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# The State of South Carolina



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April 1, 1993

The Honorable Douglas Jennings, Jr.  
Member, House of Representatives  
333-A Blatt Building  
Columbia, South Carolina 29512

Dear Representative Jennings:

You have advised that in the November 1992 general election, Elizabeth P. Ayers was elected and certified as County Treasurer for Marlboro County. She would have commenced her term of office on July 1, 1993. Unfortunately, Ms. Ayers passed away last week, prior to commencing her term of office. You have asked how the resulting vacancy should be filled.

As you point out in your letter, no actual vacancy in office has yet occurred, since Ms. Ayers had not assumed office, and the office is still held by the Honorable Maria T. Thomas. See Op. Atty. Gen., No. 2209, dated December 30, 1966 (copy enclosed); 67 C.J.S. Officers § 75; 63A Am.Jur.2d Public Officers and Employees § 143. The statute establishing a time-table for holding an election to fill a vacancy in office occasioned by death, among other reasons, would not appear to be triggered because the death occurred prior to Ms. Ayers' taking office. See S.C. Code Ann. § 7-13-190 (1992 Cum. Supp.). Thus, it is necessary to examine other relevant statutes and an analogous judicial decision.

The office of county treasurer was established generally pursuant to § 12-45-10, which provides for appointment of a county treasurer by the governor with the advice and consent of the Senate. Legislative history following that section indicates that local laws were adopted for many counties with respect to the treasurer. With the advent of home rule, treasurers were required to be elected in counties governed by the council, council-supervisor, and council-administrator forms of government, by § 4-9-60. Marlboro County is governed by the council-administrator form and thus has an elected treasurer.

Request Letter

Should a vacancy occur in the office of county treasurer, § 12-45-20 provides: "When any treasurer for any reason fails to complete his term of office, his successor shall be appointed initially for the unexpired portion of the term for which his predecessor was appointed." Though § 4-9-60 requires election of many county treasurers rather than appointment, there is no provision in § 4-9-60 or the Home Rule Act generally (Act No. 283 of 1975) which would govern the filling of a vacancy in the office of county treasurer for an unexpired term.

Consistent with § 12-45-20, § 1-3-210 provides:

Any vacancies which may happen in any of the following officers during the recess of the Senate may be filled by the Governor, who shall report the appointment to the Senate at its next session:

(1) County treasurers;

....

If the Senate does not advise and consent thereto at such next session, the office shall be vacant.

Because a county treasurer is unquestionably a county officer, two other statutes relative to filling vacancies must also be considered. Section 1-3-220 provides in relevant part:

The following officers shall be appointed by the Governor in addition to those for whose appointment by the Governor provision is elsewhere made in this Code:

....

(2) An officer to fill any vacancy in a county office. The person so appointed shall hold office, in all cases in which the office is elective, until the next general election and until his successor shall qualify; ....

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Similarly, § 4-11-20 provides:

In the event of a vacancy at any time in any of the offices of any county of the State the Governor may appoint some suitable person, who shall be an elector of the county, and, upon duly qualifying according to law, he shall be entitled to enter upon and hold the office to which he has been appointed:

- (1) If it be an elective office, until the next general election if the term of such office be fixed by the State Constitution or until the next general election if the term be not so fixed, in which latter case an election shall then be held to fill the unexpired term and in either such event such person shall hold office until his successor shall qualify; ....

Any officer so appointed shall be subject to all the duties and liabilities incident to his office during the term of his service therein. Any officer elected to fill an unexpired term under the provisions of this section shall hold office for such term and until his successor shall qualify.

These Code sections would suggest that a gubernatorial appointee serve on an interim basis, until the next general election, at which time a successor would be elected to serve the unexpired portion of the term. As is readily apparent, this scheme to fill a vacancy would conflict with the scheme contemplated by §§ 12-45-20 and 1-3-210.

This Office has examined previously the question of filling vacancies in the office of county treasurer, considering some or all of the above statutes in each opinion. See Op. Atty. Gen No. 84-7, dated January 24, 1984 (copy enclosed) and opinions cited therein. We suggested in Op. No. 84-7 that a declaratory judgment might be advisable to resolve the differences among the various statutes.

Subsequent to the 1984 opinion, it has come to our attention that a quo warranto-type action was brought in Greenwood County in April 1978 to have determined, essentially, the extent of the term of the interim appointee of the Governor serving as Greenwood County Auditor. In Underwood v. Hawkins, the auditor-elect died approximately two weeks before his term was to begin. The office of county auditor was

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established pursuant to § 12-39-10, a statute virtually identical to § 12-45-20 as to county treasurers. Thus, a virtually identical situation existed in Greenwood County.

After reviewing the relevant statutes (those discussed above and § 12-39-10), the Honorable James E. Moore by order dated May 19, 1978 (copy enclosed) concluded that the interim gubernatorial appointee would serve only until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term. Judge Moore reviewed all relevant statutes and observed the fact that the language concerning appointment of an auditor had no applicability in the Greenwood County situation.

Judge Moore determined that Section 4-11-20 was the applicable statute, a result reinforced by the provisions of Section 1-3-220. Thus, the interim appointee would hold office until the next general election, at which time a successor would be elected to serve the remainder of the unexpired term. Judge Moore continued:

Furthermore, while the statutes, of course, control my decision, I am confident that my decision is supported by reasons of sound public policy. When an elective office is rendered vacant by death or other reasons, it seems apparent to me that the people should have the right to elect the successor as soon as possible, which the Legislature has determined to be at the next general election. Conversely, when the office was filled by appointment in the first instance, no reason appears why the replacement appointment should not be made to last as long as the original appointment. No reason appears why a replacement appointment for an elective office should be permitted to continue any longer than necessary.

Applying this court decision and the reasoning therein to the circumstances in Marlboro County mandates the conclusion that §§ 4-11-20 and 1-3-220 should prevail over § 12-45-20 and 1-3-210 with respect to county treasurers elected pursuant to Section 4-9-60. Thus, consistent with Judge Moore's earlier decision, the gubernatorial appointee would serve until a successor is elected in the general election in November 1994, the successor being elected to serve the remainder of the term for which the treasurer was elected in November 1992. To the extent that today's opinion is deemed inconsistent with other opinions of this Office concerning the selection of a successor to an elected treasurer, today's opinion will be deemed controlling, as being in conformity with Judge Moore's ruling.

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With kindest regards, I am

Sincerely,

*Patricia D. Petway*

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Assistant Attorney General

PDP/an  
Enclosures

REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions