



HENRY McMASTER
ATTORNEY GENERAL

March 12, 2010

Danny C. Crowe, Esquire
Town Attorney
Town of Cottageville
Turner Padgett Graham & Laney, P.A.
P.O. Box 1473
Columbia, South Carolina 29202

Dear Mr. Crowe:

We received your letter requesting an opinion of this Office concerning dual office holding. You asked "whether or not a person who is employed as a County correctional officer also can serve as a Town Council member." As noted in your request, several prior opinions of this Office have addressed the question of whether jailers and correctional officers are considered officers for purposes of dual office holding. This opinion will address those and other prior opinions regarding jailers and correctional officers, as well as prior opinions regarding town council members.

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, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." For this provision to be contravened, a person concurrently must hold two public 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). "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, 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).

On numerous occasions, we have opined that a position on a city or town council constitutes an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., June 11, 2008; May 9, 2006; May 21, 2004; June 27, 1997.

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We have also previously addressed the positions of jailer and correctional officer, opining that both positions would be considered offices for purposes of dual office holding. In an opinion dated January 17, 1985, we concluded that the warden of a county prison system exercises sovereign powers, and would most likely be an officer for purposes of dual office holding. We stated that “[a]ppointment of a county jailer, which the warden of the county prison system presumably would be, is provided for by Section 24-5-10 et seq., Code of Laws of South Carolina (1976).” Citing Section 24-5-10, we noted that a jailer “must ‘receive and safely keep in prison any person delivered or committed’ to prison.” We further noted that “[t]enure of the jailer is not specified” and “no provisions are made for an oath or qualifications.” However, we stated that “[c]are and custody of prisoners would be an exercise of a portion of the sovereign power of the State.” We also noted the provisions of Section 23-1-145, infra.

In an opinion of this Office dated June 3, 1987, we stated as follows:

[P]ursuant to Section 23-1-145, correctional officers at the local level are considered “peace officers.” Such provision specifically states:

(e)mployees of any county or municipal jail, prison, work camp or overnight lockup facility, while performing their officially assigned duties relating to the custody, control, transportation or recapture of any inmate or prisoner of this State, shall have the status of peace officers anywhere in the State in any matter relating to the custody, control, transportation or recapture of such inmate or prisoner.

In another opinion dated July 3, 1984, we concluded that a correctional officer at a state prison would hold an office for purposes of dual office holding. We analyzed that position as follows:

While no statute creates the position, a statute does permit the employment of such persons necessary for the conduct of the prison system. See, Section 24-1-110, Code of Laws of South Carolina (1976). A correctional officer receives a salary. His tenure is not specifically provided for, though the absence of this factor is not determinative. See, C.J.S. Officers § 8; Alvey v. Brigham, 286 Ky. 610, 150 S.W.2d 935 (1941). Although the powers and duties of a correctional officer are not specified generally, the South Carolina Code, in Section 24-1-280, does provide the following:

Employees of the South Carolina Department of Corrections, while performing their officially assigned duties relating to the custody, control, transportation or recapture of any inmate within the jurisdiction of the Department, or any inmate of any jail, penitentiary, prison, public work, chain gang, or overnight lockup of the State or any political subdivision thereof not within the jurisdiction of the Department, shall have

the status of peace officers anywhere in the State in any matter relating to the custody, control, transportation or recapture of such inmate [Emphasis added.]¹

We further analyzed the definition of a “peace officer” for purposes of dual office holding, stating as follows:

A ‘peace officer’ is generally defined as a ‘person designated by public authority to keep the peace and arrest persons guilty or suspected of crime.’ Vandiver v. Endicott, 215 Ga. 250, 190 S.E.2d 775, 777 (1959). Cf., Ferraro v. City School District of City of Schenectady, 69 Misc. 2d 800, 331 N.Y.S.2d 490 (1972) (a peace officer is an individual vested with some portion of the sovereign functions of government, to be exercised by him for the benefit of the public, such powers enduring at the pleasure of the creating power, whose tenure is not transient, occasional, or incidental).

Considering the general definition of a peace officer, the specific grant of power by Section 24-1-280 of the Code, and the correctional officer’s day-to-day duty of preserving law and order as well as enforcing the law within the correctional system, clearly a correctional officer has been delegated a portion of the sovereign power of the State.

Op. S.C. Atty Gen., July 3, 1984.

In an opinion dated April 28, 1999, we concluded that simultaneous service as the mayor of Blackville and as a correctional officer for the Department of Corrections violated the Constitutional provisions on dual office holding. We further explained what happens when a person holding an office subsequently assumes a second office:

When a dual office holding situation occurs, the law operates to automatically “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. However, the individual may continue to perform the duties of the previously held office as a

¹The language of S.C. Code Section 24-1-280 was subsequently updated and amended by 1999 Act No. 72 and 2003 Act No. 12, Section 3. The statute now includes employees of the South Carolina Department of Juvenile Justice or the Department of Mental Health whose assigned work location is one of the correctional facilities of the Department of Corrections or the Department of Juvenile Justice.

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de facto officer until a successor is duly selected to assume the duties or complete the term of office. Actions taken by a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove the de facto officer from office. Ops. Atty Gen. dated April 8, 1996 and July 13, 1995.

Conclusion

Consistent with our prior opinions, it is the opinion of this Office that simultaneously holding the positions of a county correctional officer and a member of town council would constitute dual office holding in contravention of Article XVII, Section 1A of the South Carolina Constitution. Each position has continuing duties involving an exercise of some portion of the sovereign power of the State. Moreover, the dual office holding provision would be violated even if each office were held in a separate jurisdiction. See, Op. S.C. Atty Gen., Feb. 4, 1994.

Sincerely,

Henry McMaster
Attorney General



By: Elizabeth H. Smith
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General