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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

August 19, 2002

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

Re: Informal Opinion

Dear Jeff:

You have presented the following facts, seeking an opinion regarding a potential dual office holding situation. You state as follows:

1. A future County Council member who won the June primary and who faces no opposition in November is an employee of the City of West Columbia and, more specifically, is the Director of Utilities for the city.
2. This person is also the City of West Columbia's appointed representative on the Lexington County Joint Water and Sewer Commission (JWSC) as allowed by South Carolina Code § 6-25-60. The JWSC was created pursuant to South Carolina Code § 6-25-10 et seq.
3. Lexington County Council has its own appointed representative on the JWSC.
4. Assuming that he wins in the general election in November, as of January, 2003, this person will be serving as a commissioner of the JWSC as West Columbia's representative and as a County Councilmember.

You state the specific question as follows:

Would it be considered dual office holding if the person continues to serve as a commissioner on the JWSC as a representative of the City of West Columbia and as a member of County Council in January of 2003.

You also wish to know if there is any dual office holding "problem with a person serving on County Council while being employed as a municipality's utilities director."

Request Letter

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 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. Cranshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

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. Op. Atty. Gen., dated July 26, 1999; June 27, 1997; December 7, 1994; and August 20, 1985.

The question then becomes whether the member of county council would hold any other office in the situation as you have described it. In my opinion, serving as Director of Utilities for the Town of West Columbia would not constitute an office, but would be employment. For purposes herein, I assume that the position of “Director” equates roughly with that of an “executive director” [as opposed to a member of a board or commission]. We have consistently concluded that the position of executive director or director is an administrative position which is not an office. See, e.g., Op. Atty Gen., Op. No. 94-40 (June 24, 1994) [Executive Director of Real Estate Commission]; Op. Atty. Gen., May 15, 1989 [executive director of Calhoun County Development Board]. Likewise, the position of Director of Utilities for the Town of West Columbia would constitute employment. Accordingly, no dual office holding situation is created by a member of Lexington County Council also serving as Director of Utilities for the Town of West Columbia.

The issue, however, is the appointment of the Director to serve as a member of the Lexington County Joint Water and Sewer Commission while he is at the same time on Lexington County Council. The position of member of the Joint Water and Sewer Commission is created by S.C. Code Ann. § 6-25-60 which provides as follows:

- (a) The management and control of a joint system is vested in a commission. The governing body of each voting member of a joint system shall appoint a representative who must be commissioner of 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 commission.

The duties of the Joint Water and Sewer Commission are set forth in § 6-25-100. Among the powers enumerated therein is the power to “prescribe rates and regulations under which water is sold.” In addition, the power to borrow money and issue bonds, make contracts, sell, lease or transfer property,

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pledge or assign money or other revenues and authorize construction, operation or maintenance of any project is granted to the Commission. The Commission is also authorized to "sell water at retail and at wholesale; to acquire and operate water treatment and distribution systems and to "fix, charge and collect rents, rates, fees and charges for water and other services, facilities, and commodities sold, furnished or supplied through any project." Unquestionably, a member of the Commission holds an office for dual office holding purpose.

Accordingly, it is my opinion that a person simultaneously holding the positions of County Council member and member of the Lexington County Water and Sewer Commission would be dual office holding in violation of the South Carolina Constitution.¹

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. In this instance, presuming the person is elected to county council, he would vacate the office of member of the Joint Water and Sewer Commission upon assuming the office of Council member.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General and not officially published in the manner of a formal opinion.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an

¹ This situation is not governed by the doctrine which holds that the dual office holding prohibition does not generally apply when one of the offices is ex officio. See, Ashmore v. Greater Grville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947). That rule would apply if the position of Director of Utilities were an office and the individual by virtue of that office served on the Joint Water and Sewer Commission. The holding of those two positions would not constitute dual office holding because the holding of the second position – the Joint Water and Sewer Commission membership would be by virtue of the first. Here, the ex officio holding of the Joint Water and Sewer position is not the problem. First of all, as stated above, the Director of Utilities is not an office. Secondly, the problem is the simultaneous holding of the positions of County Council and membership on the Joint Water and Sewer Commission – each an office. There is no ex officio correlation between those two positions.