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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 7, 2004

Ms. Gwendolyn Conner
212-B Pebble Lane
Aiken, South Carolina 29801

Dear Ms. Conner:

You have requested an advisory opinion from this Office concerning dual office holding. You have indicated that you are currently a candidate for a seat on the Aiken County Council, and are seeking employment with the state government pursuant to three separate job openings. The first is Program Coordinator II with the Commission on Minority Affairs. The second is Program Coordinator I with the Foster Care Review Board, which is under the authority of the Governor's Office. The third is Investigator II with the Victims Assistance Division of the Governor's Office. You have provided this Office with the official job descriptions of each of these positions. You have asked this Office to advise as to "any potential legal ramifications" of concurrently holding the position of councilmember for Aiken County with any one of the three aforementioned state positions.

Law/Analysis

I assume that by your request for "any potential legal ramifications" you are referring to the prohibition on dual office holding in the South Carolina Constitution. Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. For this provision to be contravened, a person concurrently must hold two offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." 78 S.C. at 174.

This Office has advised on numerous occasions that a member of a county council would be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated March 18, 2004; July 26, 1999; July 27, 1997; December 7,

Ms. Conner
Page 2
June 7, 2004

1994; and August 20, 1985. The question therefore is whether any of the three aforementioned positions with the state government would likewise be considered offices for dual office holding purposes.

I am not aware of any prior occasion in which this Office has opined on the status of the three aforementioned positions. It would appear to be beyond dispute that a person holding either of the first two positions, Program Coordinator II for the Commission on Minority Affairs and Program Coordinator I for the Foster Care Review Board, would be considered a mere employee, not an office holder, under the relevant case law. Neither the duties, qualifications, salary, or the position itself are prescribed by statute. No oath is required for the position, and the job descriptions do not appear to invoke any portion of the state's sovereign power. Accordingly, as a member of county council you would be able to work in either of the aforementioned program coordinator positions without violating the constitutional provisions on dual office holding.

The position of Investigator II with the State Office of Victim Assistance, however, is much more problematic. Although this Office has not had the opportunity to opine on the status of this particular position, we have previously advised as to whether other investigators who work for state agencies are office holders. We concluded that arson investigators certified by the State Fire Marshal clearly are office holders in that the certification of their positions is established by statute, and their investigative duties involve an exercise of the state's sovereign power, namely the police power. Ops. S.C. Atty. Gen. dated February 25, 1992; June 15, 1984. Conversely, this Office concluded in an opinion dated April 7, 1987 that a Special Investigator IV for the Child Support Unit of the South Carolina Department of Social Services was likely not an office holder. We concluded that, in addition to the fact that there was no statute which established the position or prescribed its duties, the job description did not technically involve active participation in the investigations:

According to the job description for Special Investigator IV, class code 7157 as provided by the State Division of Human Resource Management, your function is to investigate various criminal and civil matters and to coordinate and investigate the activities of an investigative staff. In actuality, you supervise seven or eight child support investigators, assist in processing child support cases, assist clerks of court in setting dockets, preparation of cases, and so forth. You are present in court with an attorney from the Child Support Unit; you may interview clients or attend meetings in which respondents are present. Though you are called an "investigator," your position does not involve actual investigative work; you carry out administrative and ministerial activities rather than activities requiring an exercise of discretion on behalf of the State. . . [t]hough your position is related to state or sovereign activities, a court would most probably consider you to be an employee rather than a public officer in this regard.

Op. S.C. Attn. Gen., dated April 7, 1987.

The position of Investigator II with the Office of Victims Assistance is similar to the Department of Social Services investigator in that there is no statute which establishes the position or prescribes its duties. However, after reviewing the specific job description for the position of Investigator II, it is the opinion of this Office that the investigator performs actual investigative work on behalf of the state and thus exercises a portion of the state's police power. The job description, code number JA10, includes the following duties:

- Investigates regulated activities to ensure compliance with federal, state or municipal laws.
- Locates and interviews plaintiffs, witnesses or representatives of business or government to gather facts relating to alleged violations.
- Observes conditions to determine if there has been a law violation relating to such activities as revenue collection, employment practices or fraudulent benefit claims.
- Examines business, personal or public records and documents to establish facts and authenticity of data.
- Investigates suspected misuses of licenses or permits.
- Prepares correspondence and reports of investigations for use by administrative or legal authorities.
- Testifies in court or at administrative proceedings concerning findings of investigations.
- Serves legal papers.
- Conducts informal hearings or conciliation meetings to resolve complaints.

Based upon these specific investigative duties and the foregoing authorities, it is our opinion that the person holding the position of Investigator II would be an officer for dual office holding purposes. Therefore, should you serve as an Investigator II for the State Office of Victim Assistance while serving on the Aiken County Council such would constitute dual office holding in contravention of Art. XVII, § 1A of the South Carolina Constitution.

When a dual office holding situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Ms. Conner
Page 4
June 7, 2004

I trust this answers your questions.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an