



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

**Robert F. McDonnell**  
Attorney General

900 East Main Street  
Richmond, Virginia 23219  
804-786-2071  
FAX 804-786-1991  
Virginia Relay Services  
800-828-1120  
7-1-1

December 11, 2008

The Honorable Dennis Lee Hupp  
Judge, Twenty-Sixth Judicial Circuit  
112 South Main Street  
Woodstock, Virginia 22664-1423

Dear Judge Hupp:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether an elected member of the Town Council of the Town of Front Royal vacated his position on the Town Council upon qualifying as mayor and taking the oath of office for his elected position as mayor of the Town.

## Response

It is my opinion that the member of Town Council of the Town of Front Royal who was elected as mayor of the Town vacated his position as a member of the Town Council upon taking the oath of office and qualifying as mayor.

## Background

You advise that the Town Council of the Town of Front Royal ("Town Council") consists of six members and the mayor. The mayor does not have a vote, except as a tiebreaker. In May 2008, a Town Council member was elected to be the mayor of the Town of Front Royal ("Front Royal"). On June 25, 2008, the mayor-elect qualified as mayor by taking the oath of office for the term commencing on July 1, 2008 and expiring on June 30, 2010.

## Applicable Law and Discussion

Section 6 of the Charter of the Town of Front Royal (the "Charter") provides, in part, that:

On the first Tuesday in May, nineteen hundred ~~seventy-six~~ *ninety-four*, and every two years thereafter, there shall be elected by the qualified voters of the Town of Front Royal, a mayor, who shall be one of the electors of the town, and whose term of office shall

begin on the first day of July succeeding his election and continue for two years thereafter, and until his duly elected successor has qualified.<sup>[1]</sup>

In addition, § 7 of the Charter provides that “[a]ll municipal officers of the town, before entering upon the duties of their respective offices, shall be sworn in accordance with the laws of the State by anyone authorized to administer oaths under the laws of the State.”<sup>2</sup> The mayor presides at the meetings of council; however, the mayor has no right to vote in the Town Council except as a tiebreaker.<sup>3</sup>

Section 15.2-1522 sets forth the general law regarding qualification of town officers:

Every elected ... town ... officer, unless otherwise provided by law, on or before the day on which his term of office begins, shall qualify by taking the oath prescribed by § 49-1 and give the bond, if any, required by law, before the circuit court for the county or city, having jurisdiction in the ... town ... for which he is elected or appointed, or before the clerk of the circuit court for such ... town .... However, members of governing bodies and elected school boards may qualify up to and including the day of the initial meeting of the new governing body or elected school board.

Any such oath of ... town mayors ... may be taken before any officer authorized by law to administer oaths. Such oath shall be returned to the clerk of the council of the town, who shall enter the same record on the minute book of the council[.]

The Charter is clear that the mayor, while serving as the presiding officer of the Town Council, is not a member of the Council. Section 10 of the Charter provides that “[t]he council of the town shall be composed of ... *six members*.”<sup>4</sup> Section 8 of the Charter provides that the mayor has no vote on questions before the Town Council, except in the case of a tie.<sup>5</sup> In the event of the mayor’s death, § 9 provides that the Council “shall choose one of the councilmen or some other qualified voter of the Town of Front Royal.”<sup>6</sup> Therefore, the Town Council is not limited to its own membership in choosing a mayor, but may select any qualified voter of Front Royal. It is clear that the Charter does not contemplate that a Town Council member chosen as mayor may serve in that capacity while retaining a seat on the Council. Therefore, it is my opinion that when a person is elected as mayor of Front Royal and qualifies by taking the oath of that office, his Town Council seat effectively is terminated by operation of law.

The Supreme Court of Virginia has held that an officeholder who becomes incapable of holding his office by virtue of acting in an incompatible office ceases to hold the first office; a subsequent

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<sup>1</sup> See 1993 Va. Acts ch. 479, at 572, 573. The charter for the Town of Front Royal was enacted in 1937. See 1936-7 Va. Acts ch. 44, at 142. While § 6 of the charter was amended in 1993, the provision in § 6 concerning the filling of a vacancy on the town council remains essentially the same as originally enacted in 1937. Compare 1993 Va. Acts, *supra* at 573 (amending portions of § 6) with 1936-7 Va. Acts, *supra*, at 144 (enacting § 6).

<sup>2</sup> 1936-7 Va. Acts, *supra* note 1, at 144.

<sup>3</sup> See *id.*, § 8, at 144.

<sup>4</sup> 1993 Va. Acts, *supra* note 1, at 573; see also *id.*, § 4, at 572 (“The municipal officers of said town shall ... consist of a mayor [and] four councilmen .... [T]hereafter, the number of councilmen shall be six.”).

<sup>5</sup> 1936-7 Va. Acts, *supra* note 1, at 144.

<sup>6</sup> *Id.* at 145.

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resignation from the second incompatible office does not restore him to the first office.<sup>7</sup> Additionally, the Court has held that a county officer who moves to another state intending to establish residence in that state has thereby effectively resigned from his county office.<sup>8</sup> Further, if such officer returns to the county where he previously held office, he has no right to resume that office.<sup>9</sup>

Therefore, it is clear that taking the oath of office as mayor of Front Royal vacates the prior office as a Town Council member. Thus, on June 25, 2008, the day that the mayor-elect qualified as mayor by taking the oath of office as mayor of Front Royal, a vacancy occurred on the Town Council that must be filled by election or appointment.<sup>10</sup>

### Conclusion

Accordingly, it is my opinion that the member of Town Council of the Town of Front Royal who was elected as mayor of the Town vacated his position as a member of the Town Council upon taking the oath of office and qualifying as mayor.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

1:213; 1:941/08-106

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<sup>7</sup>Shell v. Cousins, 77 Va. 328, 331-32 (1883), *quoted in* Dean v. Paolicelli, 194 Va. 219, 236, 72 S.E.2d 506, 516-17 (1952); *see also* Bunting v. Willis, 68 Va. (27 Gratt.) 144, 161-62 (1876) (holding that by acting in capacity of second office, individual ceased to be sheriff and “throwing off” second office could not restore him to office).

<sup>8</sup>Poulson v. Justices of Accomac, 29 Va. (2 Leigh) 804, 805 (1830) (citing Chew v. Justices of Spottsylvania, 4 Va. (2 Va. Cas.) 208, 209 (1820)).

<sup>9</sup>*Id.*

<sup>10</sup>This opinion is consistent with the conclusion expressed in a prior opinion of the Attorney General. *See* 1990 Op. Va. Att’y Gen. 57.