

Good Liberty



HENRY McMASTER  
ATTORNEY GENERAL

January 25, 2006

The Honorable Glenn G. Reese  
Senator, District No. 11  
P.O. Box 142  
Columbia, South Carolina 29202

Dear Senator Reese:

In a letter to this office you questioned whether an individual employed by the Department of Juvenile Justice as the Deputy Director of Community Services may simultaneously serve as a part-time magistrate. In your letter, you stated that this individual's duties at the Department of Juvenile Justice are administrative and that he oversees employees but has no direct supervision over juveniles. You further indicated that he had not taken an oath of office when he assumed this position.

Article XVII, Section 1A of the South Carolina 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, a member of a lawfully and regularly organized fire department, a constable, and a 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). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its 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). Furthermore, "one 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." Sanders, supra, 78 S.C. at 174.

This Office has advised on numerous occasions that an individual who serves as a magistrate would hold an office for dual office holding purposes. See, Ops. S.C. Atty. Gen., January 29, 1998; February 20, 1980; September 23, 1980. Moreover, we have also indicated

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that one who holds a part-time magistrate's position holds an office for dual office holding purposes. See, Ops. Atty. Gen. dated July 23, 1987; June 19, 1987.

Regarding the position of Deputy Director of Community Services for the Department of Juvenile Justice, in the past this Office has reviewed other positions held at the Department of Juvenile Justice. For instance, we have advised that a Community Specialist IV for the Department of Juvenile Justice held an office for dual office holding purposes noting that many of the duties of that position are similar to those of a probation officer, an officer for dual office holding purposes. See, Op. S.C. Atty. Gen., April 2, 1998. Alternatively, we have also advised that a County Office Manager 1 for the Department of Juvenile Justice did not hold an office for dual office holding purposes. See, Op. S.C. Atty. Gen., March 2, 2000. In each of these opinions we undertook a detailed examination of the duties of each position prior to issuing the opinion. Accordingly, it will be necessary to examine the duties of the position set forth in your letter in order to properly make a determination as to whether such duties involve the exercise of a portion of this State's sovereign power.

In your letter, you stated that the position is administrative in nature and that the individual holding that position oversees employees but has no direct supervision over juveniles. You further indicated that no oath of office was taken by the individual prior to assuming the position. Additionally, following a telephone conversation, the following information was faxed to this office further describing the duties of the position of Deputy Director of Community Services:

SC Department of Juvenile Justice; Responsible for almost 800 staff members statewide while managing a \$50 million dollar budget. Charged with supervising treatment programs that serve almost 30,000 juveniles annually by providing intake, probation and parole, detention, evaluation and assessments, prevention, alternative placement, education, health care and adjudication assistance. Also work closely with victims, family court judges, solicitors, legislators, state agency officials, law enforcement officials, and county administrators using the balance and restorative justice model.

In my opinion, based upon the criteria referenced above, the position of Deputy Director of Community Services at the Department of Juvenile Justice is not an office for dual office holding purposes. Instead, such position appears to be that of an employee in that none of the duties, qualifications, salary or the position itself are prescribed by statute. As you indicated, no oath is required and the job description does not appear to invoke any portion of the sovereign power of the state. Accordingly, in my opinion, there would not be a violation of the dual office holding prohibition of the State Constitution for an individual to serve simultaneously as the Deputy

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Director of Community Services for the Department of Juvenile Justice and as a part-time Magistrate.

While there is no apparent dual office holding problem, there remains the issue of a possible conflict of interest as to an individual holding both a position as Deputy Director of Community Services at the Department of Juvenile Justice and as a magistrate. The State Supreme Court in its decision in O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184, 193 (1945) observed that "(e)very 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 irregularities, and to act primarily for the benefit of the public." A magistrate is, of course, a judicial officer, a member of this State's unified judicial system. Article V, Section 1 of the State Constitution.

In a prior opinion of this office dated September 11, 2003 the question was raised as to whether an individual could serve both as a municipal judge and as a municipal clerk for the police department. That opinion cited a prior opinion of this office dated July 25, 2002 which dealt with the question of whether a clerk of court for a particular town could also serve as a victim's advocate for that same town. In that opinion it was concluded that the individual should not serve in such dual capacity stating that

(i)n this case, there would be at least the appearance of a conflict of interest in acting as Municipal Court Clerk and also serving as Victims' Advocate...A clerk of court, when performing the duties of clerk, is an arm of the court itself...The municipal court is part of the unified judicial system created by Article V of the State Constitution...The court is constitutionally required to remain "neutral and detached" in the performance of its exclusively criminal functions, such as the issuance of warrants...While the Clerk of the Municipal Court may not be a "judicial officer" in the technical sense inasmuch as the Clerk is answerable to the City Administrator,...still the Clerk, as an arm of the Municipal Court, must maintain the appearance of neutrality. Where the Clerk of Court..., whose duties relate almost exclusively to the administration of the municipal court, also performs the duties of the Victims' Advocate, it could be alleged that an inherent conflict of interest exists in such a relationship. A municipal court possesses only criminal jurisdiction. Clearly, the Victims' Advocate for the Town would serve victims of crime coming before a municipal court whose clerk is one and the same individual. In such instance, even if there is not an actual conflict, there is the appearance of a conflict. Accordingly, I would advise against the same individual performing both functions.

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In the September, 2003 opinion it was similarly concluded that the same reasoning set forth in the referenced 2002 opinion would apply to a municipal judge serving as a municipal clerk for the police court. It was stated that "(t)his is the case particularly where the municipal judge is performing other duties as town employee related to law enforcement - particularly police clerk - which may well present the situation of an actual conflict with her duties as a municipal judge." That opinion also cited a prior opinion of this office dated October 18, 1988 where this office had advised against a town administrator holding the position as a municipal judge. The September, 2003 opinion concluded that it would be a conflict of interest for a town employee serving as a clerk for the police department to also serve as a municipal judge. It was noted that some of the duties of a police clerk touched on or were related to law enforcement and "(a) municipal judge must maintain the appearance of being neutral and detached." The opinion stated that such neutrality could be compromised in appearance or in fact when one individual would serve in both of the referenced positions.

In the situation addressed in your letter which questions whether an individual employed by the Department of Juvenile Justice as the Deputy Director of Community Services could also serving simultaneously as a part-time magistrate, in my opinion there is likewise the appearance of a possible conflict of interest where one individual would serve in both capacities. While that individual has no direct supervision over juveniles it was indicated that the individual supervises "...treatment programs that serve almost 30,000 juveniles annually by providing intake, probation and parole, detention, evaluation and assessments, prevention, alternative placement, education, health care and adjudication assistance." It was also stated that the individual "...works closely with victims, family court judges, solicitors, legislators, state agency officials, law enforcement officials, and county administrators using the balance and restorative justice model." Pursuant to S.C. Code Ann. § 20-7-410,

(t)he magistrate courts...of this State have concurrent jurisdiction with the family courts for the trial of persons under seventeen years of age charged with traffic violations or violations of the provisions of Title 50 relating to fish, game, and watercraft when these courts have jurisdiction of the offense if committed by an adult.

Therefore, a magistrate has jurisdiction over certain juvenile offenses. For an individual who as a magistrate would have jurisdiction over juveniles to also supervise treatment programs that serve juveniles at the Department of Juvenile Justice and work with the individuals referenced above could in my opinion create a possible conflict of interest. As stated above, a magistrate must maintain the appearance of being neutral and detached. In particular, having an interest in treatment programs affecting juveniles could possibly impact on the service of an individual as a

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magistrate where that individual could also sentence a juvenile. As a result, I would advise against an individual serving in both capacities.

If there are any questions, please advise.

Sincerely,



Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General