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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

January 15, 2003

Gregory D. DeLoach, Esquire
Assistant Town Manager for Administration
/ Legal Department Director
Town of Hilton Head Island
One Town Center Court
Hilton Head Island, South Carolina 29928

Dear Mr. DeLoach:

I apologize for the delay in responding to your request for an opinion. You have asked whether a person who is a member of the Town of Hilton Head's Accommodations Tax Advisory Committee and is also a member of the State Tourism Expenditure Review Committee constitutes dual office holding in contravention of Article XVII, Sec. 1A of the South Carolina Constitution.

LAW / ANALYSIS

Article XVII, § 1A of the South Carolina Constitution 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. The South Carolina Supreme Court 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 occasional or intermittent, is a public officer." Id., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes or other 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).

I am enclosing a copy of an opinion written by this Office on September 14, 2001 which addresses your question. In that opinion, we noted that pursuant to S.C. Code Ann. Section 6-4-25, a municipality or county receiving a certain amount of revenue from an accommodations tax must appoint an advisory committee to make recommendations on the expenditure of revenue generated from the accommodations tax. The advisory committee, as you note, consists of seven members

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with a majority of the committee members being selected from the hospitality industry of the municipality or county receiving the revenue.

Applying the standards set forth by our Supreme Court in Sanders v. Belue, supra and State v. Crenshaw, supra, we concluded that advisory board membership did not constitute an office. As we noted, among other things,

[t]he members are authorized only to make recommendations as to expenditures of revenues; they are not charged with the exercise of a portion of the sovereign power of the State.

In addition, we noted for future reference that "service on the Tourism Expenditure Review Committee would constitute office holding." We elaborated as follows:

[i]n contrast to the position of the advisory Accommodations Tax Committee, a member of the Tourism Expenditure Review Committee does exercise some sovereign power of the state. Act No. 74 of the 2001 Acts and Joint Resolutions states that the Committee "shall serve as the oversight authority on all questionable tourism-related expenditures and to that end, all reports filed pursuant to Section 26 6-4-25(D)(3) must be forwarded to the committee for review to determine if they are in compliance with this chapter." Furthermore, if the committee deems a local expenditure of accommodations tax improper, "it shall certify the noncompliance to the State Treasurer, who shall withhold the amount of the expenditure found in noncompliance from subsequent distributions in accommodations tax revenue otherwise due the municipality or county." In other words, the Committee has the authority to direct the State Treasurer to withhold funds from a local government. This authority, as well as other indicia in Act 74, such as the prescribed four-year term of office, compels me to conclude that a member of the Tourism Expenditure Review Committee would hold an office for dual office holding purposes. However, for the reasons I stated above, one who is a member of the Tourism Review Committee could serve on an advisory committee without contravening the dual office holding provisions of the Constitution.

While the earlier opinion concluded that it would not constitute dual office holding to hold the positions of membership on the advisory committee and the Tourism Expenditure Review Committee, the opinion also cautioned about a potential conflict of interest in holding the two positions. It was noted therein that

... because the County Accommodations Tax Committee makes recommendations to the county on expenditures that are ultimately reviewed by the Tourism Expenditure Review Committee, arguably a conflict of interest exists. Ascertaining whether such dual service creates a conflict of interest requires an interpretation of the Ethics,

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Government Accountability and Campaign Reform Act of 1991, specifically S.C. Code Ann. § 8-13-700(B). Pursuant to S.C. Code Ann. § 8-13-320(11), the South Carolina General Assembly has delegated primary responsibility for interpreting the Act's provisions to the South Carolina State Ethics Commission. Accordingly, this Office must defer to the State Ethics Commission in regard to this particular issue. You may contact the Commission by writing to Mr. Herbert Hayden, Executive Director, State Ethics Commission, 5000 Thurmond Mall, Suite 250, Columbia, S.C. 29201.

If I can be of further assistance, please let me know.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an
Enclosure