



HENRY McMASTER
ATTORNEY GENERAL

October 14, 2010

Robert Wunderlich, Chief of Police
Town of Holly Hill
P. O. Box 1108
Holly Hill, South Carolina 29059

Dear Chief Wunderlich:

We received your letter requesting an opinion of this Office concerning dual office holding. You asked whether or not a your appointment to the Holly Hill Airport Commission would be a violation of dual office holding considering your current position as Chief of Police for the Town of Holly Hill. Several prior opinions of this Office have addressed the question of whether police chiefs and airport commissioners are considered officers for purposes of dual office holding. This opinion will address those prior opinions, relevant statutes and caselaw to determine if there is a violation.

Law/Analysis

Article XVII, Section 1 A 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). "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, 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).

This Office has advised on many occasions that a police officer or police chief would be considered an office holder for dual office holding purposes. See, Ops. S.C. Atty. Gen., February 4, 1994; November 2, 1994. Moreover, in Edge v. Town of Cayce, 187 S.C. 171, 197 S.E. 216 (1938), the South Carolina Supreme Court concluded that a chief of police was a public officer. Therefore,

having determined that a police chief is an office holder within the meaning of Art. XVII, Sec. 1A, it is necessary, then, to address whether serving as airport commissioner would likewise constitute an office.

On a number of occasions this Office has opined that an individual serving on a county airport commission would hold an office for purposes of dual office holding. See, Ops. S.C. Atty. Gen., August 25, 2005; April 29, 1985; January 19, 1983; November 9, 1982; August 22, 1975. See also, Ops. S.C. Atty. Gen., July 11, 2005 (service on Richland-Lexington Airport Commission is an office for purposes of dual office holding); January 17, 2001 (service on Pickens County Aeronautics Commission is an office for purposes of dual office holding). However, the constitutional prohibition against dual office holding does not apply to officers serving in an ex officio capacity. Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947)

In an opinion of this Office dated September 11, 2006 we addressed a similar issue regarding ex officio positions where certain local officials¹ were asked to serve on the county airport commission. We explained as follows:

In an opinion dated April 24, 1978, we considered whether the members of the Commission violate the prohibition against dual office holding. Op. S.C. Atty. Gen., April 24, 1974. In that opinion, we cited the South Carolina Supreme Court Case of Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88 (1947), holding the constitutional prohibition against dual office holding does not apply to officers serving in an ex officio capacity. Id. In citing to Ashmore, we conclude because these members serve by virtue of their offices, “these office holders are not in violation of that constitutional provision.” Id.

...

Based on the foregoing, the dual office holding prohibitions of the State Constitution would not be violated if the mayor of Walterboro, the chairman of the county council of Colleton County, the treasurer of Colleton County, the auditor of Colleton County, and a member of the Walterboro City Council to be elected by the council simultaneously serve on the Airport Commission. The reason for such a conclusion is that these individuals serve on the Airport Commission by virtue of their other offices or ex officio. As stated in Ashmore, supra: “[t]he

¹ “Members of the Airport Commission are the Chairman of Colleton County Council, the Colleton County Auditor, the Colleton County Treasurer, the Mayor of the City of Walterboro and the Chairman of the City of Walterboro Finance Committee. Each member serves by virtue of holding his or her office in the City or County government.” Op. S.C. Atty. Gen., September 11, 2006.

rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law.” Id. (quoting Ashmore, 211 S.C. 77, 92, 44 S.E.2d 88, 95).

Op. S.C. Atty. Gen., September 11, 2006.

As explained in your request letter, the Holly Hill airport commission is comprised of three members. Two of the members are aircraft owners. The mayor wishes to fill the third commissioner’s spot with the police chief because there is a police shooting range on the same property.

In Ashmore, the South Carolina Supreme Court explained that “[a] common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. State ex rel. Ray v. Blease, 95 S.C. 403, 79 S.E. 247, 249, 46 C.J. 934, 42 Am.Jur. 929. Ex officio means ‘by virtue of his office.’ 1 Bouv., Law Dict. Rawles’ Third Revision, page 1103. Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the officer has only a part of joint ownership or management. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio. These observations are made to make clear that the present adjudication will not affect the state of the law with respect to ex officio office holding as it is recognized in the law of this and other jurisdictions.” Ashmore, 211 S.C. at 92.

This entity is not a fact-finding entity; “investigations and determinations of fact are beyond the scope of an opinion of this Office and are better resolved by a court.” April 6, 2006; September 14, 2006. Therefore, this Office is unclear as to whether the police chief is appointed in an ex officio capacity. However, from the information provided to this Office, it does not appear that the police chief is being appointed in an ex officio capacity, but as a separate officer.

Conclusion

Consistent with our prior opinions, it is the opinion of this Office that simultaneously holding the positions of a police chief and a member of the airport commission would constitute dual office holding in contravention of Article XVII, Section 1A of the South Carolina Constitution. Each position has continuing duties involving an exercise of some portion of the sovereign power of the State. Moreover, the dual office holding provision would be violated even if each office were held in a separate jurisdiction. However, one should note that if the police chief’s appointment to the

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airport commission is found to be an ex officio appointment, then serving in both roles would not be a violation of the dual office holding provisions of the South Carolina Constitution. Ashmore, 211 S.C. at 92.

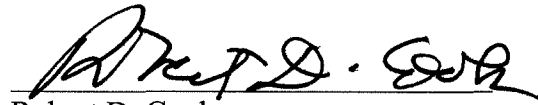
Sincerely,

Henry McMaster
Attorney General

A handwritten signature in cursive script that reads "Leigha Blackwell".

By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in cursive script that reads "Robert D. Cook".

Robert D. Cook
Deputy Attorney General