

7620 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 15, 2003

Ms. Bridget Ricks, Town Clerk
Town of Perry
147 Center Street
Perry, South Carolina 29137

Dear Ms. Ricks:

You have requested an opinion concerning dual office holding. As the Clerk of Court for the Town of Perry, you have inquired as to whether you may serve simultaneously as the Utility Clerk for the Town of Wagener without violating the constitutional prohibition on dual office holding. You have indicated that your duties as the Perry Clerk of Court include water billing, handling weekly deposits from the water department, keeping minutes for municipal proceedings, issuing business licenses, keeping town accounting and payroll records, administering the municipal traffic court, and complying with state recording requirements. You have also indicated that as the Utility Clerk for the Town of Wagener, your duties would include making a daily deposit for the water department and SCE&G, answering phone calls, waiting on customers, opening and closing water accounts, issuing water bills, and writing up service notifications for the Water Operator. You have specifically asked whether there would be any ethical or conflict of interest problems raised if you were to accept the Wagener job and thereby hold both of these positions simultaneously.

Law/Analysis

As a preliminary matter, we do not believe that part-time employment in two separate jurisdictions would create any apparent conflicts of interest. However, the question of whether any actual conflicts exist is one of fact that cannot be conclusively determined in an opinion of this Office, based upon the limited information provided. See Op. S.C. Atty. Gen. dated June 30, 2003. Regarding any violations of the State Ethics Act, we are aware of no statutory provision that would be violated by your employment with two separate municipalities. However, the General Assembly has enabled the State Ethics Commission to address the applicability of the State Ethics Act. S.C. Code Ann. §8-13-100, et seq. It appears that you have already sent a request for an advisory opinion to the Ethics Commission on this matter. If there are any potential problems with the State Ethics Act in regards to your situation, I am confident that the Ethics Commission will bring them to your attention. We will, therefore, limit our discussion to the applicability of the dual office holding provision of the South Carolina Constitution.

Ms. Ricks
Page 2
October 15, 2003

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 consistently opined that a municipal clerk of court (Town Clerk, City Clerk, or by whatever name called) holds an office for dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen., dated July 25, 2002; August 5, 1992; March 14, 1983; August 18, 1981. It does not appear that we reached this conclusion based on the specific duties of any particular municipal clerk of court. The determining factor in the conclusion that a municipal clerk of court is an office holder appears to be based rather upon the fact that the General Assembly has created and authorized such an office. Section 5-7-220, Code of Laws of South Carolina, 1976, authorizes the city council or city manager to appoint "an officer of the municipality who shall have the title of municipal clerk." That code section further prescribes the duties of the municipal clerk. This Office has held on numerous occasions that a position that is statutorily authorized by the General Assembly is an office for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen., dated April 21, 1998; January 7, 1991; July 13, 1981; March 6, 1980; August 28, 1974.

The question therefore turns to whether the position of Utility Clerk for the Town of Wagener would likewise be considered an office for dual office holding purposes. While this Office has not previously had an occasion to specifically address this question, we do not believe that a Utility Clerk would hold an office. First, we have previously opined that a municipality's "utilities director" would not hold an office for dual office holding purposes. Op. S.C. Atty. Gen., dated August 19, 2002 ("serving as Director of Utilities for the Town of West Columbia would not constitute an office, but would be employment")(copy enclosed). While the position with the Town of Wagener is titled "utility clerk," it would appear to this Office that the position is essentially that of the executive director for town's public utilities. We have consistently concluded that the position of executive director or director is an administrative position which is not an office. Ops. S.C. Atty. Gen. dated June 24, 1994; May 15, 1989. This position should be distinguished from an elected or appointed member of a municipal commission on public utilities, which we have concluded is an office holder. Ops. S.C. Atty. Gen., dated March 14, 1995 (copy enclosed) and April 12, 1993. Second, it does not appear that the aforementioned duties of Utility Clerk for the Town of Wagener demonstrate an exercise of any portion of the State's sovereign power. Sanders v. Belue. Therefore, we must conclude that the Utility Clerk for the Town of Wagener does not hold an Office for dual office holding purposes.

Ms. Ricks
Page 3
October 15, 2003

Based upon the foregoing authorities, we are of the opinion that the Clerk of Court for the Town of Perry may also be employed as the Utility Clerk for the Town of Wagener without violating the constitutional prohibition on dual office holding.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

Enclosures