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HENRY MCMASTER
ATTORNEY GENERAL

July 19, 2006

W. Thomas Sprott, Jr., Esquire
Fairfield County Attorney
Post Office Drawer 329
Winnsboro, SC 29180

Dear Mr. Sprott:

We recently issued an opinion dated May 31, 2006, in response to your concerns regarding the Fairfield County Recreation Commission (the "Recreation Commission"). Since the issuance of this opinion, we received two additional request letters from you also concerning the Fairfield County Recreation District (the "District") and the Recreation Commission. In one letter, you ask that we "address the issue of the master/servant relationship as it pertains to County Council and its Administrator, and the Director fo the Recreation Commission." In the other letter, you ask for an opinion "regarding removing for cause members of the Recreation Commission." Specifically, you inquire as to whether certain behavior by the commissioners' constitutes cause for removal.

Law/Analysis

Master-Servant

In our previous opinion, we determined an individual serving as the Director of the Recreation Commission and as a member of the Fairfield County Council ("County Council") does not violate the dual office holding prohibition contained in the South Carolina Constitution. However, you now ask whether serving in both capacities may create a conflict of interest due to the master-servant relationship. This Office, on numerous occasions, described the conflicts of interest that may arise out of a master-servant relationship as follows:

> "[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts."

Request Letters

Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994). Moreover, our Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913) stated: "No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity." Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles.

Traditionally, a master-servant conflict arises when an individual serves as an employee for the same body to which he or she serves as an officer. For example, a maintenance worker for a town also serving on the town's council or a fireman simultaneously severing as a commissioner for the fire district where he is employed. Ops. S.C. Atty. Gen., May 21, 2004; October 9, 1995. However, in an opinion of this Office dated March 26, 1999, we addressed whether a master-servant conflict arose when an employee of a county department of social services was elected to the county board of education. Op. S.C. Atty. Gen., March 26, 1999. We acknowledged to the requester that "[t]he situation raised in your opinion request does not represent the typical master-servant problem." Id. But, we considered the fact that the site of the individual's employment is one of the school district's high schools, a portion of his salary is funded by the school district, he is supervised in some degree by the high school's principal, and that he serves at the pleasure of the school district. Id. In addition, conceivably the individual may be placed in the position of having to determine his own job status, regulate his compensation, and terminate the school district's contract with department of social services. Id. Accordingly, we opined a court would likely find the individual's service in both capacities in violation of common law master-servant principles. Id.

Two previous opinions of this Office address situations in which an individual desired to serve on a county council while employed as an executive director of a local board whose members are appointed by county council. In one instance, the Executive Director of the Sumter County Commission on Alcohol and Drug Abuse (SCCADA) sought candidacy for a position on the Sumter County Council. Op. S.C. Atty. Gen., June 7, 2004. In this situation, we determined:

> Since the executive director is not a county employee and is under the direct supervisory authority of the Board of Commissioners for the SCCADA, which receives its funding primarily from federal and state sources, there would not appear to be any of the direct master-servant conflicts described above. However, the fact that members of the Board of Commissioners for the SCCADA are appointed by the Sumter County Council may evince a degree of indirect authority which county council has over the executive director for the county commission on drug and alcohol abuse. Accordingly, while it is our opinion that there are no apparent master-servant conflicts inherent in the situation about which you have inquired, the question is not beyond dispute. Certainly, one should be mindful of the indirect

> correlation between County Council and the Executive Director in this instance.

Id.

In another opinion, we considered whether an individual violated the master-servant principles by simultaneously serving as both a member of the Calhoun County Council and as executive director of the Calhoun County Development Board. Op. S.C. Atty. Gen., May 15, 1989. In that opinion, we were unable to address the issue without further inquiry, but in considering the master-servant principles, as cited above, we stated:

> Applying these common law principles to your question, it may well be that a master-servant situation, and thus a conflict of interest, may exist. For this reason, it is suggested that the relationship of the executive director of the Calhoun County Development Board to Calhoun County, with respect to personnel policies and practices, and to Calhoun County Council be further explored.

Id.

As you mentioned in your letter, the District is a special purpose district created by the Legislature in 1970. 1970 S.C. Acts 2365. The District is governed by a nine-member board, the Recreation Commission, which is appointed by members of County Council. Id. The Legislature created the District as a corporate body and afforded it the power, among others, to "appoint agents, employees and servants, prescribe their duties, fix their compensation, determine if and to what extent they shall be bonded for the faithful performance of their duties." Id. In your letter, you also informed us that: "There is a connection between the Recreation Commission and County Council as Fairfield County is the major source of funding for the Recreation Commission." Furthermore, you added:

> An additional connection is that since 1985, pursuant to Ordinance 88 [of which you attached a copy], the fiscal record keeping responsibilities of the Recreation Commission were transferred to the Fairfield County Council. As such, all funds appropriated by County Council for the benefit of the Recreation Commission, are paid by the County Council through its administrator. Attention is called to the preamble where its states, "The Fairfield County Council has ultimate fiscal responsibility for the Recreation Commission . . . ."

Id. Finally, you stated: "The County Administrator is accountable to the Director of the Recreation Commission in carrying out fiscal matters. He is also accountable to County Council of which the Director is a member. The Administrator serves both."

In our review of the District's enabling legislation and the information you provided, whether a master-servant conflict of interest arises in this instance is far from clear. The District's enabling legislation indicates the Director serves at the pleasure of the Recreation Commission, rather than at the pleasure of County Council. The Recreation Commission, not County Council, has the authority to hire, fire, and set the compensation of the Director. However, although County Council has no direct supervisory authority over the District's Director, it does appear to have some indirect control over the Director's position. Unlike the situation considered in our June 7, 2004 opinion cited above in which SCCADA did not receive its funding from the County, the District receives its "major source of funding" from Fairfield County through County Council's appropriations. Thus, because County Council has control over the District's funding, we presume is also has some control over the funding of the Director's position. In addition, you indicate County Council has supervision over the finances of the District. Given this information, we believe County Council has significant, although indirect, supervision and control over the District and its Director. While we have not solely relied on the fact that the governing body of a board is appointed by a county council in determining whether a master-servant conflict exists, we note, as we did in our 2004 opinion, this fact may evince a degree of indirect authority held by County Council over the Director of the District. Accordingly, although not free from doubt, we believe a court may find a member of County Council's service as the Director of the District in violation of common law master-servant principles.

In the materials submitted to our Office with your initial request letter, you included an opinion from the State Ethics Commission regarding the councilmember's simultaneous service on County Council and as the Director of the District. In this opinion, the State Ethics Commission warned:

> Section 8-13-735 prohibits a person who sits on county council and is also a county employee from participating in decisions which would affect the employee's economic interest, i.e. his salary or other benefits. Section 8-13-700(B) requires you to recuse yourself from any action which would affect your economic interest or that of your employer, the Recreation Commission.

Furthermore, the State Ethics Commission added:

> Public officials or more specifically in your case county council members, are prohibited by the Ethics Reform Act from representing individuals or groups before any agency, unit or subunit of the county for which the public official has official responsibility. See Section 8-13-740(A)(4). You may not represent the Recreation Commission before County Council.

Thus, presuming a court does not find a master-servant conflict in this instance barring the councilmember's service in both positions, we believe his service in both positions requires

compliance with the provisions of the Ethics Reform Act as explained in the State Ethics Commission's opinion.

Cause for Removal

In our previous opinion, we responded to your inquiry of whether County Council may discipline or remove members of the Recreation Commission. Op. S.C. Atty. Gen., May 31, 2006. The District's enabling legislation allows County Council to appoint the Recreation Commission's members. 1970 S.C. Acts 2365. But, because the District's enabling legislation establishes a fixed term for members' service, according to our Supreme Court's opinion in Williamson v. Wannamaker, 213 S.C. 1, 9-10, 48 S.E.2d 601, 604 (1948), County Council may not remove members prior to the expiration of their term, unless it establishes cause for removal. Now, you ask whether three specific incidents involving Recreation Commission members constitute "cause" for removal.

In several previous opinions we discussed removal of a public official or employee for cause. These opinions considered situations in which a statute allowing for removal was predicated on finding cause for such removal. In a 1999 opinion, we discussed the removal of a member of the Georgetown County Planning Commission by the Georgetown County Council. Op. S.C. Atty. Gen., July 1, 1999. We noted the act governing the creation of the Planning Commission, which allowed for the removal of commissioners for cause, did not define the phrase "for cause." Id. "However, this is a phrase found in many removal statutes throughout the country and has developed a common and ordinary meaning over the years." Id.

> "Cause is a flexible concept that relates to an employee's qualifications and implicates the public interest; cause for discharge has been defined as some substantial shortcoming that renders the person's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public policy recognizes as good cause for no longer holding the position; or, as sometimes stated, dismissal for cause is appropriate when an employee's conduct affects his or her ability and fitness to perform his or her duties. The phrase for cause in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause which the appointing power in the exercise of discretion may deem sufficient. Relatively minor acts of misconduct are insufficient to warrant removal or discharge for cause. The cause must relate to and affect qualifications appropriate to the office, or employment, or its administration, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. Neglect of duty, inefficiency, and the good faith abolition of a position for valid reasons are all legally sufficient causes for removal."

Id. (quoting 63C Am. Jur. 2d Public Officers and Employees § 183 (1997)). We added:

> In addition to the common and ordinary meaning of the phrase for cause, County Council may also want to review portions of the South Carolina Constitution and statutes for examples of what may constitute cause for removal in various situations. Examples of such behavior include: embezzlement or appropriation of public or trust funds to private use, crimes of moral turpitude, malfeasance, misfeasance, incompetency, absenteeism, conflict of interest, misconduct, persistent neglect of duty in office, and incapacity. S.C. Const. art. VI, §§ 8, 9; S.C. Code Ann. §§ 1-3-240, 8-1-10 et seq. Further, other states have found that persistent absences from meetings of a board or commission constitute cause for removal. Ark. Op. Atty. Gen. dated November 5, 1990, Ky. Op. Atty. Gen. dated August 22, 1980, La. Op. Atty. Gen. dated August 11, 1978.

Id. In that opinion, we also recognized the general rule in South Carolina that an officer or public employee who can only be removed for cause must also be afforded notice and an opportunity to be heard prior to removal. Id.

> [I]n Walker v. Grice, 162 S.C. 29, 159 S.E. 914 (1931), the supreme court concluded "[a] removal for cause operates as a limitation upon the power to remove, and, in our opinion, the party to be removed, or attempted to be removed, is entitled to a hearing as to the charge that he has failed to perform his duty." Further support for this proposition is found in Williamson v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948).

Id.

We again considered removal for cause in an opinion issued in 2005. Op. S.C. Atty. Gen., June 27, 2005. That opinion addressed the removal of a member of the board of trustees of a local school board in accordance with section 59-19-60 of the South Carolina Code. Id. This provision of the Code allows a county board of education to remove members of a local school district's board of trustees "for cause." S.C. Code Ann. § 59-19-60 (2004). In that opinion, we referred to our 1999 opinion for the meaning of the term "cause." Op. S.C. Atty. Gen., June 27, 2005. With this in mind, we concluded neither the fact that the board member was charged with simple assault and battery nor a letter from a citizen to the board making allegations of improper conduct by the board member "themselves constitute 'cause' for removal of a board member or members pursuant to § 59-19-60." Id. We further noted, in accordance with section 59-19-60, the board of education must afford the trustees notice and an opportunity to be heard, as well as, make a determination of "cause" prior to the removal of a trustee. Id.

In your letter, you list three particular situations in which you wish to know whether each constitutes cause for removing a member or members of the Recreation Commission. The determination of whether cause exists is factual in nature and thus, is beyond the scope of this opinion and better addressed by a court. Op. S.C. Atty. Gen., April 4, 2006 ("factual determinations are beyond the scope of an opinion of this Office."). However, in looking at each situation raised, we will attempt to provide you with some indication as to what we believe a court may conclude.

First, you propose: "Refusal by the Commission to comply or insure that it complies with the Freedom of Information Act requests, some being repeated requests." In Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997), the Supreme Court considered whether the Governor properly removed the Director of the Department of Public Safety from his office. This case involved removal of an officer by the Governor pursuant to section 1-3-240(C). Id. Nonetheless, we find the Court's analysis pertinent to your question. The Court relied on the fact that the Director did not comply with his statutory duty to provide information requested by the Governor pursuant to section 1-3-10 of the South Carolina Code, to determine the Director committed malfeasance, a ground for removal under section 1-3-240(C). Id. at 203, 489 S.E.2d at 628. According to the Court's holding in Rose and assuming the Recreation Commission was legally required to comply with the Freedom of Information Act request but did not comply, a court likely would find the Recreation Commission's failure to abide by the requirements of the South Carolina Freedom of Information Act constitutes "cause" for termination.

Second, you inquire about: "Treating the County Council appointed ex-officio member of the Recreation Commission, or anyone in attendance at the Recreation Commission meetings, rudely and disrespectfully." Although one may view this type of behavior as detrimental to the discipline and efficiency of an individual's membership on the Commission, we do not believe a court would find this behavior alone cause for removal. In our opinion, this type of behavior amounts to a minor act of misconduct, not substantial in nature and not directly affecting the rights and interests of the public. Thus, we do not believe a court would find this to be the sort of legal cause required for removal.

Third and lastly, you suggest: "Failure to provide notice of meeting to the ex-officio member." In our review of the District's enabling legislation, we did not discover a specific notice requirement for the Recreation Commission's meetings. However, according the enabling legislation, the Recreation Commission has the power to make bylaws, which may include a notice requirement. 1970 S.C. Acts 2365. Assuming the Commission's bylaws contain a notice provision, as we concluded in a recent opinion, it may not be legally required to comply with its own bylaws. See Op. S.C. Atty. Gen., May 4, 2006 (finding a county election and registration board "may amend, repeal or disregard [its] bylaws at its pleasure."). If the Recreation Commission is not legally bound to provide notice to an ex officio member, we find it unlikely that County Council has legal cause

for removing the commissioners.[1] However, if the failure to provide such notice in some way implicates a public interest, a court could find this failure on the part of the commissioners is cause for removal. But, again only a court is competent to review County Council's decision in this regard.

In addition to the requirement that County Council only remove a commissioner for cause, we also find it pertinent to note, as we did in our July 1, 1999 opinion cited above, that prior to the removal of a public officer or employee for cause, such officer or employee must be afforded notice and an opportunity to be heard. Thus, prior to County Council's removal of a commissioner, it must afford such commissioner notice and an opportunity to be heard.

Conclusion

Based on our analysis set forth above, although not free from doubt, a court may find an individual serving as a member of County Council while employed as the Director of the District in violation of the common law principles of the master-servant relationship. Nonetheless, assuming a master-servant conflict does not exist, we reiterate the findings of the State Ethics Commission and emphasize that the councilmember must comply with the provisions of the Ethics Reform Act. In addition, we are unable to address the factual issues involving whether certain behavior by the commissioners is grounds for removal by County Council. However, we hope the information provided above will assist County Council with this issue.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General

[1]In neither in this opinion, nor in our opinion issued May 31, 2006 were we asked to opine on County Council's decision to create an ex officio position on the Recreation Commission. Thus, we do not express an opinion on the propriety of this position, but solely consider whether the Recreation Commission is generally required to send notice to its members.