

# The State of South Carolina



## Office of the Attorney General

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ATTORNEY GENERAL

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November 20, 1989

James E. Brogdon, Jr., Esquire  
Marion County Attorney  
Post Office Box 1041  
Marion, South Carolina 29571

Dear Mr. Brogdon:

By your letter of November 2, 1989, you have asked for the opinion of this Office as to whether the Marion County Attorney would be considered an officer for dual office holding purposes. You have recently been appointed Marion County Attorney and you also serve on the Marion City Council.

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).

Clearly, a member of a city council would hold an office for dual office holding purposes. See, for examples, Ops. Atty. Gen. dated October 18, 1988 (copy enclosed); January 31, 1984; July 8, 1982; September 7, 1982; June 18, 1982; and many others. It thus remains to be determined whether the Marion County Attorney would hold an office.

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As to the position of Marion County Attorney, you have advised that the section in the ORGANIZATION AND RULES OF THE MARION COUNTY COUNCIL labeled "E. County Attorney" provides:

The Council shall designate an attorney, not a member of Council, to serve as the County Attorney. He shall perform such duties as are assigned to him from time to time by Council. He shall prepare all deeds, contracts, ordinances and other legal documents necessary to assist Council in performing its functions as such. He shall attend all Council meetings and advise Council when required of matters and things pertaining to the legality of proceedings before Council and its actions thereon. He shall participate in any litigation involving the County and shall carry out any assignments delegated to him by Council. The County Attorney shall serve at the pleasure of the Council and his salary and conditions of employment shall be set by Council. In the absence of the County Attorney where the Chairman shall feel that an Attorney is needed, an Attorney will be called to attend the meetings of Council or act as County Attorney when needed. [Emphasis added.]

You advise that you have found no ordinance creating the position of Marion County Attorney.

Considering the criteria described in the second paragraph above, we note that the position of Marion County Attorney is not created by a statute or ordinance; instead, it is established as a part of Marion County Council's organizational and procedural rules. No statute or ordinance specifies duties or qualifications, requires an oath, or sets a salary or term of office. The rule recited above specifies duties to be performed by the Marion County Attorney and states that Marion County Council will set his salary. Rather than a term of office, the County Attorney will serve at the pleasure of Marion County Council. It is noted that the rule mentions "conditions of employment" with respect to the Marion County Attorney.

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It is helpful to examine prior opinions of this Office to compare the Marion County Attorney's position to the same position in other counties. The Richland County Attorney was deemed to be an office-holder in an opinion dated May 5, 1981; that position was created by an act of the General Assembly which prescribed the duties of the County Attorney. In opinions dated July 13, 1981; March 6, 1980; January 28, 1980; June 4, 1968; July 7, 1967; and November 28, 1960, it was determined that the County Attorneys of Horry, Hampton, Keeshaw, Greenwood, Saluda, and Florence counties respectively would not be office holders, since none of those positions were created by statute or ordinance and no duties were prescribed thereby. 1/ Instead, these positions were deemed to be employment in the nature of an attorney-client relationship.

Considering the foregoing, since the position of Marion County Attorney was not established by statute or ordinance and no ordinance or statute specifies the Marion County Attorney's duties, it is the opinion of this Office that the Marion County Attorney would hold a position of employment rather than an office. Thus, simultaneously serving on the Marion City Council should not create a dual office holding problem.

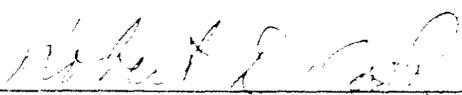
With kindest regards, I am

Sincerely,

*Patricia D. Petway*  
Patricia D. Petway  
Assistant Attorney General

PDP/nw  
Enclosure

REVIEWED AND APPROVED BY:

  
\_\_\_\_\_  
Robert D. Cook  
Executive Assistant for Opinions

1/ Whether these county attorneys' positions may have been modified by act of the appropriate county council subsequent to the advent of home rule is unknown to this Office. Should such action have been taken, the conclusion of any or all of these opinions might be changed. However, it is assumed that the opinions as written correctly reflected the law then extant.