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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

January 27, 2004

Cheryll N. Woods-Flowers, Chair
Charleston County Park and Recreation Commission
861 Riverland Drive
Charleston, South Carolina 29412

Dear Ms. Woods-Flowers:

As Chair of the Charleston County Parks and Recreation Commission, you have asked for an opinion regarding a possible dual office holding situation which has arisen with respect to a member of the Commission. A current Commissioner has stated in correspondence to this Office that she was recently "hired by Charleston County as the Director of Elections and Voter Registration." You thus request that "a determination be made as to whether she is still eligible to serve as a member in light of the new position she has taken." You note that time is of the essence "since her absence makes it more difficult to obtain a quorum at meetings."

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).

In an opinion dated January 29, 1997, we concluded that membership on the Charleston County Parks and Recreation Commission constituted an office for dual office holding purposes. There, we analyzed board membership as follows:

The present Charleston County Park and Recreation Commission was created pursuant to Act No. 1595 of the 1972 Statutes at Large, as amended by Act. No. 263 of 1985. Its members are empowered to do the following: acquire land whereupon to establish county parks and operate such facilities; acquire and operate equipment; fix rates and charges for the use of its facilities; make contracts for construction and

other services; issue revenue bonds; and expend all funds received. These functions involve the exercise of the sovereign power of the State, and therefore, the members of the Charleston County Park and Recreation Commission appear to be officers for dual office holding purposes. See Op. Atty. Gen. dated June 24, 1983. Moreover, this Office has frequently concluded that members of other counties' recreation commissions would be considered officers. See, as examples, Ops. Atty. Gen. dated July 17, 1984; August 4, 1982; and October 21, 1980. There appears no reason to treat any differently a member of the Charleston County Park and Recreation Commission. Thus, I am of the opinion that a member of that body would also be considered an officer for dual office holding purposes.

The Charleston County Elections and Voter Registration Board was created by Act No. 127 of 2003. The Governor vetoed this legislation (S.158) but the General Assembly overrode the veto on April 1, 2003. This legislation provides in pertinent part as follows:

Section 1. Notwithstanding any other provision of law:

(A) (1) There is established the Board of Elections and Voter Registration of Charleston County to be composed of nine members appointed by the Governor upon the recommendation of a majority of the senators representing the county and a majority of the members of the House of Representatives representing the county.

(2) The term of office for the members of the board is two years commencing on the fifteenth day of March in each odd-numbered year. In case of a vacancy from any cause on the board, the vacancy may be filled in the same manner of original appointment, as provided in this section, for the unexpired term. A majority of the senators representing the county and a majority of the members of the House of Representatives representing the county shall appoint the board's chairman, and the chairman shall serve a term of two years and may be reappointed to that office of any number of successive terms without limitation. The board may choose to elect a vice chair, a secretary, and other officers as the board considers appropriate. The board shall employ a director, determine the compensation, and determine the number and compensation of other staff positions. Salaries must be consistent with the compensation schedules established by the county for similar positions. The director is responsible for hiring and management of the staff positions established by the board that

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report to the director. Staff positions are subject to the personnel system policies and procedures by which all county employees are regulated, except that the director serves at the pleasure of the board. (emphasis added).

Section 2 of the Act abolishes both the Charleston County Board of Voter Registration and the Charleston County Election Commission and devolves the “functions, duties, and powers” of these offices upon the Board of Elections and Voter Registration.

As a general matter, we have previously advised that “depending on the circumstances, a clerk for a county board of registration and election might or might not be an office. The determining factor is whether the clerk has been deputized for the purpose of taking applications and issuing voter registration certificates.” Op. S.C. Atty. Gen., October 10, 1990, citing Op. S.C. Atty. Gen., June 22, 1982. Thus, it has been our opinion in such circumstances that if a clerk has “been so deputized, it is likely that [the] ... position of secretary-clerk would be considered an office for dual office holding purposes.”

Moreover, this Office has repeatedly concluded over the years that the position of executive director of a board or commission does not constitute an office. See, Op. S.C. Atty. Gen., July 24, 2001 and opinions referenced therein. We have stressed “the fact that the executive director served at the pleasure of the governing board or authority.” Id. Moreover, in those previous instances,

[g]enerally speaking, no qualifications were set forth in law in those executive director positions. And most importantly, we referenced the general rule set forth in Sanders v. Belue, supra which is stated as follows:

[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.

78 S.C. at 174. In short, in virtually every previous instance in which the question has arisen, we have concluded that an executive director of a governing board or commission is an “employee” rather than an “officer.”

It should also be noted that Act No. 127 of 2003 states that the Board shall “employ” a director. While not controlling, it is significant here that the General Assembly used the term “employ” in the context of the director, suggesting, at least, that the director’s status was one of an “employee” rather than an “officer.” Moreover, the Act further states that “[s]taff positions” are subject to the county personnel system “by which all county employees are regulated, except that the director serves at the pleasure of the board.” Again, the Legislature seems to indicate that the director is an “employee” of the county – one who serves at the pleasure of the newly created

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Charleston County Elections and Voter Registration Board. The Act's characterization of the Director as an "employee" is consistent with the above-referenced opinions that an executive director of a board who serves at the board's pleasure is not an "officer" for dual office holding purposes.

Thus, if the director in question is not deputized by the Board for purposes of "taking applications and issuing voter registration certifications," that person most likely would not be an officer for dual office holding purposes. Instead, the individual in question is most likely an "employee" of Charleston County.

With respect to your question regarding the applicability of § 8-13-730 of the State Ethics Act ("No County employee is allowed to serve as a member of any government regulatory group or agency that regulates any business with which that employee is associated"), you note that you have been advised by numerous County and State officials that such provision is not violated by your assumption of the position of director of the Board of Election and Registration while continuing to serve as a member of the County Parks and Recreation Commission. Likewise, we see no conflict of interest apparent on the face of these two positions. There appears to be no oversight authority exercised by one position over the other. However, you may wish to check with the State Ethics Commission which possesses jurisdiction with respect to any interpretation of the Ethics Act.

Conclusion

1. Unless the Director is deputized by the Board of Elections and Voter Registration as a board member to take applications and issue voter registration certifications, it is our opinion that no dual office holding problem is created by the individual in question by simultaneously holding the positions of member of the Charleston County Parks and Recreation Commission and as Director of the Charleston County Elections and Voter Registration Board.
2. No conflict of interest is apparent on the face of the two positions. However, the individual in question may wish to check with the State Ethics Commission which possesses primary jurisdiction with respect to the interpretation of the State Ethics Act.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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