

No. 351PA08

TENTH DISTRICT

NORTH CAROLINA SUPREME COURT

ROBERT BAXTER, Employee,)	
)	
Plaintiff)	FROM
)	Court of Appeals No. COA07-865
v.)	(Industrial Commission)
)	
DANNY NICHOLSON, INC.)	
Employer,)	
SELF-INSURED (KEY RISK)	
MANAGEMENT SERVICES,)	
servicing)	
Agent,)	
)	
Defendant)	

AMICUS CURIAE BRIEF
(North Carolina Institute for Constitutional Law)
(Filed 8 December 2009)

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OF NORTH CAROLINA

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Court of Appeals No. COA07-865
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QUESTIONS PRESENTED

- I. Whether an appointed officer filling an appointed office in a holdover capacity continues in that office until his successor is appointed though that successor has not yet been sworn in to that office?
- II. Whether the administration of an oath of office is a qualification for filling that office under the North Carolina Constitution?

INTEREST OF AMICUS

The North Carolina Institute for Constitutional Law (NCICL) is a nonprofit organization whose mission is to ensure compliance with constitutional limitations on government. To that end, NCICL's litigation efforts have included actions to enforce the authority of a statewide officer and to constrain the unconstitutional actions of the Executive. NCICL's work focuses primarily on economic issues as they relate to the North Carolina and United States Constitutions, but that work often includes litigation which may come before judicial officers or quasi-judicial officers who, like the Industrial Commission member involved in this matter, are hold over officers or otherwise acting in a capacity other than that of a de jure officer.

Amicus NCICL has a direct interest in constitutional limitations on government and on the authority of government actors in that those limitations are at the heart of our constitutional foundation, and NCICL has a history of litigating such issues. The decision of the Court of Appeals correctly held that an appointed officer continues in a holdover capacity until his successor is named. A plain reading of the State Constitution and other applicable law shows that an appointed officer, as contradistinguished from an elected officer, takes office upon appointment. Elected officers, on the other hand, take office when elected *and* qualified. NCICL has a strong interest in ensuring that constitutional parameters

for taking and filling appointed office are neither expanded without approval of the People through constitutional amendment, nor blurred with the distinct constitutional parameters applicable to elected offices.

ARGUMENT

The Court of Appeals below correctly determined that an appointed officer serves as a so-called “hold over” following expiration of his term only until his successor is named. No other prerequisites must be satisfied before a new appointee fills the appointed office and his hold over predecessor is displaced. The State Constitution divides public officers into two distinct categories: first, elected officers; and second, appointed officers. While elected officers must be elected and qualified before taking office, appointed officers take office upon appointment and continue to do so until their term expires and a replacement is appointed.

I. An appointed officer takes office upon his appointment.

The Constitution divides offices into two categories: elected and appointed.

See generally Baker v. Martin, 330 N.C. 331, 410 S.E.2d 887 (1991)

(distinguishing between election to office and appointment to elected office).

Article VI, § 10 provides:

In the absence of any contrary provision, all officers in this State, whether appointed or elected shall hold their positions until other appointments are made or, if the offices are elective, until their successors are chosen and qualified.

N.C. Const. art. VI, §10.

The above provision clearly distinguishes between elected and appointed offices and treats continuation in each category differently. Appointive officers continue in office until their successors are named. The “chosen and qualified” language in Article VI, § 10 is expressly limited to elected office. Absolutely nothing in Article VI, § 10 suggests that continuation in appointed office terminates only when a successor appointee is “qualified.” Permitting continuation by an appointed officer until a new appointee has been chosen *and* qualified is not only not supported by the straightforward language of Article VI, § 10, but also imposing such a requirement would require the Court to create as from whole cloth qualifications for office that do not exist in the Constitution. Where, as here, the language of the Constitution is clear, the Court “need not search for meaning elsewhere.” State ex. rel Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 472, 478 (1989).

The Constitution articulates no qualifications for appointed office. To the contrary the Constitution speaks only to disqualifications. Article VI, § 8 enumerates three disqualifications for office, only two of which are applicable to

appointed offices.¹ Another provision prohibits dual office holding except as permitted by statute or an exception in that provision. N.C. Const. art. VI, §9.

The North Carolina Constitution provides explicit qualifications for elective office. Compare the lack of constitutional qualifications for appointed office with myriad constitutional qualifications for elected office. A general eligibility for elective office is found at Article VI, § 6. N.C. Const. art. VI, § 6, “Eligibility to elective office.” Additionally, the Constitution contains several elective office specific qualifications. See N.C. Const. art. II, § 7, “Qualifications for Senator”; N.C. Const. art. II, § 8, “Qualifications for Representative”; N.C. Const. art. III, § 2, “Governor and Lieutenant Governor: election, term and qualifications; N.C. Const. art. III, § 7 (7), “Special Qualifications for Attorney General”; N.C. Const. art. IV, § 18, “District Attorney and Prosecutorial Districts” (law license is qualification for district attorney); and N.C. Const. art. IV, § 22, “Qualification of Justices and Judges.” No such “qualifications” exist in the Constitution for appointed office. Neither the general eligibility provisions of Article VI, § 6, nor any office specific provisions includes as a “qualification” for filling an office the taking of an oath of office.

¹Of the two disqualifications applicable to appointed office, the first disqualifying those “who shall deny the being of the Almighty” is undoubtedly unconstitutional on obvious grounds not relevant to this appeal.

II. Taking an oath of office is not a qualification for office under the North Carolina Constitution.

Even if the Court should determine that an appointee must be appointed and then meet some qualification before taking office, he need not be administered an oath before filling that office. Taking the oath of office, while a prerequisite to “entering upon the duties” of an office and exercising the full authority of an office, is not a qualification for filling an office. Constitutional provisions concerning eligibility for office and the provision mandating the oath of office are contained in separate sections of the Constitution and contain no cross references to each other.

The State Constitution provision concerning the oath of office is found at Article VI, § 7, and provides, in part: “Before entering upon the duties of an office, a person elected or appointed to the office shall take and subscribe the following oath: . . .” N.C. Const. art. VI, §. 7 (emphasis added). This is substantially similar to Article VI, § 4 of the 1868 Constitution which established: “Every voter, except as hereinafter provided, shall be eligible to office; but before entering upon the discharge of the duties of his office, he shall take and subscribe the following oath: . . .” 1868 N.C. Const. art. VI, § 4. (emphasis added).

As discussed above, the Constitution does not contain qualifications for appointive office, only disqualifications enumerated at Article VI, § 8. Those

constitutional provisions concerning qualifications for office apply to elective office. A review of those qualifications applicable to elective office, however, are instructive in that those provisions omit any reference to taking the oath as a qualification for elective office. By analogy, taking the oath of office is not a qualification for appointive office, even if, assuming solely for the sake of argument, appointed officers must be qualified and not simply appointed. The Constitution does not prescribe the oath as a qualification for office and qualifications to office may not constitutionally be added without amendment of the Constitution. Starbuck v. Havelock, 252 N.C. 176, 113 S.E.2d 278 (1960); Cole v. Sanders, 174 N.C. 112, 93 S.E. 476 (1917); State v. Knight, 169 N.C. 333, 85 S.E. 418 (1915); Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913); and Lee v. Dunn, 73 N.C. 595 (1875).

Consider Article III, § 4 “Oath of office for Governor” which provides, in pertinent part: “The Governor, before entering upon the duties of his office, shall, before any Justice of the Supreme Court take an oath or affirmation . . .” N.C. Const. art. III, § 4. Note that the drafters used “Governor,” not “Governor-elect.” Had the framers intended for the oath of office to be a prerequisite for holding office, the language employed would have spoken of the “Governor-elect” taking the oath “before entering upon his office.” The constitutional mandate that the Governor, rather than Governor-elect, take the oath dictates that the oath is not and

logically cannot be a qualification for holding the office. Compare Brannon v. North Carolina State Bd. of Elections, 331 N.C. 335, 416 S.E.2d 390 (1992) (Citing “[t]he people's vote to ratify a new Article IV in 1962, and their vote to ratify the State Constitution in its entirety in 1970, each time with no substantive change” to disputed constitutional provision to support interpretation that “the people adopted” interpretation of the provision previously established by the branches of government.).

Likewise legislators must be sworn in before carrying on their duties. In language similar to Article III, § 4, Article II requires “[e]ach member of the General Assembly, before taking his seat” to take an oath. N.C. Const. art. II, §12. Again, legislators are already members, not members-elect, of the General Assembly when sworn in; thus, the oath is not a prerequisite for filling the office of member of the House of Representatives or Senate.

This Court long ago held that qualifications for office may not be added legislatively, and any attempts to do so “are merely recommendatory to the voters.” Cole, 174 N.C. at 113, 93 S.E. at 476. Considering a statute which is purported to add a requirement that one elected to a township’s highway commission be selected for their “fitness rather than political faith,” Chief Justice Clark, concurring, explained:

If the constitutional qualifications apply to this position, this case is governed by S. v. Bateman, 162 N.C. 588, 77 S.E. 768, in which it is said: "The Constitution of this State, Article VI, prescribes who shall be 'voters,' and section 7 of that article provides: '*Every voter in North Carolina, except as in this article disqualified, shall be eligible to office.*' The Legislature is, therefore, forbidden by the organic instrument to disqualify any voter, not disqualified by that article, from holding any office. The General Assembly cannot render any 'voter' ineligible for office by exacting any *additional* qualifications, as by prescribing, in this instance, that the candidate shall be a 'licensed attorney at law,' any more than it could prescribe that he should own a specified quantity of property, or should be of a certain age, or race, or religious belief, or possess any other qualification not required to make him a voter."

Cole, 174 N.C. at 114, 93 S.E. at 477 (internal quotations omitted)(citing a predecessor to the current Article VI, §6)(emphasis added).

The language of Article VI, § 7 is clear. An appointed officer must take and subscribe the oath "before entering upon the duties of an office." Voters and citizens expect that elected and appointed officers will take the oath of office contemporaneously with their eligibility to do so. That is, we expect elected officers to be sworn in when elected and qualified, and we expect appointed officers to be sworn in when appointed. In recent years, some officers have unfortunately fallen into casualness about taking the oath of office.

For the sake of ceremonial events and the convenience of the predecessors in office, newly appointed and even newly elected officers have occasionally

postponed taking the oath of office until days or weeks after filling the office either by election or appointment. Yet, even where a new officer does not initially take the oath, continuity of government is maintained. The Constitution does not provide that officers must take the oath before filling the office. The language chosen by the drafters and ratified by the People plainly mandates only that the oath be taken before *entering upon the duties* of the office. Thus, offices are filled though the new officer may not have been sworn in and authorized to execute the duties of office. In the event some official action must be taken, the oath may be quickly administered and the officer made able to carry out his duties.

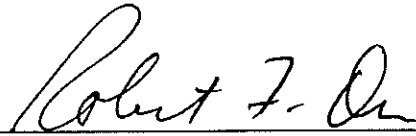
The Plaintiff and the State have suggested that the General Assembly has attempted to impose an additional requirement on the effectiveness of an appointment to office or alternatively an additional “qualification” for appointment; neither is correct. Pursuant to N.C. Gen. Stat. § 11-7, every person elected or appointed to hold any office of trust or profit in the State shall, before taking office or entering upon the execution of the office” take a prescribed oath. However, the Constitution does not authorize the General Assembly to expand the constitutional prerequisites for an appointee to take office, if in fact N.C. Gen. Stat. § 11-7 should be interpreted to require that. However, N.C. Gen. Stat. § 11-7 should be interpreted consistent with the constitutional requirements discussed above.

Whether an appointed or elected officer takes the oath as soon as legally permitted to do so, or whether an officer postpones his swearing in, the Constitution is clear that the oath of office is a prerequisite for performing the duties of an office, not for filling the office, and this Court should so affirm. A contrary decision would superimpose an additional qualification for office which is beyond what the Constitution requires and so beyond what the People have authorized. Cf. State ex rel. v. Clark, 66 N.C. 59 (1872) (characterizing the oath as a “mere incident[.]” and describing it as “constitute[ing] no part of the office”).

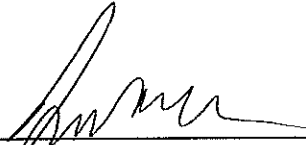
CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this the 8th day of December, 2009.



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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that a copy of the foregoing *Amicus Curiae* Brief of the North Carolina Institute for Constitutional Law was served upon counsel of record in this action by depositing a true copy thereof in the United States mail, postage prepaid, and addressed to the last known address to me as follows:

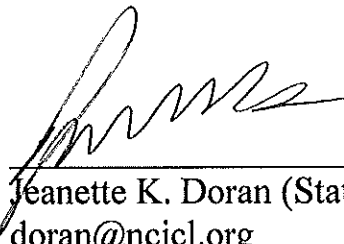
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This the 8th day of December, 2009.



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