



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

July 13, 1995

The Honorable James Lee Foster
Sheriff of Newberry County
Post Office Box 247
Newberry, South Carolina 29108

RE: Informal Opinion

Dear Sheriff Foster:

By your letter of June 30, 1995, to Attorney General Condon, you have sought an opinion as to several questions which have arisen concerning dual office holding or conflict of interest. Each of your questions will be addressed separately, as follows, after a brief summary of the principles of dual office holding.

Article XVII, Section 1A of the South Carolina 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).

Question 1

Can a Sheriff's Deputy serve simultaneously as a city councilman and as a commissioned officer? The officer would be commissioned by the County of Newberry and would serve as a City of Newberry Councilman, two separate jurisdictions. The City of Newberry does not contribute to this position nor would this officer serve at the pleasure of the City Council.

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The question would revolve around the constitutional provisions of dual office holding for two separate jurisdictions.

This Office has advised previously that a deputy sheriff would be considered an office holder for dual office holding purposes. See Ops. Att'y Gen. dated June 11, 1992; January 8, 1986; September 24, 1982; and March 6, 1979, among many others. Likewise, this Office has advised previously that a member of a city council would be considered an office holder for dual office holding purposes. See Ops. Att'y Gen. dated February 4, 1994; July 23, 1993; January 8, 1981; September 7, 1989; and many others. This Office has concluded that an individual who would serve on a city council and as a deputy sheriff simultaneously would have a dual office holding problem. See Op. Att'y Gen. dated January 8, 1986.

This Office has apparently never considered whether a commissioned officer of a county would be an office for dual office holding purposes. It would be necessary to examine whatever ordinance created the position, established qualifications for the position, specified the powers, duties, or responsibilities, and so forth, to be able to assess whether that position would be considered an office.

Based on the foregoing, if an individual were to serve on a city council and as a deputy sheriff simultaneously, dual office holding would most probably result. If you would like for the position of an officer commissioned by the county to be examined for dual office holding ramifications, we will be happy to do so upon receipt of the information as indicated above.

Question 2

The second question of dual office holding involves whether a County Councilman can serve as a volunteer non-paid reserve police officer with the Sheriff's Office. Would this be dual office holding since the reserve deputy sheriff has no pay or benefits associated with that position? If this is dual office holding, why would it not be dual office holding for members of the state legislature as well as Council members to hold non-paid state constable commissions through SLED or be volunteer firemen? Is there a constitutional difference?

This Office advised you, by an opinion dated April 14, 1993 (copy enclosed), that:

Prior opinions of this Office have concluded that the positions of reserve officer, as authorized pursuant to S.C. Code Ann. Sections 23, 28-10 et seq., and county councilman constitute offices for dual office holding purposes.

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See: Opins. dated March 19, 1990, February 5, 1988 and August 12, 1991, copies of which are enclosed. Therefore, simultaneous service as a member of county council and as a reserve officer would probably run afoul of the dual office holding provisions. ...

I am of the opinion that the conclusion of this opinion is still applicable to the question which you have raised.

In response to your additional questions, I would advise that compensation is only one of the several factors which are considered in determining whether a position is an office for dual office holding. As to certain constables and volunteer firemen, the South Carolina Constitution was amended several years ago to remove these positions or individuals from the dual office holding prohibitions; therefore, there is a constitutional difference between these officers and others who are considered officers for dual office holding purposes.

Question 3

If dual office holding were to exist, what would be the procedure for removing that person from one office or the other? If one refused to vacate one of the offices on his own, would there be legal ramifications against you as Sheriff for forcibly removing the person from this office? Would any actions taken by the dual office holder in either capacity be nullified as a result of this provision?

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,¹

¹A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees §495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

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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 Strob. 92 (S.C. 1848).

To apply these principles, it is necessary to determine the sequence of office holding, assuming that both (or all) positions held would be considered to be offices. Upon the assumption of the second office, an individual becomes a de jure officer as to that office and effectively vacates the first office held, becoming a de facto officer as to that office. This happens by operation of law automatically and is not dependent on any action which you as Sheriff might take. As to the vacated office (the one which the individual would hold as a de facto office), the appointing authority would be able to appoint a replacement, or an election could be scheduled if that is the appropriate means to fill the vacancy. Until such time as the de facto officer is replaced, any actions taken by that individual would be considered as valid and effectual as those of a de jure officer unless and until a court should declare otherwise; thus, it is possible that a court could nullify the actions taken, but such actions are not automatically nullified merely because a dual office holding situation existed and the individual became a de facto officer as a result.

Question 4

The final question concerns whether a conflict of interest would exist if a full time magistrate's wife were employed as a secretary/records clerk with the Sheriff's office. Although the Sheriff's employee does not hold a commission nor would she appear before the magistrate in any capacity, would her employment in the Sheriff's office compromise his position as a neutral and detached magistrate?

The conflict of interest issue which might arise in such a situation would possibly fall within the Canons of Judicial Conduct rather than in a statute or constitutional provision which this Office might interpret. Due to the constitutional mandate of separation of powers, this Office respectfully defers to the South Carolina Supreme Court and its commissions and agencies to advise on matters of judicial ethics. For the necessary guidance, you may wish to contact the Judicial Standards Commission or the Advisory Committee on Standards of Judicial Conduct for advice or an advisory opinion.

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The Commission may be reached by writing to Post Office Box 50487, Columbia, South Carolina 29250 or by calling (803) 734-1965. The Advisory Committee may be reached by writing to the chairman, A. Camden Lewis, Post Office Box 11208, Columbia, South Carolina 29211 or by calling Mr. Lewis at (803) 771-8000.

This letter is an informal opinion only. It has been written by a designated Senior 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. I trust that the foregoing has been responsive to your inquiry and that you will advise if additional assistance or clarification should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General

Enclosure