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# The State of South Carolina



## Office of the Attorney General

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February 2, 1994

The Honorable Thomas L. Moore  
Senator, District No. 25  
211 Gressette Building  
Columbia, South Carolina 29202

Dear Senator Moore:

By your letter of January 31, 1994, you have requested the opinion of this Office as to whether the position of Aiken County Attorney would constitute an office as contemplated by S.C. const. art. XVII, § 1A. The question arises because the Aiken County Legislative Delegation has selected the Aiken County Attorney to serve on the newly created Aiken County Transportation Committee.

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).

As you are aware, this Office concluded in an opinion dated July 28, 1993, that one who would serve on a county transportation committee would be considered an office holder for dual office holding purposes, though, as noted, the opinion was not free from doubt. Thus, it must be determined whether the position of Aiken County Attorney would constitute an office.

The Aiken County Code, in § 2-181, establishes "the office of county attorney, who shall be the chief legal officer of the county." The section continues: "The county attorney shall be an individual or law firm retained from the membership of the county bar by the county council and shall serve at its pleasure ... ." Duties and responsibilities

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of the county attorney are detailed in § 2-183, which duties include representing and defending the county and its officers; title work; bond work; enforcing collection and payment of claims existing in favor of the county; advising the county council, administrator, and department heads; and so forth. Section 2-184 provides for compensation in an amount determined by county council. No oath is provided for in the Aiken County Code, nor is a specific term provided for therein.

It is our understanding that rather than having designated a specific individual as Aiken County Attorney, Aiken County Council has retained a law firm in the county as its "county attorney." The individual whose appointment is being examined herein does much of the legal work for Aiken County and is commonly viewed as "the" County Attorney, though the law firm is actually retained and some of the legal work is handled by another attorney in the firm (and on occasion yet another attorney in the firm has also worked with the county). Because, as is permitted by § 2-181, the county council has retained a law firm rather than an individual, we are of the view that the attorney under discussion herein would not be viewed as an office holder. Clearly, a law firm could not be an office holder. Further, a contractual relationship does not create an office. 63A Am.Jur.2d Public Officers and Employees § 10. Thus, we would conclude that the attorney in question would not be considered an office holder for dual office holding purposes.

Based on the foregoing, an attorney who is a member of the law firm retained by Aiken County Council pursuant to Aiken County Code § 2-181, who is commonly referred to as "the" Aiken County Attorney, would not be considered an office holder for dual office holding purposes. Thus, that attorney could also serve on the Aiken County Transportation Committee without contravening the dual office holding proscriptions of the state Constitution.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions