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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

September 26, 2005

The Honorable Ronald P. Townsend
Member, House of Representatives
P.O. Box 8002
Anderson, South Carolina 29622

Dear Representative Townsend:

By letter you requested our opinion regarding a dual office holding question. Specifically you inquired as to whether an individual could serve simultaneously as the Anderson County Auditor and as a member on the board of directors for the Hammond Water District without violating the dual office holding provision. Furthermore, if such concurrent service violates the dual office holding provision, you ask that we explain why that is the case. Following review of your inquiry, this Office advises an individual who simultaneously serves as the Anderson County Auditor and as a member on the board of directors for the Hammond Water District would violate the dual office holding provision.

Law/Analysis

Article XVII, Section 1A of the South Carolina 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.

On several occasions, this Office has advised that a county auditor holds an office for purposes of dual office holding. *See, Ops. S.C. Atty. Gen.*, May 28, 2002; June 21, 1993; March 31, 1980. The powers and duties of a county auditor are set forth in part in S.C. Code Ann. §§ 12-39-10 to 12-39-350 of the Code. These powers and duties clearly involve an exercise of a portion of the

sovereign power of the State. Therefore, the position of county auditor is clearly an office for dual office holding purposes.

Likewise, we have advised that service on the board of directors for a local water district constitutes an office for purposes of the dual office holding provision. *See, Ops. S.C. Atty. Gen.*, November 19, 2002 (Glenwood Metro Board); January 29, 1991 (Lugoff Water District); September 15, 1983 (Beech Island Rural Community Water District); July 28, 1962 (East Seneca Water District Commission). However, as you have indicated, the Hammond Water District was established pursuant to Section 33-36-1310. Because Hammond originated as a nonprofit corporation, this may present a somewhat different situation from the other water districts referenced above.

Prior to its conversion to a public service district, the Hammond Water District was registered with the Office of the Secretary of State as a nonprofit private corporation bearing the name, "Hammond Water and Sewer Company, Inc." Clearly, for many years, the entity was a private, nonprofit company. However, on December 31, 2001, by way of local resolution, the Hammond Water and Sewer Company filed articles of conversion with the Secretary of State's office successfully converting the nonprofit private corporation into a public service district, a public body politic and corporate.

As noted above, the district was converted into a public service district by way of Section 33-36-1310 which permits a nonprofit corporation providing water and sewer services to become a public service district. Section 33-36-1310 reads as follows:

(A) For the exclusive purposes of participating in a joint municipal water system as authorized under Chapter 25, Title 6, a nonprofit corporation incorporated for the purposes of providing water or water and sewer services, pursuant to the provisions of this chapter may elect, by resolution, to become a public service district, a public body politic and corporate:

- (1) before January 1, 2002, upon a majority vote of its members constituting a quorum present at a duly called and noticed meeting; or
- (2) on and after January 1, 2002, upon a majority vote of fifteen percent of its members present or by proxy at a duly called and noticed meeting.

(B) Notice of this meeting must be given by regular mail, addressed to the last known address of the member, and mailed not less than ten days prior to the meeting. The secretary of the corporation shall certify the date of mailing. The notice shall state the purpose, time, and place of the meeting.

(C) Upon a favorable vote, the chief executive officer of the corporation shall petition the Secretary of State to issue a new charter to convert and constitute the nonprofit corporation a public service district, a public body politic and corporate.

Pursuant to Section 33-36-1360, a water district established by virtue of Section 33-36-1310 possesses, most notably, the powers to "purchase, build, construct, maintain, rent, lease, and operate" various facilities pertinent to water treatment, to "enter into contracts of short or long duration," to "prescribe rate charges for services and enact regulations," to "acquire by purchase, lease, gift, or otherwise, or obtain options for the acquisition of any property, real or personal..." to "incur liabilities, lend and borrow money, issue bonds or notes of the district," to authorize the construction, operation, maintenance of any project..." to appoint officers, agents, employees, and servants..." and to "exercise, in connection with water or sewage disposal business, the power of eminent domain as prescribed in Section 6-13-50(19). We have heretofore advised that similar powers involve the exercise of a portion of the sovereign power of the State thus rendering those who possess such authority to be office holders for dual office holding purposes. *See, Op. S.C. Atty. Gen.*, January 7, 1991 (the following duties involve the exercise of a portion of the sovereign power of the state: prescribing regulations with respect to use of property or facilities owned by the District; building or acquiring facilities; imposing rates; exercising eminent domain; employing personnel; entering into contracts; incurring indebtedness; levying taxes; and the like).

Furthermore, it is apparent that in permitting a nonprofit private corporation to convert their status to that of a public service district, the General Assembly did not intend that such corporation maintain its previous status. Section 33-36-1370 explains that "[d]istricts converted pursuant to this article shall assume all assets, properties, and liabilities of the antecedent nonprofit corporation" and thus, in essence, confirming that the private nonprofit corporation no longer exists in any form. Inasmuch as the private nonprofit corporation no longer exists, but is now, by law, constituted as a public service district, the current board of directors is required to act on behalf of the public service district and thus possesses the aforementioned powers. Thus, members of the board would, most likely, hold an office for dual office holding purposes.

Conclusion

Accordingly, we advise that an individual who simultaneously serves as the Anderson County Auditor and as a member on the board of directors for the Hammond Water District would violate the dual office holding provision.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General