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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

May 21, 2004

The Honorable Brenda Bessinger  
Mayor, Town of Olar  
Post Office Box 183  
Olar, South Carolina 29843

Dear Mayor Bessinger:

You have requested an advisory opinion from this Office concerning dual office holding. Your request indicates that a maintenance worker for the town of Olar was recently elected to the Olar Town Council. You have inquired as to whether such service would constitute dual office holding. You further indicate that it is the understanding of the Council that the aforementioned council member would not vote on the town budget or anything which would affect his pay.

Law/Analysis

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 notary public. For this provision to be contravened, a person concurrently must hold two 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). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." 78 S.C. at 174.

This Office has advised on numerous occasions that a member of a city or town council would be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated November 7, 2003; July 19, 2001; Apr. 12, 1998; June 12, 1995; Feb. 4, 1994. Conversely, a town maintenance worker would certainly be considered a "mere employee," not an office holder, under the test articulated in Sanders v. Belue. Accordingly, it is the opinion of this Office that a town maintenance man serving on town council would not violate the constitutional provisions on dual office holding.

While there is no dual office holding violation presented by the situation you have described, such dual service would directly violate Section 5-7-180 of the South Carolina Code of Laws, which provides:

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Except where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected.

Section 5-7-180 (copy enclosed) is, in part, designed to address the common law principle that one cannot be both master and servant at the same time. See Ops. S.C. Attn. Gen. dated June 12, 1995; May 24, 1995. As a general matter, all public officials are expected to act in the best interest of the public in the performance of their duties without any interference from conflicting or competing interest. Our Supreme Court has recognized that "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public." O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). Public employees must be above reproach and avoid even the appearance of a conflict of interest in carrying out their duties. See Op. S.C. Atty. Gen. dated July 25, 2002.

More specifically, conflicts of interest inherent in the master-servant relationship have been summarized by this Office as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.

Op. S.C. Atty. Gen. dated January 19, 1994. In McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), our Supreme Court stated that "[n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and as servant, he would be inclined to demand too much of himself, as master ... [t]here would be constant conflict between self-interest and integrity." When such a master-servant conflict exists, a public official cannot continue to fill both roles. Op. S.C. Atty. Gen. dated April 3, 2003.

A master-servant conflict would exist where an employee of the town also serves as a member of town council, even if, as you have indicated, that the council member in question does not vote on the budget or any issue affecting direct compensation for his employment. There are a wide range of other matters related to town employees dealt with by the town council on a regular basis that would inevitably result in the type of conflict described in McMahan v. Jones, *supra*, where "self-interest and integrity" frequently compete. Examples which immediately come to mind are the setting of policies and duties for town employees, as well as considering contracts for the municipality that may be either beneficial or detrimental to the councilmember's status as a town employee. As to the clause Section 5-7-180 as to "[e]xcept where authorized by law," I am not

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aware of any such exception having been created by the General Assembly or the courts of this State which would permit such service as you propose. Certainly this Office is without authority in an opinion to create such an exception.

Based on the forgoing authorities, this Office advises that a maintenance worker for the Town of Olar, as a mere employee, would not violate the constitutional provisions on dual office holding if elected to the Olar Town Council. However, such dual service would likely be deemed by a court to violate Section 5-7-180 of the South Carolina Code, as well as the common law master-servant principles upon which the statute is based. Accordingly, this Office must advise that such dual service is impermissible under South Carolina law.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Cook', with a stylized flourish extending to the right.

Robert D. Cook

Assistant Deputy Attorney General