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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

September 14, 1998

The Honorable James S. Klauber
Member, House of Representatives
518A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Klauber:

Your opinion request has been forwarded to me for reply. You have asked whether the dual office holding prohibitions of the State Constitution would be violated if an individual were to simultaneously serve as city attorney for the City of Greenwood and as Master-in-Equity for Abbeville County.

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 the position of Master-in-Equity is an office for dual office holding purposes. Op. Atty. Gen. dated June 5, 1981. Thus, the question turns to whether the position of city attorney would be considered an office for dual office holding purposes.

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Whether or not the position of city attorney is an office would depend on how the position is created and the duties prescribed. If the duties prescribed make the position an "office" rather than mere employment, it would be violative of the dual office holding prohibitions for one individual to hold the office of city attorney and another office.

In an opinion dated June 11, 1993, this Office was asked whether the appointed city attorney for Lake City would be considered an office-holder. This Office found:

Ordinance # 1991.002 adopted by the City Council of Lake City establishes the position of City Attorney for the City. A review of the ordinance reveals much latitude in the employment of an attorney. The attorney may be elected or retained. A written contract is to be entered into, with the scope of the work and fees to be paid, described therein. No specific term is specified; no oath is required by the ordinance. The attorney will advise the mayor and council, draft ordinances and instruments, represent city officials, and appear on behalf of the City in legal proceedings. The ordinance contemplates that more than one attorney may be retained; in this instance, we understand that the attorney in question will not prosecute criminal cases on behalf of the City, (footnote omitted) that another attorney may be retained for that function.

The ordinance contains many terms which can lead to the conclusion that a city attorney retained thereunder might well be an independent contractor, when the ordinance is considered as a whole. In a number of places, reference to the attorney "retained" or "employed" appear. Where, as is apparently the case here, the municipal attorney will represent the City in civil legal matters, on a part-time basis, while continuing his private legal practice, it appears that the individual is more an independent contractor than an office-holder.

Based on the foregoing and in confirmation of the oral opinion provided on May 27, we are of the opinion that the City of Lake City may retain by contract the individual in question (who is also an assistant solicitor) as legal counsel to advise City Council and represent the City in civil matters, on a part-time basis and concurrent with his private law practice, and further that as long as this individual is not prosecuting criminal cases on behalf of the City, he would be considered an independent contractor rather than an office holder in this instance.

You have provided a letter from the City Manager of Greenwood which describes the position of Greenwood city attorney. According to the letter, the city attorney was

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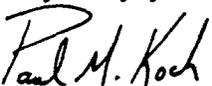
appointed on a contractual basis to provide legal guidance and represent the City in civil matters. The city attorney is provided a retainer and receives hourly compensation for civil litigation. The city attorney does not appear in Municipal Court on behalf of the City as another attorney is responsible for all prosecutorial duties. Finally, the city attorney does not take an oath of office.

Based on the information provided, it appears that the duties and nature of the position of Greenwood city attorney are very similar to those of the Lake City city attorney as discussed above. The Greenwood city attorney is retained by contract, does not take an oath of office, does not prosecute criminal cases, and is employed on a part-time basis. Thus, it appears that the Greenwood city attorney would be considered an independent contractor rather than an office-holder. Accordingly, if one were to simultaneously serve as Greenwood city attorney and Master-in-Equity for Abbeville County, the dual office holding prohibitions of the State Constitution would not appear to be violated. One cautionary note is in order, the individual in question may wish to contact the Advisory Committee on Standards of Judicial Conduct to make certain that no provisions of the Code of Judicial Conduct would be contravened by such service.

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