

1984 WL 250017 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 10, 1984

\*1 The Honorable John W. Tucker, Jr.  
Member  
House of Representatives  
Anderson County Courthouse  
Anderson, South Carolina 29621

Dear Representative Tucker:

By your letter of November 21, 1984, you have inquired as to whether a person who has been elected to and has qualified for a seat in the General Assembly is now prohibited from serving as an administrative assist and and Director of the Pretrial Intervention Program of the Tenth Judicial Circuit. We would advise that we are aware of no such prohibition.

The first question which must be resolved is whether the situation to which you refer would constitute dual office holding under the South Carolina Constitution. See, Art. III, § 24; Art. XVII, § 1A. For the dual office holding provision to be contravened, a person concurrently must hold two public 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 tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 476, 266 S.E.2d 61 (1980).

Clearly, a legislator holds an office, as that term is contemplated by the dual office holding provisions. See, Op. Atty. Gen., July 21, 1978. Thus, it must be determined whether the position of administrative assistant and Director of the Pretrial Intervention Program would be that of an employee, for, on a number of occasions, this Office has stated that a member of the General Assembly may also hold a position of state or local employment, consistent with the dual office holding provisions of the Constitution. See, Ops. Atty. Gen., No. 2531, dated October 23, 1968; February 22, 1982; and July 21, 1978.

It is our understanding that the position of administrative assistant and Director of the Pretrial Intervention Program has not been created by statute, ordinance, or regulation.<sup>1</sup> Instead, the position is a county position for which no commission or oath is required. A salary is paid, one half coming from each of county and state funds. There is no specific terms of office, tenure being simply at the pleasure of the circuit solicitor.

In addition, as communicated to us, the duties of the position will be those of an employee rather than an officer because there appears to be little or no exercise of the sovereign power of the state in the holding of this position. For example, we understand that the administrative assistant and Director is responsible for preparation of the budget, policy development, and supervision of personnel. The circuit solicitor, rather than the Director, approves participants in the program and makes all of the discretionary decisions required by the statutes pertaining to pretrial intervention, Section 17-22-10, et seq. Based upon our examination of these duties, one exercising these duties would not hold an office; instead, as stated in Sanders v. Belue, 78 S.C. at 174:

\*2 . . . 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 business, is a mere employee.

Such a conclusion is consistent with a prior opinion of this Office, concluding that an executive director of a county commission is an employee rather than an officer. See 1975 Op. Atty. Gen., No. 4000, dated March 19, 1975. Furthermore, the conclusion

is consistent with a more recent opinion concluding that an administrative assistant to the President of Horry-Georgetown Technical College is a position of employment rather than an office. See, op. Atty. Gen., dated November 26, 1984. Thus, in our opinion, the situation you present does not violate the dual office holding provisions of the State Constitution.<sup>2</sup>

We have also examined your situation from the standpoint of whether there is any prohibition as to the employment of a legislator as a county employee when he is usually absent from his employment for three days per week during the legislative session. In an opinion of this Office dated March 11, 1976, this Office examined the question of a legislator concurrently receiving a salary as an elementary school principal and found no statutory prohibition. Likewise, in an opinion dated August 6, 1984, we found no statutory prohibition as to a member of the General Assembly serving as District Vocational Job Placement Coordinator with the Darlington County Schools. Similarly, in an opinion dated November 26, 1984, no such prohibition was found with regard to a legislator serving as administrative assistant to the President of Horry-Georgetown Tec. Similarly, in the situation you present, we can find no statute or other law prohibiting a legislator's employment with a circuit solicitor's office.

Because a portion of the funding for your position is derived from state funds, we have also examined a provision in Part I, Section 130 of the Appropriations Act, Act No. 512 of 1984. That Section provides in part:

Provided, Further, That no employee of any state department or institution shall be paid any compensation from any other department of the state government except with the approval of the State Budget and Control Board . . . (Emphasis added.)

However, State Personnel regulation, R-19-702.09(D)(1)(c) exempts employees of the General Assembly and of legislative committees from the dual compensation provision and we are informed that the State Personnel Division treats legislators themselves no differently from legislative or committee employees for purposes of this provision. Thus, it would appear that the dual compensation provision is inapplicable. For further information in this regard, you might wish to contact the State Personnel Division of the Budget and Control Board. We further understand that you will be employed on a part-time basis, receiving a salary reflective of part-time employment, while the legislature is in session.

\*3 We would also direct your attention to the State Ethics Act. The Act does not expressly prohibit the situation which you reference. However, we would advise that certain provision of the Ethics Act may be applicable to particular situations and should be adhered to. For example, [Section 8-13-410\(1\) of the CODE](#) provides that '[n]o public official or public employee shall use his official position or office to obtain financial gain for himself.' Section 8-13-460 provides for action to be taken by a legislator when his financial interest might be affected:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

(a) Prepare a written statement describing the matter requiring action or decision, and the nature of his potential conflict of interest with respect to such action or decision.

(b) If he is a legislator, he shall deliver a copy of such statement to the presiding officer of his legislative branch. The presiding officer if requested by the legislator shall cause such statement to be printed in the journal and, upon request, shall excuse a legislator from votes, deliberations, and other action on the matter on which a potential conflict exists; provided, however any statement delivered within twenty-four hours after the action or decisions shall be deemed to be in compliance with this section . . .

Moreover, pursuant to Section 8-13-440, a legislator would be prohibited from using or disclosing confidential information gained by him in the course of his official activities in a way that would result in financial gain for himself or any other person. Thus, while the act does not prohibit a legislator from receiving his salary as an administrative assistant and Director of the Pretrial Intervention Program of the Tenth Judicial Circuit, the guidelines of the Act must be followed by the legislator. See, Op. Atty. Gen., dated July 21, 1978; see also, Ops. Atty. Gen., dated February 7, 1984 and January 13, 1984.

In summary, this Office is aware of no legal prohibition with respect to a member of the General Assembly also serving as an administrative assistant and Pretrial Intervention Director of the Tenth Judicial Circuit. The actual terms and conditions of employment must be determined, however, by the solicitor and the employee. Finally, we would caution that the provisions of the Ethics Act must be followed.

Sincerely,

Patricia D. Petway  
Assistant Attorney General

Footnotes

- 1 The position of Pretrial Intervention Coordinator established by [Section 17-22-40, CODE OF LAWS OF SOUTH CAROLINA \(1983 Cum. Supp.\)](#), refers to the statewide coordinator of the program and not to the various circuit coordinators or directors.
- 2 In any event, the General Assembly must determine the qualifications of its own members. See, [Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 \(1940\)](#).

1984 WL 250017 (S.C.A.G.)

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.