



HENRY McMASTER
ATTORNEY GENERAL

September 1, 2009

The Honorable Shane Martin
Senator, District No. 13
2741 Glenn Springs Road
Spartanburg, South Carolina 29302

Dear Senator Martin:

We received your letter requesting an opinion of this Office. In your letter, you asked whether an individual may serve simultaneously as a State constable and a part-time county magistrate. You included several pages of information concerning the issues of dual office holding and the separation of powers as it pertains to serving in both capacities.

Law/Analysis

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, but any person holding another office may at the same time be 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). “One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Id., 58 S.E. 762, 763. 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).

In numerous prior opinions, we have concluded that a magistrate holds an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., September 18, 1997; July 8, 1991; September 23, 1980. We have further opined that the dual office holding prohibition applies to part-time magistrates. Ops. S.C. Atty. Gen., January 25, 2006; June 19, 1987.

In other prior opinions, we have addressed the issue of dual office holding as it relates to the position of a State constable. In an opinion dated December 15, 2003, we noted that, in addition to the specific exemption for constables found in Article XVII, Section 1A of the South Carolina Constitution, S.C. Code Ann. Section 8-1-130 provides as follows:

Any member of a lawfully and regularly organized fire department, county veterans affairs officer, constable, or municipal judge serving as attorney for another city is not considered to be a dual officeholder, by virtue of serving in that capacity, for the purposes of the Constitution of this State. (Emphasis added.)

Thus, as we stated in that opinion, “this Office has...determined that Article XVII, Section 1A and Section 8-1-30 of the Code specifically excludes holders of a constable’s commission from considerations of dual office holding for purposes of the State Constitution.” Op. S.C. Atty. Gen., December 15, 2003. In that opinion, we concluded that the State constitutional provisions on dual office holding would not be contravened where a municipal judge accepted a State constable’s commission. Id.

However, as noted in the attachment to your letter, the question of whether a judge may hold a constable’s commission involves legal principles in addition to the dual office holding analysis. The most significant issue is the possible conflict of interest that may arise. We discussed that issue in a prior opinion dated January 25, 2006. In that opinion, we addressed the question of whether an individual employed by the Department of Juvenile Justice as the Deputy Director of Community Services could serve simultaneously as a part-time magistrate. Op. S.C. Atty. Gen., January 25, 2006. Although we found that holding both positions would probably not violate the dual office holding provision, we found that “there is...the appearance of a possible conflict of interest where one individual would serve in both capacities.” We cited the South Carolina Supreme Court decision in O’Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184, 193 (1945), in which the Court observed as follows: “[e]very public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in such manner as to be above suspicion of irregularities, and to act primarily for the benefit of the public.” We noted that “[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.” Op. S.C. Atty. Gen., January 25, 2006. After analyzing both the duties of the position at the Department of Juvenile Justice, and the jurisdiction of a magistrate over certain juvenile offenses, we concluded that serving in both capacities could create a possible conflict of interest, stating as follows:

[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 magistrate where that individual could

also sentence a juvenile. As a result, I would advise against an individual serving in both capacities. Id.

In another prior opinion, we addressed the question of whether a municipal judge could simultaneously serve as a clerk of court and “police clerk.” Op. S.C. Atty. Gen., September 11, 2003. Citing an earlier opinion dated July 25, 2002, in which we advised that a municipal clerk of court should not serve simultaneously as the victim’s advocate for the town, we stated as follows:

The same reasoning would apply with greater force to the municipal judge than even the Clerk of the Municipal Court. This is the case particularly where the municipal judge is performing other duties as a 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.

Therefore, we concluded as follows:

[I]t presents a conflict of interest or, at the very least, the appearance of a conflict, for a town employee also to serve as a Municipal Judge. This is particularly true where, as here, at least some of the duties involved as a Town employee touch upon or relate to law enforcement. Serving as clerk for the police department could well present a clear conflict of interest to one’s duties as a municipal judge. A municipal judge must maintain the appearance of being neutral and detached. Such neutrality may well be compromised (in appearance or fact) when a town employee is also municipal judge and certain of the employee’s duties involve serving as a clerk for the police department. (Emphasis added.)

A similar issue arises in the scenario presented in your letter, where a part-time magistrate, who is a public officer and member of the State’s unified judicial system, and who must “maintain the appearance of being neutral and detached,” would simultaneously have duties as a State constable that “relate to law enforcement.” In an opinion of this Office dated January 12, 2009, we discussed the law enforcement authority of a State constable, noting the authority conferred by S.C. Code Ann. Section 23-1-60, which provides as follows:

The Governor may, at his discretion, appoint additional deputies, constables, security guards, and detectives as he deems necessary to assist in the detection of crime and the enforcement of the criminal laws of this State.

We also reviewed our prior opinions that cited case law dealing with the law enforcement authority of State constables:

A prior opinion of this office dated January 29, 1996 determined that “[a] constable is empowered to enforce any state statute.” In an opinion dated January 25, 1996, this office, citing the decision of the State Supreme Court in State v. Luster, 178 S.C. 199, 182 S.E. 427 (1935) determined that “...state constables possess the authority of regularly commissioned peace officers, including the power of arrest.” That opinion, citing the decision in State v. Franklin, 80 S.C. 332, 338, 60 S.E. 953, 955 (1908), noted that “[o]ur Supreme Court has stated that constables perform all the duties of law enforcement officers and in particular ‘a constable stands on the same footing as a sheriff.’”

Op. S.C. Atty. Gen., January 12, 2009.

Therefore, consistent with our prior opinions, we advise against serving simultaneously as a State constable and a part-time magistrate, since doing so would present at least the appearance of a conflict of interest, if not an actual conflict.

As you noted in the attachment to your letter, the question of whether a part-time magistrate may also hold a constable’s commission also raises the issue of the separation of powers. In a prior opinion dated July 18, 1972, we addressed the issue of whether magistrates are empowered to carry out law enforcement duties as peace officers, stating as follows:

[B]oth Federal and State Constitutions require strict separation of powers of the three branches of government— executive, legislative, and judicial. Our court system is the judicial branch, of course, and magistrates are judges within that system. Law enforcement officers are in the executive branch and, therefore, may not perform judicial functions. By the same reasoning, magistrates and other judges are members of the judiciary, and may not act as executive officers. Basic constitutional provisions, then, prohibit magistrates from being law enforcement officers—because the latter are members of the executive branch. Op. S.C. Atty. Gen., July 18, 1972.

Therefore, taking into consideration not only the principle of the separation of powers (as discussed in our July 18, 1972 opinion) but also the appearance of a conflict of interest, if not the possibility of an actual conflict of interest (as discussed above), we advise against an individual serving simultaneously as a State constable and a part-time magistrate.

Conclusion

Since constables are specifically exempted from the dual office holding prohibition, a State constable’s simultaneous service as a part-time magistrate would not violate Article XVII, Section 1A of the South Carolina Constitution. However, serving as a State constable, a position which

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carries law enforcement authority, while serving as a part-time magistrate, a judicial office requiring neutrality, would, at a minimum, give the appearance of a conflict of interest. Therefore, it is the opinion of this Office that an individual should not serve simultaneously in both capacities.

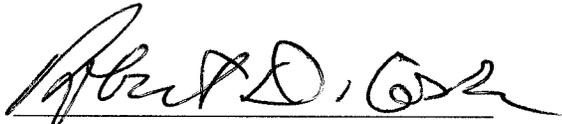
Yours very truly,

Henry McMaster
Attorney General



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