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The State of South Carolina



Office of the Attorney General

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December 29, 1992

Mr. Duffie Stone, Director
Sentencing Guidelines Commission
Post Office Box 11643
Columbia, South Carolina 29211

Dear Mr. Stone:

By your letter of December 21, 1992, you have asked whether your serving as Director of the Sentencing Guidelines Commission and simultaneously acting as a prosecutor to prosecute animal abuse cases would be permissible. In particular, you were concerned about dual office holding prohibitions.

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).

The Sentencing Guidelines Commission is an arm or agency of state government established by the General Assembly in 1989. See S.C. Code Ann. § 24-26-10 et seq. (1991 Cum. Supp.). The commission is empowered by § 24-26-20(7) to

employ a staff director and other professional and clerical personnel upon the appropriation of sufficient funds by the

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General Assembly. The duties of the staff director and the other personnel of the commission must be set by the commission.

No statute specifies qualifications to be met by the director or establishes duties or responsibilities of the director. You did not take an oath prior to assuming your duties as director; you do not serve for a term of years but rather at the will of the commission. You do receive a salary as compensation. Your duties include various tasks as assigned by the commission; handling the commission's budget; supervising staff; providing information on the guidelines to organizations within the criminal justice system; perhaps testifying before legislative committees or subcommittees when the guidelines are presented to the legislature for its approval; training different groups as to the sentencing guidelines; research; and so forth.¹ Considering all of the foregoing, you, as Director, would most likely be considered an employee rather than a public officer.

As a special prosecutor, you would assist the Humane Society in prosecuting an animal abuse case in magistrate's court; you advise that you would not be paid for this work. Clearly, prosecuting a criminal case involves the exercise of a portion of the sovereign power of the State. This Office has concluded that an assistant solicitor would be considered an office-holder (opinion dated October 19, 1990), as would a solicitor (opinion dated March 15, 1965). We also advised that one who would serve as a specially deputized solicitor on occasional or intermittent bases would be considered an office holder (opinion dated February 22, 1982). We see no reason to treat a special prosecutor, as you describe it, any differently.

While a special prosecutor would most probably be an office holder, your employment as Director of the Sentencing Guidelines Commission would likely not be considered an office; thus, dual office holding would likely not be a problem. You should consult the commission for its views as to the permissible activities of its Director; you may wish to consult the Supreme Court and/or the South Carolina Bar's Ethics Advisory Committee to cover all possible ethical or other considerations.

¹The commission establishes what it considers to be appropriate advisory guidelines, by § 24-26-20. The guidelines must be approved by joint resolution of the legislature, by § 24-26-40.

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With kindest regards, I am

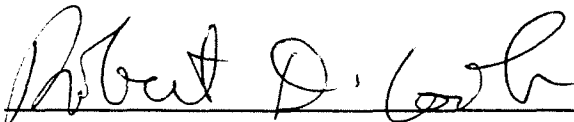
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



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