



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 5, 1998

The Honorable James S. Klauber
Member, House of Representatives
518A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Klauber:

Your opinion request has been forwarded to me for reply. You have informed this Office that a member of the Greenwood County Council was suspended by the Governor after being indicted for bingo fraud. You have asked whether this individual may offer and run for re-election in the upcoming November general election pending the resolution of the criminal charges.

Nothing in state law would technically preclude a member of county council presently under indictment and suspension from running for re-election. However, the fact that the individual would not be precluded from running does not mean that he may actually serve in office if re-elected while the indictment is still pending and the Governor's suspension order is still in effect.

In an opinion dated July 1, 1983, this Office was asked whether a mayor who was suspended by Governor Riley after being indicted for several crimes and subsequently re-elected mayor could be sworn into office while subject to the suspension order. This opinion provides in pertinent part as follows:

... the oath of office prescribed by the Constitution provides that the person swears that he is ' ... duly qualified, according to the Constitution of this State, to exercise the duties of the office to which ... (he has) been elected ...' South Carolina Constitution, Article III, Section 26. Mr Jefferson

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currently is not qualified under the Constitution of this State in that he has been suspended from Office pursuant to Article VI, Section 8 of the South Carolina Constitution. It would, therefore, appear that Mr. Jefferson could not take the oaths of office in that he does not currently meet the requirements mandated by the oaths.

This position is sustained also in the general law. In 67 CJS, Officers Section 18 it is stated that

... it has been held that the term 'eligible' as used in a constitution or statute means capacity to be chosen, and that therefore the qualification must exist at the time of election or appointment, and also at the time when seeking to qualify by taking the oath of office (Emphasis added.)

In Slater v. Varney, --- W.Va. ---, 68 S.E.2d 757, 770 (1951) the court in a similar situation, held that a candidate elected to an office '... must be eligible to the office when he takes the oath which the law requires of him.' In McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912) the court defined suspension of a public officer as the 'temporary withdrawal of the power to exercise the duties of office.' Clearly then, a Mayor under Article VI, Section 8 suspension is not eligible to hold office. See also State v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956); Commonwealth v. Kelley, 100 A. 272, 255 Pa. 475 (1917).

Therefore, for all the foregoing reasons it would not appear that Mr. Jefferson could be sworn into office until the indictment which resulted in removing him from office is resolved.

The cited reasoning of the July 1, 1983 opinion would also apply to the situation presented in your opinion request. The council member must be eligible to the office when he takes the oath which the law requires. Because the suspension acts as a temporary withdrawal of the power to exercise the duties of office, the council member suspended pursuant to Article VI, Section 8 would not be eligible to hold office until the indictment which resulted in his suspension from office is resolved. Therefore, if the council member won his bid for re-election while still under indictment and suspension, he would not be permitted by law to serve.

I also call your attention to Article VI, Section 1 of the South Carolina Constitution. This section provides in pertinent part as follows: "No person may be

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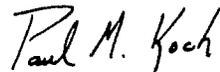
popularly elected to and serve in any office in this State or its political subdivisions unless he possesses the qualifications of an elector, is not disqualified by age as prescribed in this Constitution, and has not been convicted of a felony under state or federal law" (emphasis added). Thus, if this individual is convicted of a felony, he would be barred from serving in any office of the State or its political subdivisions.

As you can see, the law and the facts present create a unique situation. While this individual may run for office, if re-elected, he would not be permitted to serve while under indictment and subject to the suspension order. In addition, if this individual is convicted of a felony either prior to the election or following a successful bid for re-election, he would be barred from serving by the State Constitution. Thus, if the criminal charge is not resolved prior to the November general election, Greenwood County may be placed in the unenviable position of holding a futile election for the seat. Such would then burden the taxpayers with the cost of holding another election. While this Office sympathizes with the taxpayers of Greenwood County, we are bound by the law and in this case, the law dictates the above stated result.

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.

With kindest regards, I remain

Very truly yours,



Paul M. Koch
Assistant Attorney General