



WICOMICO COUNTY, MARYLAND

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December 3, 2019

Circuit Court for Wicomico County
Attn.: James S. Sarbanes, Administrative Judge
101 N. Division Street
Salisbury, MD 21801

RE: Status of Paul D. Wilber – letter by Wicomico County Executive Culver dated
December 2, 2019

Dear Judge Sarbanes,

I hope this letter finds you well. The Wicomico County Council has been made aware of a rebuttal letter sent to your attention by County Executive Bob Culver. We wouldn't trouble you with this matter further except for the fact we recognize that, in all cases, it is important for all of the facts to be clearly stated. We appreciate you taking the time from your official duties to review the facts below substantiating our original position in our letter dated November 22, 2019.

The legal analysis stated in the letter dated November 15, 2019 by Kevin Karpinski, Esq., to Mr. Culver, which he has forwarded to the Court by his letter, misinterprets the legal cases cited by Mr. Karpinski and concept known as the de facto officer doctrine. I'm enclosing the Advice Memorandum dated November 18, 2019 by the attorney for the Wicomico County Council that discusses both that doctrine and Mr. Karpinski's opinion and legal analysis. As explained by Mr. Taylor, that doctrine does not confer authority upon an attorney to continue to represent a client after being discharged or extend Mr. Wilber's authority to act as the County Attorney under the present circumstances.

I understand that the Maryland Attorneys' Rules of Professional Conduct govern Mr. Wilber's current responsibility and duty to Wicomico County and that Rule 19-301.16(1.16) states in pertinent part

(a) Except as stated in subsection (c) of this Rule, an attorney shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ... (3) [t]he attorney is discharged.

....

(c) An attorney must comply with applicable law requiring notice to or permission of a tribunal when terminating representation. When ordered to do so by a tribunal, an attorney shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, an attorney shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of another attorney, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The attorney may retain papers relating to the client to the extent permitted by other law.

Now that the 90-day period of his temporary appointment as the Acting County Attorney has expired in accordance with the Wicomico County Charter (section 414.B.), so has Mr. Wilber's authority to act in that capacity on behalf of the County. His duty is that specified in paragraph (d) of this Rule, which is discussed in the *Restatement (Third) of the Law Governing Lawyers* as follows:

- Section 31, *comment i.* – “The lawyer must no longer purport to exercise authority and must notify persons who the lawyer reasonably should know are relying on the continued existence of the authority.”
- Section 32, *comment a.* – “[a] lawyer who improperly fails to withdraw after being discharged ... is, in general, subject to professional discipline.”

In Section 33 of the *Restatement, comment g.*, which is titled *The duty not to act for a former client*, states that “[w]hen representation ends a lawyer loses actual authority to act on behalf of the client” and that “[p]urporting to do so subject the lawyer to discipline.” It also recognizes that the former client may authorize the attorney to perform certain protective actions, such as “asking the lawyer to convey a request for additional time to the opposing counsel.”

Paragraph (c) of the Rule mentioned above recognizes that an attorney must comply with the Court's procedures regarding withdrawal from any pending cases. Pursuant to the arrangement between the County and Mr. Wilber's law firm, both he and other attorneys in that firm would be subject to the withdrawal mandate (as counsel for the County) under the Rule. As discussed in *comment a.* in Section 31 of the *Restatement*, during that withdrawal process they may “act for the client only when essential to protect the client's interests.”

More than six months have passed following the County Council's vote to remove Mr. Wilber as the County Attorney in accordance with the Wicomico County Charter (section 507.A.). More than a year has passed since Mr. Wilber and the Executive Branch were made aware of the Council's intent to remove Mr. Wilber from his role as County Attorney. When the Council advised the County Executive in mid-October that his temporary appointment of Mr. Wilber as the Acting County Attorney was about to expire, Mr. Culver replied that he intended to keep Mr. Wilber's appointment in effect in the future. For many months Mr. Culver has refused to appoint another person as the County Attorney for confirmation by the Council in accordance with the Charter. His letter of December 2 removes any doubt that he does not intend to do so. Thus, he has brought about the current situation.

As noted in Mr. Taylor's memorandum, Mr. Karpinski's opinion would enable Mr. Culver to prolong the tenure of Mr. Wilber as the Acting County Attorney beyond the limited period prescribed in the County Charter by simply refusing to appoint another County Attorney. In doing so, this would, incredulously, allow Mr. Wilber to continue in his role in perpetuity. We don't believe such interpretations to be accurate; nor do they reflect the true intent of the Charter as approved by the citizens of Wicomico County. It is unfortunate that the Executive's conduct has resulted in demand upon the Court's attention in this matter. Again, we appreciate your time and patience in consideration

of the County Council's concerns.

Sincerely,



John T. Cannon,
County Council President

Enclosure

Wicomico County Council
County Executive Culver
Paul D. Wilber, Esq.

ADVICE MEMORANDUM

November 18, 2019

TO: Wicomico County Council, Council Administrator

FM: Robert B. Taylor, Council Attorney

RE: Status of Paul Wilber, Esq. -- Letter by Kevin Karpinski, Esq. to the County Executive

This evaluates the opinion and supporting legal analysis stated in Mr. Karpinski's letter of November 15, 2019. Despite its length, citation to and quotation from various court decisions and secondary authority, Mr. Karpinski's analysis is faulty and his opinion is incorrect. Mr. Karpinski, who fails in his letter to consider both the factual scenario and controlling matters of law, presents no meaningful legal precedent and misinterprets the so-called de facto officer doctrine that he regards as appropriate. The following discusses both those matters and that doctrine and offers comment and suggestions.

I. The County Charter Governs Mr. Wilber's Status and Lack of Authority

Mr. Karpinski fails to mention, much less consider the provisions of the County Charter that govern the appointment and removal of the County Attorney and temporary appointment to fill a vacancy in that position. No doubt, he is aware that Council removed Mr. Wilber as the County Attorney in accordance with section 507.A. even if he is not aware that the expressly limited period of the temporary appointment of Mr. Wilber as the "Acting County Attorney" under section 414 has now expired. Because the latter section specifies the exclusive method by which that limited period can be extended, its extension by other means is not possible. Thus, Mr. Wilber no longer has an attorney-client relationship with the County, except for certain limited matters (discussed below).

Those and other sections of the County's "Constitution" expressly govern the appointment and tenure of certain unelected appointees, including the department heads. Sections 413 and 315.A require department heads to be appointed by the County Executive within six months after he or she is elected "subject to confirmation by the Council." Section 414, titled "Temporary Administrative Appointments," addresses a vacancy in those positions, including the tenure of an "acting department head" specified in section 414.B, which is captioned "Term" and states:

The appointment of any person appointed as ... acting head of a department **may not exceed 90 calendar days, except by Council approval.** This appointment may be extended by the Council every 90 days.

Thus, the Charter clearly precludes the concept of a "holdover" acting department head following the initial or any extended period of a temporary appointment to serve in an acting capacity. The Charter does not suggest, and certainly does not state, that such an appointee may continue to serve until a permanent department head is duly appointed and confirmed by the Council. In discussing the holdover concept, Mr. Karpinski notes that it applies "in the absence of provisions

to the contrary.” The Charter provisions for removal of the County Attorney and expressly limiting a temporary appointment as acting county attorney to a specific period that “may not exceed 90 calendar days except by Council approval” are obvious “provisions to the contrary” that preclude holdover status in this instance. That may explain his failure to even mention much less consider these Charter provisions in his letter to Mr. Culver.

And this is not an “emergency” situation; since Mr. Wilber was removed, the County Executive has had almost 6 months to work with Council to select someone else to serve as the County Attorney. As discussed in the next section, the de facto officer doctrine does not apply or operate to confer actual authority for Mr. Wilber to continue as the “Acting County Attorney” following expiration of the expressly limited 90-day period that is specified in the Charter for his temporary appointment to that position by Mr. Culver on July 7, 2019.

II. The De Facto Officer Doctrine Does Not Apply to Confer Authority to Act

There is a fundamental flaw in Mr. Karpinski’s legal analysis. The de facto officer doctrine does not confer authority to hold a position, but rather serves to defeat a challenge to an action by a “holdover” official who has not been duly elected or appointed, as occurred in cases mentioned by Mr. Karpinski. For example, in *Grooms v. LaVale Zoning Board*, 27 Md. App. 266 (1975), land-owners who opposed the rezoning of nearby land argued that the Board’s decision was invalid because some of its members had not been elected – they were initially appointed to fill vacant seats, but continued to serve in subsequent terms when nobody ran for their seats and they were reappointed. The court, treating them as de facto officials, rejected that argument. Because Mr. Wilber was removed as the County Attorney and his temporary appointment to fill the vacancy is for an expressly limited period that has expired, the *Grooms* case, which Mr. Karpinski posits as being “substantively on point” is not remotely “on point.”

In the earlier decision that “the *Grooms* court principally relied [upon],” a proposed bond issuance was challenged on the ground that the town commissioners had not been duly elected. Because nobody ran for their positions, the incumbent commissioners canceled the elections, apparently to avoid the expense, and continued to serve. The court held that as de facto officials their approval was effective. *Reed v. President and Commissioners of the Town of North East*, 226 Md. 229, 237-246 (1961).

These decisions reject challenges to actions by holdover officials based upon deficiency in their “title” and authority to act. As noted in a thorough discussion of the de facto officer doctrine, it limits the “ability to challenge governmental action on the ground that the officers taking the action are improperly in office.” Kathryn A. Clokey, *The De Facto Officer Doctrine: The Case For Continued Application*, 85 Columbia Law Review 1121, 1122 (1985). Citing its decision and discussion in the *Reed* case and others, the Maryland Court of Appeals has observed that the doctrine does not apply if nobody is “misled by appearances into taking some action which constituted a detriment to him.” *Valle v. Pressman*, 229 Md. 591, 604 (1962). The Attorney General, citing *Grooms v. LaVale Zoning Board*, has observed that “recognition of a person as a *de facto* officer is done primarily for the benefit of the public with whom he has dealt, rather than for the benefit of the person himself.” 64 Md. Op. Atty. Gen. 98 (1979).

Citing both the *Reed* and *Grooms* cases, a legal commentator has stated

A "de facto officer" is one in actual possession of an office under some colorable or apparent authority, who exercises the duties of the office under such circumstances of reputation and acquiescence by public authorities and the public as is calculated to induce people, without inquiry, to submit to or invoke his or her official action, supposing the person to be the officer he or she assumed to be.

17 Maryland Law Encyclopedia *Officers* § 3 (2019). (Emphasis added). Although the *de facto* officer doctrine may serve to validate an unauthorized decision or action, it does not apply to determine whether the official is entitled to serve or receive compensation after the official's term or tenure has ended and a required election or appointment and confirmation process has not subsequently occurred.

In a case cited in Mr. Karpinski's letter, the Maryland Court of Appeals, quoting from an opinion by the Supreme Court, described the doctrine thusly:

A de facto officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely act upon the assumption that he is a rightful officer.

Buckler v. Bowen, 198 Md. 357, 370 (1951)(Emphasis added), quoting *Waite v. Santa Cruz*, 184 U.S. 302, 323 (1902). And in the *Reed* case, which Mr. Karpinski regards as significant, the Court stated that "[a]n officer *de facto* is one whose acts, though not those of a lawful officer, the law . . . will hold valid so far as they involve the public and third persons." 226 Md. at 243-44 (emphasis added).

Simply put, the *de facto* officer doctrine operates to validate actions by an official who is not a duly authorized "lawful officer" (*i.e.*, "whose title is not good in law") if it appears to others they have the requisite authority to act. However, it does not serve to confer such authority on someone to continue to act or to hold a position. None of the cases mentioned by Mr. Karpinski suggest otherwise or question the cogent observation by the Attorney General, quoted above, that the doctrine is for the benefit of those dealing with a *de facto* officer "rather than for the benefit of the person himself." To reiterate, the cases mentioned in Mr. Karpinski's letter to Mr. Culver and the analysis and opinion stated therein are not "on point" regarding Mr. Wilber's status or authority to act as the County Attorney.

There is a further fundamental flaw in Mr. Karpinski's analysis: If qualification to serve in a position is subject to both appointment and confirmation, that is a mandatory requirement to serve. As stated in the legal treatise cited several times in his letter to Mr. Culver:

With some exceptions, laws and municipal charters frequently require the appointment to be approved or confirmed by some officer or body, or board, as the council or legislative body of the municipal corporation. This provision is usually mandatory; hence, without approval or confirmation as prescribed, the appointee is not authorized to enter upon the duties of the office or employment.

3 McQuillen, *The Law of Municipal Corporations* § 12:141 (3d ed. 2019). The Maryland Court of Appeals has recognized and applied this commonsense rationale where a town's police officers were required annually to be appointed by the mayor and confirmed by the town's council at the next meeting. The mayor authorized payment to certain officers who had not been confirmed by the town council. Based upon the town council's vote not to approve the appointments, the Court affirmed the Circuit Court's holding, stating that those officers "could no longer continue to hold these offices" and that "the mayor was then under the ministerial duty to remove them from the town's police force." *Forami v. Reynolds*, 248 Md. 246, 255 (1967).

Finally, Mr. Karpinski's analysis and opinion make the County's Charter completely meaningless. In effect, Mr. Wilber could continue to serve indefinitely as the County Attorney after being removed from that position in accordance with the Charter – and that's an absurdity. Although it is sound policy for the position to be filled, that does not operate to nullify the Charter. And in this instance, the County Executive has now had nearly six months to cooperate with the Council to select and install another County Attorney, during which he has failed to do so.

Under the County Charter provisions mentioned above, confirmation by the Council is required for Mr. Wilber to serve as County Attorney after being removed from that position, except during the expressly limited (and now expired) period of service as "Acting County Attorney" and in certain ongoing matters for a further limited period of time. And there is a separate and distinct aspect of the current circumstances, discussed in the next section, that would have significant consequences if Mr. Wilber continues to furnish legal services for the County except as may be permitted by the ethical standards that apply when an attorney has been discharged and has no duly authorized client relationship.

III. The Rules of Professional Conduct Prohibit Further Service for the County

Mr. Karpinski also fails to mention or consider the Maryland Attorney's Rules of Professional Conduct, which apply to a lawyer's relationship with local government as well as other clients. These formal regulations make the County Attorney's position distinctly different from that of other County officials – they expressly provide that he or she must withdraw from further representation upon being discharged, subject to specific exception regarding certain matters (primarily litigation). This prohibition is not subject to exception by application or operation of the de facto officer doctrine. As things now stand, it appears that Mr. Wilber would violate these Rules if he continues to provide legal services for the County that do not fall within the limited exception thereunder.

Conclusion and Comment

In summary, the de facto officer doctrine does not apply or operate to extend the limited tenure imposed by the Charter for Mr. Wilber's temporary appointment as the "Acting County Attorney" or otherwise authorize him to represent the County in that or any other capacity. The Charter expressly and lawfully governs; under its provisions, Mr. Wilber is no longer authorized to serve as an attorney for the County. Because of his lack of authority, the Council may appropriately decline to act upon matters in which it desires or requires advice by a lawyer who is duly authorized to be the County Attorney. It appears that under applicable ethical standards, he would be in violation thereof if he continues to do so, except as may be allowed thereunder.

However, it is possible that someone may innocently believe that Mr. Wilber continues to have authority to serve as the County’s attorney, in which event the de facto officer doctrine might apply depending upon the circumstances. Therefore, to avoid that possibility and the potential uncertainty and cost of potential litigation, it seems appropriate to provide prominent public notice of the current circumstances by (among other things) notifying the courts in which County litigation is pending and possibly the attorneys for the other litigants, posting a notice on the County’s website and notifying local news media. The de facto doctrine applies if someone dealing with an official reasonably presumes that the official has actual authority – but, if the person is (or should be) aware that is not the case and, thus, cannot make such presumption, the doctrine would not apply.

There is another matter of concern regarding Mr. Karpinski’s letter to Mr. Culver and the legal services thereunder, which are attributed in that letter as being requested by Mr. Culver’s (“Your”) administration. This memorandum does not address this concern, but simply notes that the Charter does not provide for legal services for the County Executive’s “administration” or the Executive Branch. Unless he has been retained and is being paid for those services by Mr. Culver, rather than the County, there is concern that Mr. Karpinski may be providing services as special legal counsel to the County without having been duly appointed to do so in accordance with section 705.F of the Charter.

I suggest that Council forward this memorandum to both Mr. Wilber and Mr. Culver, who may discuss it with Mr. Karpinski if they so desire and offer whatever response they deem appropriate. In any event, before engaging in any discussion with Mr. Karpinski, I suggest that Council first obtain his written response to the legal analysis in this memorandum as well as any legal precedent or analysis that he deems to be “substantively on point” to the authority for Mr. Wilber to continue to represent the County as an attorney and why his doing so would not violate the Maryland Attorney’s Rules of Professional Conduct. In any such response Mr. Karpinski could also identify his client and whether he regards the County to be obligated to pay or reimburse anyone for his firm’s fees for the services provided by his letter to Mr. Culver or otherwise regarding Mr. Wilber’s status and if (and if so by whom) any such payment has been made to his firm.

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