



ALAN WILSON
ATTORNEY GENERAL

July 26, 2013

The Honorable Jenny A. Horne
Member, House of Representatives
107 S. Main Street
Summerville, South Carolina 29483

Dear Representative Horne:

Attorney General Alan Wilson has referred your letter of July 25, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: May a legislator currently serving in the South Carolina General Assembly also hold the position of Director of Airports on the Charleston County Aviation Authority without violating state law?

Law/Analysis:

By way of background, the Charleston County Aviation Authority governs the Charleston County Airport District in order to perform the District's functions. *Torgerson v. Craver*, 267 S.C. 558, 230 S.E.2d 228 (1976); www.chs-airport.com/About-the-CCAA/Airport-Authority.aspx. The South Carolina General Assembly created the Charleston County Airport District ("District") by Act No. 1235 of 1970. It was created as a political subdivision of the State. 1970 S.C. Acts 1235, p. 2634ff (1970). The District was given authorization to "appoint officers, agents, employees and servants, and to prescribe the duties of such, including the right to appoint persons charged with the duty of enforcing the rules and regulations promulgated pursuant to the provisions of this act, to fix their compensation, and to determine if, and to what extent they shall be bonded for the faithful performance of their duties." 1970 S.C. Acts 1235, p. 2638 (1970). Act No. 1235 of 1970 was amended by Act No. 329 of 1971. That amendment, among other things, decreed that the membership on the Charleston County Airport District Authority was not an office for honor or profit in regards to Section 2 of Article II of the South Carolina Constitution. 1971 S.C. Acts 329, p. 437 (1971).¹

Article VI, Section 3 and Article XVII, Section 1A of the South Carolina Constitution provide 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 a notary public. Article III, Section 24 of the South Carolina Constitution specifically prohibits members of the General Assembly from holding any other office or position of trust or profit. For these provisions to be contravened, a person concurrently must hold two public offices which have duties involving an exercise

¹ Today, Article II of the South Carolina Constitution concerns the right to vote. However, the reference in the Act is (presumptively) to dual office holding provisions in the Constitution. Those provisions are discussed in the following paragraph.

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 continuing, and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.” Id. at 174, 763. Other relevant considerations include “whether the position was created by the legislature; whether qualifications for appointment are established; whether duties, tenure, salary, bond and oath are prescribed or required; (and) whether one occupying position is representative of sovereign.” State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). The only exception to dual office holding prohibition would be if the person holds the second office “ex officio.” Op. S.C. Atty. Gen., 2012 WL 4459270 (September 19, 2012) (citing Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)). In other words, if the legislator is appointed as director to serve in his official capacity as a legislator, it would not be dual office holding. However, this Office understands that is not the case.

As you mentioned in your letter, this Office has consistently held the office of South Carolina legislator is an office of “honor or profit” in regards to the dual office holding prohibition. See, e.g., Op. S.C. Atty. Gen., 1984 WL 250017 (December 10, 1984) (citing Op. S.C. Atty. Gen., 1978 WL 34991 (July 21, 1978)). The office of a South Carolina legislator, like many other offices, is a part-time position. The legislature generally meets three days per week while in session. Op. S.C. Atty. Gen., 1984 WL 250017 (December 10, 1984). Therefore, it is reasonable to conclude most legislators would hold some other type of employment.

A critical issue presented by your question is whether the position Director of Airports on the Charleston County Aviation Commission is an office of “honor or profit” as to fall under the dual office holding prohibition of the South Carolina Constitution. South Carolina follows the criteria in the Crenshaw case to determine if a position is an office of “honor or profit” for dual office holding purposes. The criteria in the Crenshaw case consist of four questions:

- 1) Was the position created by the legislature?
- 2) Are there established qualifications for appointment?
- 3) Are duties, tenure, salary, bond and oath required or prescribed?
- 4) Is the position representative of sovereign duties?

None of the four questions is conclusive, nor are all the questions required to be answered consistently for an officer to be established. State v. Crenshaw, *supra*. Traditionally there are three principal attributes of sovereignty: the power to tax, the power of eminent domain and the police power. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3rd Cir. 1981)).

This Office issued a previous opinion where we concluded a Director of the Union County Airport Commission was not a public office for dual office holding purposes. In that opinion we stated:

On numerous occasions, this Office has concluded that board members of county airport commissions are public officers for purposes of dual office holding. See Ops. Atty. Gen., October 14, 2010; August 29, 2005; July 11, 2005; January 17, 2001;

April 29, 1985; January 19, 1983; November 9, 1982; *and* August 22, 1975. Likewise, we have previously opined that membership on a city stadium authority would constitute a public office. Op. S.C. Atty. Gen., February 24, 1975.

However, we have also repeatedly expressed the opinion that the position of “executive director or director is an administrative position which is not an office.” Op. S.C. Atty. Gen., March 31, 2011; *see also* Ops. S.C. Atty. Gen., August 29, 2005; May 3, 2005; August 19, 2002; June 24, 1994; *and* May 15, 1989. This is because “[t]he director generally serves at the pleasure of the governing board and would be considered a mere employee.” Id. Consistent with these prior opinions, we believe the Director of either the Union County Airport Commission or the Union County Stadium Commission is not a public officer for purposes of dual office holding.

Op. S.C. Atty. Gen., 2011 WL 6120335 (November 15, 2011) (emphasis added). This Office also issued a previous opinion concluding a secretary on the Walterboro-Colleton Airport Commission was not a public officer for dual office holding purposes because the job description did not involve any sovereign powers of the state. In that opinion this Office stated:

Furthermore, we have advised on a number of occasions that an individual serving on a county airport commission would hold an office for purposes of dual office holding. *See, Ops. S.C. Atty. Gen.*, April 29, 1985; January 19, 1983; November 9, 1982; August 22, 1975. *See also, Ops. S.C. Atty. Gen.*, July 11, 2005 (service on Richland-Lexington Airport Commission is an office for purposes of dual office holding); January 17, 2001 (service on Pickens County Aeronautics Commission is an office for purposes of dual office holding). However, in telephone conversations with this Office it became apparent that the position of “secretary” for the Walterboro-Colleton Airport Commission is not that of an elected official, but an employee. We have advised that “some county employees are considered public officers[.]. **A determination of whether a county employee is a public officer for dual office holding purposes is most effectively accomplished by providing this Office with a job description of the employee.**” *Ops. S.C. Atty. Gen.*, May 13, 1997.

In a telephone conversation, you have provided a brief job description of the secretary for the Walterboro-Colleton Airport Commission. It was explained that this included comprising the Commission's agenda and distributing it to the commissioners, keeping minutes of Commission meetings, and maintaining the financial records. It appears that **none of the aforementioned duties encompasses an exercise of a portion of the sovereign power of the State. Accordingly, we advise that the position of secretary for the Walterboro-Colleton Airport Commission is not an office for dual office holding purposes.**

Thus, it is evident that the individual in question would not contravene the dual office holding provision, regardless of our conclusion regarding the Walterboro Planning Commission.

Op. S.C. Atty. Gen., 2005 WL 2250213 (August 29, 2005)(emphasis added). As quoted above, in regards to executive directors of boards or commissions, this Office has consistently held that directors do not hold an office but are mere employees. In one such opinion, this Office concluded:

Moreover, this Office has repeatedly concluded over the years that the position of executive director of a board or commission does not constitute an office. See, Op. S.C. Atty. Gen., July 24, 2001 and opinions referenced therein. We have stressed “the fact that the executive director served at the pleasure of the governing board or authority.” Id. Moreover, in those previous instances, [g]enerally speaking, no qualifications were set forth in law in those executive director positions. And most importantly, we referenced the general rule set forth in Sanders v. Belue, supra which is stated as follows:

[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business is a mere employee.

78 S.C. at 174. In short, in virtually every previous instance in which the question has arisen, we have concluded that an executive director of a governing board or commission is an “employee” rather than an “officer.”

It should also be noted that Act No. 127 of 2003 states that the Board shall “employ” a director. **While not controlling, it is significant here that the General Assembly used the term “employ” in the context of the director, suggesting, at least, that the director’s status was one of an “employee” rather than an “officer.”** Moreover, the Act further states that “[s]taff positions” are subject to the county personnel system “by which all county employees are regulated, except that the director serves at the pleasure of the board.” Again, the Legislature seems to indicate that the director is an “employee” of the county - one who serves at the pleasure of the newly created Charleston County Elections and Voter Registration Board. The Act’s characterization of the Director as an “employee” is consistent with the above-referenced opinions that an executive director of a board who serves at the board’s pleasure is not an “officer” for dual office holding purposes.

Op. S.C. Atty. Gen., 2004 WL 235414 (January 27, 2004)(emphasis added). In addition, this Office previously concluded that based on South Carolina Act No. 329 of 1971, a member on the board of the Charleston County Aviation Authority is not an office for dual office holding purposes. Ops. S.C. Atty. Gen., 2010 WL 4391639 (October 25, 2010); 1986 WL 192071 (November 18, 1986).

Taking all of the above into consideration, we must now analyze the Director position. Based on the information given, this position was not created by the legislature, nor are its duties listed publicly, this Office is not aware of any tenure, bond or oath required. The Director would have a salary, but this Office has not been informed of the salary. As far as a description of the Director’s job, we are told it is general supervision over the property, business and affairs of the Authority including the specific duties prescribed by the Authority’s Bylaws, and Enabling Legislation No. 1235, etc., together with such duties and responsibilities as may be prescribed from time to time by the Board of Directors. It does not appear the Director would be representative of any sovereign duties.² It appears the Director is an employee of

² While the sovereign powers of the state (as discussed above) include the power of eminent domain and the power to tax, it should be noted the Charleston County Airport District is authorized to tax (1970 S.C. Acts 1235 Section 6, p. 2644, and as amended; see also Charleston County Aviation Authority v. Wasson, 277 S.C. 480, 289 S.E.2d 416

the board, not an officer of the State. Therefore, it is likely a court would find the Director does not hold an office for dual office holding purposes under the South Carolina Constitution.

It is this Office's understanding the legislator has not yet been selected for the position of Director. Please note if it is determined the Director is an office for dual office holding purposes, an officeholder may give up the first office to hold the second office, but if he takes the second office while in office, he forfeits the first office. His service in the first office while in dual offices would be de facto until that position is replaced. Op. S.C. Atty. Gen. 2012 WL 4459271 (September 13, 2012) (citing Ops. S.C. Atty. Gen., July 28, 2003; July 13, 1995).

Some other issues you may want to consider were discussed in a previous opinion. In that opinion this Office stated:

We have also examined your situation from the standpoint of [whether there] is any prohibition as to the employment of a legislator as a county employee when he is usually absent from his employment for three days per week during the legislative session. In an opinion of this Office dated March 11, 1976, this Office examined the question of a legislator concurrently receiving a salary as an elementary school principal and found no statutory prohibition. Likewise, in an opinion dated August 6, 1984, we found no statutory prohibition as to a member of the General Assembly serving as District Vocational Job Placement Coordinator with the Darlington County Schools. Similarly, in an opinion dated November 26, 1984, no such prohibition was found with regard to a legislator serving as administrative assistant to the President of Horry-Georgetown Tec. Similarly, in the situation you present, we can find no statute or other law prohibiting a legislator's employment with a circuit solicitor's office.

Because a portion of the funding for your position is derived from state funds, we have also examined a provision in Part I, Section 130 of the Appropriations Act, Act No. 512 of 1984. That Section provides in part:

Provided, Further, That no employee of any state department or institution shall be paid any compensation from any other department of the state government except with the approval of the State Budget and Control Board . . . (Emphasis added.)

However, State Personnel regulation, R-19-702.09(D)(1)(c) exempts employees of the [G]eneral Assembly and of legislative committees from the dual compensation provision and we are informed that the State Personnel Division treats legislators themselves no differently from legislative or committee employees for purposes of this provision. Thus, it would appear that the dual compensation proviso is inapplicable. For further information in this regard, you might wish to contact the State Personnel Division of the Budget and Control Board. We further understand that

(1982)) and to exercise eminent domain (1970 S.C. Acts 1235 Section 9, p.2638, and as amended; Op. S.C. Atty. Gen., 1972 WL 26113 (December 19, 1972)). However, it is this Office's understanding the members of the board (who are specifically listed as not holding offices for dual office holding purposes (1971 S.C. Acts 329, p. 437) would be the ones exercising any sovereign powers and the Director would merely be their employee pursuant to the board's ability to appoint employees found in S.C. Act No. 1235 of 1970 (p. 2638).

you will be employed on a part-time basis, receiving a salary reflective of part-time employment, while the legislature is in session.

We would also direct your attention to the State Ethics Act. The Act does not expressly prohibit the situation which you reference. However, we would advise that certain provision of the Ethics Act may be applicable to particular situations and should be adhered to. For example, Section 8-13-410(1) of the CODE provides that '[n]o public official or public employee shall use his official position or office to obtain financial gain for himself.' Section 8-13-460 provides for action to be taken by a legislator when his financial interest might be affected:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

(a) Prepare a written statement describing the matter requiring action or decision, and the nature of his potential conflict of interest with respect to such action or decision.

(b) If he is a legislator, he shall deliver a copy of such statement to the presiding officer of his legislative branch. The presiding officer if requested by the legislator shall cause such statement to be printed in the journal and, upon request, shall excuse a legislator from votes, deliberations, and other action on the matter on which a potential conflict exists; provided, however any statement delivered within twenty-four hours after the action or decisions shall be deemed to be in compliance with this section . . .

Moreover, pursuant to Section 8-13-440, a legislator would be prohibited from using or disclosing confidential information gained by him in the course of his official activities in a way that would result in financial gain for himself or any other person. Thus, while the act does not prohibit a legislator from receiving his salary as an administrative assistant and Director of the Pretrial Intervention Program of the Tenth Judicial Circuit, the guidelines of the Act must be followed by the legislator. See, Op. Atty. Gen., dated July 21, 1978; see also, Ops. Atty. Gen., dated February 7, 1984 and January 13, 1984.

Op. S.C. Atty. Gen. 1984 WL 250017 (December 10, 1984) (emphasis added). Additionally, this Office issued a previous opinion concluding any contract with a member of the governing board of the Charleston Aviation Authority with the Aviation Authority would be against public policy. Op. Atty. Gen., 1973 WL 26718 (April 27, 1973). Thus, we would urge caution in any outside actions or contracts any candidate for the Director position might execute. Accordingly, this Office would refer you to the State Ethics Commission with any ethical questions.

Conclusion: Based on the conclusion that the Director of Airports of the Charleston County Aviation Authority is not an office of "honor or profit" for dual office purposes, it appears a court would likely find a legislator would be allowed to serve as Director without violating the dual office provision of the South Carolina Constitution. Nevertheless, this Office would urge taking into consideration the additional legal

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limitations referenced above and further suggests you seek any ethical opinions from the South Carolina Ethics Commission. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General