



ALAN WILSON
ATTORNEY GENERAL

July 15, 2014

The Honorable Mike Fanning
Mayor Pro Tem
PO Box 413
Elloree, SC 29047

Dear Mr. Fanning:

This Office received your request for an opinion as to whether an individual can serve as Elloree's clerk of court if she currently serves as a neighboring municipality's clerk of court and associate municipal court judge.

LAW/ANALYSIS:

The South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention." S.C. Const. art. XVII § 1A.

The South Carolina Supreme Court explains that an "office" for dual office holding purposes is:

"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." Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). "In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that "[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public." Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). "The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority..." 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). "Other relevant considerations [as to whether a position is a public office] include: 'whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a

representative of the sovereign; among others.” See Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063) (quoting *State v. Crenshaw*, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

A municipal clerk of court is a public officer. In Op. S.C. Atty. Gen., September 12, 2003 (2003 WL 22172235), we determined:

[t]his Office has also consistently opined that a Municipal Clerk of Court (Town Clerk, City Clerk, 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 given 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 in 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.

Since a municipal clerk of court holds an office, an individual serving simultaneously as clerk of court for different municipalities would be in violation of the state constitution. It is irrelevant that each office would be held in a different jurisdiction. See Op. S.C. Atty. Gen., February 4, 1994 (1994 WL 84335); Op. S.C. Atty. Gen., May 29, 1986 (1986 WL 289799).

A municipal court judge is also an officer for dual office holding purposes. In a prior opinion, we opined:

[t]his Office has advised on numerous occasions that both clerks of court and municipal judges are office holders for purposes of dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen., July 25, 2002 (Town of Westminster Clerk of Court); August 5, 1992 (City of Pamlico Clerk of Court); March 14, 1983 (City of Cayce Clerk of Court); October 11, 2000 (part-time municipal judges are office holders); August 5, 2000 (Johnsonville City Judge); June 22, 1998 (Town of Hilton Head Associate Judge). More importantly, we specifically advised the Town of Summerville, in an opinion dated August 18, 1981, that a person who simultaneously serves as part-time municipal judge and clerk of the municipal court would clearly violate the dual office holding prohibition of the South Carolina Constitution. We are aware of no recently enacted law that would alter the August 18,

1981 opinion and, therefore, advise that an individual who holds both offices would be in violation of the state constitution.

Op. S.C. Atty. Gen., September 11, 2003 (2003 WL 22172234). Accordingly, it is our opinion that it would be dual office holding for an individual to serve as both clerk of court and judge, even if it is for different municipalities.

Based upon our prior opinions, an individual serving as Ellore's clerk of court as well as clerk of court and associate municipal court judge for another municipality would violate the constitutional prohibition against dual office holding.

If a violation against the constitutional prohibition against dual office holding does occur, the law resolves the situation as follows:

[w]hen a dual office holding situation 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).

Op. S.C. Atty. Gen., September 12, 2003 (2003 WL 22172235), supra.

CONCLUSION

In conclusion, this Office believes that an individual serving as Ellore's clerk of court as well as clerk of court and associate municipal court judge for another municipality would violate the constitutional prohibition against dual office holding.

The Honorable Mike Fanning
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Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General