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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 2, 1999

Eric P. Thompson, Executive Director
Three Rivers Solid Waste Authority
P.O. Box 850
Aiken, South Carolina 29802

RE: Informal Opinion

Dear Mr. Thompson:

Your opinion request has been forwarded to me for reply. You have informed this Office that the Three Rivers Solid Waste Authority was formed pursuant to Section 6-16-10 et seq. of the South Carolina Code of Laws. The Authority is a joint agency composed of Aiken, Allendale, Bamberg, Barnwell, Calhoun, Edgefield, McCormick, Orangeburg, and Saluda counties. You note that on March 3, 1999, the Three Rivers Board of Directors, which is composed of one person appointed from each of the member counties, voted to adopt Section 6-16-60 of the Code for the purposes of receiving per diem, mileage and subsistence expenses. You have also informed this Office that the majority of the members of the Solid Waste Authority are also members of their respective county councils.

You have asked for this Office's opinion on two questions concerning the payment of a per diem, mileage, and subsistence expenses to members of the Solid Waste Authority. First, you have asked whether the payment of a per diem to members who also serve on county council violates the provision of Section 4-9-100 of the South Carolina Code of Laws. Second, you have asked whether members are entitled to both a per diem and subsistence expenses or whether the subsistence expenses are included in the per diem amount.

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In regards to your first question, in an opinion dated October 28, 1987, this Office addressed a question similar to yours. We were asked whether ex officio members of the Charleston County Aviation Authority would be entitled to compensation as members of the Aviation Authority in addition to the compensation each received from his elective position. This Office advised as follows:

You have advised that Act No. 1235 of 1970 provides that the mayors of the cities of Charleston and North Charleston and the chairman of Charleston County Council serve as ex officio members of the Charleston County Aviation Authority. You have asked about the entitlement of each to the emoluments of both positions.

The general law relative to your inquiry is found in 67 C.J.S. Officers § 222: "Where an officer by law may, and as a matter of fact does, hold two offices, he is entitled to receive the compensation attached to both offices...." See also State ex rel. Goodwin v. Rogers, 217 S.E.2d 65 (W.Va.1975); Kendrick v. Boyd, 51 So.2d 697 (Ala.Ct.App.1951); Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo.Ct.App.1980); Lindsley v. City and County of Denver, 172 P. 707 (Colo.1918); Dumke v. Anderson, 44 Ill.App.3d 626, 358 N.W.2d 344 (1976); Throop, Public Officers, §§ 496, 497. The key question addressed in all of these cases is whether the officer who holds a second position in an ex officio capacity holds the position in a separate and distinct capacity. If so, he is entitled to compensation for both positions. If, however, a new position is not created but only new duties are added to the already-existing office, no additional compensation has been permitted. Maginn v. McDevitt, 269 Ill. 196, 109 N.E. 1038 (1915); People ex rel. Coultas v. Wabash Ry. Co., 281 Ill. 311, 117 N.E. 1018 (1917); People ex rel. Ruesch v. Hire, 406 Ill. 341, 94 N.E.2d 161 (1950). Of course, each instance of an officer holding a second position ex officio would require individual examination to determine the appropriateness of compensation for both positions.

While it is a close question, it would appear that when the

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General Assembly created the Charleston County Aviation Authority, membership thereon was not intrinsic to the duties of the mayors of the cities of Charleston and North Charleston and the chairman of the Charleston County Council and, therefore, these are additional positions which could have been performed appropriately by other persons. Therefore, these ex officio members would be entitled to compensation for service as ex officio Authority members.

The conclusions reached in the above cited opinion seem to apply to your situation as well. Section 6-16-60(a) does not mandate that a county's representative on a solid waste joint agency must be a member of county council. The Section merely provides that a county's representative on a solid waste joint agency may be an officer or employee of the member county and, if so, service would be ex officio. Thus, membership on a solid waste joint agency is not intrinsic to the duties of county council member. It would appear that if a member of county council were to serve as a member of a solid waste joint agency, the council member would be holding the position in a separate and distinct capacity. Accordingly, the county council member would be entitled to compensation for service as ex officio member of the solid waste joint agency.¹

You have also asked whether members of the Solid Waste Authority may receive both a per diem and subsistence expenses. Section 6-16-60(c) provides "... each director may be paid per diem, mileage and subsistence expenses, as provided by law for state boards, committees and commissions, incurred while engaged in the performance of such duties." Thus, the statutory language anticipates that members are to receive both a per diem and subsistence expenses. This is consistent with state law governing the payment of expenses for members of state boards, commissions or committees found in Act No. 419, Part 1B, Sections 72.35 and 72.37 of 1998. Pursuant to these sections, members of state boards, commissions or committees are entitled to a per diem in the amount set, mileage, and subsistence expenses in the amount set. I would recommend that you consult with the Comptroller General's Office for further information regarding the amount of allowable expenses.

¹ I have enclosed an opinion dated June 15, 1978 for your review. This opinion contains a detailed discussion on the State Treasurer's ability to receive compensation for ex officio service as Chairman of the Board of Financial Institutions.

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This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I remain

Very truly yours,

A handwritten signature in cursive script that reads "Paul M. Koch".

Paul M. Koch

Assistant Attorney General