

1977 S.C. Op. Atty. Gen. 82 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-92, 1977 WL 24434

Office of the Attorney General

State of South Carolina

Opinion No. 77-92

March 30, 1977

***1 In Re: Eligibility of Legislators to be elected as Family Court Judges pursuant to Act 690 of 1976**

The Honorable Wade R. Crowe
Member
House of Representatives
601 Broad Street
Bennettsville, South Carolina 29512

Dear Mr. Crowe:

Your letter of March 21, 1977, concerns the construction given to the above Act in opinions of this Office dated January 18, 1977, and July 8, 1976.

The opinion of January 18, 1977, is inconsistent with the prior opinion, such variance being based upon further research of the problem as was reflected in the citations of authorities set forth in the later opinion.

I adhere to the views stated in the January 18, 1977, opinion for the reasons stated in that opinion, except in the areas regarding effect of resignation and means of resolving any question regarding eligibility of an elected person. Succinctly stated, it is my opinion:

The only statute to be considered is Section 30–6 of the 1962 Code of Laws. This section precludes any Member of the General Assembly from being elected by the General Assembly to any office which was created during the time for which such Member was elected to serve in the General Assembly. The provision of Act No. 690 of 1976, specifically Article II, Section 4 thereof relating to the eligibility of ‘former Members of the General Assembly’ to be elected to the office of Family Court Judge,’ is not now effective law by virtue of the provisions of Article II of Act No. 690 which postpones its effective date until July 1, 1977.

In my opinion, Act No. 690 created certain numbers of judgeship positions throughout the State, as set forth in Article VI of the Act. These judgeships were created upon the approval of the Act by the Governor. This creation was accomplished in 1976 and the Members of the General Assembly at that time were precluded during their terms of office from being elected to any of the judgeships so created during their terms of office for that General Assembly, which terms expired in November 1976. A new General Assembly was elected, which is now in session, and its Members do not, in my opinion, come within the prohibition of Section 30–6 of the 1962 Code of Laws for the reason that they are not now Members of the General Assembly which created the office. Therefore, all Members of the 1977 General Assembly are eligible to be elected to judgeships created by the 1976 legislation.

Effect of Resignation. I am of opinion that the statements made in the opinion of January 18, 1977, to the effect that Members might achieve eligibility to election by resigning their membership in the General Assembly, is erroneous. Section 30–6 of the 1962 Code prohibits Members from serving, during the time for which they were elected, and this, in my opinion, is synonymous with a prohibition to extend during the term of office of the Member. As previously noted, the term of office of Members of the 1976 General Assembly expired in November 1976. Even if it should be construed that Members of the present General Assembly come within the ambit of Section 30–6, resignation, in my opinion, would be ineffective to render a Member eligible. The authorities cited below appear to be unanimous in adherence to the general rule that disqualification by constitutional or

statutory provisions, such as provided in Section 30–6, exists during the entire period for which an individual is elected and is not affected by a resignation.

*2 With respect to the procedure for determining eligibility of one elected, it is my opinion that the only means of achieving this is by a court determination sought by an individual with standing to determine the issue. Most probably, an action in the nature of quo warranto or a declaratory action would be a feasible means of having any such matter resolved.

With best wishes,

Very truly yours,

Daniel R. McLeod

Attorney General

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