



ALAN WILSON  
ATTORNEY GENERAL

February 23, 2012

The Honorable Jimmy Ward  
Member, Isle of Palms City Council  
2207 Hartnett Blvd.  
Isle of Palms, South Carolina 29451

Dear Councilman Ward,

We received your letter requesting an opinion as to a potential conflict of interest. By way of background, you explain you were recently elected and are now a member of the Isle of Palms City Council ("City Council"). You were also appointed by the City Council to serve on its Recreation Committee. As we understand it, the potential conflicts in this case arise from your past and current personal involvement with the Isle of Palms Recreation Department. You indicate you have personally provided and continue to provide acting classes and/or theater camps at the Recreation Department. In addition, a community theater company you personally founded and manage, The Crabpot Players, Inc. ("Crabpot"), has in the past conducted performances and auditions at the Recreation Department. You indicate you wish to continue providing these productions, classes, and camps at the Recreation Department without receiving any compensation for such services.

You have provided us with the following additional information concerning the history of your involvement with the Recreation Department, whether personally or through your management of Crabpot. In 2003, the City commissioned Crabpot to produce a play as part of a City event, and the City reimbursed Crabpot for expenses incurred. In 2009, the City commissioned Crabpot to stage another production, and the City compensated Crabpot for the event. Since then, you indicate Crabpot has continued to conduct performances and auditions at the Recreation Department. However, you personally have covered the expenses associated with these productions. You indicate these expenses sometimes total \$5,000 and are deducted as charitable contributions on your income tax returns. The members of Crabpot receive no compensation from the City for these productions, and there is no charge to the City for set construction, lighting or sound systems.

In 2009, you personally instructed acting classes and theatre camps, and also directed two productions at the Recreation Department. You were given an employee number, completed all forms required of City employees, and received compensation for providing these services based on a percentage of revenue generated by these programs. At the end of the year, you informed the City that you no longer wished to receive compensation for these services. You have since continued to work as an instructor without compensation, and the City now retains all of the revenue generated from these programs. You indicate you have not, and will not, receive either a W-2 or 1099 form from the City for 2010 or 2011.

As for your service on the Recreation Committee, you provide us with City Code section 1-3-31(C)(4), which describes the committee's duties as follows:

- (a) If requested, assist the City Administrator in the preparation of the annual expense budget for the Recreation Department;
- (b) Review policies and procedures regarding the Recreation Department and make recommendations as appropriate;
- (c) Work to provide recreational opportunities for all citizens and report to City Council on the condition of the recreation center and the activities of the Recreation Department; and
- (d) Examine and report upon all petitions and other matters referred to it by the Mayor and Council.

You indicate your service on this committee could be substituted by service on an alternative committee. However, you assert it is clear your fellow council members appointed you to this committee because it makes the best use of your skill and experience.

Furthermore, you inform us that on December 20, 2011, you received an informal advisory opinion from the South Carolina Ethics Commission in response to your question as to whether your service on the City Council precludes you from continuing your volunteer work at the Recreation Department. In your request to the Ethics Commission, you explained that Crabpot has been staging performances at the Recreation Department for the past three years and your arrangement with the City has been strictly as a volunteer. The City handles all of the ticket sales and receives all of the proceeds. All production costs, except for stage rental, are paid for by yourself or Crabpot, and typically range between \$2,000 to \$4,000 per show. None of these expenses are reimbursed by the City. The Ethics Commission responded that "[y]ou would not be precluded from continuing your volunteer theater work at the Isle of Palms recreation center based on the information provided."

However, you indicate the City Administrator has raised two additional issues. The first issue concerns South Carolina Code section 5-7-180, which prohibits members of municipal councils from holding any other municipal office or employment during their term of office. You indicate the City Administrator has expressed the belief that this statute implicates common law master-servant principles, and any violation of those principles constitutes a *per se* violation of section 5-7-180. As you understand it, these concerns are based upon the notion that the Director of the Recreation Department would have the authority to dismiss you from your unpaid service with the Recreation Department, but you, as a member of City Council, would exercise some superior authority over the Director. You indicate you are willing to abstain from votes concerning personnel matters that could affect the Director.

The second issue raised by the City Administrator, as you understand it, is an unwritten policy of the Recreation Department prohibiting members of City Council from serving in voluntary leadership roles such as coaching teams, teaching classes, or conducting camps at the Recreation Department. Under this policy, members of City Council are only permitted to volunteer to assist with special events and participate in activities and classes offered at the Recreation Department.

Your question is whether, under the circumstances above, section 5-7-180 prohibits you from continuing to provide these productions, classes, and camps at the Recreation Department without receiving any compensation for such services.

### **Law/Analysis**

As a threshold matter, we note that we defer to the State Ethics Commission's interpretation of the State Ethics Act, S.C. Code sections 8-13-10 et seq. Accordingly, we will address the law applicable to your continued service as an instructor as well as your ability to continue providing Crabpot productions at the Recreation Department without any reference to the application of the State Ethics Act.

Furthermore, we note that the determination of whether an actual conflict of interest exists is a question of fact which only a court, and not this Office, may ultimately resolve. Op. S.C. Atty. Gen., April 4, 2006 (citing Ops. S.C. Atty. Gen., February 19, 2003; September 3, 1999; October 9, 1985). Accordingly, "this opinion is limited to a consideration of the applicable law which a court may consider in making such a determination." Id.

### **Instructor Position**

Under the facts you provide, the instructor position you wish to maintain with the City Recreation Department during your term as a member of the City Council raises questions as to a potential violation of section 5-7-180, as well as a potential conflict of interest under common law master-servant principles. Section 5-7-180 provides: "Except where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected."

We have previously summarized a potential conflict under the common law principles of master-servant 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.

...

[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions.... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality.

Op. S.C. Atty. Gen., March 26, 1999 (quoting 67 C.J.S. Officers § 27<sup>1</sup>). Furthermore, our Supreme Court has stated the following when describing a master-servant conflict:

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.

McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1923) (holding defendants, as members of commission, could not be employed and paid a salary by commission).

Several prior opinions of this Office are instructive here. In a 2009 opinion, we addressed whether the Mayor of the Town of Blackville could concurrently serve as the operations manager for the Town, a position for which the Mayor received an additional \$1,200 a month. Op. S.C. Atty. Gen., February 17, 2009. Although we found no violation of the constitutional prohibition against dual office holding, we expressed concern that such simultaneous service would violate section 5-7-180. Id. Noting that “[p]rior opinions of this Office point out that [section 5-7-180] prevents mayors and members of town councils from being employed by their towns while in office,” we advised against concurrently serving in both capacities. Id. (citing Ops. S.C. Atty. Gen., May 6, 2005; May 21, 2004; August 4, 1986). We also observed that prior opinions of this Office concluded “that employment of a member a municipality’s council or its mayor by the municipality creates a master-servant conflict of interest.” Id. (citing Ops. S.C. Atty. Gen., October 2, 1995; August 4, 1986, May 21, 1984; November 21, 1973). Thus, we concluded a court would likely hold that “employment as the Town’s operations manager while serving as Mayor creates a master-servant conflict of interest.” Id.

In a 1995 opinion, we addressed whether a mayor or member of council under a council-manager form of municipal government could also serve as a member of the volunteer fire department for the same municipality. Op. S.C. Atty. Gen., December 6, 1995. In our analysis, we referenced a 1979 opinion addressing whether volunteer firemen were municipal employees for purposes of section 5-7-180 such that city council members were prohibited from serving in such positions:

The opinion of the Honorable Karen LeCraft Henderson (then a Senior Assistant Attorney General, now a federal judge on the United States Court of Appeals for the District of Columbia) was that “the employment of city councilmen as volunteer firemen is most probably municipal employment prohibited by Section 5-7-180.” Citing to Miller v. Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979), the opinion observed that the Supreme Court therein held that a volunteer fireman was a municipal employee subject to the mayor's power to suspend or discharge employees in the mayor-council form of municipal government. The firemen therein were paid a nominal fee, provided with life insurance and workers' compensation coverage, and allowed to use equipment owned by the town. Judge Henderson also found that:

[C]ity councils are given control over municipal fire departments pursuant to Section 5-25-20 of the Code. It is arguable, then, that a conflict of interest might arise if a city

---

<sup>1</sup> These same principles are now discussed at 67 C.J.S. Officers § 38.

council containing active volunteer firemen among its membership were called upon to decide issues of fire department policy, employment, pay, benefits, etc. For this additional reason, it would seem that city councilmen should not act as volunteer firemen during their terms of office.

Id. (quoting Op. S.C. Atty. Gen., Dec. 6, 1995).

We also noted that section 5-13-30 makes it clear that the mayor in a council-manager form of government is a member of the council, and section 5-13-40(a) provides, similar to section 5-7-180, that “no councilman” in this form of government “shall hold any other municipal office or municipal employment while serving the term for which he was elected to council.” Id. Seeing “no apparent reason to depart” from previous opinions of this Office interpreting section 5-7-180, we concluded that the mayor or a member of council in a council-manager form of government “would be prohibited from serving as volunteer fireman during the term for which they were elected to serve, by operation of §§ 5-7-180 and 5-13-40(a).” Id.

In the situation at hand, the City has adopted the council form of government. See § 5-11-20(a) (council form of government is composed of 5, 7, or 9 members including the mayor). Pursuant to section 5-11-40(a), the City Council has the authority to “establish municipal departments, offices or agencies...and may prescribe the functions of all departments, offices and agencies.” Furthermore, subsection (b) provides that “[a]ll departments, offices and agencies may be administered by an officer appointed by and *subject to the direction and supervision of the council.*” § 5-11-40(b) (emphasis added) see also § 5-11-30 (“All legislative and administrative powers of the municipality...shall be vested in the municipal council”). Consistent with this authority, the City has established the Recreation Department and appointed the Director to oversee its administration.

You indicate that prior to becoming a member of City Council, you were employed by the Recreation Department as an instructor and received compensation from the City. In consideration of the prior opinions referenced above, we would have no difficulty concluding that your continued employment in this manner during your term as a member of City Council would have constituted “municipal employment” in violation of section 5-7-180. In addition, we are of the opinion such dual service would also have created a conflict of interest in violation of master-servant principles since your supervisor, the Director of the Recreation Department, is statutorily “subject to the direction and supervision of the council.” § 5-11-40(b). However, you indicate that prior to commencing your term as a City Council member you opted to maintain your position as an instructor for the Recreation Department without compensation. Thus, the question becomes whether your continued service as an instructor becomes permissible in light of your decision to decline compensation for these services.

In another 1995 opinion, we addressed whether a member of the Springfield Town Council could concurrently serve as police chief for the Town of Springfield if the member declined to receive any additional compensation as police chief other than coverage for workers compensation. Op. S.C. Atty. Gen., June 12, 1995. Although we concluded that such service would violate the constitutional prohibition against dual office holding, we expressed the belief that section 5-7-180 would be violated as well regardless of whether compensation was received for the position of police chief:



[D]eclining compensation would not make a difference; you would still be exercising the sovereign power that is necessarily involved in being a police officer or chief. Compensation is only one issue. The statute is, in part, designed to address the fact that one cannot be both master (on council) and servant (police officer or chief, an employee of council) at the same time.

Id.

Consistent with this prior opinion, the declining of compensation associated with municipal employment does not necessarily remove the employment from the ambit of section 5-7-180 or a master-servant conflict. We note, however, that the concern expressed in the above prior opinion as to the sovereign power exercised by a police officer is not applicable to an instructor for a city recreation department. Regardless, the City Council in this case, operating under the council form of government, exercises control over the Recreation Department and its Director. As previously indicated, two positions under master-servant principles may create a conflict "even though the conflict in the duties thereof arises on but rare occasions.... [T]he applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality." *Op. S.C. Atty. Gen.*, March 26, 1999. Thus, we find it necessary to express concern that your simultaneous service as a member of City Council and as an instructor for the Recreation Department, even if you decline compensation, may still violate section 5-7-180 or create a conflict of interest under the common law.

**Crabpot Productions**

You indicate you also wish to continue providing Crabpot productions and shows at the Recreation Department at no expense to the City. Your affiliation with Crabpot as its founder and manager raises additional questions as to a potential conflict of interest. As previously noted, the State Ethics Commission has already advised that, under the facts you presented, you would not be precluded from continuing your volunteer theater work under the State Ethics Act. However, we advise that you are also required to comply with section 5-7-130 which specifically governs conflicts of interest of municipal officers:

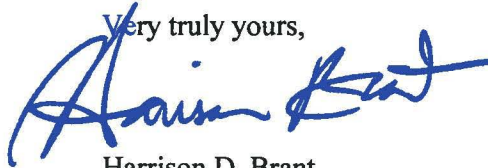
**Any municipal officer or employee who has a substantial financial interest in any business which contracts with the municipality for sale or lease of land, materials, supplies, equipment or services or who personally engages in such matters shall make known that interest and refrain from voting upon or otherwise participating in his capacity as a city officer or employee in matters related thereto.**

Any city officer or employee who wilfully conceals such a substantial financial interest or wilfully violates the requirements of this section shall constitute malfeasance in office and upon conviction shall forfeit his office or position. Violation of this section with the knowledge express or implied of the person or corporation contracting with or making a sale to the city shall render the contract or sale voidable by the municipal governing body.

The Honorable Jimmy Ward  
Page 7  
February 23, 2012

§ 5-7-130 (emphasis added). As a municipal officer under this provision, you should ensure that your interest in Crabpot is made known and refrain from voting on any matter before the City Council relating to Crabpot and its productions at the Recreation Department.

Very truly yours,



Harrison D. Brant  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General