

September 13, 2007

John B. Williams, Esquire  
Williams and Hulst, LLC  
209 East Main Street  
Moncks Corner, South Carolina 29461

Dear Mr. Williams:

We understand from your letter that you represent the Town of Moncks Corner (the “Town”) and wish to request an opinion on the Town’s behalf concerning dual office holding. In your letter, you informed us that the Town recently hired Mr. Marc Hehn as Town Administrator, and that Mr. Hehn currently serves on the Town of Summerville Planning Commission (the “Planning Commission”). Although you believe “Mr. Hehn is not in contravention of the dual office provision of the South Carolina Constitution,” you seek clarification from this Office.

### **Law/Analysis**

Article XVII, section 1A of the South Carolina Constitution (Supp. 2006) prohibits a person from holding “two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public.” In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position’s duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In numerous opinions of this Office, we concluded a member of a municipal planning commission holds an office for purposes of dual office holding. Ops. S.C. Atty. Gen., May 9, 2007 (Spartanburg Planning Commission); December 1, 2006 (Myrtle Beach Planning Commission); April 10, 2006 (Town of Bluffton Planning Commission); July 8, 2003 (Hollywood Planning and Zoning Commission); October 16, 1995 (Gaffney Zoning and Planning Commission); August 24, 1992; April 5, 1990 (Florence Planning Commission); April 24, 1979 (Anderson Planning and Zoning Commission). Thus, we must consider whether Mr. Hehn’s position as Town Administrator also constitutes an office for purposes of dual office holding.

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In your request letter, you informed us that Mr. Hehn's position as Town Administrator is an at-will position and the Town and its mayor may dismiss Mr. Hehn at anytime. Furthermore, in a conversation with this Office, you stated the Town operates under a mayor-council form of government under chapter 9 of the South Carolina Code. Furthermore, you told us the Town Administrator is not required to take of oath of office and is considered an employee of the Town.

In a 1992 opinion of this Office, we examined whether the town administrator for the Town of Andrews held an office for purposes of dual office holding. Op. S.C. Atty. Gen., October 13, 1992. According to the opinion, the Town of Andrews operates under a mayor-council form of government. Id. Thus, we noted that section 5-9-40 of the South Carolina Code, contained within the provisions pertaining to mayor-council forms of government, provides: "The mayor and council may employ an administrator to assist the mayor in his office." Id. However, we noted:

No statute of which we are aware establishes qualifications to be met or duties to be exercised by such an administrator. You advised that you did not take an oath of office and further that you serve at the pleasure of the Mayor and Town Council. You are compensated for your work. Your position as Town Administrator appears to be one of employment rather than an office, as most of the factors usually found in an office are lacking here.

Id. Based on this information, we concluded the town administrator for the Town of Andrews did not hold an office. Id.

In 2004, we addressed the more general question of whether a town administrator for a town located in Charleston County is considered an office holder for dual office holding purposes. Op. S.C. Atty. Gen., July 9, 2004. In that opinion, we noted the requester informed us that the town administrator in question was hired by a mayor and town council. Id. Based on this information, we presumed the town operated under a mayor-council form of government. Id. We considered the fact that the position is authorized under section 5-9-40 of the South Carolina Code and that no other statute exists to proscribe the qualifications or duties of administrators. Id. Additionally, the requester indicated the town administrator did not take an oath and served at the pleasure of the mayor and council. Id. We also pointed out that "§ 5-9-40 itself uses the term 'employ.'" Id. Based on these factors, we again concluded that the town administrator did not hold an office. Id.

Because the Town operates under a mayor-council form of government, we presume that Mr. Hehn was appointed pursuant to section 5-9-40 of the South Carolina. As we noted in our prior opinions, this provision does not specify the qualifications or duties of a town administrator. Moreover, you advised us Mr. Hehn serves at the pleasure of the mayor and the Town's council and is not required to take an oath of office. Thus, in accordance with our prior opinions, we conclude that in his position as town administrator, Mr. Hehn likely holds the position of an employee rather

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than an office holder. Accordingly, although Mr. Hehn's service on the Planning Commission is considered an office, because his position as town administrator is not, we do not believe he runs afoul of article XVII, section 1A of the South Carolina Constitution.

Very truly yours,

Henry McMaster  
Attorney General

By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General