7865 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

November 15, 2004

H. Lloyd Howard, Esquire
Landrum City Attorney
P. O. Box 578
Landrum, South Carolina 29356

Dear Mr. Howard:

In a letter to this office you questioned a particular individual's eligibility to hold an elective office. You indicated that the individual was convicted of housebreaking and larceny on November 1, 1985 and received a one year suspended sentence, two months confinement and one year of probation. You indicated that this individual was released by the probation and parole system on October 31, 1986 and there is no pardon on record. According to your letter, the individual was elected to a four year term of the city council which began January 1, 2000 and was reelected for a second four year term which began January 1, 2004. Referencing such, you have asked when this individual is eligible to hold elected office.

Article VI, § 1 of the State Constitution provides:

> No person may be 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 or convicted of tampering with a voting machine, fraudulent registration or voting, bribery at elections, procuring or offering to procure votes by bribery, voting more than once at elections, impersonating a voter, or swearing falsely at elections/taking oath in another's name, or has not pled guilty or nolo contendere to these offenses. However, notwithstanding any other provision of this Constitution, this prohibition does not apply to a person who has been pardoned under state or federal law or to a person who files for public office fifteen years or more after the completion date of service of the sentence, including probation and parole time, nor shall any person, serving in office prior to the ratification of this provision, be required to vacate the office to which he is elected. No person may be elected or appointed to office in this State for life or during good behavior, but the terms of all officers must be for some specified period except officers in the militia. (emphasis added).

This provision was effective March 25, 1997.

Based upon my research, housebreaking was a felony in 1985. See: S.C. Code Ann. § 16-11-320 (1985). Pursuant to Act No. 159 of 1985, the offense of burglary, codified by S.C. Code Ann. §§ 16-11-310 et seq., replaced the offense of housebreaking. According to the title to such act, Act No. 159 repealed former Section 16-11-320 "relating to the crime of housebreaking which is not burglary. Such Act became effective June 20, 1985. I am assuming that the individual questioned committed the housebreaking offense prior to such date and as a result, that is why he was charged with such offense.[1] Consistent with Article VI, § 1 of the State Constitution, the individual in question would not have been eligible to hold elective office until fifteen years after the completion of his probation on October 31, 1986.

As to your question as to what effect the conviction for housebreaking would have as to the actions or votes of the particular elected official if he was elected and assumed office prior to the referenced fifteen year period, an opinion of this office dated January 14, 1999 states:

> The general law provides that in order to hold a public office, one must be eligible and possess the qualifications prescribed by law, and the appointment to office of a person who is ineligible or unqualified gives him no right to hold the office...Put another way, the appointment of an individual not qualified to serve is void and an absolute nullity...This Office has previously stated that if a person is not qualified to hold office when he is appointed and begins to serve, that appointment is ineffective...Accordingly, based on the foregoing, the appointment of an individual to a board or commission who is not qualified to serve is an absolute nullity...(However)...(t)he fact that the appointment is an absolute nullity would not necessarily jeopardize the actions taken by the individual in question during his service on the board or commission. It is well settled that one who holds an office under an appointment giving color of title may be a de facto officer, although the appointment is irregular or invalid...The acts of a de facto officer are valid and effectual so far as they concern the public or the rights of third parties. See State ex rel McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1975). In addition, this Office has opined on numerous occasions that an individual may continue performing the duties of a previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office.

Such analysis would also be applicable to an individual elected to office. As explained in an opinion of this office dated November 20, 1997,

---

[1]Act No. 159 of 1985 contained a savings clause commenting that "(t)his act may not be construed to affect any prosecution pending or begun before the effective date of this act."

> a de facto officer is one who has a colorable right or title to the office, accompanied by possession. Op. Atty. Gen. dated June 5, 1961. One who holds an office under an appointment or election giving color of title may be a de facto officer, although the appointment or election is irregular or invalid. Op. Atty. Gen. dated June 18, 1976 (citing 67 C.J.S. Officers § 270). Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a de facto officer may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office. The duties of the office are exercised under color of a known election or appointment which is void for want of power in the electing or appointing body, or for some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public. Alleger v. School District No. 16, Newton County, 142 S.W.2d 660 (1940).

That opinion concluded that "...despite the fact that...(an)...election was irregular or invalid, a court would find...(the office holder)...to be a de facto officer." The opinion concluded that "...the member's de facto status came from the colorable title to the office derived from his election, his possession of the office, and the fact that the defect was unknown to the public." Consistent with such, the individual in question could be considered to have been a de facto officer even though he was elected prior to the fifteen year period specified by Article VI, § 1 of the Constitution. As a result, consistent with the January 14, 1999 opinion, the individual's actions could be considered valid and effective and would not impugn the actions of the whole council.

> You also cited the provisions of S.C. Code Ann. § 5-7-200 (2004) which states:
>
> A mayor or councilman shall forfeit his office if he (1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution; (2) violates any express prohibition of Chapters 1 to 17; or (3) is convicted of a crime involving moral turpitude.

Again, you indicated that the individual in question, while elected to a four year term in January, 2000, was reelected to a four year term beginning January 1, 2004. The reelection, therefore, was beyond the fifteen year period set forth by Article VI, § 1. As a result, in my opinion, the individual in question would not be required to forfeit his office pursuant to Section 5-7-200 in that he would no longer be lacking the qualifications for that office.[2] However, pursuant to S.C. Code Ann. Section 5-7-210 (2004),

---

[2]As to actions taken during the first term, again, the individual would be considered to have a been a de facto officer with his acts considered valid and effectual so far as they concern the public and rights of third parties. See: Op. Atty. Gen. dated November 20, 1997.

> The council shall be the judge of the election and qualifications of its members and of the grounds for forfeiture of their office and for that purpose shall have power to subpoena witnesses, administer oaths and require the production of evidence. A member charged with conduct constituting grounds for forfeiture of his office shall be entitled to a public hearing, and notice of such hearing shall be published in one or more newspapers of general circulation in the municipality at least one week in advance of the hearing. Decisions made by the council under this section may be appealed to the court of common pleas.

Therefore, any determination as to whether an individual possesses the qualifications necessary to serve would be a matter for resolution by the council. See: Op. Atty. Gen. dated November 26, 1997.

You also indicated that the particular individual questioned was convicted of a violation of the open container law in 1997 and paid a fine. You questioned what effect that conviction would have on the individual's eligibility to hold office. Pursuant to S.C. Code Ann. Section 61-4-110 (Supp. 2003), the offense of open container in a motor vehicle is a misdemeanor. In my opinion, a conviction for such offense would have no effect on the individual's eligibility to hold office pursuant to Article VI, Section 1 or Section 5-7-200.

With kind regards, I am,

Very truly yours,

Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General