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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

January 7, 2004

Buford S. Mabry, Jr., Chief Counsel
South Carolina Department of Natural Resources
Post Office Box 167
Columbia, South Carolina 29202

Dear Mr. Mabry:

You have requested an advisory opinion from this Office concerning dual office holding. You ask whether a member of the Migratory Waterfowl Committee ("the Committee"), which was incorporated into the Department of Natural Resources (DNR) in 1993, would hold an office for purposes of the constitutional provisions against dual office holding. You have indicated that, pursuant to Section 50-11-20(C) of the Code of Laws, the Committee is responsible for the creation of the annual Migratory Waterfowl Stamp and the recommendation to DNR of regulations concerning the administration, sale, and distribution of the stamps and prints. You indicate that Section 50-9-530 requires all waterfowl hunters in the state to purchase a Migratory Waterfowl Stamp. You further indicate that the Committee was incorporated into DNR in 1993 pursuant to Section 1-30-75 of the Code, and since that time, DNR has handled the actual sale of the waterfowl stamps to the general public.

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 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 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 twice advised in prior opinions that an appointed, but not ex officio, member of the Migratory Waterfowl Committee would be an office holder for purposes of the the constitutional provisions on dual office holding. Ops. S.C. Atty. Gen., dated September 4, 1987; October 7, 1987. In the September 4, 1987 opinion, we analyzed the question in the context of the

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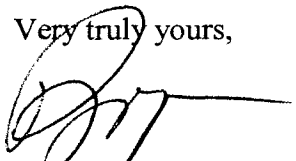
organic statute for the Committee, as it existed at the time, in Section 50-11-2135 of the Code of Laws:

> The South Carolina Migratory Waterfowl Committee is established pursuant to Section 50-11-2135 of the Code of Laws of South Carolina (1986 Cum.Supp.). The Committee is constituted of nine members appointed as described by statute; two each are to be appointed by the Governor, the chairman of the Agriculture and Natural Resources Committee of the House of Representatives, and the chairman of the Fish, Game and Forestry Committee of the Senate. All are required to be "cognizant of waterfowl." A term of three years and until successors are appointed and qualify is specified. Members of the committee are eligible to receive subsistence or per diem. Responsibilities of the Committee are provided in Section 50-11-2135(c) and include: creation of the annual migratory waterfowl stamp, providing the design to the South Carolina Wildlife and Marine Resources Department, and promulgation of regulations relative to creation of migratory waterfowl stamp prints, sale and distribution of the stamps and prints, and so forth. These individuals appear to exercise a portion of the sovereign power of the State. It appears that the six members appointed by the Governor or committee chairmen would meet the criteria usually considered, as described above, and thus would be officers for dual office holding purposes.
>
> Three members of the Migratory Waterfowl Committee are to serve ex officio: the Ducks Unlimited Regional Director for South Carolina and the immediate past and present chairmen of Ducks Unlimited. When one holds an office by virtue of service in another office, or ex officio, the second position or office is not considered an office for dual office holding purposes, as long as the functions of the second office are related to the duties of the first. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947).

It does not appear that the statutory amendments made to the Committee since this opinion was issued in 1987 change the fact that member of the Committee is an office holder for dual office holding purposes. The fact that the Committee has since been incorporated into DNR, and consequently, DNR now handles the actual sale and administration of the waterfowl stamps, is not significant as to the status of the committee member for dual office holding purposes. The provisions related to the structure of the Committee and its general duties have remained the same in the current Section 50-11-20 as they were in the former Section 50-11-2135. Three members of the committee serve ex officio, and the other six are appointed either by the Governor or committee chairs in the General Assembly. Accordingly, this Office advises that an appointed, but not ex officio, member of the Migratory Waterfowl Committee would hold an office for purposes of the constitutional prohibition on dual office holding.

We also would note that when a dual office holding situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). 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). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Very truly yours,



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