

The State of South Carolina



Office of the Attorney General

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June 11, 1993

The Honorable William J. Sebnick
Mayor, City of Lake City
Post Office Box 398
Lake City, South Carolina 29560

Dear Mayor Sebnick:

You have requested written confirmation of an oral opinion provided to you that an assistant solicitor may serve as an appointed city attorney without violating the dual office holding prohibitions of the state Constitution.

Article XVII, Section 1A of the state 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, member of a lawfully and regularly organized fire department, constable, or a notary public. For this 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. 475, 266 S.E.2d 61 (1980).

This Office has opined on several occasions that one who would serve as an assistant solicitor would hold an office for dual office holding purposes. See Ops. Attv. Gen. dated October 19, 1990; July 24, 1980; and August 18, 1980, for examples. Thus, the position of city attorney must be considered in the context of dual office holding to determine whether such a problem exists in this instance.

Opinions of this Office as to whether the position of city attorney would constitute an office, prior to the advent of home rule, reached different conclusions depending on how the position was created and what responsibilities were carried out. The Home Rule Act, Act No. 283 of 1975, contained a statute now codified as S.C. Code Ann. § 5-7-230

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which permitted a municipal council to elect or appoint a municipal attorney whose duties shall be as prescribed by law. Based solely on this statute, an opinion dated May 4, 1977 (and others issued since that time) concluded that a municipal attorney would be considered an office-holder. The opinion failed to consider a particular instance or ordinance and did not otherwise examine other criteria which are set forth in the second paragraph of this letter. We are of the view that the opinion of May 4, 1977 and its progeny must be modified to some extent.

Ordinance # 1991.002 adopted by the City Council of Lake City establishes the position of City Attorney for the City. A review of the ordinance reveals much latitude in the employment of an attorney. The attorney may be elected or retained. A written contract is to be entered into, with the scope of the work and fees to be paid, described therein. No specific term is specified; no oath is required by the ordinance. The attorney will advise the mayor and council, draft ordinances and instruments, represent city officials, and appear on behalf of the City in legal proceedings. The ordinance contemplates that more than one attorney may be retained; in this instance, we understand that the attorney in question will not prosecute criminal cases on behalf of the City,¹ that another attorney may be retained for that function.

The ordinance contains many terms which can lead to the conclusion that a city attorney retained thereunder might well be an independent contractor, when the ordinance is considered as a whole. In a number of places, references to the attorney "retained" or "employed" appear. Where, as is apparently the case here, the municipal attorney will represent the City in civil legal matters, on a part-time basis, while continuing his private legal practice, it appears that the individual is more an independent contractor than an office-holder.

Based on the foregoing and in confirmation of the oral opinion provided on May 27, we are of the opinion that the City of Lake City may retain by contract the individual in question (who is also an assistant solicitor) as legal counsel to advise City Council and represent the City in civil matters, on a part-time basis and concurrent with his private law practice, and further that as long as this individual is not prosecuting criminal cases on behalf of the City, he would be considered an independent contractor rather than an office holder in this instance. To the extent today's opinion is inconsistent

¹Prior opinions of this Office have apparently assumed that a municipal attorney would exercise all civil and criminal legal responsibilities on behalf of the municipality. That will apparently not be the case in Lake City. Thus, our prior opinions are distinguishable in this instance.

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with prior opinions, it is noted that those opinions are distinguishable and modified to the extent necessary to be consistent with the present opinion.

With kindest regards, I am

Sincerely,

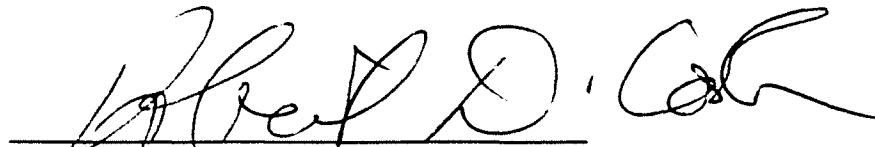
Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

cc: Ronnie A. Sabb, Esquire

REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook

Executive Assistant for Opinions