



Office of the Attorney General

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January 7, 1991

Mr. T. C. McCain
Edgefield County Administrator
Post Office Box 663
Edgefield, South Carolina 29824

Dear Mr. McCain:

By your letter of January 2, 1991, you have asked for the opinion of this Office as to whether an individual could serve simultaneously as the Edgefield County Attorney and as the county's Public Defender 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 previously that one who serves as a public defender is not deemed to be an office holder. See, for example, Ops. Atty. Gen. dated June 1, 1987 and July 9, 1986, copies of which are enclosed.

Additionally, this Office has advised on various occasions that a county attorney might or might not be an office holder. See, for example, Ops. Atty. Gen. dated November 20, 1989 (Marion County Attorney is not an office holder); November 10, 1988 (Richland County Attorney is an office holder); July 13, 1981 (Horry County Attorney is not an office holder); and numerous others. The

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distinction in results is explained in an opinion of this Office dated March 6, 1980:

Whether or not a county attorney is an office would depend upon how the office itself is created. If the position is created by state statute or county ordinance and the duties of the position make it an "office" rather than mere employment, it would be violative of the dual office prohibitions of the State Constitution for one individual to hold the office of county attorney and another office. Opinion to James I. Redfearn, Esquire, dated August 28, 1974.

We have no information before us to evaluate whether the Edgefield County Attorney might hold an office. However, it is unnecessary to reach that issue since, as Public Defender, the individual is not considered an office holder.

The only remaining considerations would be those ethical in nature. As county attorney he might be in a position to advise law enforcement officials about a criminal case or investigation which might result in an individual being arrested or charged or indicted who would require the services of the public defender, for one example. You or the affected attorney may wish to consult the South Carolina Bar's Ethics Advisory Committee to resolve any potential ethical issues.

In conclusion, there would be no dual office holding problem if an individual were to serve simultaneously as Edgefield County Attorney and as the county's Public Defender. No comment is made as to potential ethical problems, but we do respectfully suggest that the Bar's Ethics Advisory Committee be consulted in that regard.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions