

2003 WL 22172242 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 8, 2003

*1 Gary H. Smith, III, Esquire
Aiken City Attorney
Post Office Box 519
Aiken, South Carolina 29802

Dear Mr. Smith:

You have requested an opinion of this Office concerning dual office holding. Indicated in your letter is that you currently serve the City of Aiken in the position of city attorney, which is created by Section 2-281 et seq., of the Aiken City Code. Your letter provides a summary of your duties as city attorney as follows:

I am an attorney in private practice with the law firm of Smith, Massey & Brodie, P.A. In my capacity as city attorney for the City of Aiken, I am not a member of City Council. I have no authority and cannot vote on matters before Council. I serve at the Council's discretion and can be terminated by Council upon a majority vote of Council. I have a month to month contractual arrangement with Council and they are able to terminate me at will. I serve as an advisor to City Council on legal issues that they might face from time to time. In essence, I am an employee of city council. I do not think the city attorney position qualifies as office holding... As city attorney, I do not prosecute criminal cases on behalf of the city. This function is fulfilled by the city solicitor who is a full-time city employee.

Furthermore, you indicate that you are being considered by the Governor's Office for service as a member of the Aiken County Commission on Higher Education. Your question is whether an individual who serves simultaneously as Aiken City Attorney and a member of the Aiken County Commission on Higher Education would violate the constitutional prohibition on dual office holding.

Law / Analysis

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 of 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 offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Beluc, 78 S.C. 171, 58 S.E. 762 (1907). "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 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., 78 S.C. at 174. Other relevant considerations involved in a determination of whether a particular position constitutes an office 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).

*2 As noted in your request letter, this Office has concluded in an opinion dated October 14, 1994 that a member of the Aiken County Commission for Higher Education would be considered an officer for dual office holding purposes. There, we concluded that the duties of a Commissioner of Higher Education involve an exercise of a portion of the sovereign power of the State. We have also reached the same conclusion with respect to the Spartanburg County Commission

for Higher Education (see Op. S.C. Atty. Gen., dated March 27, 1992). Therefore, the question becomes whether a city attorney for Aiken would likewise be considered an office holder. If so, to simultaneously occupy both positions would contravene the dual office holding provision of the South Carolina Constitution.

This Office has reached varying conclusions with respect to the position of city attorney, depending upon the particular circumstances. See, Op. S.C. Atty. Gen., dated January 27, 2000. "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." Op. S.C. Atty. Gen., September 14, 1998. A critical factor in this determination is whether the city attorney prosecutes criminal cases in municipal court. As this Office noted in an opinion dated February 22, 1982, "[w]hether one acts as a prosecutor in a case tried before a jury or whether one represents the State in receiving a plea of guilty, undoubtedly there is an exercise of a portion of the sovereignty of the State..." In addition, our conclusion in a given instance has turned upon whether the municipal attorney is retained on an independent contractor basis or is appointed. See, S.C. Atty. Gen., September 14, 1998.

The position of city attorney for the City of Aiken is established by Aiken municipal ordinance Sec. 2-281 et seq. Section 2-281 provides that "[t]he city attorney and city solicitor shall be appointed by, serve at the pleasure of, and be subject to removal by the city council." Such section further specifies that "[t]he city council, in its discretion, may appoint one person to serve as the city attorney/city solicitor, and in the event of such appointment, it shall be considered one position or office." Section 2-282 specifies that the person who is appointed as city attorney shall be a member in good standing in the bar of the State "at the time of his appointment and throughout his term of office."

Section 2-284 creates the Department of Legal Services for the City of Aiken. Such Department is "headed by the city attorney who shall also serve as the director of the department." The city attorney is responsible to the city manager for the operations of the department and the city solicitor reports to and is subject to the direction of the city attorney. Id. Other personnel which make up the Department of Legal Services are also answerable to the city attorney.

*3 The duties of the city attorney are enumerated in Section 2-285 of the City Code. Such duties and authority are provided as follows:

(1) The city attorney shall be the chief legal advisor to the city council and all offices, departments, boards, commissions and agencies of the city and all officers and employees of the city in matters relating to their official powers and duties, and in that capacity may communicate directly with the council and those offices, departments, boards, commissions, agencies, officers and employees.

(2) The city attorney shall advise the city council, its committees, the city manager or any other city officer upon all legal questions arising in the conduct of city business.

(3) The city attorney shall prepare and revise ordinances when so requested by any member of the city council, any committee thereof or the city manager.

(4) The city attorney shall prepare, for execution, contracts and other written instruments to which the city is a party and shall approve, as to form, all bonds required to be submitted to the city.

(5) The city attorney shall enter appearances for the city in all actions, cases and special proceedings. The city attorney shall conduct all suits and other proceedings before all courts in which the city is, or shall be, a party. This subsection shall not apply to prosecutions handled by the city solicitor. The city attorney may elect not to enter appearances in suits and proceedings in which the city is represented by outside counsel employed or retained by an insurer of the city or by the city, or in which he determines there is a conflict of interest.

(6) The city attorney shall make recommendations to the city manager and city council on retaining outside legal counsel on specified matters. The retaining of counsel where the estimated cost does not exceed \$1,000 may be approved by the city manager.

(7) A city officer or employee who is being sued civilly for action taken in good faith in the course of his official duties may be represented by the city attorney if there is no conflict of interest as determined by the city attorney.

(8) With the approval of the city manager, he may settle claims against the city for an amount of \$1,000.00 or less.

(9) The city attorney may assign any of the duties provided in this division to another attorney retained or employed by the city.

(10) The city attorney shall perform such other duties as are prescribed by ordinance or state law or directed by the city council or the city manager.

Section 2-286 further provides that “[t]he city solicitor shall prosecute and represent the city in all criminal and related proceedings in municipal court and appeals therefrom.”

The foregoing duties of the city attorney are extensive. While it is true that the city attorney does not prosecute criminal cases on behalf of the City of Aiken on a day-to-day basis, it is evident that the city solicitor is “subject to the direction of the city attorney.” Thus, the city attorney is designated by the county ordinance as the ultimate decision-making authority in the prosecution of cases by the City. Nothing prohibits the city attorney from actually prosecuting a case if he sees fit, and, in any event, as supervisor, he exercises prosecutorial discretion. Accordingly, we deem this ultimate decision-making authority to constitute the exercise of sovereign power for purposes of dual office holding.

*4 Moreover, other authority afforded the city attorney by the enabling ordinance represents the exercise of sovereign power. The city attorney is authorized by Section 2-285(5) to “conduct all suits and other proceedings before all courts in which the city is, or shall be a party.” Such broad discretion to handle cases and legal actions in which the City is a party is, in our opinion, the exercise of sovereign power by the city attorney. Furthermore, the city attorney, pursuant to Section 2-285(7), makes the determination of whether to represent a city officer or employee sued civilly if the city attorney determines such officer or employee acted in good faith. Such discretion afforded the city attorney is a further indicia of holding an office.

This Office has drawn a distinction between those city attorneys who are, in essence, retained attorneys and who thus are independent contractors and those whose position is created by law and who are appointed. Compare, Op. S.C. Atty. Gen., January 27, 2000 with Op. S.C. Atty. Gen., January 12, 1979. In the latter opinion, we noted that § 5-7-230 provides that “a city council may elect or appoint a municipal attorney ... whose duties shall be prescribed by law.” There, we stated that “[b]ased on this statute, our Office has concluded that the position of municipal or city attorney is an office within the prohibition of Article XVII, § 1A. 1977 Ops. Atty. Gen. No. 77-137, p. 114; 63 Am.Jur.2d, Public Officers and Employees, Sections 1-33.” Likewise, in this instance, the Aiken city attorney is appointed by, serves at the pleasure of, and is subject to the removal of county council. Pursuant to § 2-283, the city attorney receives “a salary ... established by the city council.”

You have referenced an opinion dated September 14, 1998 in support of your view that the Aiken city attorney position is one of employment rather than an office. In that opinion, however, the Greenwood city attorney “was appointed on a contractual basis to provide legal guidance and represent the City in legal matters.” The Greenwood city attorney was “provided a retainer and receives hourly compensation for civil litigation.”

The key difference is that in this instance the Aiken ordinance specifies that the Aiken city attorney serves as the head of the department of legal services and as director of the department. The city attorney not only directs the work of the city solicitor, who serves as city prosecutor, but the remainder of the department of legal services staff as well. Moreover, the city attorney possesses other powers and duties, discussed above, which constitute indicia of sovereign powers. Rather than an independent contractor or city employee, it appears to us that the Aiken city attorney is a city officer. Moreover, there is no mention in the portion of the ordinance that we have been provided that the city attorney is “retained” or “employed” by the city council. Instead, the city attorney “serve[s] at the pleasure of, and [is] subject to removal by the city council.” Further, § 2-281 makes reference to the term “position or office.” Finally, county council itself has recognized in the enabling ordinance creating the position of city attorney that the city attorney must be a member in good standing of the state Bar “throughout his term of office.” Such would constitute a recognition by County Council that the position of city attorney constitutes an office. In our view, the terms of the ordinance itself would be controlling.

Conclusion

*5 Based upon the foregoing, it is our opinion that the Aiken city attorney holds an office for dual office holding purposes. While, admittedly, previous opinions of this Office have reached varying conclusions concerning the position of city attorney in particular jurisdictions, the particular facts in those instances are controlling. We believe the better reasoning here is that the position of Aiken City attorney constitutes an office for dual office holding purposes.

Very Truly Yours,

Robert D. Cook
Assistant Deputy Attorney General

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