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The State of South Carolina



Office of the Attorney General

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October 18, 1988

The Honorable Elias S. Mack, Jr.
Mayor, Town of Lexington
Post Office Box 397
Lexington, South Carolina 29072

Dear Mayor Mack:

By your letter of September 30, 1988, you have inquired as to whether the appointment of the Lexington Town Administrator as the Municipal Judge would be violative of the dual office holding prohibitions of the State Constitution.

Article XVII, Section 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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 municipal judge holds an office for dual office holding purposes. See Op. Atty. Gen. No. 84-11 dated February 1, 1984 (copy enclosed).

The Town of Lexington operates under the council form of municipal government, which is provided for in Section 5-11-10 et seq., Code of Laws of South Carolina (1976). Section 5-11-40 of the Code, in subsection (a) provides that "[t]he council may hire an administrator to assist the council." No duties, qualifications, oath, salary, or tenure are provided for by statute and thus are left to

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the discretion of Lexington Town Council. Because the Town Council is vested with all legislative and administrative powers needed to operate town government and the determination of policy is vested in council, it would appear that all of the sovereign power is most probably being exercised by council instead of the administrator. Thus, it must be concluded that the administrator contemplated by Section 5-11-40(a) of the Code is most probably not an officer for dual office holding purposes.

Thus, it is our opinion that one who would serve concurrently as municipal judge and as Lexington Town Administrator would most probably not contravene the dual office holding prohibitions of the State Constitution.

A cautionary note is in order. A municipal judge would be subject to the Code of Judicial Conduct, as found in Rule 33 of the Supreme Court Rules. Due to the possible appearance of a conflict of interest by having a town employee also serve as municipal judge, it might be prudent to obtain an advisory opinion on the ramifications of the Code of Judicial Conduct from the Advisory Committee on Standards of Judicial Conduct. The committee is chaired by the Honorable C. Victor Pyle, Jr., whose address is 312 County Courthouse, Greenville, South Carolina 29601.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS