

1984 S.C. Op. Atty. Gen. 321 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-134, 1984 WL 159940

Office of the Attorney General

State of South Carolina

Opinion No. 84-134

November 16, 1984

\*1 The Honorable William E. Applegate, III  
Senator-Elect  
District 43  
Post Office Box 1119  
Charleston, South Carolina 29402

Dear Senator-Elect Applegate:

You have asked the opinion of this Office on whether a candidate for elective office, having been certified as the winner of the election by the appropriate county board of canvassers, may take the oath of office before determination of an appeal or protest pending before the State Board of Canvassers. It is the opinion of this Office that the certified winner is entitled to take the oath of office, the appeal or protest notwithstanding.

Chapter 17 of Title 7, Code of Laws of South Carolina (1976), providing for canvass of votes, protests, appeals, and certification of election results, is silent on the questions of when an oath may be taken or whether such action would be stayed pending the determination of an appeal or protest. The taking of an oath by one certified as the winner in an election is not prohibited by any of the provisions of Section 7-17-10 *et seq.* of the Code or other statutes or constitutional provisions relative to public officers generally or legislators particularly. By comparison, if the results of a municipal election should be appealed or protested, [Section 5-15-120 of the Code](#) provides that 'in the case a contest is finally filed the incumbents shall hold over until the contest is finally determined.' The provisions for contesting municipal election results, Section 5-15-140, provide in part that '[t]he notice of appeal shall act as a stay of further proceedings pending the appeal.' It seems significant that such provisions are not within the general election laws of Title 7 and are applicable only to municipal elections, thus strengthening the conclusion that there is no prohibition against a certified winner of an election covered by Title 7 of the Code taking the oath of office pending the determination of an appeal or protest.

The general rule, which appears to be well-supported by case law, is stated in 63A Am.Jur.2d, Public Officers and Employees, § 91:

The institution and pendency of an election contest does not, as a general rule, prevent one who has received a proper certificate of election from assuming the office, and he is entitled to take the office as against one whose term has expired.

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.

\*2 Although a certificate of election may be superseded by a decree in proceedings to contest the election, it is conclusive as to the result of the election until set aside or vacated in some manner authorized by law, and is not subject to collateral attack. . . . Hence, it has been said that the holder of a certificate of election who has duly qualified is *prima facie* entitled to the office when his term begins . . .

See also 67 C.J.S., Officers, § 86, reiterating the same principle.

While no South Carolina court appears to have ruled on the matter, the Supreme Court in Segars v. Parrott, 54 S.C. 1, 31 S.E. 677 (1898), has pointed out that until the decision of the county election commission or county board of canvassers 'is set aside or annulled in some form of proceeding recognized by law, [the decision] must be regarded as showing conclusively the result of the election.' 54 S.C. at 30. It is the opinion of this Office that a South Carolina court, considering the dicta in Segars v. Parrott, would follow the general rule stated above, to hold that the winner as certified by the county board of canvassers would be entitled to take the oath of office and assume the duties of the office, an appeal or protest notwithstanding.

We hope that the above satisfactorily responds to your ?? inquiry. Please advise this Office if we may provide additional assistance or clarification.

Sincerely,

Patricia D. Petway  
Assistant Attorney General

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