

The State of South Carolina



Office of the Attorney General

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November 14, 1988

The Honorable Joyce C. Hearn
Member, South Carolina House of
Representatives
503-B Blatt Building
Columbia, South Carolina 29211

RE: Retirement of Elected Official

Dear Representative Hearn:

Attorney General Medlock has referred to me for response your letter to him dated November 9, 1988.

You ask a number of questions which I will answer in order.

Your first question is, "If an elected official serves a term that ends December 31st and is reelected for another term, does that not become official until the swearing in on January 3rd?" I must begin by stating that in every instance of which I am familiar, elected officials do not serve terms that end exactly on a particular day. The Secretary of State's Office indicates that generally the commissions of elected officials do not expire on a particular day but rather "as provided by law." It is clearly established law in South Carolina 1/ (and the well settled opinion of this Office 2/) that public officers hold over de facto

1/ Heyward v. Long, 178 SC 351, 183 S.E. 145 (1935); Rogers v. Coleman, 245 SC 32, 138 S.E.2d 415 (1964); Bradford v. Byrnes, 221 SC 255, 70 S.E.2d 228 (1952); Langford v. State Board of Fisheries, 217 SC 118, 60 S.E.2d 59 (1950); Smith v. City Council of Charleston, 198 SC 298, 17 S.E.2d 860 (1941).

2/ Op. Atty. Gen., #2846 (March 2, 1970 - from Daniel R. McLeod, Attorney General, to Henry O. Stuckey); Op. Atty. Gen., #3797 (June 10, 1974 - from Daniel R. McLeod to State Senator); Op. Atty. Gen., (March 30, 1984 - from Patricia D. Petway to The Honorable Irene K. Rudnick).

The Honorable Joyce C. Hearn
November 14, 1988
Page 2

until their successors are elected and qualify. In view of the fact the swearing in of the new term is January 3rd, the elected official's old term does not end December 31st, but continues until he or she is sworn into the new term. Just as nature abhors a vacuum, the law of government does not ordinarily countenance an interregnum or vacancy which occurs when there is no government. (See, Bradford v. Byrnes, 221 SC 255, 70 S.E.2d 228 (1952), wherein the South Carolina Supreme Court held that the members of the York County governing board held over in office until the qualification of their successors.)

An elected official who holds over is regarded as a de facto officer, (as opposed to a de jure officer) and would be entitled to the emoluments of office, including salary, during such time. (See, Op. Atty. Gen., (March 30, 1984)). The public purpose supporting the doctrine of de facto officers is continuity of governmental service and the protection of the public. (See, Bradford v. Byrnes, supra).

Therefore, while it is true that a new term does not commence until the swearing in, it is incorrect that the old term ends December 31st. The old term continues up to the beginning of the new term to ensure an unbroken succession of office.

You next ask, "Does this elected official have the right to apply for South Carolina retirement benefits, if all age requirements are met, in view of the fact that any State employee can stop work 24 hours, return to work, and also draw South Carolina retirement benefits up to \$9,000.00 received in salary?" State employees upon retirement are entitled to receive retirement benefits from the State and if they choose to return to work with an employer who is covered by the State Retirement System, they will continue to receive retirement benefits until they receive \$9,000.00 in salary at which point they will receive no additional retirement benefits for the remainder of the fiscal year. However, the key is that the employee must first retire. South Carolina Code of Laws §9-1-10 (21) indicates that retirement means withdrawal from active service. An elected official who has been reelected for the succeeding term has never withdrawn from active service. As was discussed earlier, there has never been a break in service therefore, he or she would not be entitled to receive retirement benefits.

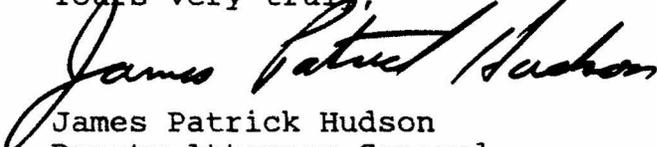
Your final concerns have been addressed in the discussion above; however, in conclusion, allow me to reiterate that an elected official serves continuously until his or her successor is qualified. Where the elected official has been reelected for the suc-

The Honorable Joyce C. Hearn
November 14, 1988
Page 3

ceeding term, there is no break in service, but rather a continuity of office. There is no retirement or withdrawal from active service, therefore, the official is not entitled to retirement benefits.

I hope this information will be helpful to you. If I can provide further assistance or clarification, please feel free to contact me.

Yours very truly,

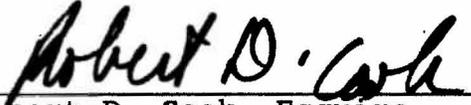

James Patrick Hudson
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