

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

July 15, 1986

Steven W. Hamm
Administrator
Department of Consumer Affairs
Post Office Box 5757
Columbia, South Carolina 29250

Dear Mr. Hamm:

By your letter of May 30, 1986, you have advised that a member of the Commission on Consumer Affairs accepted a position as a member of the Board of Directors of the Lexington County Hospital. You have asked whether the individual may hold both positions in light of certain provisions of Section 37-6-502, Code of Laws of South Carolina (1976) and the prohibitions against dual office holding within the State Constitution. Each question will be dealt with separately, as follows.

Section 37-6-502 of the Code

The relevant portion of Section 37-6-502, which establishes the Commission on Consumer Affairs, provides that "[n]o person associated with any businesses regulated by the Commission on Consumer Affairs shall be eligible to serve on the Commission as defined by § 8-13-20 of the Code of Laws of South Carolina." You have advised that Lexington County Hospital has filed notification with the Department of Consumer Affairs that it is a credit grantor, pursuant to requirements of Section 37-3-305 of the Code. You have asked whether such would cause the individual to be associated with a business regulated by the Commission, so as to bring him within the above-quoted prohibition.

By Section 37-6-506(2), the Commission on Consumer Affairs is charged with enforcement of provisions of the Consumer Protection Code, of which Section 37-3-305 is a part. Section 37-3-305 et.seq. of the Code imposes certain obligations on

Steven W. Hamm
Page 2
July 15, 1986

Lexington County Hospital as a credit grantor, which may be enforced by the Commission if the statutes are not followed. While the Commission does not regulate businesses in the sense that the Public Service Commission does, such enforcement or regulation of obligations imposed by statute upon credit grantors would be one form of regulation. See 36A Words and Phrases, Regulate, p. 303 et seq. Thus, it would appear that the Commission does, in some fashion, regulate certain aspects of the business of the Lexington County Hospital.

Section 8-13-20 must also be considered. Subsection (b) defines the phrase "business with which he is associated" to mean

any business of which the person or a member of his household is a director, officer, owner, employee, or holder of stock worth ten thousand dollars or more at fair market value, and any business which is a client of the person[.]

The term "business" is defined by subsection (a) to mean

any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, and self employed individual[.]

According to the Secretary of State's office, no certificate of incorporation has been issued to Lexington County Hospital, nor have the enabling statutes conferred corporate status. But see Act No. 860 of 1976, § 1(15), granting power of eminent domain "for any corporate function." The term "organization" could include a governmental agency such as a county hospital, however, Cf., United States v. California State Automobile Assn., 385 F.Supp. 669 (E.D. Cal. 1974); In re Le Mieux, 362 F.Supp. 1040 (D. Minn. 1973), which exists apart from the individuals involved in it.

Because the individual is a director of a business or organization which appears to be regulated to some extent by the Commission on Consumer Affairs, it appears that he may be contravening the terms of Section 37-6-502 of the Code.

Dual Office Holding

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or

Steven W. Hamm
Page 3
July 15, 1986

profit at the same time." 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). 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 opined previously, by an opinion dated June 22, 1982, that one who serves as a member of the Commission on Consumer Affairs would hold an office for dual office holding purposes. The same conclusion was reached, in an opinion dated April 5, 1982, as to one who would serve on the Board of Directors (or Trustees) of Lexington County Hospital. Thus, one who would hold both offices concurrently would appear to hold dual offices in contravention of the State Constitution. Copies of these opinions are enclosed herewith.

You have advised that the individual was first appointed to the hospital board in 1974 for a four-year term. In 1978 he was appointed to serve a two-year term. In March 1986 he was reappointed to serve on the hospital board. He was appointed to the Commission on Consumer Affairs in March 1981 to fill an unexpired term and was reappointed in August 1983 to a four-term. You have asked about his status as to both boards; to answer your question, it is necessary to examine the mechanics of dual office holding.

If an individual holds one office (i.e., Commission on Consumer Affairs) on the date he assumes a second office (hospital board), both office falling within the provisions of Article XVII, § 1 of the Constitution, he is deemed to have vacated the first office by acceptance of the second. However, the individual may continue to perform the duties of the previously held officer, as a de facto officer rather than de jure, until a successor is duly selected to complete his term of office. See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877).

A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees § 495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E., 145, 151 (1936); see also Smith v. City Council

Steven W. Hamm
Page 4
July 15, 1986

of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952). Thus, the individual would be a de facto officer of the Commission on Consumer Affairs, which office would actually be vacant, and a de jure officer as a board member of Lexington County Hospital.

We trust that the foregoing has satisfactorily responded to your inquiry to your inquiry. Please advise if you need additional information or clarification.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:hcs
Enclosures
REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions