

6433 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 7, 1998

Kenneth W. Arthur, Chief of Police
Walterboro Police Department
Post Office Box 709
Walterboro, South Carolina 29488

RE: Informal Opinion

Dear Chief Arthur:

Your opinion request has been forwarded to me for reply. You have asked whether an individual may simultaneously serve as a municipal court judge and as probate judge. You have also asked for an explanation of the legal ramifications if such a situation exists.

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 previously concluded that a probate judge would be considered an office holder for dual office holding purposes. Ops. Atty. Gen. dated September 15, 1994 and January 17, 1985. We have also concluded that a municipal judge would be considered an office holder for dual office holding purposes. Op. Atty. Gen. dated September 9, 1991. Therefore, it must be concluded that one who would simultaneously serve as a probate judge and as a municipal court judge 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. Moreover, actions taken by a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove the de facto officer from office. Ops. Atty. Gen dated April 8, 1996 and July 13, 1995.

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 kindest regards, I remain

Very truly yours,



Paul M. Koch
Assistant Attorney General