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### OFFICIAL OPINION

Honorable Chuck Eaton  
Commissioner  
Georgia Public Service Commission  
244 Washington Ave., SW  
Atlanta, Georgia 30334

Re: Code section 46-2-5 is constitutional; the Commission does not have the authority to declare the statute unconstitutional; the Commission is not free to disregard the statute; the Commission may not select a chairman for a two-year term; and a chairman whose term commences on July 1, 2009, may serve beyond January 16, 2010, only if there are no other commissioners eligible to serve as chairman under O.C.G.A. § 46-2-5(b)(2).

Dear Commissioner Eaton:

You have requested my opinion whether the Public Service Commission (hereafter "Commission" or "PSC") may use a process to select a chairman that is different from the process set forth in O.C.G.A. § 46-2-5. Specifically, you have asked whether O.C.G.A. § 46-2-5 is unconstitutional; whether the Commission may declare that O.C.G.A. § 46-2-5 is unconstitutional or, in the alternative, disregard it prior to it being declared unconstitutional; whether the Commission may, by a simple majority vote, select a chairman for a two-year term commencing July 1, 2009, and ending June 30, 2011; and whether a chairman whose term commences on July 1, 2009, may serve beyond January 16, 2010, if there are other commissioners who are eligible to serve as chairman under O.C.G.A. § 46-2-5.

A brief legal history of the PSC will be instructive. The Georgia PSC is the successor to the Georgia Railroad Commission. The legislation creating that commission provided that "it shall be the duty of the Commission to elect from its membership the chairman . . ." 1907 Ga. Laws at 74. When the Railroad Commission became the Public Service Commission in 1922, 1922 Ga. Laws at 143, that statutory language was carried forward.

The PSC was first proposed as a constitutional body in a 1943 amendment to the Constitution of 1877. It was ratified August 3, 1943, and included language providing that "[a] chairman shall be elected by the members of the commission from its membership." The Constitution of 1945 adopted essentially the same provision, revising the language to provide that the members would "select" a chairman. That language was carried forward without change into the 1976 Constitution and remains in the current Constitution. GA. CONST. art. IV, sec. I, para. I(a). The Constitution does not provide specific details for that selection process.

The statute governing the selection of the PSC chairman was substantially revised in 1992 and is now codified at O.C.G.A. § 46-2-5. As revised, O.C.G.A. § 46-2-5(a) provides that a chairman shall be selected annually for a one-year term of office, and that a new chairman shall take office within fifteen days after the first day of January each year. In addition to providing a seniority method of selecting a chairman, current law authorizes the Commission “by unanimous vote of the members [to] select any member as chairman for any given year for a term of office as chairman as specified in subsection (a) of this Code section.” O.C.G.A. § 46-2-5(c).

If the chairman is not selected unanimously, O.C.G.A. § 46-2-5(b) establishes a procedure for the selection by rotation of the chairmanship amongst eligible commissioners. To be eligible for the chairmanship under this subsection, a commissioner must have completed one year of “continuous unbroken service” on the Commission. O.C.G.A. § 46-2-5(b)(1). In addition, a commissioner who already has served as chairman is not eligible to serve a second term as chairman until each other eligible commissioner has either served or deferred service as chairman. O.C.G.A. § 46-2-5(b)(2). Subject to these eligibility requirements, the most senior eligible commissioner shall serve as chairman. O.C.G.A. § 46-2-5(b)(3). If a commissioner chooses to defer service as chairman in a particular year, then that commissioner will resume his place at the head of the order in the following year’s selection. 1999 Op. Att’y Gen. 99-1. If there is no unanimous choice and two or more eligible and willing commissioners have equal seniority, then the chairman is selected by lot. O.C.G.A. § 46-2-5(b)(4).

1. Is O.C.G.A. § 46-2-5 unconstitutional?

No. There is a strong presumption in favor of the constitutionality of a statute, and acts of the General Assembly will not be declared unconstitutional except in clear and urgent cases. *Bryan v. Georgia Pub. Serv. Comm.*, 238 Ga. 572, 573 (1977); *Service Employees Int’l Union v. Perdue*, 280 Ga. 379, 380 (2006).

A unanimous Georgia Supreme Court in *Bryan v. Georgia Public Service Commission*, 238 Ga. 572, 573 (1977), said:

The inherent powers of the Georgia General Assembly are plenary. Unlike the United States Congress, which has only delegated powers, the Georgia legislature is given full lawmaking powers. . . . *Sears v. State of Georgia*, 232 Ga. 547, 553 (1974). ‘The legislature is absolutely unrestricted in its power to legislate, so long as it does not undertake to enact measures prohibited by the State or Federal Constitution.’ *Id.* at 554. Because the legislature has plenary legislative powers, there is a strong presumption in favor of the constitutionality of a statute. *Park v. Candler*, 114 Ga. 466 (1901).

The issue underlying your question is whether the General Assembly violated the Constitution by enacting specific procedures for determining chairmanship of the Commission that were not set forth in the Constitution. The Georgia Constitution vests the legislative power of the state in the General Assembly, GA. CONST. art III, sec. I, para. I, and it gives the General Assembly “the

power to make all laws not inconsistent with this Constitution, and not repugnant to the Constitution of the United States, which it shall deem necessary and proper for the welfare of the state.” GA. CONST. art. III, sec. VI, para. I. The Code section here, O.C.G.A. § 46-2-5, is not inconsistent with the constitutional provision authorizing the Commission to “select” its chairman. Establishing an orderly procedure for determining the chairman of the Commission does not contravene the constitutional provision that the Commission select its chairman. On the contrary, it appears to be an exercise by the General Assembly of its power to make laws “necessary and proper for the welfare of the state” in aid of the constitutional provision, not repugnant to it.

This conclusion is further supported by the fact that the Constitution confers upon the General Assembly plenary authority over constitutional boards, including the PSC. GA. CONST. art. IV, sec. VII, para. I provides that “the qualifications, compensation, and removal from office of members of constitutional boards and commissions provided for in this article shall be as provided by law.” Furthermore, the Constitution specifies that the “powers and duties of members” of the PSC shall be as provided by law. GA. CONST. art. IV, sec. VII, para. II. In light of these provisions, O.C.G.A. § 46-2-5 clearly does not exceed the legislature’s powers under the Constitution.

Nor is there any conflict between GA. CONST. art. IV, sec. I, para. I(a) and O.C.G.A. § 46-2-5. As noted above, nothing in the Constitution mandates any particular procedure; it only provides that the commissioners select the chairman, and that the chairman be a member of the Commission. The procedures specified in O.C.G.A. § 46-2-5 do not violate those requirements. You state in your letter that it has been asserted that “O.C.G.A. § 46-2-5 is unconstitutional given that it would not allow a simple majority of the commissioners to elect the chairman of their choice or to give that chairman a term of their choice.” Nowhere does the Constitution provide for the number of votes necessary for the Commission to choose a chairman; nowhere does the Constitution specify any term of service for a chairman; nowhere does the Constitution limit the ability of the General Assembly to legislate such procedural details. Instead, it provides only that the commissioners “select” a chairman.<sup>1</sup> The General Assembly’s determination that a particular procedure to select a chairman should be imposed on the Commission is clearly within

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<sup>1</sup> The use of the word “select” in lieu of “elect” in the Constitution of 1945 and succeeding constitutions is significant. “Select” has a more general meaning, simply “to choose,” whereas “elect” means “to choose by vote.” AMERICAN HERITAGE DICTIONARY 1111, 442 (2<sup>nd</sup> ed. 1982). While it is likely that the General Assembly could provide clarifying procedures under either term, the use of the more general word “select” offers greater latitude in legislating the method of choosing. Indeed, current law even authorizes selection “by lot” in the event of two chairman candidates of equal seniority. Had the Constitution continued to use “elect,” it is possible that this method would not be available as a legislative choice. It is reasonable to infer that the constitutional provision was intended to allow the legislature to establish methods for selecting a chairman other than through “election.” In essence, the Constitution does not restrict the legislative power to prescribe how the commissioners may select a chairman, and it does not confer upon the Commission any “right” to vote for the chairman.

its legislative prerogative under our constitutional scheme, and the requirement that if departing from the statutory succession procedure the vote for the chairmanship be unanimous does not conflict with the definition of the word “select” set forth above.<sup>2</sup> Given the strong presumption in favor of a statute’s constitutionality, I conclude that O.C.G.A. § 46-2-5 does not conflict with the Constitution, either in the method of selection prescribed or in the term of service as chairman.

2. May the Commission declare that O.C.G.A. § 46-2-5 is unconstitutional or, in the alternative, disregard O.C.G.A. § 46-2-5 prior to it being declared unconstitutional?

No. The Georgia Constitution plainly confers on the judiciary the power to declare that acts are in violation of the Constitution.<sup>3</sup> GA. CONST. art. I, sec. II, para. V. “The power to test [an] act by a comparison with the constitution is one inherently residing in the courts . . .” *Coleman v. Bd. of Educ.*, 131 Ga. 643, 647 (1908). An administrative hearing officer or board is powerless to declare an act unconstitutional, “and resolution of the constitutional question must await judicial review on appeal.” *Flint River Mills v. Henry*, 234 Ga. 385, 386 (1975). *See also Perdue v. Baker*, 277 Ga. 1, 14 (2003) (“The power to forbid the execution of the laws would enable the executive branch to nullify validly enacted statutes.”). Therefore, the Commission, a part of the executive branch of government, has no authority to declare O.C.G.A. § 46-2-5 to be unconstitutional.

Similarly, the Commission may not simply disregard O.C.G.A. § 46-2-5. As an agency within the executive branch, it is the duty of the Commission to “enforce the statutes passed by the General Assembly until such time as they are amended or held to be unconstitutional by the

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<sup>2</sup> It is not difficult to imagine situations in which the five members of the Commission would be deadlocked in the selection of a chairman. For example, if each commissioner voted for himself, or a 2-2-1 split emerged, no chairman could be selected. The procedures established by O.C.G.A. § 46-2-5 insure against deadlock.

<sup>3</sup> This is not to say that only the judicial branch of government is empowered to make decisions on whether laws are constitutional. Both the legislative and executive branches of government have the ability to consider and act on constitutional questions. The General Assembly during the process of enacting a law, in either the House of Representatives or the Senate, may determine at any step that a proposal does not pass constitutional muster in some particular and endeavor to correct the deficiency or let the legislation die. For example, if a bill under consideration “refers to more than one subject matter or contains matter different from what is expressed in the title thereof,” GA. CONST. art. III, sec. V, para. III, either chamber is under a constitutional obligation to remedy the defect without relying on the judiciary. Likewise, the executive branch is empowered to determine constitutional questions. When presented with duly enacted legislation, the Governor has authority to veto the legislation. GA. CONST. art. III, sec. V, para. XIII. The reason for the veto may be the Governor’s determination that the legislation contravenes the Constitution in some particular. These powers in the legislative and executive branches, however, are grounded in language in the Constitution. There is no similar power, expressed or implied, conferred on the Public Service Commission. Its duty is to faithfully execute the laws duly enacted by the General Assembly and signed into law by the Governor.

courts.”<sup>4</sup> *Adams v. Ga. Dep’t of Corrections*, 274 Ga. 461, 462 (2001); *Perdue v. Baker*, 277 Ga. at 4.

3. May the Commission, by a simple majority vote, select a chairman for a two-year term commencing July 1, 2009, and ending June 30, 2011?

No. As discussed above, there are three ways in which a commissioner may be selected chairman: unanimously; pursuant to a rotation based on seniority; or, in the event of two or more eligible candidates, by lot. O.C.G.A. § 42-2-5(b); *see also* 1999 Op. Att’y Gen. 99-1. None of these three methods authorizes the Commission to choose a chairman by simple majority vote.

Nor does O.C.G.A. § 46-2-5 authorize the Commission to select a chairman to serve a term in excess of one year. O.C.G.A. § 46-2-5(a) specifically addresses the term that a chairman may serve:

There shall be a chairman of the commission. *The chairman shall be selected on an annual basis.* The initial chairman selected under this Code section shall take office within 15 days after April 20, 1992, and shall serve for a term of office as chairman expiring January 1, 1993. Thereafter a new chairman shall take office within 15 days after the first day of January in 1993 and each subsequent year; and *each such chairman shall serve for a one-year term of office as chairman.*

(Emphasis added.) Regardless of which method is used to select the chairman, the term of a chairman is limited to one year. For these reasons, the Commission may not select a chairman for a two-year term.

4. May a chairman whose term commences on July 1, 2009, serve beyond January 16, 2010, if there are other commissioners who are eligible to serve as chairman under O.C.G.A. § 46-2-5?

No. O.C.G.A. § 46-2-5(a) provides that “a new chairman shall take office within 15 days after the first day of January in 1993 and each subsequent year,” and that the term of office is one year. The statute does not prohibit a serving chairman from resigning in mid-term, to be replaced by a new chairman. However, the replacement chairman would not be eligible to serve as chairman beyond January 16 of the following year unless no other commissioner is eligible. O.C.G.A. § 46-2-5(b)(2).

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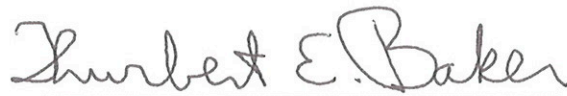
<sup>4</sup> This does not foreclose the possibility that judicial precedent regarding a particular matter is so clearly and unambiguously established that the Attorney General, as the sole constitutional legal advisor of the executive branch of state government, may advise an agency not to enforce a statute because to do so would violate constitutional principles. This does not present such a case.

Honorable Chuck Eaton  
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Therefore, it is my official opinion that O.C.G.A. § 46-2-5 is constitutional; that the Commission does not have the authority to declare the statute unconstitutional; that the Commission is not free to disregard the statute; that the Commission may not select a chairman for a two-year term; and that a chairman whose term commences on July 1, 2009, may serve beyond January 16, 2010, only if there are no other commissioners eligible to serve as chairman under O.C.G.A. § 46-2-5(b)(2).

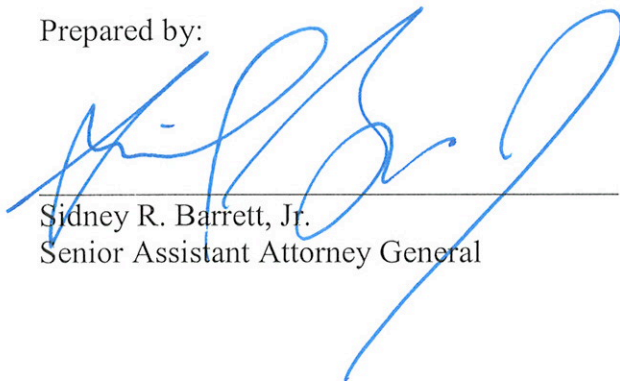
Issued this 8<sup>th</sup> day of June, 2009.

Sincerely,



THURBERT E. BAKER  
Attorney General

Prepared by:



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