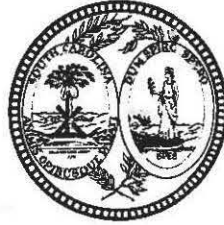


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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

October 23, 1996

The Honorable Robert W. Hayes, Jr.  
Senator, District No. 15  
P. O. Box 904  
Rock Hill, South Carolina 29731

Re: Informal Opinion

Dear Senator Hayes:

You have enclosed a copy of the Rock Hill Municipal Court's most recent reorganization adopted October 8, 1996 by a 4-3 vote of the City Council. You have submitted the following specific questions.

- I. Could you please critique this policy as to meeting all standards of the S.C. Unified Court System?
- II. Can the Court Administrator and the prosecutor be the same person?
- III. Should this be a city ordinance and placed in the City Code or just a policy as it is now?
- IV. Under the present policy the city manager contends the council can dismiss any court employee they employ for the 45% judicial functions they perform but he can keep them employed in another position within the court if he so wishes. True or False?

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### LAW / ANALYSIS

In an Informal Opinion to you, dated August 27, 1996, I attempted to set forth the responsibilities of city council and the city manager with respect to the municipal court system. I emphasized therein that the municipal court is part of this State's unified judicial system. Stressed in this letter was the fact that judicial officers were those who exercise "judicial" functions. I stated:

... in the context of the municipal court, the "judicial officers" are the municipal judges themselves, whether full-time or part-time, whose offices are created pursuant to the foregoing statutes, referenced above. Such municipal judges are, as stated, appointed by the City Council, and their terms, not to exceed four years, are set by Council.

Also noted in the Opinion was the fact that municipal recorders were "judicial officers" in that sense of the word because such recorders typically exercise a judicial function. Accordingly, the Informal Opinion emphasized that "[a]s is the municipal judge, the ministerial recorder is responsible to City Council in the sense of creation, appointment, reappointment, etc." Also noted in the Informal Opinion was the fact that "recorders are part of the unified judicial system."

The Informal Opinion also stated that

non-judicial support personnel would include all those persons who are not judges, defined above [municipal court judges and recorders] ... and who assist the court through support functions. In this regard, typically, one would be speaking of secretaries, process-servers, clerks, bailiffs, court administrator, stenographers, administrative personnel and other support staff. If these individuals are employed by the City and there is no specific statute authorizing their appointment or employment by Council or the Court itself (and here I know of no other statutes) ... it would be by my opinion, as stated in the August 13, Informal Opinion that such individuals would be employed by the City Manager pursuant to Section 5-13-90.

Of course, in an Opinion, this Office can provide only general legal analysis rather than a position-by-position "critique" of a city council's policy. I would strongly suggest

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that the municipal attorney be consulted in this regard and again, would suggest Court Administration as a useful resource. Again, only a court could review a particular position as to whether its creation conflicted with state law.

As a general matter however, I would stress to you that where the judiciary is involved, it is essential that the court maintain an appearance of independence. Our Supreme Court has emphasized that members of the judiciary should not be given executive functions as part of their duties as part of the unified judicial system. In State ex rel. McLeod v. Yonce, 274 S.C. 81, 261 S.E.2d 303 (1979), the Court struck down a statute which authorized the Chief Justice to appoint a circuit judge to preside over hearings of the Public Service Commission. The Court, while relying principally upon Art. I, § 8 of the South Carolina Constitution mandating that a separation of powers be maintained, the Court also noted that the statute was inconsistent with "several sections" of Article V which require a unified judicial system. The Court stated:

[o]ne of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws. There can be no doubt but that a circuit judge is a powerful member and an important voice within the judicial department. There can be no doubt but that the Public Service Commission is an important arm of the executive branch of government. It deals in matters involving millions of dollars on a regular basis.

In determining whether the use of a circuit judge as presiding officer of the Public Service Commission is constitutionally proscribed, we take judicial notice of the fact that the presiding officer of any committee, board or [274 SC 85] commission, can have and does have a tremendous potential for influencing the result of matters being considered. Rulings, of necessity, involve many discretionary matters of importance. While we recognize the desirability of having a person knowledgeable in evidentiary law presiding over hearings which involve many millions of dollars, we think the same may be accomplished by the legislature by requiring that

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the presiding officer have those qualifications normally possessed by a circuit judge. In like fashion, we recognize the desirability of giving to the presiding officer, as does § 2, "... authority to control the proceedings and the conduct of participants therein as [the circuit judge] would have in proceedings being heard in the circuit courts of the State." This, too, can be accomplished by legislative enactment.

Although it is generally recognized that the constitutional requirement of separation of powers does not apply to local political subdivisions, see, City of Greenville v. Pridmore, 86 S.C. 42, 68 S.E. 636 (1910), as stated, the requirements of Article V do apply to municipal courts. Yonce certainly suggest that the unified judicial system requires that the judiciary should perform only judicial functions and that executive functions should not be intermingled with judicial.

I note that the policy you have submitted divides judicial functions from administrative functions with respect to associate recorders. Particularly, the policy states that "[a]s a regular employee ... Associate Recorders will report to the Court Administrator/Solicitor." This mixing of judicial and executive functions could present an appearance of a conflict.

You specifically ask whether the "Court Administrator and the prosecutor [can] be the same person." As we recognized in an opinion of January 25, 1995,

[c]learly the prosecutor must, at all times avoid the appearance or reality of a conflict of interest. State v. Capps, 276 S.C. 59, 275 S.E.2d 872 (1981).

Moreover, it has been stated elsewhere that

[t]he need to keep the prosecutorial function separate from the judicial function is obvious if we are to have an impartial judiciary.

In re Pending Cases, Augusta Jud. Dist., 234 Ga. 264, 215 S.E.2d 473, 476 (1973) [dissenting opinion]. Another authority has recognized that a court "must not violate the basic principle that in our system of justice the judicial and prosecutorial functions are separate and distinct and are not to be merged." U.S. v. Jacquillon, 469 F.2d 380, 387 (5th Cir. 1972). The same principle requiring separation is applicable to court employees who must "maintain a disinterested attitude." 21 C.J.S., Courts, § 107.

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This Office cannot tell City Council how its municipal court system must be structured. I can only comment generally that when the court administrator is the same person as the prosecutor, such will subject the municipal court to legal attack and is inconsistent with the principle of judicial and prosecutorial independence. Likewise, where an associate recorder is answerable to an individual who performs prosecutorial functions, a challenge is likely. As a general rule, prosecutorial functions should be kept completely separate from judicial functions and should be performed by different persons, not the same person.

With respect to your question regarding whether the municipal court structure should be adopted by ordinance, of course, this is preferable. An ordinance involves the required number of readings and has the force of law.

With respect to your last question, again, the judicial functions and other functions should be kept separate and should not be performed by the same individuals to avoid the appearance of impropriety.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions 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 am

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/ph