



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 19, 2001

George S. Glassmeyer, Assistant General Counsel
South Carolina Department of Public Safety
5400 Broad River Road
Columbia, South Carolina 29212-3540

Dear Mr. Glassmeyer,

By your letter of July 5, 2001, you have requested an opinion of this office concerning our State's Constitutional provision prohibiting dual office holding. You inform us that you are employed as an Attorney III, in a classified position, in the Office of General Counsel at the South Carolina Department of Public Safety. You note that your "primary duties are to provide legal instruction to law enforcement personnel at the South Carolina Criminal Justice Academy." On occasion, you have been "assigned to prosecute criminal cases in summary courts on behalf of the Highway Patrol." You now intend to seek candidacy for city council in the town of Irmo, South Carolina. You have asked if simultaneous service in your position with the Department of Public Safety and on city council would violate the Constitution's dual office holding prohibition.

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." 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

*Respectfully,
Charlie Condon*

George S. Glassmeyer, Assistant General Counsel
Page 2 of 2
July 19, 2001

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).

This Office has advised on numerous occasions that a member of a city or town council would be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, OPS. ATTY. GEN. Apr. 12, 1998; June 12, 1995; Feb. 4, 1994; July 23, 1993; July 24, 1991. Therefore, the question turns to whether the position as an Attorney III in the Office of General Counsel at the S.C. Department of Public Safety would likewise be considered an office.

The position as an attorney in the Office of General Counsel at the Department of Public Safety apparently has not been considered in terms of dual office holding previously. It must be noted that no statute creates the position, states qualifications, or specifies the duties of the holder of the position. Tenure is at will rather than for a specific term of years. The individual is paid a salary. Certain statutes specify the obligations of the Department of Public Safety, but these statutes do not specifically detail the duties of the individual in question. Generally, the individual appears to be an attorney for a public entity, in an attorney-client relationship, rather than an officer.

However, while your primary duty of providing legal instruction to law enforcement personnel does not appear to involve the exercise of sovereign power, I am concerned by your prosecution of criminal cases in summary 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...." See also OP. ATTY. GEN. Sept. 14, 1998. Accordingly, unless this particular duty can be reassigned to another attorney, I must advise that your position with the Department of Public Safety in the Office of General Counsel would constitute an office by virtue of the actual duties performed in prosecuting cases. Thus, in my opinion the dual office holding prohibitions of the State Constitution would be violated if an individual were to simultaneously serve in your position with your current duties and as a member of town council.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General