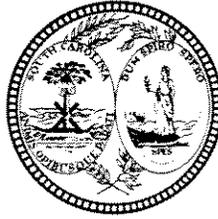


IO 4937



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 15, 1995

James W. Peterson, Jr., Esquire
Attorney for City of Florence
Post Office Box 1865
Florence, South Carolina 29503

RE: Informal Opinion

Dear Mr. Peterson:

As attorney for the City of Florence, you have sought an opinion as to several questions concerning the results of the recent elections held in the City of Florence. You have advised that an election was held on May 2, 1995, for mayor and two at-large city council seats; the election was handled by the Florence County Election Commission with the Municipal Election Commission retaining the function of certifying the results. The ballots used were punch card ballots. As the results were being tabulated, a contest arose regarding the correct counting of a significant number of ballots on which voters had punched both a straight party ballot and voted for only one of the same party's candidates on the city council ballot which called for no more than two votes. The contest questioned the counting of those ballots.

Two of the four candidates for city council filed notices of protest within the 48-hour period allowed by statute. On May 5 the Municipal Election Commission, in a public meeting, considered the results of the election as reported by the Florence County Election Commission, heard from the candidates and the public in general, and voted to certify the election results consistent with the identical computer count. In a separate session, the Election Commission then heard the protest filed by one of the candidates contesting these certified results. After receiving a number of exhibits and allowing presentations from all sides of the issue, the Election Commission voted to deny the protest of the candidate. That candidate has apparently filed an appeal of the decision to the Court of Common Pleas pursuant to S.C. Code Ann. §5-15-140 and has apparently

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named all of the candidates running for city council as parties to the appeal.¹ It is in this context that your questions have arisen.

The questions for which you seek an opinion are as follows:

1. During the period of time that the appeal to the Circuit Court is pending, should the candidate with the most votes in the city council race, as presently certified, be given the oath of office?
2. During the period of time that the appeal to the Circuit Court is pending, should the candidate with the second-most number of votes in the city council race, as presently certified, be given the oath of office?
3. During the pendency of the appeal to the Circuit Court, should the incumbents to the two city council seats remain seated as voting members of council?
4. Should the City of Florence take any steps to allow any of the candidates certified as the prevailing candidates to take an active part in council meetings pending the outcome of the appeal?

Florence City Code

The Code of the City of Florence contains provisions relative to the time of taking office, in Section 2-22, as follows:

- (a) Newly elected officers shall not be qualified pursuant to section 5-15-120 of the South Carolina Code of Laws, 1976, as amended, until at least forty-eight (48) hours after the closing of the polls.
- (b) The newly-elected officers shall take office within one week after the time for contesting the election has passed. In case a contest is finally filed, the incumbents shall hold office until the contest is finally determined.
- (c) The date for the swearing-in ceremony shall be established by the council at a time convenient for the newly elected members.

State Law

The above-cited provision of the Code of the City of Florence is virtually identical to S.C. Code Ann. §5-15-120 (1994 Cum. Supp.), which provides in relevant part:

¹A NOTICE OF APPEAL AND APPEAL FROM THE DECISION OF THE MUNICIPAL ELECTION COMMISSION OF FLORENCE, SOUTH CAROLINA, captioned Carolyn Pusser, Appellant v. Joseph F. Stukes, et al., Respondents, has been filed in the Court of Common Pleas of the Twelfth Judicial Circuit. Named as respondents were candidates Bobby Holland, J. Lawrence Smith, and Rick Woodard.

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Newly elected officers shall not be qualified until at least forty-eight hours after the closing of the polls and in the case a contest is finally filed the incumbents shall hold over until the contest is finally determined.

Discussion

Both state law and the City Code provide that until the election contest is settled, the incumbents shall hold over. As stated in Op. Att'y Gen. No. 2846 dated March 2, 1970,

one who holds over after the expiration of his term, whether or not there is statutory provision providing for his holding over, serves in a de facto capacity, and his acts and doings in such capacity are valid and proper.

The doctrine behind the concept of de facto officers² is stated in Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952):

The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers... . As nature abhors a void, the law of government does not ordinarily countenance an interregnum....

Id., 221 S.C. at 261-62. See also Ops. Att'y Gen. dated March 30, 1984 and May 16, 1988. The incumbents holding over would thus be considered de facto officers, lawfully in office and entitled to carry out their duties until the election contest has been decided.

In cases such as Bradford v. Byrnes, supra, the courts have permitted de facto officers to continue to exercise their powers and duties until replaced by de jure officers or until otherwise relieved by the court. In an opinion of this Office dated February 10, 1984, this Office advised that "anything [one has] done as a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove [the officer] from

²A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936). A de jure officer, on the other hand, is "one who is in all respects legally appointed and qualified to exercise the office." 63A Am.Jur.2d Public Officers and Employees §580. See also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

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office." Applying these principles to the instant situation, the incumbents, as de facto officers, would be entitled to continue to exercise their powers and duties as usual, unless or until a court should declare otherwise. Such would include the right to vote on matters before council.

Based on the City Code and §5-15-120, I am of the opinion that the incumbents would remain in office, as hold-overs, until the outcome of the appeal of the election contest, particularly since all of the candidates have apparently been made parties to the appeal; based on those authorities, I am further of the opinion that the two recipients of the highest numbers of votes would not be sworn in until the appeal has been decided. Until a candidate is actually determined to be the winner and is sworn in, I am of the opinion that he (or she) would not be entitled to act as a member of council; how much of a role council would wish any of the candidates to play in city government until the appeal is decided (such as participating in discussions and the like) would be within the province of council, by way of its rules of procedure.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that the foregoing has satisfactorily responded to your inquiry and that you will advise if clarification or additional assistance should be necessary.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General