

1981 WL 157941 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 28, 1981

*1 Honorable Richard W. Riley
Governor
State of South Carolina
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:

Mr. McLeod has referred your recent letter to me for reply. You have stated that you have been informed that a councilman in Erhardt was not a registered voter when he was elected on June 5, 1979 to the City Council. Subsequent to his election, on August 7, 1981 the councilman was reinstated as a registered voter. You have inquired if any action should be taken against this councilman since he was apparently not qualified when he was elected.

[Article VI, Section 1 of the South Carolina Constitution](#) states that no person shall be elected to any office in this State unless he possesses the qualifications of an elector. Our Office has interpreted this provision to mean that in order for a person to be elected to any public office in this State, he must not only be a qualified elector, but he must also be a qualified elector in the county or political unit in which he would be elected. A qualified elector is defined as a person who is legally registered to vote. [Blalock v. Johnson](#), 180 S.C. 40, 185 S.E. 51 (1936); [Mew v. Charleston & Savannah Ry.](#), 55 S.C. 90, 32 S.E. 828 (1899); see also [State v. City Council of Union](#), 95 S.C. 131, 78 S.E. 738 (1912); [Rawl v. McCowan](#), 97 S.C. 1, 181 S.E. 959 (1913); [Thomas v. Macklen](#), 186 S.C. 290, 195 S.E. 539 (1938); 63 Am.Jur.2d [Public Officers and Employees](#), §§ 38, 40, 49.

Therefore, obviously the councilman was not qualified when he was elected and did not meet the requirements of registration until August 7 of this year. What is not as clear is the effect of his present meeting of the qualifications. See 63 Am.Jur.2d [Public Officers and Employees](#), § 43; 67 C.J.S. [Officers](#), § 19.

I have been unable to find any South Carolina case that has determined this issue; however, the weight of the case law seems to be that subsequent qualification does not qualify a person to continue in office. See in general [143 A.L.R. 1026, 1031](#) and cases cited following 49 A.L.R.2d [Public Officers and Employees](#), § 43 ([Lee v. Byrd](#), 169 Ga. 622, 151 S.E.2d (1929), cited in footnote 58 for the proposition that a disqualification cured after assumption of office will validate the title to office actually supports the opposite view.)

It is stated in part at 63 Am.Jur.2d [Public Officers and Employees](#), § 38 that
[t]o hold a public office one must be eligible and possess the qualifications proscribed by law, and an election or appointment to office of a person who is ineligible or unqualified gives him no right to hold the office.

Section 40 states that if a qualification for office is specified and
... it is specified that they must exist at the time of the election, a candidate who does not possess them at that time is not eligible although the disqualifications cease to exist before the beginning of the term. This rule has been applied to ... suffrage ...

*2 It would appear to be inconsistent to state that a person who is discovered to be disqualified after the election but before he is sworn in and then cures the disqualification before he is sworn in cannot serve, but a person who is not discovered to be

disqualified until after he has served several years and then cures the disqualification would be considered to be a qualified officer.

Therefore, as the councilman was not qualified when he was elected, his curing of his disqualification several years into his term of office would apparently not cure the defect in his title to office. It should be pointed out that even though he may not be a qualified officer, he would be a de facto officer and any actions he took while holding this office would not be questioned because of his lack of qualifications to hold that office. [Parrish v. Town of Adel](#), 86 S.E. 1095 (1915); [State v. Porter](#), 158 S.E.2d 626 (1968).

The question remains as to what procedure, if any, should be utilized to remove him from office. The law only provides the Governor with the right to suspend an officer who has the custody of public or trust funds and has embezzled or appropriated these funds; or who has been indicted by a grand jury for a crime involving moral turpitude. [South Carolina Constitution, Article VI, Section 8](#).

[Article III, Section 26 of the Constitution](#) provides that an officer can be removed for incapacity, misconduct, or neglect of duty. The court has held in [Smith v. City Council](#), 198 S.C. 313, 17 S.E.2d 860 (1940), that a duly elected officer cannot be deprived of his office without a hearing. Although there is substantial question whether or not this councilman was duly elected, it would appear that the best procedure would be for an action of quo warranto to be brought to try his right to this office. A quo warranto hearing would also allow a South Carolina court to decide this State's view as to the legal issue involved.

Sincerely,

Treva G. Ashworth
Senior Assistant Attorney General

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