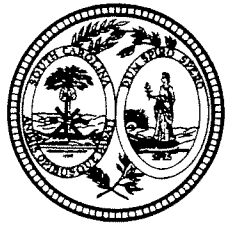


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

September 11, 2003

Brian M. Gibbons, Esquire
Fort Lawn Town Attorney
Post Office Drawer 808
Chester, South Carolina 29706-0808

Dear Mr. Gibbons:

You state in your letter that you represent the Town of Fort Lawn as its Town Attorney. You seek an opinion "concerning an issue involving an employee of the Town who also happens to be the Municipal Judge." A job description of this individual's duties on behalf of the Town has been enclosed. By way of background, you state the following:

[the employee] ... is employed by the Town of Fort Lawn as the "Clerk of Court" or police clerk. Her job duties in this position normally require her to do all the record keeping for the police department, including filing, processing the ticket, incident report, etc. In addition, she accepts the payments of the fines associated with traffic tickets issued by the Town of Fort Lawn.

Ms. Revels was also appointed by the Town of Fort Lawn last year as the Municipal Judge. At that time, I raised an opinion that it would be a conflict of interest for an employee of the Town to [be] the Municipal Judge as well The Town is seeking an Attorney General's opinion concerning the practice of having an employee who is the police clerk and also the "Clerk of Court" serving as municipal judge. In my opinion, I believe it is a conflict of interest and the Town needs to appoint another judge

We note also that Judge Revels has asked for an opinion as to this question as well. We are consolidating both requests for opinions into a single request.

Law / Analysis

The situation which you raise presents a number of separate issues, all of which are problematical in terms of the person continuing to serve in both capacities. We thus agree with your assessment that there would be a conflict of interest for an employee of the Town to serve as Municipal Judge as well. Our analysis is set forth more fully below.

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The first issue which must be addressed is dual office holding. 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). 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).

This Office has advised on numerous occasions that both clerks of court and municipal judges are office holders for purposes of dual office holding. See, as representative of those numerous opinions, Op. S.C. Atty. Gen., July 25, 2002 (Town of Westminster Clerk of Court); August 5, 1992 (City of Pamplico Clerk of Court); March 14, 1983 (City of Cayce Clerk of Court); October 11, 2000 (part-time municipal judges are office holders); August 5, 2000 (Johnsonville City Judge); June 22, 1998 (Town of Hilton Head Associate Judge). More importantly, we specifically advised the Town of Summerville, in an opinion dated August 18, 1981, that a person who simultaneously serves as part-time municipal judge and clerk of the municipal court would clearly violate the dual office holding prohibition of the South Carolina Constitution. We are aware of no recently enacted law that would alter the August 18, 1981 opinion and, therefore, advise that an individual who holds both offices would be in violation of the state constitution.

It is not clear from your letter or the job descriptions which you have enclosed whether the positions of municipal judge and clerk of court and/or “police clerk” are separate positions in the Town of Fort Lawn or whether all of the various job duties have been assigned to one position. See, § 14-25-35 [municipal clerk or other municipal employee may be appointed to serve as clerk of the court]. If these are separate positions, as it appears they are, see, § 14-25-15, then, a dual office holding situation has occurred by simultaneously holding these positions. On the other hand, additional duties may be assigned to a single position. See, Op. S.C. Atty. Gen., August 27, 2003; Op. S.C. Atty. Gen., June 2, 2000; Op. S.C. Atty. Gen., November 10, 1998. [The mere assignment of additional duties to an already-existing office would not create a second office.”]

It is clear, however, that state law in § 14-25-15 and 14-25-35 has designated the positions of municipal judge and municipal clerk as separate positions. Thus, in our view, a dual office holding situation has been created here. No where does state law appear to allow the duties of municipal judge to be assigned to the municipal clerk or vice versa. Thus, even though the municipal clerk is authorized also to serve as clerk of court for the municipal court, § 14-25-35 does not allow the duties of a municipal judge – who is an officer not an “employee” – to be assigned to the town clerk. Accordingly, it is likely that a court would conclude that a municipal judge who also serves as municipal clerk or clerk of the municipal court is dual office holding.

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However, we must also examine the question of whether a conflict of interest, or the appearance thereof, is created by the individual's service simultaneously as municipal judge and clerk of court for the Municipal Court as well as "police clerk." You have forwarded to us a general job description of Judge Revels' duties in this dual capacity. Such description states:

[s]erves as judge and clerk of court for the Municipal Court. Performs various routine and moderately complex administrative clerical duties, processing court dockets, collecting fines and bonds, completing fingerprint cards, hears and presides over criminal, city ordinance and traffic cases and determines judgments that are fair, impartial and just, and performs related functions.

Also included are specific job functions. Among these are to "[m]aintain ongoing relationship with SC Department of Public Safety," "[m]aintain log for community service designees," "[c]ollect all fines and bonds for Municipal Court system," "[r]eceive, review, prepares and processes various forms, phone messages, fingerprint cards, court dockets, payments, record checks, rap sheet requests, etc." Your letter describes part of the Judge's duties as not only "clerk of court" but "police clerk" or serving as record keeper for the police department.

In O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945), our Supreme Court observed 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 or irregularity, and to act primarily for the benefit of the public."

A municipal judge, whether full-time or part-time is, of course, a judicial officer. Municipal judges are appointed by the City Council and their terms, not to exceed four years, are set by Council. See, § 14-25-15 of the S.C. Code Ann. The compensation of such judges is established by the Council.

At the same time, it must be remembered that Article V of the South Carolina Constitution places the Municipal Courts, including the Municipal Judges thereof under the auspices and control of the Supreme Court of South Carolina as part of the unified judicial system. Pursuant to Article V authority, the Supreme Court disciplines municipal judges for violations of the Code of Judicial Conduct. See, e.g., In the Matter of Martin, 315 S.C. 370, 434 S.E.2d 262 (1993); In the Matter of Derrick, 301 S.C. 367, 352 S.E.2d 180 (1990). And the Supreme Court maintains oversight over the Municipal Court and its judges as it does any other court in the unified judicial system. The municipal courts possess jurisdiction to try all cases arising under the ordinances of the municipality as well as "all such powers, duties and jurisdiction in criminal cases made under state law and conferred upon magistrates."

In an opinion dated July 25, 2002, we addressed the question of whether the Clerk of Court for the City of Westminster could also serve as the Victim's Advocate for the Town. Therein, we noted that "[p]ublic employees must be above reproach and avoid even the appearance of a conflict

of interest in carrying out their duties.” Applying that standard, we concluded that the individual should not serve in such dual capacity. We concluded as follows:

[i]n this case, there would be least the appearance of a conflict of interest in acting as Municipal Court Clerk and also serving as Victims’ Advocate for the Town of Westminster. A clerk of court, when performing the duties of clerk, is an arm of the court itself. See, Thornton v. Atlantic Coast Line R. Co., 196 S.C. 316, 13 S.E.2d 442, 446 (1941), quoting Chafee and Co. v. Rainey, 21 S.C. 11, 18 [“The clerk is the officer of the court, and any mere ministerial act he does by the order of the court is the act of the court itself.”] The municipal court is part of the unified judicial system created by Article V of the State Constitution. See Op. Atty. Gen., August 13, 1996 and Op. Atty. Gen., August 27, 1996. The court is constitutionally required to remain “neutral and detached” in the performance of its exclusively criminal functions, such as the issuance of warrants. See, Shadwick v. City of Tampa, 407 U.S. 345, 92 S.Ct. 2119, 32 L.Ed.2d 738 (1972). 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, see Op. Atty. Gen., August 27, 1996, still the Clerk, as an arm of the Municipal Court, must maintain the appearance of neutrality. Where the Clerk of Court of Westminster, 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 in cases 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.

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.

Indeed, we have recognized that a municipal judge also holding the position of town administrator could present a conflict of interest situation. In Op. S.C. Atty. Gen., October 18, 1988, we advised that

[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.

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It follows from both of these opinions that an employee of the Town who is also serving as Municipal Judge could be deemed to be in a conflict of interest situation.

Conclusion

We agree with your conclusion that it 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.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an

cc: The Honorable Lisa G. Revels