ALAN WILSON
ATTORNEY GENERAL

July 2, 2012

The Honorable Vanessa C. Hollins
Municipal Judge
Town of Winnsboro
P.O. Box 209
Winnsboro, SC 29180-0209

Dear Judge Hollins:

In a letter to this Office, you reference your appointment as a Municipal Court Judge for the Town of Winnsboro ("Town"). By way of background information, you state as follows:

> I was appointed and sworn in to serve . . . in November of 2000. I completed certification and training requirements for this position and was sworn in again in August of 2001, along with three other municipal judges, to serve a four year term. The Town process for reappointing judges is as follows:
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> > "the municipal judge shall, 90 days prior to expiration of their term, in writing, make known to the council their intention to serve another four year term or not to serve, giving the council and the mayor time to find a replacement"[1]
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> In 2005, the human resource department requested intent letters from the Municipal Court judges. I submitted my letter of intent to serve another four year term in June of 2005. However, there was no communication concerning letters of intent from the human resource office in 2009. I currently preside as a municipal court judge for the Town . . . . I am one of three judges in this municipality. The other two judges have recently elected to retire. One has retired this past May and the other will retire [in June]. These changes leave me as the sole judge for the Town . . . Municipal Court. Through no communication from the Town['s] . . . city council, town manager, nor human resource department, I have recently learned that the council is proposing to enter into a contractual agreement to transfer all municipal court judicial duties to county magistrate judges.

[1]The process for selecting Municipal Court Judges for the Town of Winnsboro was adopted by Resolution the Winnsboro Town Council on October 17, 2000.

Given the background provided, you specifically question whether you are serving another four-year term as Municipal Court Judge, or at the pleasure of Winnsboro Town Council ("Town Council") since you were not reappointed by Town Council in 2009. If you are holding over, you ask whether you may serve until a successor is appointed. Finally, you ask whether Fairfield County Magistrates may lawfully be appointed as successors to the Municipal Court Judges of the Town.

Law/Analysis

Municipal courts in South Carolina possess concurrent criminal jurisdiction with magistrates' courts pursuant to S.C. Code Ann. §14-25-45. The authority for the establishment of a municipal court is found at §14-25-5. Section 14-25-5(a) authorizes that the city council:

> ... of each municipality in this State may, by ordinance, establish a municipal court, which shall be a part of the unified judicial system of this State, for the trial and determination of all cases within its jurisdiction. The ordinance shall provide for the appointment of one or more full-time or part-time judges and the appointment of a clerk.

Section 14-25-25 also states:

> [a] municipal judge shall not be required to be a resident of the municipality by whom he is employed. A municipality may contract with any other municipality in the county or with the county governing body to employ the municipal judge of the other municipality or a magistrate to preside over its court.
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> In case of a vacancy in the office of municipal judge, a successor shall be appointed in the manner of original appointment for the unexpired term. In case of the temporary absence, sickness, or disability of a municipal judge, the court shall be held by a judge of another municipality or by a practicing attorney or some other person who has received training or experience in municipal court procedure, who shall be designated by the mayor and take the prescribed oath of office before entering upon his duties.

Furthermore, §5-7-230 provides that "[t]he city council may elect or appoint a municipal attorney and a judge or judges of the municipal court, whose duties shall be as prescribed by law."

Accordingly, in the context of the municipal court, municipal judges are "judicial officers," whether full-time or part-time, whose offices are created pursuant to the above statutes. Such municipal court judges are, as stated, appointed by the city council, and their terms, not to exceed four years, are set by such council. The compensation of municipal court judges is established by the city council. Council fills the vacancies in the offices of municipal court judge. Thus, in the sense of appointment,

reappointment, filling of vacancies, compensation, length of term, etc., municipal court judges are completely "responsible" to city council. See Ops. S.C. Atty. Gen., August 27, 1996; August 15, 1996.

However, we emphasize Article V of the South Carolina Constitution places the municipal courts, including the municipal court judges thereof, under the auspices and control of the Supreme Court of South Carolina ("the Court"). Pursuant to its Article V authority, the Court disciplines municipal judges for violations of the Code of Judicial Conduct. See, *e.g.*, In the Matter of McKinney, 324 S.C. 126, 478 S.E.2d 51 (1996); In the Matter of Martin, 315 S.C. 370, 434 S.E.2d 262 (1993); Op. S.C. Atty. Gen., November 15, 2005. The Court further maintains oversight over the municipal court and its judges as it does any other court in the unified judicial system. See City of Pickens v. Schmitz, 297 S.C. 253, 376 S.E.2d 271, 272 (1989).

We understand that your term has since expired and that Council did not take action to reappoint you as Municipal Court Judge. The Winnsboro Town Code does not address the service of a municipal court judge beyond his/her term. However, §14-25-15 specifically provides that a municipal judge "shall be appointed by the council to serve for a term set by the council of not less than two years but not more than four years and until his successor is appointed and qualified." [Emphasis added]. This would seem to be controlling in the instant case and require you to hold over until your successor is appointed by Town Council and qualified.[2]

This matter has been answered by previous opinions of this Office and by decisions of the Court. In an opinion of this Office dated June 5, 2003, we stated 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

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[2]Although not presented by the circumstances in your letter, we note that §14-25-15(E) provides as follows:

> [u]pon written notification of the Supreme Court or its designee to the affected municipal judge and the council of the failure of the municipal judge to complete the training program or pass the certification examination required pursuant to subsection (D), the municipal judge's office is declared vacant, the municipal judge does not hold over, and the council shall appoint a successor, as provided in Section 14-25-25; however, the council shall not reappoint the current municipal judge who failed to complete the training program or pass the certification examination required pursuant to subsection (D) to a new term or to fill the vacancy in the existing term. [Emphasis added].

> 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
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> > ... 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 office to hold over is present, that officer serves in a *de facto* capacity.
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> 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).

The June 5, 2003, opinion also addressed the question of the legality of the acts of a *de facto* officer. We recognized in that opinion that even though the officer is serving in a *de facto* capacity, all acts taken by that officer are valid and legally binding upon third parties. We stated the following:

> [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*, 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. Accordingly, assuming these individuals are simply continuing to hold over without reappointment, their acts would, nevertheless, be valid. (emphasis added).

In Colleton County, the Court held that the acts of the Probate Court were valid even though the Court struck down the law creating that court as unconstitutional. The Court concluded:

> [o]ur holding in State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967) is consistent with this view. The Constitution mandates a forty-six member Senate. We held in effect that notwithstanding the fact that a fifty member Senate was unconstitutional, the acts of the General Assembly, of which the Senate was a part, were not null and void although there was no Senate *de jure*. We held that there was a Senate *De Facto* and that the acts of the Senate, prior to our decision and until the next general election, were valid. The Senate was permitted to carry out its legislative functions as a *de facto* body even though the law which provided for its composition was invalid. Public policy considerations, which were influencing there, are equally present here. In like fashion, these four courts, and their judges were *de facto*.

Colleton County, 223 S.E.2d at 180.

Based on statutory authority, prior opinions of this Office and decisions of the Court, you would continue to hold over as Municipal Court Judge for the Town until your successor is appointed by Town Council and qualified. See Ops. S.C. Atty. Gen., November 19, 1990 [magistrates are directed to holdover in office until their successors are appointed and qualified]; April 18, 1986 [where statute provides for an incumbent trustee to remain in office until his successor has been elected and qualified, such "hold-over" trustee would be considered to be a *de facto* officer until a successor is duly selected]; August 7, 1979 [a magistrate serving past his appointed term would be in a *de facto* capacity inasmuch as no one had been appointed to succeed him at the conclusion of his term of office].

In an opinion of this Office dated June 28, 1984, we considered whether a vacancy on the board of trustees for the Medical University of South Carolina could be filled if the vacancy occurs while the Legislature is not in session. Section 59-123-50 provided that board members' "successors shall be elected for terms of four years or until their successors are elected and qualify." We concluded that such provision:

> . . . would require a board member to continue to serve until his successor has been elected and qualified. Although the right of public officials to resign from office has been recognized generally, a South Carolina case has held ineffective the attempted resignation of certain public officials prior to the appointment and qualification of their successors. 63 Am.Jur.2d Public Officers and Employees §§136 and 162; Rogers v. Coleman, 245 S.C. 32, 138 S.E.2d 415 (1964). The Rogers decision was based on statutory language requiring the officers to continue in office until selection of their successors. It also found authority in 'the general rule that a public officer does not cease to be such even when his resignation is accepted but [that he] continues in office until a successor is qualified where the statute or constitution so provides [citation omitted].' 245 S.C. at 34. See also Op. Atty. Gen., September 27, 1983 . . . Thus, if the board member should attempt to resign from the board upon his election to county council, he would nevertheless continue to serve on the board until his successor has been elected and qualified.

In addition, we previously noted that it is Town Council as the legislative body for the Town which has broad authority to establish by ordinance the Municipal Court System. Accordingly, Town Council possesses considerable discretion in the structure, make-up, organization and administration of the court system through the local legislative process. Accordingly, if Town Council so desires, it may decide to contract, pursuant to §14-25-25,

> ... with any other municipality in the county or with the county governing body to employ the municipal judge of the other municipality or a magistrate to preside over its court.

In addition, §14-25-5(c) authorizes any municipality to:

> ... prosecute any of its cases in any magistrate court in the county in which such municipality is situate upon approval by the governing body of the county.

This Office has consistently stated that in lieu of the establishment of a separate municipal court structure, municipal cases may be handled by the magistrate pursuant to a contract between the city council and the county. See Ops. S.C. Atty. Gen., August 27, 1996; August 13, 1996. For example, in an opinion dated July 14, 1981, we addressed the question of whether the Beaufort Township Magistrate could handle City of Beaufort Municipal Court matters on some type consolidation basis through an agreement between the Beaufort County and the City of Beaufort. There, we stated that "it appears that such arrangement would be permitted by Sections 14-25-25 and 14-25-5(c)." This remains the opinion of this Office.

## Conclusion

Town Council possesses broad statutory authority pursuant to §14-25-5 with respect to the creation of Municipal Court Judge positions (full or part-time, assistant or otherwise) for the Town, in terms of filling such positions or a vacancy therein, in reappointment of Municipal Court Judges or selecting someone else, keeping in mind the caveat that these officers are also part of the judicial system and thus are also responsible to the Supreme Court of South Carolina pursuant to Article V of the South Carolina Constitution. Secondly, §14-25-15(a) provides that municipal court judges must be appointed by the governing city council to serve a term set by city council not to exceed four years and until his/her successor is appointed and qualified. Because you were not reappointed by Town Council to another four-year term, you would hold over until your successor is appointed by Town Council and qualified. It has long been the law of South Carolina, as reflected in court decisions and the opinions of this office, that your official actions would be upheld with respect to third persons. Finally, §§14-25-5(c) and 14-25-25 permit the handling of municipal cases by the magistrate's courts if such arrangement is agreed to by contract and is made in accord with the express terms of these statutory provisions. We would suggest that the Town's City Attorney work with Fairfield County officials (and the county attorney) if Town Council chooses to pursue this procedure.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General