



HENRY McMASTER
ATTORNEY GENERAL

August 27, 2009

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Town of Mount Pleasant
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

We understand you desire a follow-up opinion to an opinion we issued to you on April 21 of this year concerning a mayor pro tempore's service as mayor. First, you ask that we address whether "the Mayor Pro Tem can receive the salary of the Mayor." Second, you ask us to reconsider our findings in our previous opinion concluding that a mayor pro tempore serves as the mayor, but does not become the mayor when the mayor resigns.

Law/Analysis

Initially, we address your desire for us to reconsider our April 21 opinion. In our previous opinion, we examined section 5-7-190 of the South Carolina Code (2004), which states as follows:

Immediately after any general election for the municipal council, the council shall elect from its membership a mayor pro tempore for a term of not more than two years. The mayor pro tempore shall act as mayor during the absence or disability of the mayor. If a vacancy occurs in the office of mayor, the mayor pro tempore shall serve as mayor until a successor is elected.

Employing the rules of statutory interpretation and citing authority from other jurisdictions, we stated:

The statute provides that the mayor pro tempore "serves as" the mayor rather than stating that the mayor pro tempore becomes the mayor when a vacancy occurs. Moreover, we do not believe the mayor pro tempore technically becomes the mayor as he is not elected or appointed to the position. Rather, his or her service as mayor is by operation of law. Thus, we believe the mayor pro tempore remains in his position of mayor pro tempore and does not become the mayor.

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Accordingly, we do not believe the mayor pro tempore is sworn in as mayor.

This Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Op. S.C. Atty. Gen., March 4, 2009. We note no changes in the applicable law since our April 21 opinion. However, in your letter, you argue the fact that section 5-7-190 uses different language to describe the mayor pro tempore's role indicates that the mayor pro tempore becomes the mayor when a vacancy in the mayor's office occurs. You argue that section 5-7-190

states that the Mayor Pro Tem *shall act* as Mayor during the absence or disability of the Mayor. In other words, it is clear during this temporary time that the Mayor Pro Tem only acts as the Mayor and does not become the Mayor, pursuant to the plain meaning of the words. At the same time, this section also states in the next sentence that if a vacancy occurs in the office of the Mayor, the Mayor Pro Tem *shall serve* as Mayor until a successor is elected. In other words, it seems clear that different language was used for the permanent time the Mayor Pro Tem will assume the role of Mayor. In other words, it seems clear that the words *shall serve* and not *shall act* indicates that there is a different meaning, that being that the Mayor Pro Tem becomes the mayor and does not just act as the Mayor.

We respect your argument and agree with your assessment that Legislature, in choosing to describe the mayor pro tempore's actions differently when the mayor is simply absent verses when a vacancy arises in the office of the mayor, intended for the mayor pro tempore's role to be different under these two situations. However, we do not believe that the Legislature intended for the language "shall serve" to be tantamount to becoming the mayor.

Webster's New World Dictionary contains many definitions for the term "act." However, we believe in the context of section 5-7-190, the most appropriate definition is "to serve or function" or "to serve as spokesman or substitute." Webster's New Word Dictionary, 13 (2nd ed. 1976). In addition, we found many definitions for the term "serve." But, again in the context of section 5-7-190, we believe this term means "to carry out the duties connected with an office or position." Id. at 1301. From these definitions, we observe that these terms are closely linked and could be substituted for one another. However, we presume that by choosing to use these two different terms, the Legislature intended for a distinction to exist between them. Nonetheless, we do not believe the Legislature necessarily intended by the use of the term "serve" to cause the mayor pro tempore to become mayor upon a vacancy in the mayor's office.

While we find it difficult to fully understand the Legislature's intentions with regard to its word choice in section 5-7-190, we can speculate that the Legislature by employing these two

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different terms aimed to give more permanence to the mayor pro tempore's service when filling a vacancy than just serving temporarily in the mayor's absence. However, we are given no indication that the Legislature intended for the mayor pro tempore to become the mayor. Thus, while we appreciate you pointing out the distinction in the language used in section 5-7-190 and recognize that this could lead one to believe that the mayor pro tempore's role is certainly more significant when he or she is serving as mayor upon a vacancy in that office, we are reluctant to conclude that the term "serve as" allows the mayor pro tempore to become the mayor for the same reasons expressed in our prior opinion. Accordingly, finding no change in the law and not finding our April 21 opinion to be clearly erroneous, we decline your request to overrule our prior opinion.

Finding that our prior opinion stands, we proceed to the other question you asked in your letter concerning the mayor pro tempore's ability to receive the salary of the mayor. Initially, we note that section 5-7-190 does not speak to the mayor pro tempore's ability to receive the mayor's salary when serving as the mayor. In addition, we were unable to find any South Carolina court decision or prior opinion of this Office addressing whether a mayor pro tempore may receive the mayor's salary under these circumstances. However, at least one South Carolina Supreme Court case and several opinions of this Office conclude that in other situations in which an officer is required to take over the duties and responsibilities of another officer upon a vacancy, the substituting officer is entitled to receive the pay normally afforded the office with the vacancy.

In Ridgill v. Clarendon County, 188 S.C. 460, 199 S.E. 683 (1938), our Supreme Court considered whether a clerk of court is entitled to receive a probate judge's salary when the Legislature passed a local law abolishing the office of probate judge in a particular county and devolving the probate judge's duties and responsibilities on the clerk of court. The Court acknowledged the trial court's theory that in order to make a claim for compensation, the officer must support his or her claim with law specifically authorizing payment. Id. at 466, 199 S.E. at 686. The Court explained:

if one is elected or appointed to an office or position just created and there is in the act creating the office no provision for compensation and no general law covering the case, then the implication might arise that it was not intended that compensation should be made for the performance of the duties of that office. But if the office be one already established with well defined duties, responsibilities and jurisdiction, and the discharge of the duties, and the assumption of the jurisdiction and responsibilities of the office are devolved upon another, who holds another office of grave responsibilities and onerous and exacting duties, it is a logical implication that the emoluments and compensation attached to the abolished office still attach to the office to which its duties have been transferred.

Id. at 466-67, 199 S.E. at 686. Thus, the Court concluded: “The fact that the abolishing act does not specifically say that the Clerk of the Court, who must perform the duties of the abolished office, shall have the same compensation therefor, is not, we think, open to the implication that the Clerk should perform the additional duties without compensation.” Id. at 468, 199 S.E. at 687. Accordingly, the Court found the clerk of court was entitled to the probate judge’s salary. Id.

Several opinions of this Office also conclude that when a clerk of court serves as probate judge he or she is entitled to the probate judge’s salary. In a 1967 opinion, we discussed whether the clerk of court, who was appointed by the Governor to serve as probate judge, may receive the probate judge’s salary. Op. S.C. Atty. Gen., December 12, 1967. We stated: “It is generally recognized that the salary pertaining to an office is an incident of the office itself and not to the individual discharging the duties of the office.” Id. Following Ridgill, we noted that although the statute under which the clerk of court was appointed probate judge does not specifically provide for compensation, “[i]t is our opinion that the logical inference is that the temporary appointee falls heir to the compensation attached to an office when he is appointed under Section 50–10.” Id. Furthermore, we added:

Given the fact that any office, State, County, or Municipal, normally carries with it a stated salary or other form of compensation, it is our opinion that the mere fact that no provision is made in Section 50–10 for compensating the temporary appointee does not necessarily lead to the conclusion that the appointee is to serve without compensation. On the contrary, it is our opinion that the appointee would be entitled to the salary or other form of compensation the suspended incumbent would have been entitled to.

Id. Several other opinions of this Office also came to the same conclusion with regard to a clerk of courts ability to receive the probate judge’s salary when serving as probate judge. Ops. S.C. Atty. Gen., June 2, 2004; August 27, 2001; June 2, 1997; July 8, 1981.

In a 1986 opinion, this Office addressed whether a coroner serving as sheriff is entitled to the sheriff’s salary. Op. S.C. Atty. Gen., October 6, 1986. According to the opinion, section 23-11-50 of the South Carolina Code provides that the coroner shall assume the office of sheriff should a vacancy in that office arise. Id. We cited to the general rule prohibiting a change in an officer’s compensation during his or her term of office and concluded “the County would not be authorized to change the salary and benefits of the office of sheriff by withholding such salary and benefits from [the coroner] during the period in which you assume the office of sheriff.” Id. Thus, we concluded that the coroner is entitled to the sheriff’s salary. Id.

In 2004, we considered whether an interim Commissioner of Agriculture is entitled to receive the Commissioner’s compensation. Op. S.C. Atty. Gen., August 24, 2004. We cited to Ridgill and our 1967 opinion pertaining to clerks of court serving as probate judges and concluded “an appointee

to an office would be entitled to the salary and other benefits that a suspended incumbent would have been entitled to receive.” Id. Based on this authority, we determined “if the Governor makes an interim appointment, that appointee would be entitled to receive the Commissioner of Agriculture’s salary and benefits during the period he or she serves as interim Commissioner.” Id.

Most recently, we were asked to determine whether a deputy auditor serving as auditor is entitled to the auditor’s pay and salary supplement. Op. S.C. Atty. Gen., September 22, 2006. We cited to Ridgill and many of the opinions cited above and stated:

Ridgill and our prior opinions recognize regardless of whether the statute allows for payment of the office’s compensation to the individual performing the duties of the office, under common law, entitlement to compensation arises by virtue of the performance of the duties of the office. Moreover, this common law rule applies regardless of whether individual fulfilling the duties of the office is acting pursuant to an appointment by the Governor or in accordance with a statutory provision. Thus, we believe a court would find a deputy auditor, by his or her performance of the duties of the auditor in accordance with 12-39-40(B), is entitled to receive the auditor’s compensation.

Id.

Based on the authority cited above, although section 5-7-190 does not specifically state that the mayor pro tempore is entitled to the mayor’s salary when serving as mayor, we believe that because the mayor pro tempore is performing the duties of the mayor he or she is entitled to receive the mayor’s salary. We understand your concern that receiving the mayor’s salary may be viewed as an increase in the mayor pro tempore’s salary that cannot be implemented pursuant to section 5-7-170 of the South Carolina Code (2004) until after the next election. However, we follow the view explained in our 1986 opinion referenced above that not giving the mayor pro tempore the mayor’s salary would result in a change in the mayor’s salary. Op. S.C. Atty. Gen., October 6, 1986. Thus, we conclude that the mayor pro tempore can and should receive the mayor’s salary when serving as the mayor.

Conclusion

We appreciate your argument that the different language used to describe the mayor pro tempore’s role with regard to temporarily acting as mayor and filling a vacancy in the mayor’s position indicates different types of service by the mayor pro tempore. However, we do not believe that the language used to describe the mayor pro tempore’s role when filling a vacancy in the mayor’s position is equivalent to the mayor pro tempore becoming the mayor. Thus, finding no

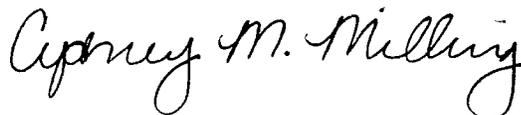
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change in the law since our April 21 opinion and not finding our previous opinion to be clearly erroneous, we decline your request to overrule that opinion.

However, with regard to your question as to whether the mayor pro tempore is entitled to receive the mayor's salary when serving as mayor, we are of the opinion based on our Supreme Court's decision in Ridgill and prior opinions of this Office, the mayor pro tempore is entitled to receive the mayor's salary when filling a vacancy in that office.

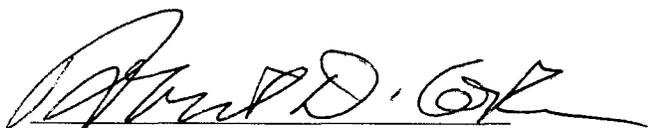
Very truly yours,

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