

The State of South Carolina



Office of the Attorney General

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June 21, 1993

Honorable DeWitt Williams
Member, House of Representatives
P. O. Box 297
St. Stephen, South Carolina 29479

Dear Representative Williams:

You have asked the opinion of this office whether it would be a conflict of interest for a person who is a deputy county auditor to continue in that position if elected mayor in a town mayor's race. You also inquire whether this would violate the dual office holding prohibition.

Pursuant to Article XVII, Section 1A of the South Carolina Constitution ". . . (n)o person may hold two offices of honor or profit at the same time . . . (except) an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." A public officer has been defined as:

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. . .

Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763 (1907). Other relevant indicia include whether statutes or other authority establish the position, prescribe its duties, tenure, salary, and bond or require oath or qualifications. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). Not all of these factors need to be present for the office to be considered an office for purposes of the dual office holding prohibition.

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This office has opined numerous times that an individual who serves as mayor of a municipality would hold an office for dual office holding purposes. See Op. Atty. Gen. dated September 21, 1989 and Opinions cited therein. This office has also concluded that the position of county auditor is a public office subject to the dual office holding prohibition. See Op. Atty. Gen. dated March 31, 1980. We have determined that an employee of the auditor's office is not a public office holder because the duties of an employee are ministerial only and do not involve the exercise of the sovereign power. Op. Atty. Gen. dated May 11, 1971. We have recognized, however, with regard to deputy coroners and deputy clerks of court that individuals in those deputy positions perform all the duties pertaining to the office, that there was no justification for differentiation and that the deputies were public office holders. See Op. Atty. Gen. dated December 29, 1981; September 2, 1983; and October 13, 1992. It should be noted that the positions of deputy coroner and deputy clerk of court are established by statute, require an oath of office and statutory authority sets forth the specific duties.

With regard to deputy county auditor, I have been unable to locate any statute which creates the position. South Carolina Code Anno. § 12-39-40 provides that where there is a chief clerk, the clerk shall discharge the duties and functions of the auditor in the event of vacancy by reason of death, resignation, or disqualification of the county auditor and until a successor is appointed. I have been advised that in Berkeley County the chief clerk is the deputy auditor. I have also been advised by the Berkeley County auditor that, in this instance, no county ordinance or other authority creates the position of deputy auditor, the deputy auditor is not required to take an oath, serves at the auditor's pleasure, performs all the duties and functions of the auditor, and receives a salary.

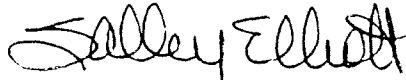
Because many of the indicia of a public office are lacking, the question of whether the Berkeley County deputy auditor would hold a public office for the purposes of the dual office holding prohibition is an extremely close one. It is the policy of this Office to resolve any doubt in favor of the position not falling within the dual office holding prohibition. Therefore, it is the opinion of this office that the position of Berkeley County deputy auditor would not constitute a public office for the purposes of Article XVII, Section 1A of the South Carolina Constitution.

As to your question concerning conflict of interest, I would refer you to the State Ethics Commission for a ruling under the Ethics Act.

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With kind regards, I am

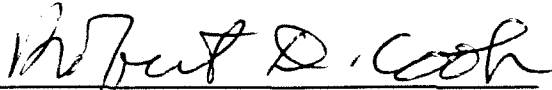
Sincerely,



Salley W. Elliott
Deputy Attorney General

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REVIEWED AND APPROVED BY:



Robert D. Cook
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