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The State of South Carolina

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October 26, 1992

George A. Markert, Assistant Director
South Carolina Court Administration
P. O. Box 50447
Columbia, South Carolina 29250

Dear George:

In a letter to this Office you questioned the effect of improper or inadequate performance bonds on the commissioning of magistrates. You asked whether a commissioned magistrate acts in a de facto capacity where the performance bond for that office is, or has become, inadequate or not in a form prescribed by this Office.

Pursuant to S.C. Code Ann. § 22-1-150 a performance bond is required of magistrates. Such provision states in part:

> No person shall be commissioned, nor shall he continue to hold office or be qualified to discharge the duties and exercise the powers of magistrate, until he enters into and files, in the office of the clerk of court of the county in which he is to serve, bond to the State in a sum specified by the governing body of such county. ... Any magistrate not in compliance with this section shall be subject to immediate removal from office until he shows good cause to the Supreme Court for not obtaining such bond.

It is generally stated:

> As a rule, an officer does not acquire a legal standing until the required bond is given, although he may be regarded as an officer de facto.

63A Am.Jur.2d Public Officers and Employees, Section 129, p. 761.

It has been further stated:

> A number of cases have also taken the position that a person may be a de facto officer when the only defect in his title is due to his failure to perform some step required to perfect his legal title to the office, such as ... the giving of a proper bond ... Under this view, statutes requiring the taking of an oath or the giving of a bond have been construed as not preventing a person from being a de facto officer.[1]

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[1]Admittedly that same provision states further that " (o)ther cases, however, have taken the position that an officer's failure to take an oath or give a bond renders him a usurper and not a de facto officer." However, this Office has typically cited the ruling in Bradford v. Byrnes, 221 S.C. 255 at 261-262, 70 S.E.2d 228 (1952) that

> The purpose of the doctrine of de facto officers is the continuity of governmental service and the protection of the public in dealing with such officers ... As nature abhors a void, the law of government does not ordinarily countenance an interregnum.

An opinion dated August 30, 1971 stated that a magistrate in possession of an office and performing its duties who has entered thereto by right with "all surroundings affording an appearance of a de jure official status" should be

(continued...)

Id. Section 594, p. 1092. Such is consistent with an early South Carolina case, Kottman v. Ayer, 3 Strob. 92 (1848) which indicated that the law which requires a bond or oath is "merely directory." The Court stated further:

> The omission to qualify by giving bond or taking the oaths is cause of forfeiture; but so long as the officer appointed continues to discharge the duties of his office, his official acts as to third persons, are legal.

3 Strob. at 94.

Consistent with the foregoing, it appears that a magistrate not properly bonded could be considered as serving in a de facto capacity. However, as referenced by Section 22-1-150 the Supreme Court may review this matter further.

With kind regards, I am

Very truly yours,

Charles H. Richardson
Assistant Attorney General

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REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions

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[1](...continued)
considered as serving in a de facto capacity even though holding over after the expiration of his term of office.