CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS — LEGISLATURE — LOCAL GOVERNMENT.

No constitutional prohibition against member of House of Delegates serving as temporary assistant Commonwealth’s attorney.

The Honorable Ryan T. McDougle
Member, House of Delegates
March 15, 2002

You ask whether you, as a member of the House of Delegates, may serve as a temporary assistant Commonwealth’s attorney for approximately three months.

You advise that you have been requested to work as an assistant Commonwealth’s attorney for three months. You state that the Commonwealth’s attorney seeking your assistance will be without one of his assistants for three months while she is on maternity leave. Because of your prior experience as a prosecutor, you have been asked to work, for a set compensation, as one of the assistants to the Commonwealth’s attorney. You desire to perform the duties of an assistant Commonwealth’s attorney while serving as a delegate from the Ninety-Seventh House District. Finally, you advise that the General Assembly will not be in session during the period you work as an assistant Commonwealth’s attorney.

The qualifications to hold office as a member of the General Assembly are set out in Article II, § 5 of the Constitution of Virginia, which provides:

The only qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution, and except that:

....

(c) nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests,
dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision.

Specific constitutional provisions contain the required qualifications for General Assembly members and the prohibition against multiple officeholding at the local level. Article IV, § 4 describes the qualifications necessary to be elected to the General Assembly:

No person holding a salaried office under the government of the Commonwealth, and no judge of any court, attorney for the Commonwealth, sheriff, treasurer, assessor of taxes, commissioner of the revenue, collector of taxes, or clerk of any court shall be a member of either house of the General Assembly during his continuance in office; and his qualification as a member shall vacate any such office held by him. No person holding any office or post of profit or emolument under the United States government, or who is in the employment of such government, shall be eligible to either house.

Prior opinions of the Attorney General consistently conclude that the deputies of constitutional officers are themselves officers and, therefore, are subject to the same requirements and disabilities as the principal officer. A 1991 opinion responds to the specific inquiry regarding whether an assistant Commonwealth’s attorney may serve concurrently as a member of the General Assembly. The opinion concludes that Article IV, § 4 prohibits an assistant Commonwealth’s attorney from simultaneously serving as a member of the General Assembly.

In 1999, however, the Supreme Court of Virginia considered the question whether Article VII, § 6 bars a deputy sheriff from also serving on a town council. Article VII, § 6 is the constitutional prohibition against holding multiple public offices. The Court concluded that the prohibition against holding multiple public offices set forth in Article VII, § 6 is "clearly and unambiguously limited to persons who hold more than one of the various offices expressly mentioned in Article VII, §§ 4 and 5 of the Constitution of Virginia." Furthermore, the Court observed that "Article VII, § 4 … mentions ‘a sheriff’ and Article VII, § 5 mentions ‘[members of] the governing body of each … town.’" The Court held that there is "nothing in Article VII, § 6 which extends its proscription against multiple public office holding beyond the holders of the offices described or referred to therein."
The language of Article IV, § 4 specifically prohibits only the "attorney for the Commonwealth" from serving as a "member of either house of the General Assembly during his continuance in office." Just as was indicated by the Supreme Court, the language in Article IV, § 4 does not expressly include assistant attorneys for the Commonwealth within its scope. The two constitutional provisions are virtually identical in prohibiting the holding of multiple offices, and neither specifically restricts the ability of assistants to the principal officer to hold office. Therefore, it is my opinion that the logic of the Supreme Court decision that provisions and prohibitions applicable to constitutional officers do not apply to their assistants will apply with equal force to both Article IV, § 4 and Article VII, § 6. Accordingly, the prior opinions of the Attorney General concluding that deputies of constitutional officers are themselves officers subject to the same requirements and disabilities as the principal officer are expressly overruled.

It is, therefore, my opinion that there is no constitutional prohibition against you, as a member of the House of Delegates, serving as a temporary assistant Commonwealth’s attorney for approximately three months during the time that the General Assembly is not in session.

1See Va. Const. art. IV, § 4.


3See Op. Va. Att’y Gen.: 1991 at 55 (assistant Commonwealth’s attorney may not serve as member of General Assembly); 1979-1980 at 282 (deputy clerk may not serve as member of city council); 1975-1976 at 50 (deputy commissioner of revenue must meet residency requirement); 1974-1975 at 384 (deputy sheriff must meet age and residency requirements).


5Id. at 56.


7258 Va. at 621, 521 S.E.2d at 527.

8Id.
9 Id.

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