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The State of South Carolina



Office of the Attorney General

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September 15, 1994

The Honorable Donald B. Hocker
Associate Probate Judge of Laurens County
Post Office Box 972
Laurens, South Carolina 29360

Dear Judge Hocker:

By your letter of September 14, 1994, you have advised that you are presently serving as Associate Probate Judge of Laurens County. You have asked, in the context of dual office holding, whether you may be retained, by a retainer agreement, to be the attorney for the Commission of Public Works for the City of Laurens.

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 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). 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).

Each probate judge has the power to appoint one or more associate judges of probate, who shall have the jurisdiction to hear and decide all matters assigned by the probate judge which are within the jurisdiction of the probate court. S.C. Code Ann. § 14-23-1030 (1993 Cum. Supp.); § 14-23-1150 (as to jurisdiction). Unquestionably, a probate judge or an associate probate judge would be considered an office holder due to the exercise of sovereign power inherent in the position.

Ream & Hester

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The Commission of Public Works for the City of Laurens is a political subdivision with elected commissioners selling utility services to city residents and businesses, you have advised. You would be on retainer to represent and advise the Commission as to its business and conduct of its affairs. No actual exercise of sovereign powers appears to be involved, as you would not be prosecuting criminal cases or undertaking similar activities usually thought of as "exercising a portion of the sovereign power of the state." No statute or ordinance created the position of attorney; you would be an independent contractor rather than an employee of the Commission. No oath would be required. There is no specific tenure (i.e., term of years) for the position. As to the usual criteria found in an office, the position of attorney for the Commission lacks most, if not all, of those criteria. Thus we would conclude that the position of attorney for the Commission of Public Works for the City of Laurens would most probably not be an office.

This Office is of the opinion that you could most probably serve concurrently as Associate Probate Judge of Laurens County and as the attorney for the Commission of Public Works for the City of Laurens without running afoul of the dual office holding proscriptions of the state Constitution.

There may be other considerations, such as the Canons of Judicial Conduct. I understand that you are aware of these other considerations and are looking into them, as well.

With kindest regards, I am

Sincerely,



Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions