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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 15, 2000

The Honorable Thomas E. Redmond
Mayor, City of Johnsonville
P.O. Box 455
Johnsonville, SC 29555

Re: Informal Opinion

Dear Mayor Redmond:

By your letter of August 4, 2000, you have asked whether a dual office holding situation would exist if an individual were to serve simultaneously as the Johnsonville City Administrator, Johnsonville Associate City Judge, and as a member of the Johnsonville School District 5 Board of Trustees.

Article XVII, Section 1A of the South Carolina 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, 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." 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." 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).

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According to the 2000 South Carolina Municipal Association Directory p. 58, the City of Johnsonville operates under the council form of government as provided for in S.C. Code Ann. §5-11-10 et seq. Section 5-11-40(a) of the Code states, "[t]he council may hire an administrator to assist the council." This Office, in an opinion dated October 18, 1988 (enclosed), observed that "[n]o duties, qualifications, oath, salary, or tenure are provided for by statute and thus are left to the discretion of ... Town Council. Because the Town Council is vested with all legislative and administrative powers needed to operate town government and the determination of policy is vested in council, it would appear that all of the sovereign power is most probably being exercised by council instead of the administrator." For this reason, we concluded that the position of town administrator as contemplated by §5-11-40 is "**most probably not an office** for dual office holding purposes." (Emphasis added.) Accordingly, it is my opinion that the position of Johnsonville City Administrator is most probably not an office for dual office holding purposes. *See also*, Op. Atty. Gen. dated October 13, 1992 (enclosed).

With respect to associate municipal court judges and school district trustees, however, this Office has previously determined that these individuals are officers for dual office holding purposes. *See, e.g., Op. Atty. Gen.* dated June 22, 1998; May 30, 1997; October 18, 1998; August 14, 1996; and October 5, 1993 (enclosed). Therefore, based upon the reasoning and conclusions of these earlier opinions, it is my opinion that a Johnsonville Associate City Court Judge may not simultaneously serve on the Johnsonville School District 5 Board of Trustees without contravening the dual office holding prohibitions of the State Constitution. I have also enclosed a prior opinion dated July 13, 1995 which discusses how dual office holding works and how the law operates to cure a dual office holding situation.

Finally, municipal court judges are subject to the Code of Judicial Conduct, as found in Rule 33 of the Supreme Court Rules. Due to the possible appearance of a conflict of interest by having a town employee and school trustee serving as an associate city judge, it might be prudent to obtain an advisory opinion on the ramifications of the Code of Judicial Conduct from the Advisory Committee on Standards of Judicial Conduct. You may contact the Committee by writing to the Commission on Judicial Conduct: 1015 Sumter Street; Calhoun Building, Room 111; Columbia, SC 29201.

I trust this information is responsive to your inquiry and that you will not hesitate to contact me if I can be of additional assistance. 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

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scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Zeb Williams".

Zeb C. Williams, III
Deputy Attorney General

ZCW/an

Enclosures