



ALAN WILSON
ATTORNEY GENERAL

March 11, 2019

The Honorable Ronald Young, Member
South Carolina House of Representatives
District No. 84
220 Deerwood Drive
North Augusta, SC 29841

Dear Representative Young:

You have requested an opinion from this Office regarding dual office holding. Specifically, you state the following:

It has come to my attention that the special purpose districts known as the Clearwater Water Commission, overseeing the Clearwater Fire Department, and the Bath Water Commission, overseeing the Bath Fire Department, have agreed to merge these two separate fire departments. As such, the new fire department will be known as the Midland Valley Fire Department. In order to ensure the delivery of quality fire suppression services by this new, combined department, the water commissions have agreed to set up a Midland Valley Fire Department Board of Directors. The members of this new board will consist of two senior water commissioners from the Clearwater Water Commission and two senior water commissioners from the Bath Water Commission. To complete this new board membership, three at-large members will be selected from residents of the Midland Fire Department service area. I have attached an exhibit with this opinion request for your reference.

I am aware that Art. XVII, Sec. 1A of our South Carolina Constitution generally prohibits dual office holding, i.e., that "...no person may hold two offices of honor or profit at the same time." However, it further provides "...but any person holding another office may at the same time be...[a] member of a lawfully and regularly organized fire department...."

In this merger, concerns have arisen as to the continuing oversight of the merged fire department operations. As you will see in my enclosed exhibit, this supervision will be done by water commissioners from the two water districts. Please note that they previously supervised each of their respective fire departments prior to this merger. They view their supervision of the new, merged fire department as a continuation of their

supervisory roles. However, to avoid the forfeiture of their Water Commission Board seats, we seek an opinion from your office as to the prudence of their doing so.

As a result, our questions are:

1. Does South Carolina Constitution Art. XVII, Sec. 1A authorize commissioners from the Clearwater Water Commission and the Bath Water District Commission to also serve on a board of directors for the newly-formed Midland Valley Fire Department?
2. Does this organizational structure, which does not create any expansion of these commissioners' powers, but merely allows a continuation of their fire suppression operations oversight, comport with the permissions granted under South Carolina Constitution Art. XVII, Sec. 1A?
3. Can these water commissioners be considered 'member[s] of a lawfully and regularly organized fire department' by also serving as directors on the Midland Valley Fire Department Board of Directors? . . .

Our Office has been provided with a copy of the Bylaws of Midland Valley Fire Department, Inc.

LAW/ANALYSIS:

The issue is if it would be dual office holding for an individual to simultaneously serve as a commissioner of the Clearwater Water and Sewer District ("Clearwater District") or the Bath Water and Sewer District ("Bath District") (collectively "Water Districts")¹ and as a director of the Midland Valley Fire Department, Inc. ("Midland Valley"). Dual office holding is provided for in the South Carolina Constitution, which states:

[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public ... The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1 A (emphasis added).

¹ These are the proper names of the Water Districts. See 1958 Acts No. 1006 (providing for the election of the Water Districts' Commissioners and explaining that the Water Districts were organized pursuant to 1952 South Carolina Code of Laws).

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“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.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907), “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority ...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). Other relevant considerations for an office are:

whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

We believe that the position of commissioner of the Water Districts constitutes an office for purposes of dual office holding.² As stated above, the Water Districts were organized pursuant to the 1952 South Carolina Code of Laws, by statutes now codified as section 6-11-10 et seq. of the South Carolina Code of Laws. The statutes provide for the creation of a special purpose or public service district governed by a board of commissioners who serve without compensation.³ S.C. Code Ann. §§ 6-11-10; 6-11-60; 6-11-90 (1976 Code, as amended). Pursuant to statute, the commissioners are granted certain powers:

² A 2010 opinion of our Office considered whether there would be a dual office holding violation for the employed secretary of the Clearwater Water & Sewer District to be elected a commissioner of the same District. Op. S.C. Atty. Gen., 2010 WL 4391634 (October 14, 2010). That opinion briefly observed that there was no dual office holding violation, in part because the paid secretary was a “mere employee,” before quickly moving to the flagrant master-servant conflict of interest inherent in the proposed arrangement. Id. That opinion did not discuss the powers and duties of a commissioner in light of Sanders v. Belue and State v. Crenshaw, as we do here. See id.

³ S.C. Code Ann. § 6-11-91 (1980) now provides for a governing body changing the compensation or other benefits for the members of the governing body and being reimbursed for expenses.

The boards of commissioners of these districts must be bodies politic and shall exercise and enjoy all the rights and privileges of such. They may purchase and build or contract for building electric light, water supply, fire protection, and sewerage systems, and may lease, own, hold, and acquire all necessary equipment and property for that purpose. They may operate it and may contract with existing light and water companies and municipalities for light, water, and fire protection, or contract and connect with existing sewerage systems of municipalities or other districts. They may supply and furnish lights and water and provide for fire protection and sewerage disposal to citizens of these districts and may require an exact payment of rates, tolls, rentals, and charges they may establish for the use of lights, water, fire protection, and the sewerage plant. Property purchased by the boards of commissioners may be held in either the name of the commission or the name of the district.

S.C. Code Ann. § 6-11-100 (1976 Code, as amended). The statutes do not provide for qualifications, an oath, or bond of the commissioners. In 1958 Acts No. 1006, which amended the statute currently codified as section 6-11-60, the Legislature specifically provided that the commissioners of these Water Districts would serve terms of 6 years, beginning in the year 1960.

Through statute, the Legislature has provided for boards of commissioners, which are public bodies politic, as well as their compensation and duties. A term of office for the commissioners of these Water Districts has been specifically designated. Furthermore, the boards have been empowered with duties involving an exercise of the sovereign power of the State. Accordingly, we believe that the position of commissioner for the Water Districts is an office.

Our conclusion is supported by our prior opinions, in which we determined that commissioners of certain special purpose districts held an office:

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.

Op. S.C. Atty. Gen., 2015 WL 992705, at *2–3 (Feb. 19, 2015) (quoting Op. S.C. Atty. Gen., 2003 WL 21043505 (April 3, 2003)).⁴

We will now consider if service on the Midland Valley Board of Directors constitutes a public office. This Office has advised on many occasions that a commissioner of a fire district is an office holder for dual office holding purposes.⁵ Although the South Carolina Constitution provides an exemption for a “member of a lawfully and regularly organized fire department,”⁶ we have specifically stated that “[t]he exception for a ‘member of a lawfully and regularly organized fire department’ would not apply to a member of a fire district board.” Op. S.C. Atty. Gen., 2004 WL 439320, at *1 (Feb. 24, 2004) (emphasis added). Our reasoning was that the exemption only applied to firemen and did not extend beyond their capacity as firefighters. Ops. S.C. Atty. Gen., 2005 WL 1983348 (July 25, 2005); 2012 WL 3142775 (July 19, 2012). We determined that the exemption applied to a fire chief, as a fire chief served as the chief fireman of a lawfully and regularly organized fire department. Id.

However, Midland Valley is not a fire district. Instead, Midland Valley Fire Department, Inc. has been incorporated as a nonprofit corporation.⁷ We have concluded on more than one occasion that a member of a nonprofit corporation’s board of directors is not an office for dual office holding purposes. Our rationale was that a nonprofit corporation was not a state agency; the position of board member was not created by a state law; and that private entities did not, except in special circumstances, invoke the sovereign power of the State or any portion thereof, since their powers and duties were non-governmental in nature. See Op. S.C. Atty. Gen., 2008 WL 608964 (Feb. 4, 2008); 1996 WL 599391 (September 6, 1996); 2005 WL 774153 (Mar. 24, 2005); and 2003 WL 21040140 (Feb. 14, 2003).

In a prior opinion, we discussed the special circumstances under which a nonprofit corporation can invoke the sovereign power of the State:

Our office has also repeatedly recognized that a member of a nonprofit corporation’s board of directors generally does not classify as an office holder for dual office holding purposes. However, in rare instances, a nonprofit corporation has been held to constitute a state, local, or other governmental agency. See Op. S.C. Atty. Gen., 1996 WL 599391 (Sept. 6, 1996) (discussing relevant decisions on this issue). Our Office has recognized that “courts sometimes look beyond a non-profit corporation’s status as such to determine whether, in reality, the corporation is an ‘alter

⁴ An exception is found in Op. S.C. Atty. Gen., 1996 WL 494761 (July 23, 1996), in which we concluded that members of the Kershaw County Water and Sewer Authority were not officers because they were not exercising any real sovereign power of the State.

⁵ See Op. S.C. Atty. Gen., 2013 WL 3960435 (July 19, 2013) (citing Ops. S.C. Atty. Gen., 2009 WL 1968630 (June 23, 2009); 2008 WL 5476550 (December 5, 2008); 2004 WL 439328 (March 3, 2004); 1994 WL 50434 (January 19, 1994); 1983 WL 182083 (December 29, 1983); 1972 WL 20449 (May 9, 1972)).

⁶ S.C. Const, art. XVII § 1 A, supra.

⁷ See South Carolina Secretary of State website at: businessfilings.sc.gov/BusinessFiling/Entity/Profile/cfaf5410-4b9c-43ff-ad7f-525d7517ce88.

ego' of the State." Id. at *7. In our September 6, 1996 opinion, we referenced the case of Philadelphia Nat. Bank v. United States, 666 F.2d 834 (3rd Cir. 1981) which held that Temple University, a nonprofit corporation, was not a political subdivision of the State of Pennsylvania. Op. S.C. Att'y Gen., 1996 WL 599391 (Sept. 6, 1996). Applying the "state sovereignty test" the Court found that the University did not possess any of the "three sovereign attributes" being "the power to tax, the power of eminent domain, and the police power" and would therefore not constitute as an alter ego of the state. Philadelphia Nat. Bank, 666 F.2d at 839. In regards to a state's police power, quoting the United States Supreme Court, the Third Circuit Court of Appeals noted that such power "embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety." Id. at 840 (quoting Chicago, Burlington & Quincy Railway Co. v. Illinois, ex. Rel. Drainage Commissioners, 200 U.S. 561, 592, 26 S. Ct. 341, 349 (1906)). Thus, we take from this authority that while rare, members of a nonprofit corporation can be deemed to be officers in the constitutional sense if the entity is found to be an alter ego of the state possessing some of its sovereign powers.

Op. S.C. Att'y Gen., 2014 WL 4382452, at *5 (Aug. 19, 2014).

Additionally, this Office has concluded that a nonprofit corporation's receipt of public funds does not make members of its board of directors public officers. See Op. S.C. Att'y Gen., 2012 WL 5078730 (Oct. 9, 2012); 2003 WL 21040140 (Feb. 14, 2003). In the February 14, 2003 opinion, "we noted that the fact that a nonprofit body receives public funds 'does not make the organization a public body or state agency, or the officers of the body public officers, however.'" Id. at *4. (quoting Op. S.C. Att'y Gen., November 10, 1983, Op. No. 83-87).

This Office is not aware of any statutes, regulations, or ordinances creating Midland Valley or its Board of Directors. Instead, Midland Valley has bylaws, entitled Bylaws of Midland Valley Fire Department, Inc. ("Bylaws"). The Bylaws describe the purpose of Midland Valley as follows:

[t]he purposes for which the Corporation [Midland Valley] is organized are exclusively religious, charitable, scientific, literary and educational within the meaning of Section 501(C)(3) of the Internal Revenue Code of 1986, as amended. . . Specifically, the Corporation is organized to provide fire protection services and first responder services for public safety emergencies, medical emergencies and other disasters, to protect the lives and property of the residents and visitors of its service area. . . .

Bylaws, Article I, Section 2.

Pursuant to the Bylaws, Midland Valley is currently governed by a Board of Directors, consisting of two senior commissioners from the Clearwater District, two senior commissioners from the Bath District, as well as three at-large members selected from residents of the service area. Bylaws, Article IV, Section 2,

3. The terms of the Midland Valley Directors who are also serving as the Water Districts' Commissioners run concurrently with their terms on the Water Districts. Bylaws, Article IV, Section 3.

The Midland Valley Directors can not receive any of the assets, income, or net earnings of Midland Valley, but they can be reimbursed for reasonable expenses and be paid reasonable compensation for services rendered on behalf of the Corporation. Bylaws, Article I, Section 3.

The Bylaws empower Midland Valley, through its Board of Directors, to contract directly with Aiken County under section 4-21-10 of the South Carolina Code of Laws⁸ and to "receive moneys necessary for its operation through fees levied by the County against property in areas receiving the Corporation's services." Bylaws, Article I, Section 2. The Directors are assigned certain duties, which are too numerous to quote in their entirety. Such duties include: amending or repealing the Bylaws; electing, appointing or removing corporate directors or officers; adopting a plan of merger or consolidation with another corporation; authorizing or revoking the voluntary dissolution of the corporation; amending or repealing Board resolutions; incurring corporate debt; removing or dismissing the fire chief; and designating and appointing committees. Bylaws, Article V, Sections 6 – 7; Article VIII, Section 1.

We believe that service on Midland Valley's Board of Directors does not constitute an office. Midland Valley is a nonprofit corporation and its Bylaws, not South Carolina law, provide for its Board of Directors and their qualifications, terms of office, compensation, and duties. Neither the Bylaws nor State law provide for an oath or bond of the directors.

The Board of Directors does not appear to be exercising the sovereign power of the State or any portion thereof through their assigned duties, since none of the duties involve the power to tax, the power of eminent domain, or the police power. Instead, the Board of Directors appears to be performing typical corporate duties, such as entering into a contract to provide services. As we explained above, the fact that Midland Valley is being paid with county funds does not mean that it is a public body or that its directors are public officers. Accordingly, it is our opinion that service as both a commissioner of the Water Districts and as a director of Midland Valley would not violate the constitutional prohibition against dual office holding.

However, you may wish to contact the State Ethics Commission to confirm that there are not any conflicts of interest. Our Office defers to the Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended).

CONCLUSION:

In conclusion, it is the opinion of this Office that the dual office holding prohibition in Article XVII, Section 1A does not prohibit commissioners from the Clearwater Water and Sewer District and the Bath Water and Sewer District from serving on the board of directors of a nonprofit corporation such as the Midland Valley Fire Department. This is consistent with the numerous prior opinions of this Office which conclude that membership on a nonprofit board does not constitute an office of honor or profit for purposes of the South Carolina Constitution. We do not reach the question of whether a board member of

⁸ Section 4-21-10 permits county councils to contract with private agencies, such as nonprofit corporations, to provide fire protection services. See S.C. Code Ann. § 4-21-10 (1976 Code, as amended).

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a nonprofit fire department corporation is a "member of a lawfully and regularly organized fire department" as contemplated by the Constitution because our prior opinions on nonprofit corporations control the resolution of the other questions in your letter. However, we further advise that all stakeholders in the proposed arrangement should take care not to violate conflict-of-interest principles, including the master-servant rules found in the common law of our State.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General