

6852 Litwang



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

January 27, 2000

Debra J. Gammons, Esq.
402 Idlewild Avenue
Greenville, South Carolina 29605

Dear Ms. Gammons:

By your letter of January 14, 2000, you have asked the opinion of this Office on whether the dual office holding prohibitions of the State Constitution would be violated if an individual were to simultaneously serve as the Assistant City Attorney for Greenville and as a state senator.

As you know, Article XVII, Section 1A of the South Carolina Constitution states that "no person may hold two offices of honor or profit at the same time" with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine *whether a position is an office or not* depends upon a number of circumstances and *is not subject to any precise formula.*" (Emphasis added). The South Carolina Supreme Court, though, has held that 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). "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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee." Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other 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).

*Respectfully,
Charles M. Condon*

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Clearly, a state senator would hold an office for dual office holding purposes. *See*. Op. Atty. Gen. (February 24, 1970). Therefore, the question turns to whether the position of Assistant City Attorney for Greenville would likewise be considered an office. While I tend to concur with your conclusion that many of the traditional indicia of an office are lacking, as you can see from the enclosed opinions dated September 14, 1998 and June 11, 1993, the answer is not clear-cut. "Whether or not the position of city attorney is an office would depend on how the position is created and the duties prescribed. If the duties prescribed make the position an 'office' rather than mere employment, it would be violative of the dual office holding prohibitions for one individual to hold the office of city attorney and another office." Op. Atty. Gen. (September 14, 1998). While most of the duties described in your letter do not involve the exercise of sovereign power, I am concerned by your prosecution of criminal cases in municipal court. In an opinion dated February 22, 1982, Attorney General Daniel McLeod noted, "[w]hether one acts as a prosecutor in a case which is tried before a jury or whether one represents the State in receiving a plea of guilty, *undoubtedly there is an exercise of a portion of the sovereignty of the State....*" (Emphasis added). Accordingly, unless this particular duty can be reassigned to another attorney, I must advise that your position with the City of Greenville appears to be an office by virtue of the actual duties performed. Thus, while not entirely free from doubt, in my opinion the dual office holding prohibitions of the State Constitution would be violated if an individual were to simultaneously serve as the Assistant City Attorney for Greenville and as a state senator.

Again, thank you for your letter. I trust this information is responsive to your inquiry. This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Sincerely yours,



Zeb C. Williams, III
Deputy Attorney General

ZCW,III/an
Enclosures