



## WICOMICO COUNTY, MARYLAND

OFFICE OF THE COUNTY EXECUTIVE

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November 15, 2019

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Dear Council Members:

Attached you will find a self-explanatory letter dated November 15, 2019 from Kevin Karpinski regarding the appointment of the County Attorney.

Respectfully,

WICOMICO COUNTY, MARYLAND



Bob Culver  
County Executive

Cc: Director of Administration Wayne Strausburg  
Assistant Director of Administration Weston Young

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November 15, 2019

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Bob Culver

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RE: Status of Paul Wilber, Esquire

Dear County Executive Culver:

Your Administration has requested guidance on the issue of whether Mr. Wilber can continue in his position as County Attorney even though his appointment has expired. In my opinion, Mr. Wilber is now a *de facto* appointee until someone else is appointed County Attorney and therefore he can continue to serve as the County Attorney for Wicomico County.

Maryland law has specifically addressed when a *de jure* officer's appointment expires and what that person's status becomes upon expiration of the appointment. In a case which is substantively on point, *Grooms v. LaVale Zoning Bd.*, 27 Md. App. 266, 340 A.2d 385 (1975), the Court of Special Appeals explained how through certain circumstances a holdover official would retain the responsibility and right to continue to execute the duties of the office. In *Grooms*, the appellate court affirmed the order of the local zoning board in the face of a challenge to the validity of the action grounded on the fact that two of the three board members had never been elected to the positions but rather were holdovers from appointments to fill vacancies in prior terms, extended to additional full terms when no one ran for the seats they had filled by appointment, and then, by reappointment.

In pertinent part, the Court of Special Appeals described how *de facto* officials can

come into being, and what effect that construction has upon their execution of their duties:

A *de jure* officer is one regularly and properly elected or appointed and qualified, and holding his office during a constituted term. 3 McQuillin, *Municipal Corporations* s 12.102 (3rd ed. 1973). A '*de facto*' officer has been defined as 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 the public authorities and the public as is calculated to induce people, without inquiry, to submit to or invoke his official action, supposing him to be the officer he assumed to be. *Kone v. Baltimore County*, 231 Md. 466, 471, 190 A.2d 800, 802 (1963); *Reed v. President of Town of Northeast*, 226 Md. 229, 243-44, 172 A.2d 536, 542 (1961); *Buckler v. Bowen*, 198 Md. 357, 369-371, 84 A.2d 99, 105-06 (1951). A 'usurper' or 'intruder' has been defined as one who has neither lawful title nor color of right to office. *Reed, supra*, at 226 Md. 244, 172 A.2d 542-43. Thus, a *de facto* officer is distinguished from a usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its function without either the legal title or color of right to such office. 3 McQuillin, *supra*, at ss 12.102, 12.103. Color of right may consist of an election or appointment, holding over after the expiration of a term, or by acquiescence by the public for such a length of time as to raise the presumption of colorable right by election, appointment or other legal authority to hold such office. 3 McQuillin, *supra*, s 12.102; *see Izer v. State*, 77 Md. 110, 115, 26 A. 282, 283 (1893).

All of the official acts of a *de facto* officer, filling a *de jure* office, done in regard to public matters affecting the public interest, are, upon grounds of public policy and necessity, considered as valid and binding as if they had been performed by *de jure* officers. *Kone, supra*, at 231 Md. 473, 190 A.2d 803; *Reed, supra*, at 226 Md. 246, 172 A.2d 543; *Havre de Grace v. Fahey*, 108 Md. 533, 538-39, 70 A. 218, 220 (1908); *Koontz v. Burgess*, 64 Md. 134, 136, 20 A. 1039 (1885); *see Hetrich v. County Commissioners of Anne Arundel County*, 222 Md. 304, 312, 159 A.2d 642, 646 (1960). A mere usurper does not acquire the status of a *de facto* officer and his acts generally are void unless and until he continues to act for so long a time as to afford a presumption of his right to act. *Reed, supra*, at 226 Md. 244, 172 A.2d 542-43; *Van Amringe v. Taylor*, 108 N.C. 196, 12 S.E. 1005, 1007 (1891); 2A Antieau, *Municipal Corporation Law*, s 22.01 (1974); 63 Am.Jur.2d *Public Officers and Employees*, s 499 (1972).

Where there is a *de jure* office, all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of right. Since color of right may consist of holding over after the expiration of a

term, one who is actually in possession of a public office, by virtue of holding over after the expiration of a previous official term, and who discharges the duties of such office, is at least a *de facto* officer. *Reed, supra*, at 226 Md. 243-46, 172 A.2d 542-43; *Benson v. Mellor*, 152 Md. 481, 487-92, 137 A. 294, 296-98 (1927); 3 McQuillin, *supra*, s 12.102.

It has long been recognized in this State, as elsewhere, that the public interest requires, in the absence of any provisions to the contrary, that public offices should be filled at all times, without interruption. *Reed, supra*, at 226 Md. 242-43, 172 A.2d 542; *Benson, supra*, at 152 Md. 491, 137 A. 298. In accord with this principle the Court of Appeals has recognized that an elected or appointed officer may remain in office at the expiration of his term and is entitled to exercise the powers of the office until his successor qualifies, whether or not the statute creating the office so provides. *Reed, supra*, at 226 Md. 242, 172 A.2d 541; *Walker v. Talbot County*, 208 Md. 72, 79-80, 116 A.2d 393, 397 (1955); *Benson, supra*, at 152 Md. 491, 137 A. 296-97; *Ijams v. Duvall*, 85 Md. 252, 261-62, 36 A. 819, 820 (1897); *Ash v. McVey*, 85 Md. 119, 130, 36 A. 440, 442 (1897); *Lynn v. Mayor and City of Cumberland*, 77 Md. 449, 454, 26 A. 1001, 1002-03 (1893); *Robb v. Carter*, 65 Md. 321, 335, 4 A. 282, 284 (1886); *Sappington v. Scott*, 14 Md. 40, 54-55 (1859); *Thomas v. Owens*, 4 Md. 189, 221-22 (1853).

This principle has been recognized by a preeminent treatise on municipal law.

Officers who hold over after the expiration of their term under some color of right, no successor having been appointed or chosen, and continue to exercise the functions of their office are *de facto* officers. Absent provisions to the contrary, the public interest requires that public offices should be filled at all times without interruption. fn. 2 Under this policy, an elected or appointed officer may remain in office after the expiration of its term until a successor qualifies, whether or not this is provided for by the statute creating the office. fn. 3 Stated otherwise, the rights of a holdover officer terminate when the rights of the successor vest.

§ 12:160 Hold-overs, 3 McQuillin Mun. Corp. § 12:160 (3d ed.) (updated through July of 2019) (fns. 2 & 3 citing *Grooms*; fns. 1 & 4 omitted).

In *Reed*, one of the case upon which the *Grooms* court principally relied, the Court of Appeals stated:

The controlling, if not the sole, consideration has been that the law requires, in the public interest, that the offices be filled at all times, without interruption, and to this end the intention and understanding that

incumbents shall hold until their successors qualify has grown up and taken position as part of the law; and according to the law as it has been laid down for us, it is upon this provision or rule that dependence is placed primarily for having the offices continuously filled, *notwithstanding any delay or failure in the election of successors in ordinary course.* (Emphasis added)

*Reed v. President & Comm'rs of Town of N. E.*, 226 Md. at 243, 172 A.2d at 542 (1961) (italicized emphasis in original) (quoting *Benson v. Mellor*, 152 Md. 481, 137 A. 294, 298 (1927)).

Without belaboring the point, the County Attorney serves an essential function within County government. It is my understanding that the County Attorney reviews all contracts executed by the County. The County Attorney is involved in extensive litigation on behalf of the County and provides consultation to various departments within County government. In short, leaving the County Attorney's position vacant clearly would have such a deleterious impact on the County's ability to conduct day to day business. This is contrary to the well established stated policy in Maryland that positions need to be filled in order to accomplish the operations of government.

On a related note, I have been authorized by the Local Government Insurance Trust to attempt to facilitate a resolution between the County Executive's Office and the County Council regarding the duties and responsibilities of the various branches of government. I would welcome the opportunity to meet with the Administration and the Council to attempt to facilitate an amicable resolution to any questions or concerns regarding the duties and the responsibilities of the County Executive and County Council. Please let me know if this would be of any interest to the elected officials.

Should you have questions, please do not hesitate to contact me.

Sincerely,

KARPINSKI, COLARESI & KARP

A handwritten signature in blue ink, appearing to read "Kevin Karpinski", with a stylized flourish at the end.

BY: Kevin Karpinski

KK:bjap