



ALAN WILSON  
ATTORNEY GENERAL

January 25, 2017

Octavia Y. Wright  
Legal Counsel  
State of South Carolina  
Department of Probation, Parole and Pardon Services  
Post Office Box 50666  
Columbia, SC 29250

Dear Ms. Wright:

Attorney General Alan Wilson has received your letter dated January 20, 2016 requesting a legal opinion. The following is this Office's understanding of your question and our opinion based on that understanding.

**Question:**

May a procurement manager work full-time for the Department of Probation, Parole and Pardon Services and still be an elected mayor of a small town without violating the dual office holding prohibitions in the Constitution of the State of South Carolina?

**Law/Analysis:**

As you mention in your letter, the South Carolina Constitution prohibits holding more than one office of honor or profit at one time. S.C. Const. Arts. 6 § 3; 17 § 1.A. Regarding dual office holding and whether one is an officer or an employee, this Office has previously opined that:

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.

Op. S.C. Att'y Gen., 2016 WL 4698870 (S.C.A.G. Aug. 24, 2016) (quoting Op. S.C. Att'y Gen., 2016 WL 3545857 (June 14, 2016)) (citing State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (April 9, 1980)). Crenshaw quotes Sanders v. Belue in explaining that:

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.

State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980) (quoting Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907)). The traditional sovereign powers of the State are taxing, policing and eminent domain. Op. S.C. Att’y Gen., 2015 WL 1093150 (S.C.A.G. February 27, 2015). Moreover, this Office recognizes the only exception to the dual office holding prohibitions (other than those listed in the Constitution and statutes) is if the person holds the second office “ex officio.” See Op. S.C. Att’y Gen., 2013 WL 4636665 (S.C.A.G. July 26, 2013); 2012 WL 4459270 (S.C.A.G. September 19, 2012) (citing Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)).

This Office has consistently opined that the position of mayor of a town or municipality is an office for dual office holding purposes. See, e.g., Ops. S.C. Att’y Gen., 2014 WL 2120885 (May 2, 2014) (quoting Op. S.C. Atty. Gen., 2013 WL 6831111 (December 12, 2013) (“This Office has consistently opined the position of mayor is an ‘office of honor or profit’ for dual office holding purposes.”); Op. S.C. Atty. Gen., 2012 WL 1154553 (March 27, 2012) (“This Office has issued numerous opinions concluding that one who serves as the mayor of a municipality holds an office for purposes of the constitutional prohibition against dual office holding.”); Op. S.C. Atty. Gen., 2012 WL 989298 (March 16, 2012) (“In numerous opinions of this Office we have concluded that a mayor holds an office for purposes of dual office holding.”); Op. S.C. Atty. Gen., 2010 WL 3505053 (August 30, 2010) (“In numerous opinions of this Office we have concluded that a mayor holds an office for purposes of dual office holding.”); Op. S.C. Atty. Gen., 2009 WL 2844884 (August 13, 2009) (“Numerous opinions of this office have concluded that a mayor is an officer for dual office holding purposes.”); Op. S.C. Atty. Gen., 1959 WL 10343 (June 6, 1959) (“The position of Mayor is undoubtedly that of an office within the meaning of our State Constitutional dual office holding provision.”). Furthermore, South Carolina law specifically prohibits a mayor from holding any other municipal office or municipal employment while in office. S.C. Code § 5-7-180.

Thus, let us examine whether a procurement manger with the Department of Probation, Parole and Pardon Services would hold an office of honor or profit. This Office has previously opined that a member of the state’s Procurement Review Panel would not likely be holding an office of honor or profit where the position had no tenure, oath and no salary but reviewed procurement decisions, established rules, held interviews and reported findings. See Op. S.C. Att’y Gen., 1989 WL 406095 (January 23, 1989). Examining the four questions in Crenshaw as outlined above, based on the information in your letter and discussions with your office, it is our understanding that the position was not created by the General Assembly, it is not appointed, there is no tenure or oath, and it only utilizes taxpayer funds collected by a different agency and allocated to the Department of Probation, Parole and Pardon Services, thus not engaging in the sovereign powers of the State. Moreover, it appears the position is one that performs duties required by his employer and/or pursuant to a contract.

**Conclusion:**

It is for all of the above reasons we believe a court will likely determine that a procurement manager with the South Carolina Department of Probation, Parole and Pardon Services is not an office of honor or profit but that the office of mayor of a municipality is an office of honor or profit. Nonetheless, we caution that even if holding both positions does not violate the dual office holding provisions, one cannot be both master and servant. As we have previously stated:

In addition to dual office holding concerns, we must further caution against violations of the common law master-servant principle. See, e.g., McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913) (prohibiting one from holding two positions resulting in the same person to be both master and servant in service to the public).

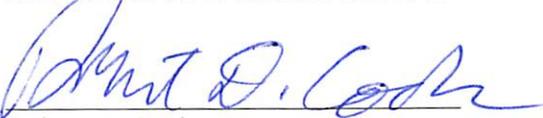
Op. S.C. Att’y Gen., 2016 WL 4698870 (S.C.A.G. Aug. 24, 2016). Moreover, we would caution against any conflicts of interests and advise prohibiting the employee from engaging in any contracts where the municipality would be a bidder.<sup>1</sup> Please also refer any ethics questions to the South Carolina Ethics Commission. 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 (Mardi) S. Fair  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General

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<sup>1</sup> Though we trust this is an unlikely scenario.