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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 3, 2003

The Honorable Ronald P. Townsend
Chairman, Education and Public Works Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211

Re: Your Letter of March 19, 2003

Dear Representative Townsend:

In your above-referenced letter, you have requested an opinion from this Office concerning the propriety of certain appointments to local boards or commissions and public service districts. Specifically, you present the following questions:

1. Is there a conflict of interest if a legislative delegation appoints someone to a local board or commission that receives no compensation or pay under the delegation's jurisdiction and a county council appoints the same person to a board or commission that receives no compensation or pay under the council's jurisdiction?

2. In cases where a legislative delegation submits a recommendation to the governor for an appointment to a water district that is designated as a public service district, is the legislative delegation required to submit only one name or may the delegation submit several names and the governor allowed make a choice from the list?

3. Is an appointee to a water district that is designated as a public service district required to be a customer of the water district or may the appointee be a resident of the district? There are cases where a resident of a designated water district is not a customer because there are no water lines to the resident's home.

Each of your questions will be addressed in turn.

Request Letter

LAW/ANALYSIS

Question 1

Initially, you question whether a conflict of interest might exist in a situation where the same person is appointed to two separate local boards or commissions. While not specifically asked, the situation you describe may not only involve conflict of interest issues, but may also implicate our State's constitutional prohibition of dual office holding. Questions concerning conflicts of interest and dual office holding in such dual service roles cannot be fully answered without knowing the specific functions, duties, responsibilities, powers, etc. of each board or commission. Therefore, I can only set forth general law on the subject in an attempt to provide some guidance on the issues.

As a general matter, all public officials are expected to act in the best interest of the public in the performance of their duties without any interference from conflicting or competing interest. Our Supreme Court has recognized that "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public." O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). Public employees must be above reproach and avoid even the appearance of a conflict of interest in carrying out their duties. See Op. S.C. Atty. Gen. Dated July 25, 2002.

The laws prohibiting public officials from operating under a conflict of interest could be implicated in a number of ways by the situation you describe. A conflict of interest exists when one individual is both master and servant. The master-servant relationship is based on common law and may be summarized 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.

See Op. S.C. Atty. Gen. Dated January 19, 1994. In McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), the Supreme Court stated that "[n]o 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 ... [t]here would be constant conflict between self-interest and integrity." When such a master-servant conflict exists, a public official cannot continue to fill both roles.

There is also a common-law doctrine of incompatibility which may be relevant to your question. This doctrine prohibits a person from holding two offices where one is accountable or subordinate to the other, or where there is an overlap of powers and duties such that one person could not disinterestedly serve in both. See Thomas v. Abernathy County Line Indep. Sch. Dist., 290 S.W.

152 (Tex. App. 1927); State ex rel. Brennan v. Martin, 51 S.W.2d 815 (Tex. App. 1932). Should the two boards or commissions contemplated in your request be antagonistic to each other or be such that exercising the power of one board works to the detriment of the other, then a conflict of interest may exist.

As to the dual office holding issue, Article XVII, Section 1A of the State 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 a notary public. For this provision to be contravened, a person concurrently must hold two public 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., 78 S.C. at 174. 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).

Given the overall subject of the questions you have raised, it is assumed that one of the boards or commissions addressed in your first question would be a public service (water) district. This Office has previously concluded that commissioners of certain public service or special purpose districts would be considered office holders for dual office holding purposes. Ops. S.C. Atty. Gen. January 7, 1991, October 12, 1990 (Sea Pines Public Service District); September 13, 1990 (North Charleston Public Service District); October 19, 1990 (Saluda County Water and Sewer Authority); and numerous other opinions. In determining that members of public service districts are officers, we found that the following duties involve an 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. See Op. S.C. Atty. Gen. January 7, 1991.

Accordingly, the State's Constitution would prohibit the same person from serving on the governing body of a public service district which exercises the sovereign power of the State and simultaneously serving on another board or commission which also exercises some portion of the sovereign power of the State. Similarly, the same person could not occupy positions on any two boards or commissions which exercise any portion of the sovereign power of the State.

Question 2

In your second question, you ask if a legislative delegation may recommend several names for appointment to a public service (water) district and allow the Governor to then choose the ultimate appointee from the list of those recommended. It is assumed for purposes of this question

that the legislative act which resulted in the creation of the public service district contained language similar to the following with reference to its governing body:

> The board shall consist of [a certain number of] resident electors of the area who shall be appointed by the Governor, upon the recommendation of a majority of the county legislative delegation.

For the reasons cited below, it is my opinion that the legislative delegation should recommend only the number of persons for appointment as there are positions available on the governing body of the public service district.

If the Governor is given a list of names from which to choose the ultimate appointee to the water district it is apparent that the governor would be required to exercise his discretion in the making of the appointment. In Blalock v. Johnston, 180 S.C. 105, 185 S.E. 51 (1936), our Supreme Court addressed the question of whether the Governor possessed any discretion in the appointment of the Cherokee County tax collector where the statute providing for the appointment stated that the appointment "shall be made by the Governor upon the recommendation of a majority of the members of the General Assembly from Cherokee County." In holding that the Governor possessed no such discretion under the statutory direction, the Blalock Court held that

> [t]he law imposes the positive duty upon the Governor to make the appointment at a time and in a manner upon conditions which are specifically designated. It is a simple definite duty arising under conditions admitted or proved to exists, and it leaves nothing to his discretion. It is ministerial.

185 S.E. at 53. In Fowler v. Beasley, 322 S.C. 463, 472 S.E.2d 630 (1996), the Court cited with approval the Blalock holding and stated that the language in the statute with regard to appointment "... vested the Governor with no discretion..." and that the Governor's duty under such a statute was merely ministerial. 472 S.E.2d at 632. Accordingly, assuming the language of the statute relevant to your question is substantially similar to that referenced above, it does not appear that the Governor would have the authority to exercise any discretion in the appointment of persons to the governing body of a water district. Therefore, the delegation should not submit for appointment several names and allow the Governor to choose the ultimate appointee.

Question 3

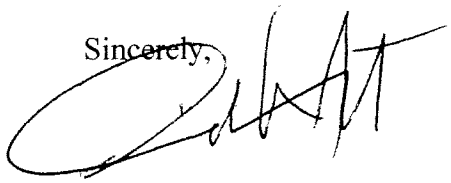
In your final question, you ask if there is a requirement that the appointee to the water district be a customer of the district rather than merely a resident of the area served by the district. Again, for purposes of this question it is assumed that the language of the statute which lead to the creation of the district is similar to that referenced above. Specifically, it is assumed that the statute provides that the governing body "shall consist of ... resident electors of the area ... ."

In responding to this question, it must be kept in mind that the primary goal of statutory interpretation is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). The statute's words must be given their plain and ordinary meaning without resort to a forced or subtle construction which would work to limit or to expand the statutes operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). Here, the language as assumed is that the board consist of resident electors. There is no specific language limiting appointment to actual customers of the district. I can find no authority in the form of case law or prior opinions from this Office which indicates that this residency requirement also includes a requirement that the members of the governing body also be customers of the water district. To now imply that limitation would be contrary to the apparent intent of the Legislature. Of course, this does not mean that a person's status as a customer or non-customer of the district could not be taken into account by the delegation in deciding who to recommend for appointment.

CONCLUSION

A conflict of interest may exist in a situation where the same person is appointed to two separate local boards or commissions. The conflict can arise if the dual roles would result in the same person being both master and servant or where the duties and responsibilities of each board or commission are incompatible with or antagonistic to each other. The dual appointment may also violate Article XVII, Section 1A of the State Constitution if the duties and powers of each board or commission involve an exercise of some portion of the sovereign power of the State. Also, a legislative delegation should recommend only the number of persons for appointment as there are positions available on the governing body of the public service district. Therefore, the delegation should not submit for appointment several names and allow the Governor to choose the ultimate appointee. Finally, no authority in the form of case law or prior opinions from this Office has been found which indicates a requirement that the appointee to the water district be a customer of the district rather than merely a resident of the area served by the district.

Sincerely,



David K. Avant
Assistant Attorney General

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