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Office of the Attorney General
40 Capitol Square, SW
Atlanta, Ga 30334

Via Facsimile

Dear Sir;

We are writing to request an Attorney General Opinion as to whether a conflict of interest exists when the Secretary of State is a party nominee for the office of Governor and continues to perform the duties of his elected office. While a party nominee is not an employee or office holder, does the conflict of interest standard as defined by the common-law doctrine of incompatibility apply?

Several prior opinions of the Attorney General have examined the application of the doctrine of incompatibility of offices:

'The common-law doctrine of incompatibility of offices arises out of the public policy that an officeholder's performance should not be influenced by divided loyalties. *Dunn v. Froelich*, 382 A.2d 686 (N.J. 1978). Incompatibility exists where one office is subordinate to another, *subject to its supervision or control, or the duties conflict*, thus inviting the incumbent to prefer one obligation to another.'" *Gryzik v. State*, 380 So.2d 1102, 1104 (Fla. 1980).' Op. Att'y Gen. U83-55; see also, Op. Att'y Gen. U84-22.

1985 Op. Att'y Gen. 85-28 at 68. "If the office holder in one capacity supervises or reviews the functions he has performed in his other capacity, common-law incompatibility exists." 1983 Op. Att'y Gen. U83-36 at 261.

"A **conflict** may also arise even though there is no "direct supervision or control" of one position over the other. 1984 Op. Att'y Gen. U84-22 at 238. Instead, where there is even the potential for abuse arising from the holding of two such offices, there is an impermissible **conflict of interest** created. *Id.*; 1980 Op. Att'y Gen. 80-64.

There need not be any actual wrongdoing to create a conflict of interest, and none is suggested here. Common-law and statutory provisions are designed to preclude the opportunity or temptation for impropriety, by prohibiting the holding of incompatible positions. “*Montgomery v. City of Atlanta*, 162 Ga. 534, 546 (1926). 1997 Op. Att’y Gen. U97-11, quoting 1980 Op. Att’y Gen. 80-65 at 136.

As defined by the Official Code of Georgia § 21-2-50 the Secretary of State’s powers include inter alia the power to:

- (1) To determine the forms of nomination petitions, ballots, and other forms the Secretary of State is required to determine under this chapter;
- (2) To receive registration statements from political parties and bodies and to determine their sufficiency prior to filing, in accordance with this chapter, and to settle any disputes concerning such statements;
- (3) To receive and determine the sufficiency of nomination petitions of candidates filing notice of their candidacy with the Secretary of State in accordance with this chapter;
- (4) To certify to the proper superintendent official lists of all the political party candidates who have been certified to the Secretary of State as qualified candidates for the succeeding primary and to certify to the proper superintendent official lists of all the candidates who have filed their notices of candidacy with the Secretary of State, both such certifications to be in substantially the form of the ballots to be used in the primary or election. The Secretary of State shall add to such form the language to be used in submitting any proposed constitutional amendment or other question to be voted upon at such election;
- (5) To furnish to the proper superintendent all blank forms, including tally and return sheets, numbered lists of voters, cards of instructions, notices of penalties, instructions for marking ballots, tally sheets, precinct returns, recap sheets, consolidated returns, oaths of managers and clerks, oaths of assisted electors, voters certificates and binders, applications for absentee ballots, envelopes and instruction sheets for absentee ballots, and such other supplies as the Secretary of State shall deem necessary and advisable from time to time, for use in all elections and primaries. Such forms shall have printed thereon appropriate instructions for their use;
- (6) To receive from the superintendent the returns of primaries and elections and to canvass and compute the votes cast for candidates and upon questions, as required by this chapter;
- (7) To furnish upon request a certified copy of any document in the Secretary of State's custody by this chapter and to fix and charge a fee to cover the cost of furnishing same;
- (8) To perform such other duties as may be prescribed by law;
- (9) To determine and approve the form of ballots for use in special elections;
- (10) To prepare and provide a notice to all candidates for federal or state office advising such candidates of such information, to include requirements of this chapter, as may, in the discretion of the Secretary of State, be conducive to the fair, legal, and orderly conduct of primaries and

elections. A copy of such notice shall be provided to each superintendent for further distribution to candidates for county and militia district offices;

(11) To conduct training sessions at such places as the Secretary of State deems appropriate in each year, for the training of registrars and superintendents of elections;

(12) To prepare and publish, in the manner provided in this chapter, all notices and advertisements in connection with the conduct of elections which may be required by law;

(13) To prepare and furnish information for citizens on voter registration and voting;

(14) To maintain the official list of registered voters for this state and the list of inactive voters required by this chapter; and

(15) To develop, program, build, and review ballots for use by counties and municipalities on direct recording electronic (DRE) voting systems in use in the state.

(b) As the state's chief election official, the Secretary of State shall not serve in any fiduciary capacity for the campaign of any candidate whose election will be certified by the Secretary of State. Nothing in this subsection shall prohibit the Secretary of State from organizing and operating his or her own campaign for election to public office.

Specifically, I am requesting an Attorney General Opinion as to whether not a Secretary of State's candidacy for Governor constitutes a conflict of interests under the doctrine of incompatibility of offices as to specific duties of his office as enumerated in O.C.G.A. § 21-2-50 paragraphs (1), (2),(3), (4), (5), (6), (7), (8), (10), (12),(13) and (15).

Also, although the Office of Secretary of State is declared "vacant" upon his qualification, is the incumbent office holder still authorized to continue to perform the duties outlined by statute despite the "opportunity or temptation for impropriety"?

Thank you for your immediate attention to this request for an opinion.

Sincerely,

Bettianne Childers Hart, Esq.

Judge (Retired) Thelma Wyatt Cummings Moore