



HENRY MCMASTER
ATTORNEY GENERAL

August 19, 2009

Mary C. McCormac, Esquire
Mary C. McCormac Attorney At Law, LLC
Post Office Box 1535
Clemson, South Carolina 29633

Dear Ms. McCormac:

We understand you serve as the Town Attorney for the Town of Iva (the "Town") and wish to request an opinion of this Office on behalf of the Town concerning "whether a Town Council member may serve as a poll manager or clerk without offending State law or constitutional prohibitions against dual office holding." Specially, you state your questions as follows:

1. May a municipal Council member serve as a poll manager or clerk for municipal elections in which he or she is not a candidate?
2. May a municipal Council member serve as a poll manager or clerk for state, county, or municipal elections for other municipalities for elections in which he or she is not a candidate?
3. Would it make a difference if the municipal Council member declined to accept payment for his/her service as a poll manager or clerk?

Law/Analysis

Section 5-15-100 of the South Carolina Code (2004) gives municipal election commissions the authority to appoint poll managers. No other provision in the Municipal Code pertains to poll managers. Thus, we look to the provisions in title 7 generally governing all elections, including municipal elections. Section 7-13-72 of the South Carolina Code (Supp. 2008) addresses poll managers and provides that they are appointed by the appropriate commission of election. Moreover, this provision states that clerks are selected from among the managers for each polling place. Section 7-13-120 of the South Carolina Code (1976) specifically prohibits "a candidate or the spouse, parents, children, brothers or sisters of a candidate for public office to work as a manager or clerk of election at a polling place where such candidate's name appears on the ballot." However,

this provision does not specifically prohibit an elected official whose name does not appear on the ballot from serving as a poll manager or clerk.

Nonetheless, we believe that a member of a municipal council is prohibited from serving as a poll manager or clerk pursuant to article XVII, section 1A of the South Carolina Constitution (2009). Article XVII, section 1A of the South Carolina Constitution prohibits a person from holding “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.” To contravene this provisions, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position’s duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

Numerous opinions of this Office conclude that a member of a city or town council is considered an office holder for purposes of dual office holding. Ops. S.C. Atty. Gen., June 5, 2009; March 4, 2009; February 26, 2007; May 9, 2006; April 29, 2004. In addition, in several opinions, this Office concluded that poll managers hold offices for purposes of dual office holding. Ops. S.C. Atty. Gen., February 8, 1991; October 24, 1984; June 11, 1984; June 14, 1973. In two of these earlier opinions, we relied on the fact that poll managers must take an oath as the reason for concluding that they are in fact public officers. Ops. S.C. Atty. Gen., June 11, 1984; June 14, 1973. However, we noted numerous factors indicating that poll managers serve as officers in our October 25, 1984 opinion.

The position of poll manager is established by Section 7–13–70, Code of Laws of South Carolina (1976), and poll managers are appointed by county election commissioners. Section 7–13–70 also specifies an oath which must be taken, subscribed, and filed with the Clerk of Court in the appropriate county; the managers also take and sign an additional oath specified in Section 7–13–100 prior to opening the polls. By Section 7–13–140, poll managers are given police power to maintain order at the polls and to enforce obedience to their lawful commands. Poll managers receive a per diem of \$25.00. See Act No 512, Part I, § 13, 1984 Acts and Joint Resolutions. Clearly, a poll manager is a public officer.

Op. S.C. Atty. Gen. October 25, 1984.

While some of the statutes cited above have been renumbered and the per diem currently paid to poll managers has increased, we find no changes in the law relied upon in our previous opinion.

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Accordingly, we continue to opine that poll managers are office holders for purposes of dual office holding. Thus, to answer your questions, a member of a municipal council cannot serve as a poll manager in any election because by serving in both capacities, the municipal council member would be holding two offices at the same time in violation of article XVII section 1A of the Constitution.

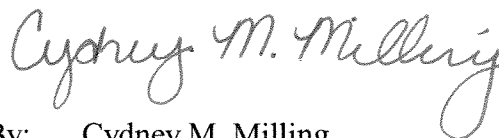
You also ask whether our opinion would change if the municipal councilmember declined payment for his or her service as a poll manager or clerk. While compensation is one factor considered when determining whether an individual holds an office, it is not the only factor. With regard to poll managers and clerks, as expressed in our previous opinions, we believe the fact that they must subscribe to an oath, are appointed as provided by statute, and they exercise a portion of the sovereign power of the State causes them to be considered an officer for purposes of dual office holding. Thus, we do not believe a poll manager's or clerk's decision to decline payment would remove them from being considered office holders. Therefore, declining payment would not allow them to serve as a poll manager or clerk when they are otherwise prohibited from serving due to the prohibition on dual office holding.

Conclusion

While we do not find any provisions in the law governing municipal and other elections indicating that a member of a municipal council cannot serve as a poll manager or clerk, we believe that such an individual would be prohibited from serving in both capacities due to the prohibition on dual office holding found in our State Constitution.

Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General