



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

January 7, 1999

The Honorable John Graham Altman, III  
Member, House of Representatives  
306-D Blatt Building  
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Altman:

Thank you for your letter of December 3, 1998, requesting an advisory opinion addressing the meaning of the term "office of honor, profit or trust." Attorney General Condon has asked me to respond.

As you know, the term about which you have inquired is found in Article XVII, Section 1A of the South Carolina Constitution, which is commonly referred to as the dual office holding provision. This provision states that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine *whether a position is an office or not* depends upon a number of circumstances and *is not subject to any precise formula.*" (Emphasis added.) The South Carolina Supreme Court, though, has held that 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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee." Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other authority, establish

The Honorable John Graham Altman, III

Page 2

January 7, 1999

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).

Accordingly, while the constitution prohibits dual office holding, both the courts and this Office have held that such prohibition does not generally apply when one of the positions held is purely advisory in nature or is held ex officio. Traditionally, advisory boards and commissions expend no public funds and can take no final or binding action which would be construed as an exercise of the State's sovereign power. The phrase ex officio is defined as "[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 his 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 conclusion, it is difficult to generalize about dual office holding questions, because there are so many different boards or commissions, both state and local, to which individuals might be appointed. If you would find it helpful, please advise as to any particular positions you are concerned about, and I would be happy to look into those positions and advise you further. It is necessary to examine a number of criteria, including how a particular position was created, whether there are qualifications to be met, what the duties are, whether the duties are specified by law or ordinance, whether an oath is required prior to assuming the

The Honorable John Graham Altman, III  
Page 3  
January 7, 1999

duties, whether compensation is paid, and, most importantly, whether the position involves an exercise of the sovereign power of the State.

Again, thank you for your letter. I trust this information is responsive to your inquiry. This letter is an informal opinion only. It has been written by a designated Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Sincerely yours,



Zeb C. Williams, III  
Deputy Attorney General

ZCW/an