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ATTORNEY GENERAL

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Dear Mr. James:

As County Attorney for Fairfield County, you have requested an opinion related to the recent election for a Fairfield County Council seat that resulted in a victory for the incumbent by four votes. Subsequently, the challenger protested the election. As the State Election Commission upheld the Fairfield County Election Commission's decision that a new election for the seat must be held, you indicate that the challenged seat will likely be undecided when the new Fairfield County Council is seated in January of 2015. Therefore, you ask: "should the process carry past the second day of January would the incumbent's office be held over until the protest has been determined?"

Upon review of the applicable case law, statutory authority, and opinions previously written by this Office, it is our opinion that a court would likely find that after the expiration of his seat, the incumbent Fairfield County Council member would hold over in a de facto capacity until a successor is duly elected and qualified.

Law / Analysis

Chapter 9, Title 4 of the South Carolina Code governs county government, with S.C. Code Ann. § 4-9-90 (1986) speaking generally to the election of council members. In part, S.C. Code Ann. § 4-9-90 (1986) states that: "[m]embers of the governing body of the county shall be elected in the general election for terms of two years or four years as the General Assembly may determine for each county commencing on the second of January next following their election." S.C. Code Ann. § 4-9-10 (1986) establishes what type of government counties within the state shall operate under, unless otherwise determined by referendum, and directs Fairfield County to govern under the council-administrator form:

[n]otwithstanding any other provisions of this chapter, unless otherwise determined by referendum prior to July 1, 1976, the county concerned shall, beginning on that date, have the form of government including the method of election, number, composition and terms of the governing body most nearly corresponding to the form in effect in the county immediately prior to that date, which the General Assembly hereby determined to be as follows:

...
For the counties of . . . Fairfield . . . the council-administrator form of government as prescribed in Article 7 of this chapter.

Under the council-administrator form of government, S.C. Code Ann. § 4-9-610 (1986) directs that “[c]ouncil members shall be elected in the general election for terms of two or four years commencing on the first of January next following their election.”

As a matter of clarification, we point out that previous opinions of this Office have concluded that the conflict between commencement dates of a county council seat generally pursuant to S.C. Code Ann. § 4-9-90 (1986) (the “second of January next following their election”) and specifically under a council-administrator form of government pursuant to S.C. Code Ann. § 4-9-610 (1986) (“term. . . commencing on the first of January next following their election”), should be resolved in favor of the specific, council-administrator provision controlling. See Op. S.C. Att’y Gen., 1976 WL 23022 (July 26, 1976) (“Since Greenville County has selected the council-administrator form of government which specifies that council members’ terms are to commence on ‘the first of January next following their election’ . . . and inasmuch as Section 14-3740¹ is a specific provision while Section 14-3706², which provides that terms of council members are to begin ‘on the second of January next following their election,’ is a general provision, I think that the specific provision controls. . . .); see also Op. S.C. Att’y Gen., 1984 WL 249988 (Oct. 8, 1984) (concluding that under a council-administrator form of government, “the terms of the council members elected in the general election will commence on January 1. . . .”). Thus, based on the prior opinions of this Office, we continue to opine that commencement of a county council seat under the council-administrator form of government is January 1st opposed to January 2nd. See Op. S.C. Att’y Gen., 2006 WL 2849807 (September 29, 2006) (“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”) (citation omitted).

S.C. Code Ann. §§ 4-9-90 (1986) and 4-9-610 (1986) provide a specific date for term commencement and consequently a specific term expiration date for county council members but fall silent on the authority of a county council incumbent to “hold over” until a successor has been elected and qualified. As a result, we have been asked the process to follow in light of an election protest and determination by the State Election Commission that a new election must be held. In analyzing this question, we first point out the former conclusion reached by this Office that “a person should not be able to take the oath of office until he is certified to the Secretary of State as the winner of that race.” Op. S.C. A’tty Gen., 1989 WL 406102 (Feb. 16, 1989) (relying on S.C. Code Ann. § 7-17-300 and § 7-17-340 in reaching this conclusion and finding error in Op. S.C. Att’y Gen., 1984 WL 159940 (Nov. 16, 1984) that concluded a “certified winner is entitled to take the oath office, the appeal or protest notwithstanding”). We have since elaborated on the conclusion reached in our February 16, 1989 opinion, clarifying the steps of certification following an election as follows:

in addition to the county board of canvassers, State law requires the Board of State Canvassers to meet within ten days of the general election to canvass the vote. S.C. Code Ann. § 7-17-220 (Supp. 2007). In addition, section 7-17-240 of the South Carolina Code (1976) requires the Board of State Canvassers, once

¹ Section 14-3740 is the precursor to S.C. Code Ann. § 4-9-610.

² Section 14-3706 is the precursor to S.C. Code Ann. § 4-9-90.

certified statements from the county boards of canvassers are received, to certify a statement as to the results of the election. After such statements are certified, the Board of State Canvassers must “determine and declare what persons have been duly elected to such offices. S.C. Code Ann. § 7-17-250 (1976). Once the Board of State Canvassers certifies the statement declaring the winner, section 7-17-290 of the South Carolina Code (1976) calls for the Board of State Canvassers to deliver the certified statement to the Secretary of State.

Op. S.C. Att’y Gen., 2009 WL 276746 (Jan. 13, 2009).

While not specified in your correspondence, it appears that if the incumbent was certified by the State Election Commission to the Secretary of State as the election winner, certification has since been de-certified upon the challenger’s success in protesting the election and the determination that a new election must be held. S.C. Code Ann. § 7-17-270 sets forth the procedure for an election protest, indicating that “[u]pon the conclusion of the hearing of the protest, the board shall determine all issues by majority vote and forthwith *certify the results of the election.*” S.C. Code Ann. § 7-17-270 (Supp. 2014) (emphasis added). In the situation you have presented to us, the decision to hold a new election was made by the Fairfield County Election Commission and was thereafter confirmed by the State Election Commission. As we have not been provided with any information that the incumbent has appealed the State Election Commission’s decision to the South Carolina Supreme Court in the requisite time period following the State Election Commission’s decision, the decision to hold a new election, or to de-certify the election results, appears to be final.

Case law provides significant guidance to the issue at hand. In Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1935) our Supreme Court considered the status of certain highway commissioners after the expiration of the term for which they had been appointed where no provision indicated that they would hold over until their successors were appointed and qualified. The Court noted that “[t]he general law is that one who holds over after the expiration of his legal term, where no provision is made by law for his holding over, is commonly regarded as a de facto officer.” Id. at 151 (citation omitted). The Court went on to state that “[i]t has been held that it is the general rule of law that an incumbent of an office will hold over after the conclusion of his term until the election and qualification of a successor, even although there is no express provision of the law to that effect.” Id. at 155 (citation omitted).

A similar issue was under consideration in Becknell v. Waters, 156 S.C. 77, 152 S.E. 816 (1930) where the Court considered the status of trustees of a county board of education serving terms ending on a specified date. The Supreme Court upheld the trial Court’s order, which, in part, contained the following:

[i]t is my opinion that even though the Act provides that the terms of office of the trustees shall expire on April 1, 1929, that they are still trustees until their successors are elected or appointed and qualified.

There is no statutory or constitutional provision as to whether or not all public officers in the State of South Carolina hold over until their successors

are appointed or elected and qualified. There is such a provision as to certain constitutional officers, but no provision as to officers generally. It is my opinion, however, under the authorities, that the policy of the law is that all administrative officers should hold over until their successors are appointed or elected and qualified, so that the administration of governmental affairs will not be halted for the lack of an officer to carry them on. The purpose of this policy is to prevent a hiatus in the administration of governmental affairs pending the time when a successor may be appointed or elected and qualified.

Id. at 818. In the Supreme Court's analysis affirming the trial court, it reasoned that:

[n]o other construction of the statute in question would be consistent with reason and common sense. It cannot be assumed, in the absence of unequivocal language, that the Legislature intended, by the act of 1929, to place the schools districts of Spartanburg county in a situation in which, through some unforeseen or unavoidable contingency, or dereliction of duty on the part of some public official, any one of them should be without trustees for any period of time, and particularly in the midst of the school year, to carry on its affairs.

Id. at 820. We highlight this case as it provides significant insight into the rationale of the holdover concept.

Furthermore, in Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860, 863 (1941), the Court, after quoting the Heyward v. Long Court's holding that one who holds over after the expiration of his legal term is a de-facto officer, noted that: "[t]his is so although the term of the office is definitely fixed by statute. Of course, upon the office being filled either by appointment or election, as may be provided by the statute for the filling of the office, and the qualification of the appointee or electee, the de facto status terminates."

In application of the above cases to the situation at hand, it is our opinion that in the event of the expiration of an officer's term where the law is silent on holdover and no provision states to the contrary, he or she holds over in a de facto capacity until a successor is elected or appointed and qualified. Case law also indicates that this remains the case despite the term length being definitely fixed by statute and having a definite expiration. As noted above, the rationale behind this rule of law is the prevention of a hiatus in the administration of governmental affairs pending the time when a successor may be appointed or elected and qualified. Therefore, although S.C. Code Ann. § 4-9-610 (1986) provides for term commencement of council-administrator county council members on January 1st following the general election at which the council member was elected and consequently a definite term expiration for the outgoing council member, while also failing to address whether an incumbent holds over in the event his successor has not yet been elected and qualified at the expiration of his term, it is our opinion that the incumbent, in such a situation, holds over in a de facto capacity until the successor is elected and qualified.

The distinction between a de facto officer and a de jure officer has been addressed in several opinions of this Office. See, e.g., Op. S.C. Att'y Gen., 2012 WL 2867808 (July 2, 2012);

Op. S.C. Att’y Gen., 2003 WL 22172233 (Sept. 6, 2003); Op. S.C. Att’y Gen., 2003 WL 21471510 (June 5, 2003); Op. S.C. Att’y Gen., 1995 WL 803566 (May 15, 1995). In our June 5, 2003 opinion, we summarized other opinions on the subject and applicable case law as follows:

[t]he law distinguishes somewhat between an officer who holds over by statute and one holding over where no statute providing for holdover status is applicable. In Op. S.C. Atty. Gen., Op. No. 84-129 (November 5, 1984), we noted that “where a statute provides that an officer hold over until a successor is selected and qualifies, such period is as much a part of the incumbent's term of office as the fixed constitutional or statutory period.” A person who by statute holds over until a successor is elected or appointed and qualifies is, in other words, a de jure officer. On the other hand, it was recognized by our Supreme Court in Bradford v. Byrnes, 221 S.C. 255, 262, 70 S.E.2d 228 (1952) that

... in the absence of pertinent statutory or constitutional provision, public [officers] ... hold over de facto until their successors are appointed or elected as may be provided by law, qualify and take the offices; but meanwhile the “holdovers” are entitled to retain the offices. As nature abhors a void, the law of government does not countenance an interregnum.

Thus, where no statute authorizing an officer to hold over is present, that officer serves in a de facto capacity.

A de jure officer is one who is in all respects legally appointed or elected to the office and has qualified to exercise the duties of the office. See, Op. S.C. Atty. Gen., February 10, 1984. A “de facto” officer, by contrast, 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, 367, 183 S.E. 145 (1936).

Op. S.C. Att’y Gen., 2003 WL 21471510 (June 5, 2003).

Our June 5, 2003 opinion also addressed the legality of actions taken by a de facto officer, summarizing prior opinions speaking to the subject as follows:

[t]his Office has consistently recognized that “[a]s an officer de facto, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer de jure unless or until a court would declare such acts void or remove the de facto officer from office.” Op. S.C. Atty. Gen., March 15, 2000. See for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848). In addition, we have opined on numerous occasions that an individual may continue performing the duties of a previously held office as a de facto officer, rather than de jure until a successor is duly selected. See Ops. S.C. Atty. Gen., December 23, 1996 and September 5, 1995 as examples thereof. In other words, the acts of a de

facto officer “would not be void ab initio, but would be valid, effectual and binding unless and until a court should declare otherwise.” Op. S.C. Atty. Gen., December 31, 1992.

Id. at *5.

Applying these principles to the instant situation, the Fairfield County Council incumbent, serving as a de facto officer after his term’s expiration, would be entitled to continue to exercise his powers and conduct his duties as normal, until the officer de jure is elected and qualified.

Last, we make note that several opinions of this Office that have spoken to the effect of an officer’s holdover in a de facto capacity on the length of the de jure officer’s term, once the de jure officer is elected or appointed and qualified. In an opinion issued on May 29, 2013, we noted that:

it is also well established that a situation where an officer holds over beyond his term does not serve to vary the term because of the delay in the successor’s election or appointment. As our Supreme Court recognized in *Heyward v. Long* . . . “since the term of an office is distinct from the tenure of an officer, the term of office is not affected by the holding over of an incumbent beyond the expiration of the term for which he was appointed; and a holding over does not change the length of the term *but merely shortens the term of the successor.*”

Op. S.C. Att’y Gen., 2013 WL 2450881 (May 29, 2013) (emphasis in original).

Furthermore, in a March 5, 1987 opinion related to expiration date of the term of an individual serving on the board of the Department of Parole and Community Corrections, we reached the same conclusion that hold over of a de facto officer would result in the shortened term of his successor. Op. S.C. Att’y Gen., 1987 WL 245431 (March 5, 1987). Specifically, we stated that: “the predecessor’s holding over for one year, until March 15, 1976, shortened the tenure which the individual in question would subsequently serve, though the term of office would remain twelve years.” Id. at *1.

From the foregoing authorities, it is our opinion that the term of the officer who is elected to serve on the Fairfield County Council in the new election will expire as statutorily provided and will not be extended as a result of the incumbent serving as a de facto officer until the successor is elected and qualified.

Conclusion

Statute provides for a commencement date for county council members, and consequently, an expiration date for predecessors, but falls silent on the authority of county council members to holdover in the event a successor has not been elected and qualified at the date of the term expiration for the outgoing officer. Nonetheless, based upon prior case law and former opinions of this office, it is our belief that a court would find an incumbent of a county council seat would hold over as a de facto officer after the conclusion of his term until the

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election and qualification of a successor, despite there being no provision of the law to that effect. Our Supreme Court has clarified that this is so although an officer's term is definitely fixed by statute. Accordingly, as to the Fairfield County Council seat in question, it is our opinion that the incumbent should holdover as a de facto officer until a new election is held and the elected successor officer is qualified.

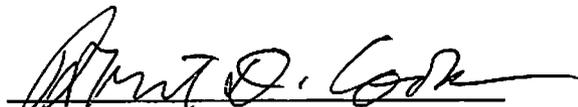
We are hopeful that the above analysis will be helpful in answering your concerns. Should you have any additional questions, please do not hesitate to contact our Office.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



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