



ALAN WILSON
ATTORNEY GENERAL

June 14, 2016

Mr. Gary Kubic
Beaufort County Administrator
Post Office Drawer 1228
Beaufort, SC 29901-1228

Dear Mr. Kubic:

Attorney General Alan Wilson has referred your request dated April 18, 2016 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

"On March 25, 2016, Beaufort County received an application for employment from a County Council Member for the position entitled Recycling Coordinator – Solid Waste and Recycling. I have attached the full job description, but the basic job description is as follows:

Under general supervision of the Solid Waste Superintendent, plans, implements and coordinates comprehensive waste management system to maximize prevention, reuse, and recycling opportunities in accordance with applicable federal/state/local laws and regulations. Plays a central role in planning and administering environmental activities related to waste management.

We have reviewed several previous Attorney General Opinions and concluded that current employees can run for elected office while being employed by the County. Additionally, a March 2004 Attorney General opinion held that the employment of a County Council Member as a City Public Utilities Director for a municipality did not violate dual office holding provisions under Article XVII, Section 1A. However, unlike that set of facts, this would be employment of an individual by the same entity which the council member serves as an elected official. We respectfully request clarification on whether a current County Council Member may be employed by the same County or if such employment would violate the dual office holding provisions or other South Carolina laws."

Law/Analysis:

By way of background, Article VI, Section 3 and 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, a member of a lawfully and regularly organized fire department, a constable, or a notary public. For these provisions 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). The Sanders case states:

One 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

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concerned, and which are continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Id. at 174, 763. Other relevant indications of an office “of honor or profit” include “whether the position was created by the legislature; whether qualifications for appointment are established; whether duties, tenure, salary, bond and oath are prescribed or required; [and] whether one occupying [the] position is representative of sovereign [power or duties].” State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980) (citing State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E.2d 482 (1970)). The exception to the dual office holding prohibition would be if the person holds the second office “ex officio.” Op. S.C. Atty. Gen., 2012 WL 4459270 (September 19, 2012) (citing Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)). As you may be aware, an officeholder may give up the first office to hold the second office, but if he takes the second office while in office, he forfeits the first office. His service in the first office while in dual offices would be de facto until replaced. Op. S.C. Atty. Gen., 2012 WL 4459271 (September 13, 2012) (citing Ops. S.C. Atty. Gen., July 28, 2003; July 13, 1995). Likewise, South Carolina law specifically prohibits county council members from holding any other office of honor or profit in the government. S.C. Code § 4-9-100.

The first issue presented by your question is whether the position of Recycling Coordinator is an office of “honor or profit” as to fall under the dual office holding prohibition of the South Carolina Constitution. South Carolina follows the criteria in the Crenshaw case to determine if a position is an office of “honor or profit” for dual office holding purposes. The criteria in the Crenshaw case consist of four questions:

- 1) Was the position created by the General Assembly?
- 2) Are there established qualifications for appointment?
- 3) Are duties, tenure, salary, bond and oath required or prescribed?
- 4) Is the position representative of sovereign duties?

An office of “honor or profit” does not require an affirmative answer to all of the questions, nor is any one question conclusive to the determination. State v. Crenshaw, supra. Traditionally, sovereignty holds three powers: the power to tax, the power of eminent domain and the power to police. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3rd Cir. 1981)). Using the information provided to us, it does not appear this position was created by the General Assembly. The position appears to have limited qualifications, no bond, tenure or oath that we are aware of, and the duties do not appear to have any sovereign duties. Based on this information, we believe a court will find that this position is not an office “for honor or profit.”

Regardless of whether or not both positions are offices, one cannot violate the common law master-servant principle. This Office has stated regarding the master-servant principle:

In past opinions, we summarized this 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.

...
[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions.... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality.

Op. S.C. Atty. Gen., March 26, 1999 (quoting 67 C.J.S. Officers § 27). Furthermore, the South Carolina Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1913), declaring the employment of two commissioners by the commission illegal, stated:

No 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. Should Richardson, as chairman of the commission, appoint the committee to investigate his own management of the infirmary, or check his accounts as treasurer? Should he be present, when his administration of the institution is being considered and discussed? Should he and Butler participate, when their own duties are being prescribed and their compensation fixed? It requires only a moment's reflection to see that the positions are utterly inconsistent, and ought not to be held by the same persons. Propriety, as well as public policy, forbids it.

This Office has considered various situations involving potential violations of common law master-servant principles. In those opinions, we determined whether or not an actual conflict exists is a question of fact, which may not be determined in an opinion of this Office. Op. S.C. Atty. Gen., February 19, 2003 ("the ultimate conclusion of whether an actual conflict exist is a factual matter. As we have previously opined, '[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions.' See Ops. Atty. Gen. dated October 9, 1985 & September 3, 1999."). Thus, this opinion is limited to a consideration of the applicable law which a court may consider in making such a determination.

In identifying situations in which a potential conflict may exist, we primarily consider the level of supervision and control the elected or appointed position may have over the position in which he or she is currently employed. Op. S.C. Atty. Gen., October 17, 2000.

As we mentioned above, South Carolina law specifically prohibits county council members from holding any other office of honor or profit in the government but the statute is silent regarding other county positions. S.C. Code § 4-9-100. This Office has previously addressed a similar issue regarding employment of a town councilman by the same town. See Op. S.C. Atty. Gen., 2013 WL 5291571 (S.C.A.G. September 9, 2013). In that opinion we stated:

[S.C. Code] § 5-7-180 [prohibiting a mayor or a councilman from holding any other municipal office or municipal employment at the same time] “is, in part, designed to address the common law principle that one cannot be both master and servant at the same time.” Op. S.C. Atty. Gen., 2004 WL 1182071 (May 21, 2004). Thus, we concluded § 5-7-180, as well as the common law master-servant principles upon which the statute is based, would be violated if an employee of the Town of Olar continued such employment after being elected to the Olar Town Council. Id.; see also Op. S.C. Atty. Gen., 1996 WL 82889 (Jan. 8, 1996) (concluding § 5-7-180 prohibits town mayor or councilman from serving as volunteer fireman for same town). Along the same lines, we have consistently advised that § 5-7-180 only serves to prohibit a mayor or councilman from also being employed by the same city or town they were elected to serve while in office. See Op. S.C. Atty. Gen., 2012 WL 889084 (March 5, 2012) (“Numerous prior opinions of this office point out that [§ 5-7-180] prevents mayors and members of town councils from being employed in other positions by their towns while in office”) (citations omitted).”

Op. S.C. Atty. Gen., 2013 WL 5291571 (S.C.A.G. September 9, 2013). The 2013 opinion went on to distinguish between working for the same town as a councilman versus working for a different town. Id. Since you are asking about a county councilman working for the same county, it is likely a court would find the same principles of master-servant to apply. Even though the Recycling Coordinator may not report directly to the county council, county council controls funding for and would have the ability to hire, fire, and set the salary of the people who would hire, fire, set the salary of and manage the Recycling Coordinator. Moreover, this Office stated in a 2006 opinion regarding potential conflicts that:

In identifying situations in which a potential conflict may exist, we primarily consider the level of supervision and control the elected or appointed position may have over the position in which he or she is currently employed. Op. S.C. Atty. Gen., October 17, 2000. In an opinion of this Office dated March 26, 1999, we considered whether a youth counselor, employed by the Department of Social Services (DSS), may run for a position on the Board of Education of Laurens County School District 55. Op. S.C. Atty. Gen., March 26, 1999. In determining a potential conflict existed, we considered the fact that the counselor, although employed by DSS, was on site at a high school in the school district, the high school's principal partially supervised the counselor, and the counselor received ten percent of his pay from the school district. Id.

Op. S.C. Atty. Gen., 2006 WL 1207271 (S.C.A.G. Apr. 4, 2006). In addition, South Carolina law prohibits using one's office for financial gain or to influence a governmental decision for economic impact. S.C. Code § 8-13-700. Furthermore, our courts have declared it is against public policy to appoint or use your influence to be appointed to a position. See Bradley v. City Council of City of Greenville, 212 S.C. 389, 46 S.E.2d 291, 295 (1948) (“[i]n the absence of constitutional or statutory provision it is, as said in 42 Am.Jur. 955, Public Officers, Sec. 97, ‘contrary to public policy to permit an

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officer having an appointment power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members.””).

Conclusion:

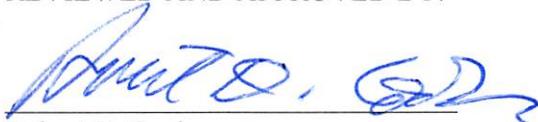
This Office believes a court will find that it could be a potential master-servant conflict for a county councilman to be employed by the same county as Recycling Coordinator because county council would have the ability to hire, fire and set the salary and duties of the people who would hire, fire, set the salary and duties and manage the Recycling Coordinator. Nevertheless, we do not believe a court will find this is an office “for honor or profit” prohibited by the South Carolina Constitution. Conversely, we also believe a court will determine there are positions a county councilmember may hold that would not be a master-servant conflict. See, e.g., Op. S.C. Att’y Gen., 2016 WL 386066 (S.C.A.G. January 5, 2016). We also encourage you to check with the South Carolina Ethics Commission for any potential ethical conflicts. However, this Office is only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may also petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20. If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General