

1984 WL 249916 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 26, 1984

*1 Larry W. Propes
Deputy Director
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29250

Dear Mr. Propes:

You have presented the following situation. A person who has been elected Circuit Judge will take the oath of office on Friday, June 29, 1984, at 4:00 p.m. Immediately thereafter, he will enter upon the duties of office. Afterwards, that same day, he will mail the oath of office for filing with the Secretary of State, in Columbia. However, the oath will not be filed until sometime after July 1st. You have inquired as to the individual's status as Circuit Judge after taking the oath of office on June 29. Specifically, you wish to know whether this individual will then possess the entitlement to all rights, privileges and emoluments of office, assuming all other requirements of qualification are met.

[Section 14-5-110 of the Code of Laws of South Carolina](#) (1976 as amended) provides for the manner of qualification of Circuit Judges as follows:

The circuit judges of this State, upon their election, shall qualify by taking the oath required by the Constitution of this State before a justice of the Supreme Court, the President of the Senate, the Speaker of the House of Representatives, a circuit judge, a clerk of the Supreme Court, a clerk of the county, and shall forthwith enter upon their duties. Such oath must be filed in the Office of the Secretary of State (emphasis added).

As a general rule, an appointee or successful candidate for an office does not become entitled to the office until he has qualified. 67 C.J.S., Officers, § 45. Moreover, in this particular instance, pursuant to [§ 14-5-110](#), a Circuit Judge is prohibited from entering upon the duties of his office until he has taken the oath. See also, § 8-3-10. And, § 8-3-70 provides that No executive, judicial or other officer, elected or appointed to any office in the State, shall be entitled to receive any pay or emoluments of office until he has been duly commissioned and qualified and shall have given bond when so required to do by law. (Emphasis added).

The question then is the legal effect, if any, when the oath of office is filed slightly later in time than when the oath is taken.

Certain general principles are here applicable. Statutes relating to qualification are usually liberally construed in favor of the intending incumbent. 67 C.J.S., Officers, § 45. Where no express time to qualify is required, such must be within a reasonable time. Supra. Moreover,

. . . in the majority of jurisdictions the rule has been laid down that in the absence of a provision expressly declaring that the failure to take the oath or give the bond [or otherwise qualify] shall operate ipso facto to vacate the office, such a statute is merely directory and the officer may afterwards comply with the requirements of the statute, unless a vacancy has actually been declared by the proper legal authority. (Emphasis added).

*2 [State v. Gallitz](#), 61 N.E.2d 738, 739 (1945), quoting Ann. Cas. 1915D, p. 412. Moreover,

[w]here the oath of office is required by law to be filed in a particular place or with a named officer, this should be done. This requirement is not mandatory, however, but merely directory . . .

63A Am.Jur.2d, Public Officers and Employees, § 131. See also, State v. Toomer, 7 Rich. 225 (1854); 1970 Op. Atty. Gen., No. 2918, p. 165.

In this particular instance, no precise time for taking the oath and filing it with the Secretary of State has been established by statute. The applicable statutes simply require that the person elected Circuit Judge take the oath before entering upon the duties of office and 'qualify' before being entitled to salary and emoluments. In accordance with State v. Toomer, supra, we construe these provisions as directory rather than mandatory, and thus so long as the required qualifications (including filing) are completed within a reasonable period of time, no forfeiture or vacancy would occur.

As to the rights, privileges and emoluments attaching to the Office of Circuit Judge, § 14-5-110 requires the oath to be taken prior to the person assuming the duties of office; and we are informed that such will occur in this instance. Once the oath is taken, § 14-5-110 mandates that the Circuit Judge 'forthwith enter upon [his] duties', which in this instance would occur on Friday, June 29. We understand that the oath would then be placed in the mail that afternoon and then probably be received by the Secretary of State's office that next week. Thus, technically, the oath would not be filed until that next week, when it is received for filing. See, 16A Words and Phrases, 'Filing'.

However, so long as the oath is filed relatively soon after it has been taken, salary and emoluments should be unaffected, even though § 8-3-70 requires a judicial officer to be qualified before receiving salary and emoluments. The general law concerning the effect upon salary and emoluments of qualification subsequent to entering upon the duties of and office appears to be as follows:

An officer is not entitled to his salary, until he has taken the oath of office and given the official bond, if a bond is required. But although the law requires a government officer . . . to give a bond and take an oath, before entering upon his official duties, he may have his compensation from the time when his services were accepted by the government, although the oath was taken and the bond was given afterwards.

Throop, Public Officers, § 472. Further, the United States Supreme Court has stated that where there exists a statute which requires an officer to qualify 'before being entitled to any of the salary or other emoluments of office', . . . we are of opinion that the statute is satisfied by holding that his title to receive or retain or hold or appropriate the commissions or compensation does not arise until he takes and subscribes the oath or affirmation, but that when he does so, his compensation is to be computed . . . from the time when, under his appointment, he began to perform his services . . .

*3 United States v. Flanders, 112 U.S. 88, 91 (1884). Our own Court has similarly concluded with respect to qualification procedures requiring filing, such as here. In State v. Toomer, supra, for example, the Court noted that the procedures of qualification, such as the filing of a bond or oath, give complete title to the office and are . . . merely to protect [the title] against forfeiture at the instance of the State. But if instead of enforcing a forfeiture of the office, the State sees fit to [file the commission or oath] . . . the defects in his title, whatever they may be, are thereby completely cured, and if he be already in office, his de facto title is immediately converted into a title de jure, and has relation back . . .

7 Rich. 225, 229-230. Thus, it would appear that once the oath is filed in the Secretary of State's office and qualification is complete, the judge's entitlement to all emoluments would relate back to the date he began, discharging the duties of office, in this instance, June 29, 1984.

As a matter of caution and to remove any possible question, we would offer for your consideration the advice given by former Attorney General McLeod in somewhat similar circumstances. In that instance, he concluded, as we have here, that the requirements of qualification for public officers were 'directory only'. In addition, however, he advised:

I would suggest, however that you subscribe to the oath of office prior to your duties . . . and that if you wish a ceremonial swearing in at a subsequent date, that this procedure be undertaken at whatever time you desire. This would avoid any question of the propriety of your assumption of office by anyone directly interested therein and will be in strict accordance with the requirements of this State.

Op. Atty. Gen., June 12, 1970. Again, however, we would advise that the salary and emoluments of office would relate back to June 29, 1984.

If you have any further questions, please let us know. With kindest personal regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

1984 WL 249916 (S.C.A.G.)

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.