



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

February 26, 2003

Jeff M. Anderson, Esquire
Lexington County Attorney
P. O. Box 489
Lexington, South Carolina 29071-0489

Dear Jeff:

You reference a situation regarding the legality of a member of Lexington County Council serving as adviser to the Lexington County Joint Water and Sewer Commission. In your letter, you note that this Office previously issued an opinion concluding that it would constitute dual office holding for a member of Lexington County Council to serve as the City of West Columbia's representative on the Commission. In that opinion, dated August 19, 2002, we concluded that the simultaneous holding of the positions of Director of Utilities for the City of West Columbia and member of the Joint Water and Sewer Commission did not create a dual office holding situation because service on the Commission would be ex officio.¹ However, we additionally advised that it would constitute dual office holding for the Commission member then to occupy the office of member of Lexington County Council. In that instance, there was no ex officio relationship between the member's service on the Water and Sewer Commission and Lexington County Council.²

¹ The South Carolina Supreme Court has consistently held that the dual office holding prohibition does not generally apply when one of the offices is ex officio. See, Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947). The phrase ex officio is defined as "by virtue of the office" and is 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 (1923); Ashmore, *supra*. Ashmore held that the duties of the officer must have a reasonable relationship to the officer's function ex officio.

² The position of member of the Lexington County Joint Water and Sewer Commission is created by S.C. Code Ann. § 6-25-60 which provides that the "governing body of each voting member of a joint system shall appoint a representative who must be commissioner of

(continued...)

Following the issuance of our opinion, the Council member in question "... resigned from the Joint Water and Sewer Commission and [now] only serves on County Council." You raise the additional question of whether the council member "can serve in an advisory capacity to the Joint Water and Sewer Commission." By way of background, you state the following:

I understand this position would not involve any voting powers or other powers of the Commissioners of the Joint Water and Sewer Commission. The County Council Member may attend the regular meetings of the Joint Water and Sewer Commission and may be asked his opinion and advice on various matters. It is also possible that he may be asked to go into Executive Session with the Joint Water and Sewer Commission Members. I understand that the Joint Water and Sewer Commission has a former member who is serving in a similar capacity to the Commission.

The issue is whether the above is permissible from a dual office holding standpoint. I would also ask your opinion on whether serving as an "honorary" member on the Commission with no voting powers and serving only to give advice to the Commission would be in violation of the dual office holding provisions. To summarize, my questions are as follows:

1. Is it permissible for a County Council Member to serve in an advisory capacity to the Joint Water and Sewer Commission or does this violate the dual office holding provisions of the Constitution?
2. Is it permissible for a County Council Member to serve as an "honorary" member of the Joint Water and Sewer Commission if, in this position, the Council Member does not have any voting powers or any other powers of the regular appointed Commissioners to the Joint Water and Sewer Commission?

²(...continued)

the joint system. The representative may be an officer or employee of the member and may also serve ex officio as a member of the system." (emphasis added). Pursuant to this statute, another member of Lexington County Council has apparently been appointed to the Commission and serves ex officio thereupon as the County's representative pursuant to the foregoing provision. This situation is markedly different from the one addressed in the August 19 opinion in which we concluded that there was no ex officio relationship between the County Council member in question and service on the Commission.

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 office of the militia, member of a lawfully and regularly organized fire department, constable or notary public.

For these provisions 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).

As we stated in the August 19 opinion, without question, a member of county council is an officeholder. This Office has, on many occasions, advised that a member of a county council would hold an office for dual office holding purposes. Ops. S.C. Atty. Gen. dated July 26, 1999; July 27, 1997; December 7, 1994; and August 20, 1985.

Thus, the question here is whether the position of "advisor" as you have described is also an office. It is important to note that § 6-25-5 et seq. does not mention any "advisor" to the Commission and we are unaware of any other statute or provision of law which establishes the position of advisor to the Joint Water and Sewer Commission.³ It thus follows also that there is no set term for such a position as recognized by law. Apparently, the position is one which has been established by practice or custom of the Lexington County Joint Water and Sewer Commission.

Most importantly, it does not appear that the advisor position which you have described exercises any portion of the sovereign power of the State. You note that this position will not involve any voting powers or other powers of the Commissioners of the Joint Water and Sewer Commission. Based upon your description, the individual "may attend the regular meetings of the Joint Water and Sewer Commission and may be asked his opinion and advice on various matters" and possibly "be asked to go into Executive Session with the Joint Water and Sewer Commission members."

Consistently, this Office has opined that where the duties of a particular position are advisory only, no office has been created for dual office holding purposes.

³ Section 6-25-100(r) authorizes the Commission to appoint such officers, agents and employees, describe their duties and fix their compensation as may be necessary.

Mr. Anderson
Page 4
February 26, 2003

For example, in Op. S.C. Atty. Gen., Op. No. 83-79 (October 4, 1983), we concluded that members of a committee which possessed purely advisory functions were not office holders. We stated as follows:

... it is clear that the Committee is capable of no binding exercise of sovereign power. To the contrary, its functions are advisory only. This office has consistently expressed the view that committees which function in a purely advisory capacity are not offices within the meaning of the dual office holding provisions of the South Carolina Constitution. E.g., 1976 Op. Atty. Gen. 200; 1975 Op. Atty. Gen. 195; Unpublished Opinions dated: June 22, 1982; July 12, 1980; September 7, 1978.

And, in Op. S.C. Atty. Gen., Op. No. 4126, (September 22, 1975), we advised that membership on the Advisory Committee on Programs for the Handicapped is not an office subject to the constitutional restraints on dual office holding. In our opinion, the Committee performed functions "purely advisory, as the name implies." We noted that there 'are no duties defined by law nor is there any exercise of the sovereign power of this state."

In addition, an opinion of August 6, 1971 concluded that the position of legislative assistant to the Richland County Delegation was not an "office" for dual office holding purposes. Based upon the assumption that the assistant was an employee of the Richland County Council, serving "merely [as] a legal advisor to the Council," we advised that no dual office holding situation existed by the assistant also serving as Veterans Affairs Officer for Richland County. Id.

Accordingly, in our opinion, for the member to serve as a so-called advisor to the Lexington County Joint Water and Sewer Commission would not constitute dual office holding under the facts as you have described them. In essence, based upon the information which you have presented, the individual would simply provide advice and counsel to the Commission and would possess no voting power or other authority typically exercised by a Commission member.

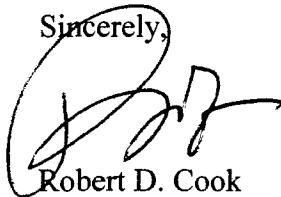
You also request our advice as to whether dual office holding would occur if the individual is designated simply as an "honorary" member of the Commission itself. Similar to the analysis above, even if we view the member as serving as an honorary or emeritus member of the Commission, the conclusion is still the same. Where a position is purely honorary and the individual in question is serving solely in an emeritus or honorary capacity, we have concluded that "a person serving as member emeritus of a board does not hold an office within the meaning of the provisions of the Constitution prohibiting dual office holding." Op. S.C. Atty. Gen., February 9, 1983. In another opinion, dated November 1, 1982, former Attorney General McLeod advised that a person designated as "member emeritus" of the Ports Authority did not hold an office. Such a designation was deemed simply "as an honor" to the particular individual and thus no sovereign power of the state was being exercised. However, Attorney General McLeod cautioned that such designation of emeritus capacity "did not carry with it the right to vote" and his conclusion was based upon that

Mr. Anderson
Page 5
February 26, 2003

premise. Therefore, based upon our longstanding opinion that an emeritus position which is truly honorary is not an office, we likewise conclude herein that no dual office holding situation would exist if the council member simply occupies emeritus or honorary membership status on the Lexington County Joint Water and Sewer Commission. As in the 1982 opinion, our conclusion here assumes that the member possesses no voting rights whatsoever nor possesses any other authority of a Commission member.

We hasten to emphasize the conclusions expressed herein – that no dual office holding problem here exists – are based upon our understanding that the council member in question will serve solely and exclusively in an advisory capacity, will not vote as a Commission member, and will not exercise or attempt to exercise any authority of a commission member. This Office has consistently recognized that what cannot be done directly cannot be done indirectly, either. Ops. S.C. Atty. Gen. November 13, 2000; July 31, 1990, citing State ex rel. Edwards v. Osborne, 193 S.C. 158, 7 S.E.2d 526 (1940); Lurey v. City of Laurens, 265 S.C. 217, 217 S.E.2d 226 (1975); Westbrook v. Hayes, 253 S.C. 244, 169 S.E.2d 775 (1969). Thus, caution is advised to insure that no new dual office holding situation is created by the Council member's actions. Exercise or attempted exercise of any sovereign power by the individual on behalf of the Commission would run the risk of recreating the same situation which was the subject of our earlier opinion.

Sincerely,

A handwritten signature in black ink, appearing to be "R.D. Cook", written over a circular stamp or seal.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an