

1986 S.C. Op. Atty. Gen. 226 (S.C.A.G.), 1986 S.C. Op. Atty. Gen. No. 86-70, 1986 WL 222843

Office of the Attorney General

State of South Carolina

Opinion No. 86-70

June 24, 1986

*1 Where a resignation in the office of sheriff becomes effective prior to preclearance of R-416, an act amending Section 23-11-40 relating to the method of filling vacancies in the office of sheriff, such vacancy should be filled by appointment by the Governor, pursuant to previous § 23-11-40.

Saluda County Attorney

You have inquired as to the appropriate method of filling a vacancy for Sheriff in Saluda County. The present Sheriff has apparently submitted his resignation, effective immediately. It is my advice that the most appropriate method for filling the vacancy is by an appointment by the Governor.

The office of Sheriff is a constitutional office. Article V, § 24;¹ see also, *Privette v. Grinnell*, 191 S.C. 376, 4 S.E.2d 305 (1939). As stated by the Court in *Privette*, because “the Constitution makes no provision whatever for the filling of a vacancy nor does it prescribe any time for the election of sheriffs, ... it follows that these are matters within the legislative power and discretion.” 4 S.E.2d at 306.

Section 23-11-40 provides the method for filling vacancies in the office of Sheriff. Such section prior to amendment provided that

[i]n the event that any vacancy shall, at any time, occur in the office of sheriff in any county of this State, the Governor may appoint some suitable person, who shall be an elector of such county and who, upon duly qualifying according to law, shall be entitled to enter upon and hold the office until the next general election for county sheriffs and shall be subject to all the duties incident to such officer during the term of his services in such office.

This Office has long interpreted this provision as prescribing the method for filling vacancies in the office of Sheriff. See, e.g. 1978 Op.Atty.Gen., No. 78-65, pp. 92-93 (March 31, 1978); Op.Atty.Gen., June 6, 1979; Op.Atty.Gen., November 14, 1980.

Recently, however, the General Assembly enacted R-416, amending § 23-11-40. This bill was signed into law by the Op.Atty.Gen. (La.) No. 82-936, October 15, 1982. But see, *Francis v. Cothran*, 280 S.C. 516, 313 S.E.2d 332 (1984).²

Robert D. Cook
Executive Assistant for Opinions

Footnotes

1 Article V, § 24 provides that “[t]here shall be elected in each county by the electors thereof ... a sheriff ... [who] ... shall serve for [a] term [] of four years and until ... [his] successor ... [is] elected and qualif [[ies].” Similar language has been interpreted by our Supreme Court as requiring the incumbent who resigns to hold the office until his successor is chose and qualifies. See, *Rogers v. Coleman*, 245 S.C. 32, 138 S.E.2d 415 (1964); See also, *Badger v. United States*, 93 U.S. 599 (1877); *State v. Hargis*, 179 La. 623, 154 So. 628 (1934); *City Council of Waycross v. Youmans*, 11 S.E. 865 (Ga.1890); *State ex rel. Coc v. Lee*, 3 So.2d 497 (Fla.1941). See also, Op.Atty.Gen., June 30, 1980; September 27, 1983; June 28, 1984.

This rule is not altered in this instance by the fact that § 23-11-50 provides that, during the continuance of a vacancy in the Office of Sheriff, the coroner assumes the duties of the office. This Office has stated that the coroner is "merely the substitute for the Sheriff". Op. Atty. Gen., April 20, 1960; see also, 80 C.J.S., Sheriffs and Constables, § 32. Moreover, although § 23-11-50 states that the coroner will serve as sheriff where there is a vacancy in the office of Sheriff, several authorities have concluded that no corporeal vacancy exists upon resignation where the incumbent serves until a successor is chosen and qualifies. See, *City Council of Waycross v. Youmans*, supra; *State ex rel. Coe v. Lee*, supra; *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 163 P. 248, 250 (1917); *People v. Supervisor*, 100 Ill. 332; see also, 1956-57 Op. Atty. Gen., 94. However, a technical vacancy does exist so that a successor may be chosen. *State ex rel. Coe v. Lee*, supra.

- 2 In any event, a person appointed pursuant to former § 23-11-40 would possess de facto authority with respect to third parties. *State ex rel. McLeod v. Probate Court of Colleton Co.*, 266 S.C. 279, 223 S.E.2d 166 (1976); see also, *Malone v. State*, 406 So.2d 1060 (Ala.1981); 80 C.J.S., Sheriffs and Constables, § 28; 67 C.J.S., Officers, § 270.

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