PUBLIC COMMENT
to the
MS CHARTER SCHOOL AUTHORIZER BOARD

Board members are without authority to act until ratified by MS Senate

Submitted by Mike Sayer, Southern Echo, Jackson, MS

The Mississippi Constitution, Section 103, provides that the Legislature has the authority to "determine the mode of filling all vacancies, in all offices…" The same section provides that the Governor has the authority "in emergency situations" to make interim appointments until the public office is filled.

To become a member of the MS Charter School Authorizer Board the Legislature determined that the appointed nominees must be ratified by the Mississippi Senate:

> **All appointments *must* be made with the advice and consent of the Senate.** [emphasis added.] *MS Code Sec. 37-28-7(3).*

There are no "ifs, ands or buts" about it. And no emergency exists or has been declared.

None of the nominated members of the Charter Board have been ratified with the advice and consent of the Senate. Therefore, at this time the nominated members of the Charter Board would appear to be without authority to act as sitting members of the Charter Board, or as agents of the state or collectively as an agency of the state, or to expend state or private funds or to promulgate charter rules, charter applications, charter evaluation rubrics or otherwise.

In raising this issue, there is nothing personal toward any board member or the agency as a whole. My expectation would be that the Board members will eventually be ratified by the Senate.

Nevertheless, there is a critical constitutional and legal issue involved that must not be overlooked: the ratification process has not taken place. While it may appear to be a benign situation now, it could set a terrible precedent for situations which may turn out to be anything but benign.

There were available solutions that could have avoided this legal and constitutional dilemma. The Governor could have called a special session to ratify the nominees at the beginning of September, 2013, but declined or neglected to do so. The Legislature could have put off the timeline and deadlines for the board until after ratification of its members, or until the beginning of the 2014 session, whichever came first. But the Legislature chose not to do so.

No municipal, county, school board, legislative or executive official has the authority to function in office without being duly appointed or elected, taking the oath of office when required, or awaiting ratification by a public body, such as the Senate, as a precondition to assuming the duties and responsibilities of public office. That is how we know that such person has the authority to act.

See, for example, Section 40 of the Mississippi Constitution, which requires that legislators take an oath of office *before* assuming the duties of office.

If compliance with state law is merely voluntary, then the Senate ratification process required by state statute would be essentially ineffective … ornamental rather than substantive.

After a legislative session adjourns at the end of March, for example, a Governor could appoint an agency head, *without ratification*, who could run the agency for eight months before the Senate comes back into session. The Senate could not come back into session without the Governor calling a special session. But suppose the Senate had good reason to reject such a nominee, but would be unable to prevent the appointment because of a *custom and practice* to permit officials to take office *without ratification.*

Customs and practices are very powerful in our culture. They bring a lot of comfort and a sense of practicality and familiarity. So why be fussy about all this?

It's the law. It is expressly set forth in the charter law. We cannot pick and choose with which laws to comply. That would be a very bad precedent. It is illegal and unconstitutional. Proceeding without ratification sends the wrong message.

Worst of all – it brings into doubt whether the actions of the Charter Board taken prior to ratification will withstand a legal challenge if one is brought. Above all, potential applicants who will invest substantial time and money in their efforts to start a charter school need to know that the process on which they are relying is actually legal and constitutional, and that they will not have to start all over again at some point in the future.

Confidence and certainty … regularity, if you will … are essential to a stable economic process. Charters are in part an economic undertaking. However, if the legality of the Board's decisions is on shaky grounds, then the investment process is on shaky grounds.

Does raising this issue generate the specter of delay until Senate ratification? Unfortunately, yes. But doing it right the first time around removes the uncertainty and sets the correct precedent. The Governor and Legislature could have prevented this dilemma. I am only pointing it out because it is there. Failure to deal with it may have dire consequences for all interested parties.

The Board needs to protect the public on this issue by doing the right thing.

Respectfully submitted
by Email and US Mail,

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