and resigned 4/15/13. However, the Governor's Office was not notified of this vacancy until after the Legislative Session had ended for 2013.

As Chief Magistrate, The Honorable Susan Gladden stepped up to work full time hours and asked one of the weekend Judges, Carolyn Brownlee, to work in the former part time hours. However, there is an individual ready to step in and fill this position, but since the vacancy occurred during legislative session, the Governor's Office is hesitant to make this appointment, even though they were not made aware of this vacancy until after sine die. Can they make the appointment?

Law/Analysis

The South Carolina Constitution grants the Governor, with the advice and consent of the Senate, the power to appoint magistrates:

The Governor, by and with the advice and consent of the Senate, shall appoint a number of magistrates for each county as provided by law. The General Assembly shall provide for their terms of office and their civil and criminal jurisdiction. The terms of office must be uniform throughout the State.

S.C. Const, art. V, § 26. The General Assembly has provided that "[t]he Governor, by and with the advice and consent of the Senate, may appoint magistrates in each county of the State for a term of four years and until their successors are appointed and qualified" S.C. Code § 22-1-10(A)

When a vacancy occurs in a magisterial position while the Senate is in recess, the Governor is statutorily given the power to make an interim appointment to fill the vacancy:

During the recess of the Senate, vacancy which occurs in an office filled by an appointment of the Governor with the advice and consent of the Senate may be filled by an interim appointment of the Governor. The Governor must report the interim appointment to the Senate and must forward a formal appointment at its next ensuing regular session.

If the Senate does not advise and consent thereto prior to sine die adjournment of the next ensuing regular session, the office shall be vacant and the interim appointment shall not serve in hold over status notwithstanding any other provision of law to the contrary. A subsequent interim appointment of a different person to a vacancy created by a failure of the Senate to grant confirmation to the original interim appointment shall expire on the second Tuesday in January following the date of such subsequent interim appointment and the office shall be vacant.

S.C. Code Ann. § 1-3-210.

As our Supreme Court has stated, "the Governor's power of appointment without the advice and consent of the Senate is limited to vacancies occurring during a recess of the Senate, and that the appointment ceases to be of force if the Senate at its next session fails to confirm it." *State v. Bowden*, 92 S.C. 393, 75 S.E. 866, 871 (1912). A vacancy in a magisterial office is otherwise "filled by the Governor with the advice and consent of the Senate." 12 S.C. Jur. Magistrates and Municipal Judges § 8 (citing § 22-1-10).

Thus, the pertinent question in this case is whether a vacancy occurred when the magistrate allegedly resigned from that office while the Senate was still in session. 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 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.¹ 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)).

Furthermore, our Supreme Court has also held 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." *Rogers v. Coleman*, 245 S.C. 32, 34 (1964). Relying on *Rogers* and the language of § 22-1-10 providing that magistrates serve "until their successors are appointed and qualified," we have repeatedly advised that a magistrate whose resignation is tendered and accepted before his term of office expires is required to continue discharging the duties of his office until his successor is appointed and qualified. See *Op. S.C. Att'y Gen.*, 1980 WL 120890 (Sept. 23, 1980); 1980 WL 81956 (June 30, 1980); 1982 WL 189127 (Jan. 6, 1982).

Based on the above authorities, the appropriate authority to which a magistrate's resignation must be tendered is the Governor. A magistrate's resignation is not effective unless and until it is tendered to, and accepted by, the Governor. Under the facts you present, the magistrate's attempted resignation on April 15 of this year was not properly tendered to the Governor at that time or any time before the legislative session ended. Therefore, we believe the magistrate's attempted resignation was ineffective and no vacancy in his office occurred before the Legislature went into recess. If the magistrate's resignation has since been properly tendered to and accepted by the Governor, or if such occurs before the upcoming legislative session commences, it is our opinion the resignation would be effective and considered to have occurred during the recess of the Senate. Thus, the Governor would have the power to fill the office using her interim appointment power under § 1-3-210. Regardless of whether or when the magistrate's resignation becomes effective, we note that under *Rogers* the magistrate is considered to continue holding office until his successor is appointed and qualified.

Sincerely,

/s/

Harrison D. Brant

Assistant Attorney General

REVIEWED AND APPROVED BY:

/s/_____

Robert D. Cook

Solicitor General

Notes:

1. See, e.g., *Advisory Opinion to the Governor re Sheriff And Judicial Vacancies Due to Resignations*, 928 So.2d 1218, 1220 (Fla. 2006) ("Under our precedent, a judicial vacancy occurs when a letter of resignation is received and accepted by the Governor"); *Cole v. McGillicuddy*, 316 N.E.2d 109, 110 (111. App. Ct. 1974) ("A resignation once tendered is final and becomes effective when it is received by, or filed with the officer authorized by law to fill the vacancy"); *Attorney Gen. ex rel. Chamerblin v. Nadeau*, 266 A.2d 118, 119-20 (N.H. 1970) ("By the weight of authority a resignation from a public office requires an acceptance by the appointing authority, and it is not effective until accepted"); 63 C Am. Jur. 2d *Public Officers and Employees* § 154 ("In the absence of a statutory direction, a public officer should tender his or her resignation to the tribunal having authority to appoint a successor. A resignation tendered to an improper person or body is a nullity."); 48A C.J.S. *Judges* § 52 ("In the absence of a statute providing otherwise, the resignation of a judge

becomes effective when it is received by, filed with, or upon its acceptance by, the proper authority").

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1-866-77-FASTCASE (866.773.2782)
support@fastcase.com

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