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The State of South Carolina

OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

August 28, 2003

The Honorable J. Roland Smith
House of Representatives, District 84
183 Edgar Street
Warrenville, South Carolina 29851

Dear Representative Smith:

You have requested an opinion from this Office concerning dual office holding. You have asked whether simultaneously holding the positions of "city judge and magistrate in another district that is not his or hers" would constitute dual office holding.

Law/Analysis

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).

This Office has advised on numerous occasions that both magistrates and municipal judges are office holders for purposes of dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated January 25, 1991; July 14, 1981; October 16, 1980; September 13, 1979. Therefore, as a general matter, a person who serves simultaneously as a municipal judge in one jurisdiction, and as a magistrate in another jurisdiction, would be in violation of the constitutional prohibition against dual office holding.

Notwithstanding this general rule, we have recognized in several prior opinions that there is a relevant statutory exception in Section 4-25-25 of the Code of Laws of South Carolina, 1976. Ops. S.C. Atty. Gen. dated January 25 1991; July 14, 1981; December 4, 1980. Section 4-25-25 of the Code of Laws reads, in relevant part:

> A municipality may contract with any other municipality in the county or the county governing body to employ the municipal judge of the other municipality or a magistrate to preside over its court.

Section 4-25-25 clearly specifies that a resident municipal judge or county magistrate may contract with another municipality within the same county to preside over that municipality's court, without being in violation of the constitutional prohibition against dual office holding. Because your request is somewhat general in nature, we are not certain that the situation with which you are concerned falls within the specific exception of Section 4-25-25. Accordingly, we advise that as a general matter, a person who serves simultaneously as a municipal judge in one jurisdiction, and a magistrate or municipal judge in a separate jurisdiction, would violate the constitutional prohibition against dual office holding. However, the dual office holding provision of the state constitution is not violated where the individual in question acts under the authority of Section 4-25-25 of the Code of Laws and presides over another municipal court within the same county solely on a contract basis. This Office has concluded on several occasions that "the mere assignment of additional duties to an already-existing office would not create a second office." Op. S.C. Atty. Gen., November 10, 1988. Thus, the specific situation which you reference must be guided by these general guidelines and the ultimate answer to your question will depend upon whether the particular magistrate is serving as municipal judge pursuant to contract in accord with § 4-25-25.

We would add that, depending upon which situation is applicable, if dual office holding 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).

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General