

7630 July 1993



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

September 12, 2003

Ms. Geneva D. Lawrence
Mauldin Clerk of Court
207 Beattie Street
Simpsonville, South Carolina 29681

Dear Ms. Lawrence:

You have requested an opinion from this Office concerning dual office holding. You have indicated that you are currently employed by the City of Mauldin as the Clerk of Court. You state that you do not possess the power to sign warrants, plead cases, or reduce tickets, and that accordingly you do not believe that you possess any power of the state. You indicate that you have not been sworn in, and simply oversee the clerical portion of the court. You further indicate that you have been approached to run for a position on the Simpsonville City Council. You ask whether simultaneously holding the positions of Mauldin Clerk of Court and Simpsonville City Council member would constitute dual office holding.

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). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its duties or salary, or require qualifications for 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 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 July 19, 2001; April 12, 1998; June 12, 1995, February 4, 1994; July 23, 1993. Therefore, the question turns to whether the position of Municipal Clerk of Court likewise be considered an office.

This Office has also consistently opined that a Municipal Clerk of Court (Town Clerk, City Clerk, by whatever name called) holds an office for dual office holding. See, as representative of

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those numerous opinions, Ops. S.C. Atty. Gen., dated July 25, 2002; August 5, 1992; March 14, 1983; August 18, 1981. It does not appear that we reached this conclusion based on the specific duties of any given municipal clerk of court. The determining factor in the conclusion that a municipal clerk of court is an office holder appears to be based rather in the fact that the General Assembly has created and authorized such an office. Section 5-7-220, Code of Laws of South Carolina, 1976, authorizes the city council or city manager to appoint "an officer of the municipality who shall have the title of municipal clerk." That code section further prescribes the duties of the municipal clerk. This Office has held on numerous occasions that a position that is statutorily authorized by the General Assembly is an office for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen., dated April 21, 1998; January 7, 1991; July 13, 1981; March 6, 1980; August 28, 1974.

Based on the forgoing authorities, it is the opinion of this Office that the Clerk of Court for the City of Mauldin would hold an office for dual office holding purposes. Accordingly, we advise that a person who simultaneously holds the positions of City Clerk of Court and City Council member would violate the constitutional prohibition on dual office holding, regardless of whether the positions are held in the same or different jurisdictions.

When a dual office holding situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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