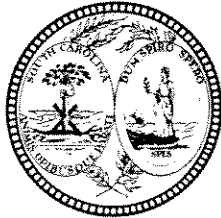


IO 5158/5814



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

December 28, 1995

The Honorable Henry deS. Copeland
Mayor, Town of Ehrhardt
Post Office Box 185
Ehrhardt, South Carolina 29081-0185

RE: Informal Opinion

Dear Mayor Copeland:

By your letter of December 11, 1995, to Attorney General Condon (which was received December 18), you sought an opinion as to whether you should administer the oath of office to an individual who has allegedly violated state laws and town ordinances. Your letter is apparently a follow-up to a telephone conversation which you and I had about the time your letter was dated.

According to the allegations in your letter, you are informed that the individual in question is operating as a builder and contractor in the Town of Ehrhardt despite not being in possession of an appropriate contractor's license issued by the State of South Carolina. You allege that the individual has, for at least two licensing periods, conducted business within the Town as a building contractor without valid municipal business licenses or building permits. You also allege that the individual is improperly disposing of building wastes and construction materials. As we discussed by telephone, you advised that the individual in question has not been arrested or indicted for or convicted of any crime relative to these alleged activities (or apparently for any other reason).

As we further discussed by telephone, you have advised that the individual in question meets the constitutional and general law requirements for one to be elected to public office. Further, we discussed the fact that there are two statutes relative to grounds for forfeiture of office of mayor or council member; but you advised that the grounds specified in S.C. Code Ann. §5-7-200 were not applicable to the individual in question.

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I am not aware of any statute which would assign to the mayor of a municipality the task of unilaterally deciding that an individual should not be sworn in on the basis of allegations such as those contained in your letter.

I further advise that merely taking the oath of office does not per se make one an officer. 63A Am.Jur.2d Public Officers and Employees §131. This Office has advised previously, by an opinion dated November 6, 1987, for example, that for the sake of convenience it might be necessary for a public official to take the oath of office early, prior to the commencement of his term of office.

I understand from your letter that the Municipal Election Commission has certified the individual in question as the winner of the election. Further, your letter indicates that an appeal was filed from the election and that the appeal was to be heard in the Court of Common Pleas on Friday, December 15, 1995, with a decision by the judge to follow. I understand that a written order is to be issued shortly. Assuming that the court does not find adversely to the individual in question, I am of the opinion that the oath may be administered to the individual in question, notwithstanding further potential proceedings (i.e., petition for writ of certiorari to the South Carolina Supreme Court). The general law is stated in 29 C.J.S. Elections §311: "[A] judgment rendered in an election contest is not stayed or superseded by an appeal therefrom" Furthermore, it is stated in 26 Am.Jur.2d Elections §305 that a certificate of election

entitles the recipient to take the office as against an incumbent whose term has expired, notwithstanding the pendency of a proceeding to contest the election instituted by the incumbent or another. He has a right to exercise the functions of the office until the true result of the election is determined in the manner authorized by law, or until the certificate is set aside in an appropriate proceeding. In other words, the certificate confers a temporary right subject to destruction by an adverse decision of a tribunal having jurisdiction in the matter.

A limited exception is created by S.C. Code Ann. §5-15-140 in that a stay is in effect during the pendency of the appeal; however, once the appeal is decided in the Court of Common Pleas, the stay is lifted and the oath may be administered.

Therefore, assuming that the individual in question is qualified according to the South Carolina Constitution and general law of this State to hold office, I am of the opinion that you, as Mayor, do not have the authority to decide that the oath of office should not be administered to the individual. My opinion expressed today is in accord with the views expressed during our earlier telephone conversation.

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This letter is an informal opinion only. It has been written by a designated Senior 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 am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General