



ALAN WILSON
ATTORNEY GENERAL

November 12, 2015

J. Hugh Ryan III
South Carolina Commission on Indigent Defense
Post Office Box 11433
Columbia, SC 29211-1433

Dear Mr. Ryan:

We received your request regarding whether an individual may serve simultaneously as a public defender and as a member of county council in the same county. You explain that as public defender, the individual is a full-time employee of the county. The county is required by law and does provide funds to the county's public defender office. The amount of funds provided to the public defender office is determined by county council. Each of your questions and its response follows.

LAW/ANALYSIS:

I. Does service as a member of county council and public defender (county employee) violate the prohibition against dual office holding?

The South Carolina Constitution provides that “[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public.” S.C. Const. art. XVII, § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” *Willis v. Aiken County*, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). “Other relevant considerations [as to whether a position is a public office] include: ‘whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.’” See Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

We have previously determined that a public defender did not hold an office. We stated the following:

on many occasions our office has concluded that county public defenders are not officers for dual office holding purposes. See, Ops. S.C. Atty. Gen., May 4, 2005; April 5, 1982; April 20, 1979; May 26, 1975; February 9, 1971. “This result was reached on the basis that . . . a public defender does not act on the state’s behalf or in concert with it.” Op. S.C. Atty. Gen., May 4, 2005 (quoting Op. S.C. Atty. Gen., April 5, 1982). The 2007 Act No. 108, § 3 established Circuit Public Defenders and explained that county public defenders “shall serve at the pleasure of the circuit public defender.” See, S.C. Code § 17-3-520 et seq. (Supp. 2009).

Op. S.C. Atty. Gen., Oct. 25, 2010 (2010 WL 4391639).

We have stated in a prior opinion that “[t]his Office has consistently advised that a position on a county council constitutes an office.” Op. S.C. Atty. Gen., February 3, 2014 (2014 WL 1398598) (quoting Op. S.C. Atty. Gen., No. 77 - 119, April 26, 1977 (1977 WL 24461)).

Based upon our prior opinions, we believe that serving as a member of county council and as a public defender does not violate the constitutional prohibition against dual office holding. We reached the same conclusion in our July 9, 1986 opinion, in which we declared that “one who would serve as a member of a county council and as a public defender would not contravene the dual office holding prohibitions of the State Constitution.” See Op. S.C. Atty. Gen., July 9, 1986 (1986 WL 289872).

II. Does a common law master-servant conflict of interest or any other conflict of interest exist as county council does appropriate funds to the public defender’s office of which the council member is an employee?

On prior occasions, this Office has described a conflict of interest arising from a master-servant relationship as follows:

a conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts. Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994).

Moreover, our Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913) stated: ‘[n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.’ Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles. See Op. S.C. Atty. Gen., July 19, 2006 (2006 WL 2382449).

Op. S.C. Atty. Gen., February 3, 2014 (2014 WL 1398598), supra.

To determine if a master-servant relationship exists, we must examine the South Carolina Code, which provides for the employment and funding of county public defender’s offices. The Code specifies that “[a] public defender shall serve at the pleasure of the circuit public defender and shall have the authority, powers, and duties as assigned by the circuit public defender.” S.C. Code Ann. § 17-3-580(C) (1976 Code, as amended). Also, see S.C. Code Ann. § 17-3-540(A) (1976 Code, as amended). For administrative purposes, i.e., the day to day operations of the circuit public defender’s office, “[a]ll public defenders and other personnel employed by a county public defender corporation on a full-time or a part-time basis are considered employees of the circuit public defenders office in the judicial circuit in which they serve.” S.C. Code Ann. § 17-3-570 (1976 Code, as amended).

Compensation of a public defender is also a consideration. Section 17-3-570(E) states that “[t]he circuit public defender shall fix the compensation of each state-paid employee appointed pursuant to this article in accordance with the class to which the person is appointed and the appropriate step of the salary schedule.” S.C. Code Ann. § 17-3-570 (1976 Code, as amended). Public defenders are county employees in regard to their fringe benefits and class of compensation (see S.C. Code Ann. § 17-3-540 (1976 Code, as amended); S.C. Code Ann. § 17-3-560 (1976 Code, as amended)). What is unique is that the circuit public defender must reimburse all employee compensation and fringe benefits paid by the county from operational funds provided from county and state appropriated funds as well as from other sources. S.C. Code Ann. § 17-3-540; S.C. Code Ann. § 17-3-560, supra. Additionally, “[n]o county may appropriate funds for public defender operations in a fiscal year below the amount it funded in the immediate previous fiscal year.” S.C. Code Ann. § 17-3-550 (1976 Code, as amended).

In a prior opinion, we stated that “[t]raditionally, a master-servant conflict arises when an individual serves as an employee for the same body to which he or she serves as an officer.” Op. S.C. Atty. Gen., July 19, 2006 (2006 WL 2382449). However, a public defender is not a typical employee because the circuit public defender, and not county council, controls the compensation of public defenders and is responsible for their appointment and termination and supervision. Accordingly, we do not believe a conflict of interest exists when an individual serves as both county council member and public defender.

III. Does this arrangement potentially violate S.C. Code Section 8-13-700 or any other laws, ethic regulations, etc., as appropriations to the public defender office could benefit a public official? If the disclosure provisions and procedures outlined in 8-3-700(B)(1-5) are adhered to would such actions prevent any potential violation?

Section 8-13-700 is part of the Ethics, Government Accountability, and Campaign Reform Act ("Ethics Act"). S.C. Code Ann. § 8-13-100 *et seq.* (1976 Code, as amended). Section 8-13-700 prohibits a public official from using his office to obtain financial gain for himself, a family member, or a business with which he is associated. However, it does provide a means for a public official recusing himself from matters to which he may have a direct or indirect economic interest. It states the following:

- (A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use that does not result in additional public expense.

- (B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a family member, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a family member, an individual with whom he is associated, or a business with which he is associated shall:
 - (1) prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest with respect to the action or decision. . .

 - (4) if he is a public official, other than a member of the General Assembly, he shall furnish a copy of the statement to the presiding officer of the governing body of an agency, commission, board, or of a county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists and shall cause the disqualification and the reasons for it to be noted in the minutes. . . .

As stated above, a public defender is an employee of the circuit public defender's office for administrative purposes and a county employee for purposes of fringe benefits and class of compensation. It therefore needs to be determined whether section 8-13-700 applies. The definition of "business with which he is associated" is helpful in making this determination. "Business with which he is associated" is defined as "a business of which the person or a member of his immediate family is a director, an officer, owner, employee, a compensated agent, or holder of stock worth one hundred thousand dollars or more at fair market value and which constitutes five percent or more of the total outstanding stock of any class." S.C. Code Ann. § 8-13-100(4) (1976 Code, as amended).

Unfortunately, it would be improper for us to make a determination as this is an ethics question. The State Ethics Commission was given authority by the Legislature to interpret and issue opinions pertaining to the provisions of the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended). Accordingly, we suggest you contact the State Ethics Commission for further advice or information.

CONCLUSION:

In conclusion, we believe that an individual may serve as both a member of county council and as a public defender without violating the constitutional prohibition against dual office holding and without a conflict of interest existing. However, we suggest you seek an opinion from the State Ethics Commission as to whether section 8-13-700 or any other ethics statute would be applicable.

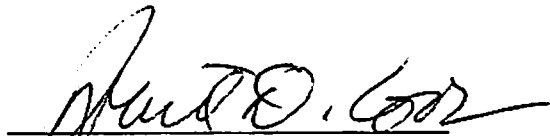
Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General