



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

March 13, 2003

William B. Patrick, Jr., Esquire
Post Office Box 1547
Columbia, South Carolina 29648

Dear Mr. Patrick:

You note that you represent the Commissioners of Public Works of the City of Greenwood. In your letter, you state that a Commissioner "has been asked to serve on the GLEAMNS Human Resource Commission. You have asked this Office to "give its opinion as to whether or not it would violate the dual office holding prohibition of the South Carolina Constitution for a CPW Commissioner to also serve as a member of the GLEAMNS Commission."

By way of background, you state the following:

CPW is a body politic and corporate created pursuant to Sections 5-31-210 et seq. of the South Carolina Code of Laws.

GLEAMNS is a body politic and corporate created pursuant to Chapter 41 of Title 43 of the South Carolina Code of Laws. Section 43-41-30(A) of the South Carolina Code provides that one-third of the members of the GLEAMNS Commission shall be elected public officials or their representatives, unless the number of such officials reasonably available and willing to serve is less than one-third of the membership. Section 43-41-20 provides that membership on the GLEAMNS Commission shall not be construed to be an office of honor or profit.

Law / Analysis

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 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). 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). Section 5-31-210 provides for election of commissioners of public works and for six-year terms of office. Section 5-31-240 requires that commissioners take an oath. Section 5-31-250 sets forth the powers of commissioners.

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This Office has consistently concluded that the position of commissioner of public works authorized by § 5-31-210 et seq. is an office for dual office holding purposes. See, Ops. S.C. Atty. Gen., dated July 19, 1995; April 12, 1993; September 24, 1990; May 2, 1974. There appears to be no reason to treat the commissioners of public works for the City of Greenwood differently from other commissioners.

Thus, the issue is whether a member of the GLEAMNS Human Resource Commission is also an officer for purposes of the dual office holding provision of the South Carolina Constitution. As you indicate, the GLEAMNS Commission is created by S.C. Code Ann. Section 43-41-10 et seq. Section 43-41-10 creates the Commission to encompass the area covering Greenwood, Laurens, Edgefield, Abbeville, McCormick, Newberry and Saluda Counties. In the preamble creating the Act, the General Assembly found that

... a public commission should be created in Greenwood, Laurens, Edgefield, Abbeville, McCormick, Newberry, and Saluda Counties charged with the responsibility of implementing programs designed to improve the health, education, welfare, housing, and employment opportunities of economically disadvantaged persons in these counties. The commission must be funded by federal, state, county, municipal or private organizations.

Act No. 16, 1993, Section 1. Section 43-41-20 declares the GLEAMNS Commission to be "a body politic and corporate" and capable of enjoying "all the rights and privileges as such."

Section 43-41-100 specifies the powers of the GLEAMNS Commission. Such provision authorizes the Commission to sue and be sued; to adopt, use and alter a corporate seal; to make bylaws; to appoint agents and employees and to prescribe their duties, fix their compensation and specify their bonding. Other specific powers granted to the Commission are:

... (e) to undertake the improvement of communication and cooperation among existing and future programs administered by federal, state, county and municipal governmental agencies and private organizations designed to improve the health, education, welfare, housing or employment of the low income residents of the counties represented by the commission and, with the consent of such agencies and organizations, to coordinate the same;

(f) to enter into contracts and agreements for performance of its programs and duties with federal, state, county and municipal governmental agencies and subdivisions thereof, and private nonprofit organizations;

(g) to receive and expend funds for the performance of its duties in the administration of its programs from such governmental agencies and subdivisions thereof and private nonprofit organizations, as well as any other sources;

(h) to designate an executive committee from among the members of the commission to which may be delegated one or more duties and responsibilities of the commission and, from time to time, to appoint one or more subcommittees to advise and assist in the administration of its programs and the performance of its duties; all such committees designated to have representation from the three categories enumerated in items (1), (2) and (3) of Section 43-41-30(a) in the same proportion as such categories are represented on the full commission;

(i) to maintain adequate accounts and records of its activities, receipts and expenses in conformance with requirements of any contract or agreement with any federal, state, county or municipal governmental agency, or subdivision thereof, or any private nonprofit organization;

(j) to acquire, own or hold in trust, preserve, restore, maintain, or lease property, facilities and equipment reasonably necessary for the performance of its duties and the administration of its programs;

(k) to do such other things as may be necessary to perform the duties prescribed in this chapter.

The Commission is "composed of twenty-one members in accordance with federal law appointed by the governing bodies of the counties enumerated in § 43-41-40" § 43-41-30(A). Section 43-41-40 allocates each county included in the GLEAMNS service area a certain number of members. In this instance, Greenwood County is allocated three members.

Pursuant to § 43-41-30(A)(1), one-third of the Commission must be comprised of "elected public officials or their representatives unless the number of those officials reasonably available or willing to serve is less than one-third of the membership of the commission." Another one-third of the body must be "chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the areas to be served." § 43-41-30(A)(2). The final one-third must be made up of "officials or members of business, industry, labor, religious, welfare, education or other major groups and interests in the areas served."

Commission members serve for a specified "term of office." See, § 43-41-60. The method of filling vacancies is provided for in § 43-41-70. The makeup of the Commission's membership is set forth in § 43-41-30. Section 43-41-20 states that "[m]embership on the Commission shall not be construed to be an office of honor or profit."

In an opinion, dated November 19, 2002, we addressed a situation concerning an appointed member of the Greenwood Metro Board (Water District) being appointed to the GLEAMNS Commission. There, we concluded that membership on the GLEAMNS Commission constituted an office for dual office holding purposes. However, because we were advised that service on the Greenwood Metro Board was through an appointment, rather than an election, there was no need to

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address appointment to the GLEAMNS Commission pursuant to § 43-41-30(A)(1), specifying that one-third of the GLEAMNS Commission must be "elected public officials or their representatives"

In this instance, however, your letter implies that Commissioner Stoner is being asked to serve on the GLEAMNS Commission in the capacity of an elected official. Inasmuch as § 5-31-210 provides that Commissioners of Public Works are elected, I am thus assuming for purposes of this opinion that Commissioner Stoner is being appointed pursuant to § 43-41-30(A)(1). Thus, we must address whether serving in this capacity would make a difference in our dual office holding analysis.

While the constitution prohibits dual office holding, such prohibition does not generally apply when one of the offices is held ex officio. The phrase ex officio is defined as "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position." Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423 (1921). In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E. 2d 88 (1947), the South Carolina Supreme Court commented extensively on ex officio memberships:

"The 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. 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. Ex officio means 'by virtue of his office.' ... 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 office has only a part or 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. ...

In an opinion, dated July 18, 1989, this Office elaborated at some length upon the legal concept of service ex officio. There, we stated:

This Office has reviewed a number of instances in which ex officio membership was provided for by statute or ordinance. See, for examples, Ops. Atty. Gen. dated October 28, 1987 (ex officio members on the Charleston County Aviation Authority); May 6, 1986 (State Fire Marshal on the South Carolina Manufactured Housing Board); October 28, 1985 (ex officio membership, Piedmont Municipal Power Agency); December 11, 1985 (ex officio members--mayor, councilman, commissioner of water or sewer commission--on a joint municipal water system); January 4, 1985, supra; January 3, 1985 (representative of House Medical, Military,

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Public and Municipal Affairs Committee serving on The Citadel Board of Visitors, ex officio); December 11, 1984; May 10, 1984; September 12, 1983 and June 22, 1982, among many others.

In addition, there are many statutes which provide for ex officio membership of an individual on a second board or commission by virtue of his membership on a first board or commission. See, for examples, the following from the Code of Laws of South Carolina (1976, as amended): Sections 6-23-70; 6-25-60; 20-7-2379; 49-7-20; 51-13-220; 50-3-10; 31-3-120; 51-19-10; 59-117-10; 59-121-10; 59-123-40; 59-125-20; 59-127-20; 59-130-10; 59-133-10; 59-135-10; 2-11-10; 2-15-10; 2-29-10; 2-37-10; 2-39-10; 2-41-10; 2-43-10; 2-67-10; and many others. ...

A review of these statutes and opinions reveals that in some instances membership on the second board, commission, or committee is denominated "ex officio," and in others it is not, though the membership on the first body is always specified (i.e., membership in the General Assembly) as a prerequisite to membership on the second (i.e., Textile Industry Study Committee). In many cases it is made clear that the term of service on the second is coterminous with the term of service in the first position. That an ex officio member may vote is not a factor to defeat ex officio membership; an ex officio member of an entity is a member for all purposes, including voting, unless the enabling legislation directs otherwise. Ops. Atty. Gen. dated January 3, 1985; March 4, 1976; December 22, 1981. Further, not every legislative enactment relative to ex officio membership specifies a particular position (i.e., mayor, Governor) to be held in the first instance; often, only membership on the larger body (municipal council, General Assembly, as examples) is specified. (emphasis added).

Here, the reasoning of the foregoing opinion is applicable. Assuming that Commissioner Stoner is being appointed to GLEAMNS as an "elected public official," (presumably having been elected as a Commissioner of Public Works for the City of Greenwood), it is our opinion that such simultaneous service would not constitute dual office holding. Membership on the GLEAMNS Commission would be service ex officio as an "elected public official," pursuant to § 43-41-30(A)(1). This would be consistent with the Court's analysis of ex officio service in Ashmore, as well as this Office's analysis in the above-referenced July 18, 1989 opinion.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General