1977 S.C. Op. Atty. Gen. 28 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-20, 1977 WL 24363

Office of the Attorney General

State of South Carolina
Opinion No. 77-20
January 18, 1977

***1** Section 30–6 of the 1962 Code of Laws of South Carolina, as amended, does not prohibit a legislator whose term of office expired in 1976 and who was re-elected to a subsequent term of office and who is presently serving in the 1977 Session from qualifying as a candidate for the office of family court judge created by Act 690 of 1976.

TO: Honorable C. Anthony Harris
Chairman
Judicial Qualification Screening Committee

QUESTION PRESENTED:

Does Section 30–6 of the 1969 Code Laws of South Carolina, as amended, prohibit a legislator whose term of office expired in 1976 and who was re-elected to a subsequent term of office and who is presently serving in the 1977 Session from qualifying as a candidate for the office of family court judge created by Act 690 of 1976?

AUTHORITIES:

Act 690 of 1976;

Section 30–6, 1962 Code of Laws of South Carolina, as amended;

67 C.J.S. Officers, Section 21;

82 C.J.S. Statutes, Section 399;

Vol. 1, Story on the Constitution, 5th Ed., Section 867;

Meredith v. Kauffman, 169 S.W.2d 37, 293 Ky. 395 (1943);

Spears v. Davis, 398 S.W.2d 921 (Tex. 1966);

State ex rel. Hawthorne v. Wisehart, 28 So.2d 589, 158 Fla. 267 (1946);

State ex rel. O'Connell v. Dubuque, 413 P.2d 972, 68 Wash.2d 553 (1966);

Town of Westernport v. Green, 124 A. 403, 144 Md. 85 (1923).

DISCUSSION:

Articles I, II and III of Act 690 of 1976, the 'Judicial Reform' Act, provide for the creation of several family court judgeships and for the election of the judges by the General Assembly. Article XI, Section 1, of the Act delays the effective date of Articles I, II and III until July 1, 1977.

In a situation such as the case at hand when the effective date of an act is delayed by the provisions of the act itself, the Rules of Statutory Construction require that the act be construed as if it had been passed on its effective date. See, e.g., 82 C.J.S. Statutes, Section 399. Such an act has no force and effect until its effective date and no rights may be acquired under it and no one is bound to regulate his conduct according to its terms.

It would thus appear to follow that Articles I, II, and III of Act 690 do not 'create,' that is, do not 'bring into being and cause to exist' (Town of Westernport v. Green, 124 A. 403, 144 Md. 85 (1923)) the new family court judgeships until July 1, 1977.

Section 30–6 of the 1962 Code of Laws of South Carolina, as amended, states a prohibition that prevents any member of the General Assembly from being elected or appointed to any office created during his term of office:
No Senator or Representative shall, during the time for which he was elected, be elected by the General Assembly or appointed by any executive authority to any civil office under the dominion of this State which shall have been created during the time for which such Senator or Representative was elected to serve in the General Assembly.

***2** The prohibition stated by Section 30–6 is not a lifetime disqualification for office since the phrase 'time for which he was elected' is properly construed as referring to 'term of office' as distinguished from 'tenure of office.' Spears v. Davis, 398 S.W.2d 921 (Tex. 1966). Section 30–6 'does not state a disqualification for office, it only prohibits election or appointment to another office during the period for which one is elected to the Legislature. When that period expires, the prohibition expires and the member of the Legislature is eligible to election or appointment to any civil office.' State ex rel. Hawthorne v. Wisehart, 28 So.2d 589, 592, 158 Fla. 267 (1946).

Although Section 30–6 has never been interpreted by the South Carolina Supreme Court, similar provisions have been interpreted and applied in other states on numerous occasions. There is little disagreement as to the purpose of this type of provision, and although the exact language varies from state to state, all such provisions are intended to remove improper motives from consideration of legislators in voting for the creation of new offices. Almost every case quotes the following passage from Vol. I, Story on the Constitution, 5th Ed., Section 867:
The reasons for excluding persons from offices who have been concerned in creating them, or increasing their emoluments, are to take away, as far as possible, any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness.

Perhaps the only thread of consistency running through the numerous cases involving provisions similar to that stated in Section 30–6 is the Rule of Construction adopted by the courts favoring the eligibility of legislators. See, e.g., 67 C.J.S. Officers, Section 21.

The situation presented by the delayed effective date of Act 690 is one that apparently has never been considered by a court. Although the Act itself was enacted and signed into law in 1976, its effective date, and thus its operation, is delayed until 1977. The effect of this particular delay is to postpone the creation of the new judgeships until the first year of the legislative term of office next following the term during which the Act was passed. The question ultimately posed by this situation may be stated as follows: Within the meaning of Section 30–6, are the new family court judgeships created during the legislative term of office encompassing the 1976 Session, or the legislative term of office encompassing the 1977 Session?

There are at least two cases from other states wherein the court was faced with a somewhat similar situation.

Meredith v. Kauffman, 169 S.W.2d 37, 293 Ky. 395 (1943) involved an Act of the Kentucky General Assembly creating the office of Assistant County Attorney. The Act was enrolled by both houses of the legislature on February 27, 1942, and became effective on March 2, 1942, when it was signed by the Governor. The Appellee Kauffman was elected to the House of Representatives in a special election held on February 28, 1942, and was sworn in on March 2, 1942, after the Governor had signed the act creating the new office. Thus, Kauffman was a member of the legislature when the new office was created although he was not a member of the legislature at the time the act creating the new office was passed. Later in March 1942, he was appointed Assistant County Attorney.

***3** The Kentucky Court of Appeals quoted from Mr. Justice Story's treatise and stated:
Considering the provision in the light of the purpose it was intended to accomplish, it is apparent that it does not render appellee (Kauffman) ineligible to the office to which he was appointed. The Act creating the office was passed, enrolled and signed before he was elected to the General Assembly. True, it did not become effective as a law until after his election but the word 'created' in the constitutional provision should be construed to have reference in point of time only to the termination of legislative action necessary to creation and not to a future date on which legislative action becomes effective through operation of law. 169 S.W.2d at 38. (Emphasis added.)

State ex rel. O'Connell v. Dubuque, 413 P.2d 972, 68 Wash.2d 553 (1966), involved a prohibition that operated as to offices 'which shall have been created or the emoluments of which shall have been increased' during the legislator's term. A declaratory judgment action was brought to determine whether members of the legislature who voted themselves a salary increase effective at the beginning of the next legislative term of office were eligible for re-election. The court was able to find eligibility by looking to the effective date of the salary increase rather than to the date of the Act's passage:
. . . [I]f the term drawing the increased salary begins at the end of the legislator's term, then the salary will not have been increased during the term for which he was elected to the legislature. Expressed another way, where the salary increase does not take effect during the term for which the legislator was elected to the legislature he is not ineligible to stand and serve in an office at a high salary commencing with the expiration of his elected term as legislator, because no part of the increase will be earned during the legislator's incumbent term of office. 413 P.2d at 981–982.

Although it could be stated that these two cases represent contradictory interpretations of virtually identical provisions of law, each also stands for the rule of construction favoring eligibility to office. Given that proposition, it is doubtful that the courts of this State would find that the new family court judgeships are 'created' within the meaning of Section 30–6 during the 1977 legislative term of office, since to do so would not only render ineligible those legislators who served in 1976 and who were re-elected in 1977, but it would also render ineligible those legislators who did not serve in 1976 but who were elected for the first time in 1977. Following the rule favoring eligibility, it is more probable that the courts of this State would adopt the rule first stated in Meredith v. Kauffman and would construe the word 'create' as it is used in Section 30–6 as having reference in point of time only to the termination of legislative action necessary to creation and not to a future date on which the legislative action becomes effective through operation of law.

***4** Foreseeing this uncertainty, the General Assembly included in Article II, Section 4 of Act 690, the following provision:
Notwithstanding any other provision of law, any former member of the General Assembly may be elected to the office of family court judge.

Thus, on July 1, 1977, the effective date of Article II, Section 4, Section 30–6 will be modified by necessary implication so as to make any 'former member of the General Assembly' eligible to qualify as a candidate for the office of family court judge. A reasonable interpretation of the phrase 'former member of the General Assembly' would include all persons who have served as members of the General Assembly but who were not re-elected to the 1977 Session, as well as all members serving in the 1977 Session who resign their positions prior to the election of the family court judge.

CONCLUSION:

Therefore, it is the opinion of this Office, that Section 30–6 of the 1962 Code of Laws of South Carolina, as amended, does not operate to prohibit a legislator whose term of office in the General Assembly ended in 1976 and who was re-elected to a subsequent term of office and who is presently serving in the 1977 Session from qualifying as a candidate for the office of family court judge created by Act 690 of 1976.

Any uncertainty as to the eligibility of a legislator could be resolved under the provision of Article II, Section 4 of Act 690.

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