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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

November 2, 2005

The Honorable Nathan Ballentine
Member, House of Representatives
1108 Belfair Way
Irmo, South Carolina 29063

Dear Representative Ballentine:

In a letter to this office you indicated that Mr. Paul W. Hughey is employed by the State Department of Corrections and wishes to run for Richland County Council. It is my understanding that Mr. Hughey is employed as an Administrative Coordinator I. In such capacity he manages the Department of Corrections commissary warehouse. You indicated that you are questioning Mr. Hughey's ability to seek and hold the Richland County Council office while remaining an employee of the Department of Corrections.

In examining questions of this nature with regard to serving in a position if an individual is elected, one consideration is whether there is any conflict with Article XVII, Section 1 A of the South Carolina Constitution which 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). 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, 1994; and August 20, 1985. However, based upon my understanding of Mr. Hughey's position with the Department of Corrections, such position does not constitute an office and, therefore, it does not appear that there would be any conflict with the dual office holding provision of the State Constitution if he would be elected as a member of the county council.

It is my information, according to the attachments Mr. Hughey forwarded to this office that apparently the Department of Corrections has no specific opposition to Mr. Hughey running for office. However, reference was made to certain provisions of that agency's policy on employee

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political activity. As to Mr. Hughey's running for office, according to a memorandum dated August 3, 2004, it was stated as follows:

Please note that while Mr. Hughey is not covered under the Hatch Act, several provisions of the agency's policy on Employee Political Activity (ADM-11.07) apply. Specifically, section 3.3 states that employees not disqualified under the Hatch Act may resign their position, request annual leave, or take leave without pay upon their filing for office. Once Mr. Hughey files for office, he must elect how his absence should be covered. Should he win election, I agree that there should be no conflict of interest upon his return to work.

I would note that section 3.3 also contains a provision that "[i]f in the judgment of the Agency Director, the employee's duties cannot be effectively handled, the employee may be required to resign or be terminated."

A prior opinion of this office dated March 18, 1998 dealt with a municipal ordinance that declared that "...no employee who offers for any elective public office shall remain an employee of the City...." The opinion stated that

There is overwhelming support for the proposition that the government has an appropriate and substantial interest in proscribing certain political activities by public employees. Naccarati v. Wilkins TP., PA, 846 F.Supp 405 (W.D.Pa 1993). The leading case on this subject is Broadrick v. Oklahoma, 413 U.S. 601 (1973). In this case, the United States Supreme Court upheld the constitutional validity of a Oklahoma statute which restricted partisan political conduct by state civil service employees. The Court held that a state could prohibit certain public employees from becoming "candidate[s] for nomination or election to any paid public office." *Id.* Many other courts have also upheld the validity of statutes and ordinances similar to...(the municipal ordinance)....In doing so, these courts recognized the important governmental interest in promoting efficiency and integrity in the discharge of official duties and in insulating public employees from political pressures so as to protect their individual rights. Magill v. Lynch, 560 F.2d 22 (1st Cir. 1977); Moses v. Town of Wytheville, Virginia et al., 959 F.Supp 334 (W.D.Va 1997); Naccarati v. Wilkins TP., PA, supra; Pennsylvania ex rel. Specter v. Moak, 307 A.2d 884 (1973).

It was also indicated that other prior opinions of this Office had addressed the validity of ordinances and policies similar to the referenced ordinance. In these opinions, this office concluded that such ordinances and policies which restricted employees from offering for election were valid based on the previously cited cases. See Ops. Atty. Gen. dated August 24, 1982 and September 27, 1979. The 1998 opinion concluded that if the referenced municipal ordinance was "...being offered to promote

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important governmental interests similar to the one discussed in the previously cited cases, it would most likely withstand a challenge to its constitutionality."

Another opinion of this office dated March 21, 1980 stated that

There is no statewide personnel rule, regulation or policy that prohibits employees of the State from offering for elective office. However, the agencies and departments of the State may promulgate, within certain constitutional parameters, their own rules, regulations and policies regulating the political activities of their employees.

Consistent with these prior opinions and the cases referenced above, it is my opinion that the policies of the Department of Corrections which have been determined to be applicable to Mr. Hughey's candidacy for county council are valid. Generally, an employer has the right to adopt reasonable policies vis-a-vis its employees. As long as a policy is generally fair and treats all employees in a similar position equally and without discriminatory affect, it will be upheld.

I would only further add that the State Ethics Act, S.C. Code Ann. §§ 8-13-100 et seq., prescribes rules of conduct for public employees and public officers. If Mr. Hughey has any questions in such regard, he should contact the State Ethics Commission as that agency is given the responsibility of interpreting its provisions.

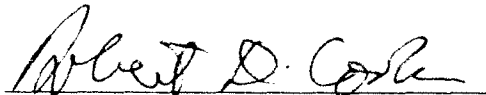
With kind regards, I am,

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General

cc: Mr. Paul W. Hughey, Jr.