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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 25, 2000

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

RE: Informal Opinion

Dear Mr. Young:

You have informed this Office that a police officer for the Town of Mount Pleasant serves on the Berkeley County Council. You have asked whether simultaneous service as a police officer and a member of county council violates the dual office holding prohibitions of the State Constitution.

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 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). 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 many occasions that a police officer would be considered an officer for dual office holding purposes. Ops. Atty. Gen. dated June 12, 1995, February 4, 1991, and November 2, 1994; See State v. Crenshaw, supra (police officers considered "officers" rather than employees for purposes of bribery statute). We have also advised that a member of a county council would hold an office for dual office holding purposes. Ops. Atty. Gen. dated July 26, 1999, June 27, 1997, December 7, 1994, and August 20, 1985. Accordingly, simultaneous service in both capacities would violate the dual office holding prohibitions of the State Constitution.

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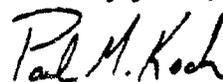
When a dual office holding situation occurs, the law operates to automatically "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer until a successor is duly selected to assume the duties or complete the term of office. While the actions taken by a de facto officer are generally held to be valid with regard to third parties, there is no question that such officer is acting under color of law rather than with full de jure status which he would possess if there had been no dual office holding. Furthermore, there exists general authority that the protections afforded a de facto officer will not be deemed to continue indefinitely, particularly when the public is chargeable with notice that the officer's status has been reduced to one of de facto rather than de jure. Op. Atty. Gen. dated May 7, 1998.

You have stated that the individual in question was a police officer before he became a member of county council. Therefore, the individual is deemed by law to have vacated his position as police officer when he assumed his position with the Berkeley County Council. He would, however, continue to serve as a police officer in a de facto capacity until his successor is found. This de facto capacity does carry with it some risk. While a de facto officer's actions are generally held to be valid with regard to third parties, it is possible that a court may find that the actions of a de facto officer are invalid. This is of particular concern here where the de facto officer is charged with enforcing the criminal laws of this State. Therefore, the wisest course of action in this case would be for the police officer to avoid a situation where his law enforcement actions could be called into question.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,



Paul M. Koch
Assistant Attorney General