





Round II: Judge backs ruling for incumbent Pearlberg to run

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MARIETTA - A Superior Court judge said Tuesday that nothing prohibits Van Pearlberg from seeking another term on the Marietta City Council while serving as an assistant district attorney.

The incumbent Ward 4 councilman is seeking re-election Nov. 3. He is challenged only by developer Wes Godwin, who asked the court to disqualify Pearlberg from seeking another term, claiming there is a conflict of interest with him serving as the county's deputy chief assistant DA and city councilman. Godwin first raised the issue with the Cobb Board of Elections, which sided with Pearlberg. He then appealed to Cobb Superior Court.

"There are several statutes that explicitly prohibit certain public officials from holding other positions," wrote Bartow County Superior Court Judge Carey Nelson, who handled the case for Cobb Superior Court by special appointment after Cobb's judges recused themselves. "...However, none of these are applicable here."

Following the release of the judge's Tuesday order, Pearlberg said, "I'm elated to say the least. I'm prouder than ever to be a Marietta city councilman and an assistant district attorney."

Regarding a possible appeal, Godwin said, "We are studying the judges opinion to see what course of action is best to take at this point."

Nelson heard arguments from both sides on Friday.

Godwin's attorney, Douglas Chalmers, Jr. of FSB Legal Council, a former partner with McKenna, Long & Aldridge, said no one who is serving as an assistant district attorney with the oversight of law enforcement and prosecution in a given county should also be serving as an elected city official because his duties may end up conflicting.

While he acknowledged Friday that there is no constitutional or statutory provision that clearly addresses the issue, his main argument was based on a doctrine in the common law called the "incompatibility of offices," which states there is a conflict of interest when a public official holds two offices that have conflicting loyalties to different groups of people.

Chalmers said when the legislature enacts a statute that directly addresses a topic, typically the common law no longer applies because elected representatives have chosen to enact a law that directly addresses the subject.

"In this case, there is no statute that directly addresses the question of whether an assistant district attorney can be an elected official in a township. This is the first time the courts have heard this question. And so what the attorney general said in 2002 - and in a number of other (unofficial) attorney general opinions that don't directly relate to assistant district attorneys and elected officials - is that under the common law and the conflict of interest analysis applied over the years, you can't serve in both offices because you owe conflicting loyalties to different groups of people," Chalmers said Friday.

To this, Nelson wrote, "The common law rule of incompatibility of office applies only to the simultaneous holding of two incompatible offices. It has no relevance to a candidate's qualifications to seek public office; a public official is not disqualified from running for an office if the office currently held would be incompatible with the office sought."

Godwin, he wrote, "expressly states he is not seeking the removal of (Pearlberg) from office; instead his sole contention is that this common law rule disqualifies Pearlberg and prohibits him from seeking the office of city councilman."

In short, Pearlberg's attorney and former Cobb Superior Court Judge Tom Cauthorn said, "The common law disqualification that Godwin urged does not deal with running."

He said Godwin "filed the wrong case."

Yet Godwin asks, "If it is illegal to hold office, why is it legal to seek office?"

"Anyone that can't see this is a blatant conflict of interest, I question them," he said.

Godwin has come under criticism for challenging Pearlberg's eligibility to run again for City Council because his initial challenge came Sept. 10 - which was after the qualifying window closed for the Nov. 3 election. That means if Pearlberg were banned from seeking re-election, Ward 4 voters would only have Godwin to vote for.

"Godwin wanted to win the election on the cheap," Cauthorn said. "That's why he chose to do this. The whole thing has a bad odor to it...Bottom line is Pearlberg won the matter and the public will now choose who they want to serve. I think it's clear to me who's going to get elected."

However, Godwin's attorney earlier said a complaint may not be filed until after qualifying.

Nonetheless, mayoral candidate Steve "Thunder" Tumlin, said, "People who I talked said they wanted to choose by vote rather than a lawsuit."

"Now that they both have an equal chance, I think the tension will be off," he said.

On whether Nelson made the right ruling, Tumlin, who attended Friday's hearing, said, "They presented their cases well and the judge raised a lot of issues. The judge took it very seriously."

Both parties agreed that Nelson was very knowledgeable about the case and asked a lot of questions.

"He made the other lawyer and me earn our fee," Cauthorn said.

Pearlberg was first elected councilman in 2005, taking office in 2006. He served as an assistant district attorney from 1983 to 1984, rejoining the office in 1990. He and Jesse Evans both hold the title of deputy chief assistant district attorney in the Cobb Judicial Circuit. District Attorney Pat Head holds the only rank higher in the district attorney's office.