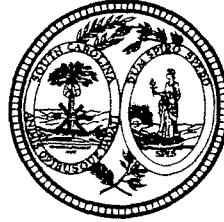


7753 *Willis*



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

March 18, 2004

Steve Willis, City Administrator
City of Lancaster
Post Office Box 1149
Lancaster, South Carolina 29721

Dear Mr. Willis:

You have requested an opinion from this Office concerning dual office holding. The Public Utilities Director for the City of Lancaster is considering running for a seat on the Lancaster County Council. You inquire as to whether simultaneously holding the positions of county council member and Public Utilities Director for the City of Lancaster would constitute dual office holding, which is prohibited under the South Carolina Constitution. You have indicated that the position of Public Utility Director is created by city ordinance, and that as city administrator you appoint the department heads with the advice and consent of City Council. You have also indicated the Director has obtained a determination from County Council that serving as a Council member would not interfere with his job as Public Utilities Director; you have indicated that this pre-clearance is required by the Personnel Policy for the City before running for a public office. A job description for the City Public Utilities Director has been included by you to assist this Office in determining whether the person holding that position is an officer, or merely an employee, for dual office holding purposes.

Law / Analysis

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in 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. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations 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). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." Sanders, supra, 78 S.C. at 174.

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This Office has concluded in a number of prior opinions that a member of county council holds an office for dual office holding purposes. See as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated February 26, 2003; July 26, 1999; July 27, 1997; December 7, 1994; and August 20, 1985. Therefore, the question turns to whether the position of Public Utilities Director for the City of Lancaster would likewise be considered an office holder, or an employee, for purposes of dual office holding.

However, we have not had the opportunity previously to advise as to whether the Public Utilities Director for the City of Lancaster is an office holder. We have opined as to what appears to be an analogous position. We recently concluded that the Director of Utilities for the City of West Columbia was not an office holder, and could serve as a member of the Lexington County Council without violating the dual office holding provisions in the state Constitution. Ops. S.C. Atty. Gen. dated August 19, 2002. Moreover, in an opinion dated September 13, 1974, we concluded that the Superintendent of Public Works for Sullivan's Island was not an officer holder, but a mere employee. There, we stated as follows:

[T]he Superintendent of Water Works for the Town of Sullivan's Island performs chiefly maintenance duties. He is not involved in policy making for the town, exercises no sovereign power, and has little control over the allocation and expenditure of public funds. He is hired by the council and serves at its pleasure. It is, therefore, my opinion that he is an employee in his position of Superintendent of Public Works and not an 'officer.'

Ops. S.C. Atty. Gen. dated September 13, 1974. Furthermore, assuming that the position of "Director" equates roughly with that of an "executive director" [as opposed to a member of a board or commission], we have consistently concluded that the position of executive director or director is an administrative position, not an office. See, e.g., Ops. S.C. Atty. Gen. dated June 24, 1994 [Executive Director of Real Estate Commission]; May 15, 1989 [executive director of Calhoun County Development Board]. After review the job description that you have provided along with your request, it is our opinion that the Public Utilities Director for the City of Lancaster is similar to the positions, discussed above. Accordingly, the Director does not appear to exercise any portion of the State's sovereign power. Sanders v. Belue.

Conclusion

Based upon the foregoing authorities, we are of the opinion that the Public Utilities Director for the City of Lancaster is an employee of the City, and does not hold an office for dual office holding purposes. Thus, it would not be a violation of the Constitutional provision prohibiting dual office holding for one person to simultaneously serve as a member of the County Council for Lancaster County and as the Public Service Director for the City of Lancaster. So long as the City has no policy which would prohibit the Public Utilities Director from running for County Council, this Office is aware of no legal barrier which would prohibit him from doing so.

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You have also referenced the fact that the Hatch Act may apply to the situation at hand. The Public Utilities Director has properly directed this inquiry to the appropriate federal authorities.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read 'RDC', is positioned above the printed name.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an