

7938 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 4, 2005

The Honorable Timothy L. Nanney
Register of Deeds, Greenville County
301 University Ridge, Suite 1300
Greenville, South Carolina 29601

Dear Mr. Nanney:

You have requested an opinion as to whether the Greenville County Register of Deeds may simultaneously serve as the Greenville County Tax Collector without violating the dual office holding prohibition. We advise that it would be a violation of the dual office holding prohibition for an individual to serve as the register of deeds and a tax collector simultaneously.

Law / Analysis

Article XVII, Section 1A of the South Carolina 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, "one 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." *Sanders, supra*, 78 S.C. at 174.

We have previously advised that a county register of deeds (formerly known as register of mesne conveyances) would be considered an officer for dual office holding purposes. See *Op. S.C. Atty. Gen.* dated June 7, 2004. In that opinion, we noted that Section 4-1-150 authorized the county register of deeds to charge and collect fees on behalf of the county and the state for the filing of critical legal documents such as deeds and mortgages. *Id.* We also noted that Section 1-7-730 of the Code specifically refers to a county register of deeds as an "officer." *Id.*

Furthermore, we have consistently opined that a county tax collector holds an office for purposes of dual office holding. See, *Ops. S.C. Atty. Gen.* dated October 3, 2003; July 13, 1988;

The Honorable Timothy L. Nanney
Page 2
April 4, 2005

March 10, 1980; April 30, 1979. Therefore, in accordance with our prior opinions, we are of the opinion that both the county register of deeds and the county tax collector are office holders, and that it would violate the dual office holding prohibition to occupy both positions simultaneously.

Additionally, you ask whether the law would treat this situation "as it does in several cases across the State where Clerks of Court also serve as Registers of Deeds?" We answer this question in the negative because the situation of a clerk of court serving as a register of deeds is unique and is the product of statute. In the situation in which you refer, the clerk of court serves as the register of deeds ex officio by statute. See, S.C. Code Ann. Section 30-5-10 (performance of duties of register of deeds by clerk of court in certain counties). If the position is held ex officio, or "by virtue" of holding a separate office, the dual office holding provision of the state constitution is not violated. See *Ops. S.C. Atty. Gen.* dated January 7, 2004; March 12, 2003; July 18, 1989 (giving a detailed opinion on the legal concept of ex officio). The phrase "ex officio" is defined as: "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position."

In *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E. 2d 88 (1947), the South Carolina Supreme Court commented extensively on ex officio memberships:

The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. Ex officio means "by virtue of his office". . . Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the office has only a part or joint ownership or management.

In sum, if, pursuant to statute, a clerk of court holds the position of register of deeds by virtue of being elected clerk of court, then there is no dual office holding violation. However, it appears that the ex officio exception would not apply in your situation because as you note, the register of deeds is elected and the County Administrator appoints the tax collector separately. We are aware of no statutory enactment combining the two positions. Therefore, the position of tax collector is not attained by virtue of holding the office of register of deeds, and thus would not fall under the ex officio exception.

The Honorable Timothy L. Nanney
Page 3
April 4, 2005

Conclusion

Accordingly, a county register of deeds and a county tax collector are both officers for purposes of dual office holding. Thus, it would be a violation of the dual office holding prohibition to serve simultaneously as the register of deeds and the tax collector. Furthermore, because the position of tax collector is not held by virtue of holding the position of register of deeds, the ex officio exception does not apply.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General