ALAN WILSON
ATTORNEY GENERAL

October 26, 2015

Mr. Mark A. Leiendecker
First Circuit Public Defender
107 W. 6th North Street
Suite 100
Summerville, South Carolina 29483

Dear Mr. Leiendecker:

You have requested the opinion of this Office as to whether simultaneously holding the positions of Coroner of Dorchester County, by direction of S.C. Code Ann. § 17-5-50(B), and Chief Magistrate of Dorchester County would contravene the dual office holding prohibition set forth in our State's Constitution as well as the Judicial Code of Conduct. Our analysis follows.

Background

By way of background, the Coroner of Dorchester County was indicted on October 1, 2015 on a count of Misconduct in Office. Thereafter, by Executive Order No. 2015-20, the Coroner was suspended from Office by the Governor, pursuant S.C. Const. art. VI, § 8, as a result of being indicted for a crime that involves moral turpitude. Exec. Order No. 2015-20 (October 1, 2015); see S.C. Const. art. VI, § 8 ("Any officer of the State or its political subdivisions. . . who has been indicted by a grand jury for a crime involving moral turpitude. . . may be suspended by the Governor until he shall have been acquitted").

By the same Order, the Governor appointed the Chief Magistrate of Dorchester County to serve as coroner until reinstatement of the former acting coroner or until a coroner is elected and qualifies in accordance with state law. Exec. Order No. 2015-20 (October 1, 2015). The Governor's appointment of the Chief Magistrate of Dorchester County was mandatory, as S.C. Code Ann. § 17-5-50(B) (2014) provides that: "[i]f a county coroner is suspended by the Governor upon the coroner's indictment or for other reasons, the chief magistrate of that county shall act as coroner until the suspended coroner is reinstated or until a coroner is elected and qualifies in the next general election for coroners, whichever occurs first."

Law / Analysis

Article XVII, Section 1A of the South Carolina Constitution states that "[n]o person may hold two offices of honor or profit at the same time . . ." with the exception that individuals serving as officers in the militia, a member of a lawfully and regulated organized fire department, constable, or notary public may hold an additional office. A person not falling into this exception would violate the dual office holding prohibition by concurrently serving in two offices "involving an exercise of some part of the sovereign power [of the State], either small or great, in the performance of which the public is concerned. . . ." Sanders v. Belue, 78 S.C. 171,

174, 58 S.E. 762, 763 (1907). It has been said that the public policy behind the dual office holding prohibition is "to prevent public officials from acting in circumstances in which their personal interests conflicts with the public whose interest they have been elected to represent." 63C Am. Jur. 2d Public Officers and Employees § 63 (2014) (citing Dykeman v. Symond, 54 A.D.2d 159, 388 N.Y. S.2d 422 (NY 4th Dep't 1976)).

In considering whether a particular position is an office in the constitutional sense, South Carolina courts look to whether "[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). More specifically, our Supreme Court has clarified that the criteria to be considered includes "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." State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

However, our jurisprudence has a narrow but firmly established exception to the dual office holding prohibition often referred to as the "ex officio" or "incidental duties" exception. Seagars-Andrews v. Judicial Merit Selection Com'n, 387 S.C. 109, 125, 691 S.E.2d 453, 462 (2010). As provided in Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947), "double or dual officeholding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law." This exception may be properly invoked only where there is a constitutional nexus in terms of power and responsibilities between the first office and the "ex officio" office, and preserves inviolate the central feature of separation of powers in the Constitution. Seagars-Andrews, 387 S.C. at 126, 691 S.E.2d at 462.

In prior opinions of this Office, we have consistently opined that the position of coroner or deputy coroner and magistrate both constitute as an office for dual office holding purposes. See, e.g., Op. S.C. Att'y Gen., 2004 WL 323938 (Feb. 5, 2004); Op. S.C. Att'y Gen., 2001 WL 129342 (Jan. 22, 2001); Op. S.C. Att'y Gen., 2000 WL 1803616 (Oct. 16, 2000); Op. S.C. Att'y Gen., 1991 WL 633065 (Oct. 23, 1991); Op. S.C. Att'y Gen., 1984 WL 249824 (Feb. 10, 1984) (all providing that the position of coroner or deputy coroner would be considered an office for purposes of the constitutional dual office holding prohibition); see, e.g., Op. S.C. Att'y Gen., 1998 WL 940259 (October 8, 1998); Op. S.C. Att'y Gen., 1997 WL 568835 (July 10, 1997); Op. S.C. Att'y Gen., 1982 WL 189357 (July 8, 1982) (all providing that the position of magistrate would be considered an office for purposes the dual office holding prohibition of the South Carolina Constitution). In a 1982 opinion, we even addressed whether a coroner could appoint a magistrate as deputy coroner pursuant a prior version of S.C. Code Ann. § 17-5-50 and concluded that such appointment would violate the dual office holding provision of the South Carolina Constitution. Op. S.C. Att'y Gen., 1983 WL 142753 (Nov. 3, 1983).

We stand by above cited opinions that conclude both the position of coroner and magistrate would constitute an office for dual office holding purposes. However, the situation you have asked us to address differs in that the magistrate who is also currently serving as coroner is doing so pursuant to the direction of the legislature as specifically set forth in S.C. Code Ann. § 17-5-50(B) (2014). S.C. Code Ann. § 17-5-50(B) was enacted by our legislature in

the 2008 session by Act No. 314. Act No. 314, 2008 S.C. Acts 3205. Again, it provides that "[i]f a county coroner is suspended by the Governor upon the coroner's indictment or for other reasons, the chief magistrate of that county shall act as coroner until the suspended coroner is reinstated or until a coroner is elected and qualifies in the next general election for coroners, whichever occurs first. S.C. Code Ann. § 17-5-50 (2014).

In a prior opinion of this Office, we have discussed our Office's application of Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947) and the ex officio exception in several instances where members of the General Assembly are required to serve on a particular board or commission. See Op. S.C. Att'y Gen., 2003 WL 21040132 (Feb. 18, 2003). Specifically, we provided that:

> [t]his Office has frequently applied the principles expressed in Ashmore to the situation where, by statute, members of the General Assembly are required to serve on a particular board or commission. For example, in an opinion dated June 5, 1981, we concluded that §§ 1-19-60 and 59-123-40 mandated that certain members of the General Assembly were designated to serve on the State Reorganization Commission and the Board of Trustees of the Medical University of South Carolina. We noted that Ashmore dictated the conclusion that such additional service on those boards and commissions as designated by state law did not created a dual office holding situation. Similarly, in an opinion of April 3, 1979, we advised that a State Senator who also served as a member of the Atlantic States Marine Fisheries Commission pursuant to § 50-7-10 (one of the Commissioners shall be a legislator and member of the Commission on Interstate Cooperation of this State, ex officio, designated by the Commission on Interstate Cooperation) did not contravene the dual office holding provision of the South Carolina Constitution.
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> Significantly, in Op. S.C. Atty. Gen., Op. No. 77-171 (June 2, 1977), we concluded that four members of the General Assembly could be appointed to the South Carolina Coastal Council ex officio without any dual office holding problem. The relevant statute provided that two of the ex officio members were to be appointed from the House by the Speaker and two from the Senate, appointed respectively by the President of the Senate and Senate Fish, Game and Forestry Committee. Our conclusion as to whether or not a dual office holding violation occurred with respect to those four members was that it did not. We noted that "[o]f course, a member of the General Assembly may be named by the President of the Senate Fish, Game and Forestry Committee or appointed by the Speaker of the House to serve ex officio as members of the Council. The Act so provides." In contrast, we advised that other legislative members who were appointed to the Coastal Council in a non-ex officio capacity, but instead pursuant to the general appointment powers of the legislative delegations or the governing bodies of the affected counties, were not exempted from the dual office holding requirement of the Constitution.

Op. S.C. Att'y Gen., 2003 WL 21040132 (Feb. 18, 2003). We believe this summary is particularly illustrative of the fact that the service "ex officio" comes from the specific direction

of the law, not from general appointment powers. It is without question that the duty of the chief magistrate to serve as coroner, due to the suspension of the former acting coroner, is incidental to holding the position of chief magistrate and is specifically directed by law— S.C. Code Ann. § 17-5-50(B) (2014). As a result of S.C. Code Ann. § 17-5-50(B) (2014), it is our opinion that the dual office holding violation of the constitution would not be violated in this situation because the chief magistrate is acting as the coroner at the mandatory direction of the legislature providing that the chief magistrate must do so upon suspension of the former acting coroner. In other words, in the situation at hand, this is another duty of chief magistrate mandated by law "by virtue of his office" as chief magistrate.

While we believe this conclusion is supported by case law and prior opinions of this Office, we must also note that this Office has consistently taken the position that enacted legislation, unless facially invalid, is presumed constitutional and must be enforced until a court of competent jurisdiction declares otherwise. See, e.g., Op. S.C. Att'y Gen., 1979 WL 43243 (April 3, 1979). Accordingly, pursuant to the longstanding policy of this office, we must presume S.C. Code Ann. § 17-5-50 (2014) is constitutional and advise that is must be enforced unless and until it is set aside by a court of competent jurisdiction.

Finally, we address your concern that serving simultaneously as coroner and chief magistrate would violate the Code of Judicial Conduct. You cite several rules relating to a judge's ethical responsibility to remain impartial, and state that "[a]t the very least the appearance of 'impartiality' would be impaired if a magistrate were to preside over cases involving death where she had the authority to order the autopsy, determine the cause of death, and investigate the circumstances surrounding the death."

"It is well settled judges should recuse themselves where questions of impartiality or impropriety are raised." State v. Cheatham, 349 S.C. 101, 111, 561 S.E.2d 618, 623 (Ct. App. 2002). The Court of Appeals has also summarized that:

> [t]he Code of Judicial Conduct requires a judge to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned." Canon 3(C)(1) of the Code of Judicial Conduct, Rule 501, SCACR. A judge must exercise sound judicial discretion in determining whether his impartiality might reasonably be questioned. *Christy v. Christy*, 317 S.C. 145, 452 S.E.2d 1 (Ct.App.1994). Absent evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993). It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias. *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996); *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct.App.1996). Furthermore, the alleged bias must be personal, as distinguished from judicial, in nature. *Christensen v. Mikell*, 324 S.C. 70, 476 S.E.2d 692 (1996).

Parker v. Shecut, 340 S.C. 460, 497, 531 S.E.2d 546, 566 (Ct. App. 2000), rev'd on other grounds, 349 S.C. 226, 562 S.E.2d 620 (2002).

Whether or not a judge has the ethical duty to disqualify himself or herself on the basis of the inability to remain impartial in a processing is entirely factual in nature. While we acknowledge situations may arise where disqualification may be necessary due to the chief magistrate simultaneously serving as coroner pursuant to S.C. Code Ann. § 17-5-50(B) (2014), analysis must be done on a case-by-case basis. Because this Office does not have the jurisdiction to resolve questions of fact, and because it is our understanding that no specific instance of impartiality has occurred, we are without authority to resolve this question. See Op. S.C. Att'y Gen., 2007 WL 4284623 (Nov. 27, 2007) (acknowledging this Office is without jurisdiction to resolve questions of fact); see also Op. S.C. Att'y Gen., 1998 WL 196485 (March 23, 1998) (providing that this Office will not answer hypothetical questions in a legal opinion).

Conclusion

For the reasons set forth above, it is our opinion that serving simultaneously as chief magistrate and coroner pursuant to S.C. Code Ann. § 17-5-50 (2014) is an ex officio position that comes from the specific direction of the law and as a result of one's position as chief magistrate. Therefore, falling within the ex officio exception, we do not believe the dual office holding prohibition of our State's Constitution has been violated. Furthermore, pursuant to the longstanding policy of this office, we must presume S.C. Code Ann. § 17-5-50 (2014) is constitutional and advise that is must be enforced unless and until it is set aside by a court of competent jurisdiction.

A determination of whether a judge must recuse himself on the basis of impartiality or impropriety is a question of fact that this Office is without jurisdiction to answer. In addition, it is the longstanding policy of this office that we cannot comment on hypothetical questions in a legal opinion. Accordingly, we are without authority to address whether serving simultaneously as chief magistrate and coroner pursuant to S.C. Code Ann. § 17-5-50(B) (2014) would violate the Judicial Code of Conduct.

If we can assist with anything further, please do not hesitate to contact our Office.

Very truly yours,

Anne Marie Crosswell

Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Solicitor General