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Office of the Attorney General

Opinion No 88-41
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May 16, 1988

Thomas O. Lawton, Jr. Esquire
Allendale Town Attorney
Post Office Box 646
Allendale, South Carolina 29810

Dear Mr. Lawton:

By your letter of May 5, 1988, you have asked for the opinion of this Office on several questions involving two incumbents of the Allendale Town Council for whom an election runoff or contest is yet pending. The recent municipal election was to fill three (3) at-large council seats. Two of the three seats were filled and the winners seated. The third seat is currently the subject of an election contest between two council incumbents, which contest is expected to take awhile to resolve.

The questions posed about the continued operation of Allendale Town Council pending the outcome of the election contest are:

1. Can Council convene with the seat being contested and therefore vacant?
2. Who would be seated at the Council meeting, the incumbents or the elected uncontested Council members who have been sworn in?
3. During the period prior to the resolution of the question of seating the contested Council seat, would actions taken by the Council (assuming the actions are morally and legally correct) be subject to suspect due to the contested vacancy on the Council?

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As Town Attorney, you have provided an opinion to Mr. Bruce McGougan; we concur with the conclusions which you reached therein and would add only a few comments. We will point out relevant law and then discuss each question.

Allendale Town Code

Section 1-8006(b) of the Allendale Town Code provides: "If the results of the election are contested, the incumbent who fills that contested office shall hold over until the contest is finally determined." Because at-large elections are held, candidates do not declare their candidacy for a specific seat; thus, it is not possible to determine exactly which office is being filled and, thus, which incumbent is being replaced.

State Law

The above-cited provision of the Town Code is virtually identical to Section 5-15-120, South Carolina Code of Laws (1976), which provides in relevant part:

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 Town Code provide that until the election contest is settled, the incumbent(s) shall hold over. As stated in Op. Atty. 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.

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The doctrine behind the concept of de facto ^{1/} officers 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 Op. Atty. Gen. dated March 30, 1984 (copy enclosed). 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. Thus, we can identify no reason, based on the election contest, to refrain from convening the Allendale Town Council pending the outcome of the election contest.

Based on the Town Code and Section 5-15-120, we concur with your advice that neither of the incumbents be sworn in, as to the remaining at large seat on council, until the outcome of the election contest. Each would continue to hold over until such time as the contest has been decided. For the present time, council would consist of the mayor, council members already sworn in, and the two incumbents who are holding over.

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 (copy enclosed), we have previously 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

^{1/} A 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." 63 Am. Jur. 2d Public Officers and Employees § 495. 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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until a court would declare such acts void or remove [the officer] from 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.

You have suggested, as a matter of prudence, that certain steps could be taken by the incumbents to protect their actions against challenges in the future. These include the incumbents' taking part in deliberations and agreeing:

1. That they would not vote until the contest is resolved; or
2. That two (2) votes be taken on any matter, one (1) vote being by Council members already elected and seated with a second vote in which all Council members and the incumbents voting also with a record kept as to how each individual person voted.

As noted above, the incumbents, as de facto officers, would most likely be entitled to vote. This Office would have no way of knowing what matters might come before the council or of what significance a given vote might be; as Town Attorney, you would be in the best position to offer guidance, such as that outlined above, to protect the Town in any given situation. The advice which you have given already appears to be reasonable in light of the circumstances.

To summarize the foregoing, this Office is of the opinion that:

1. Allendale Town Council may continue to convene and carry on its normal business pending the outcome of the election contest.
2. Those council members recently elected and sworn in, the mayor, and the incumbents whose election contest has not yet been decided would comprise the council until the election contest has been decided.
3. Actions taken by the incumbents, as de facto officers, would generally be regarded as valid and effectual as those taken by de jure officers, unless or until a court should declare otherwise. As to particular situations, you as the Town Attorney may wish to offer specific advice which would afford the greatest protection to the Town and the council.

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I hope that this has satisfactorily responded to your inquiry. Please advise if you have additional questions or need clarification.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP:sds

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS