



L 6126/6706

STATE of SOUTH CAROLINA

CHARLES MOLONY CONDON
ATTORNEY GENERAL

Office of the Attorney General
Columbia 29211

May 3, 1999

The Honorable D. Leslie Tindal
Commissioner
SC Department of Agriculture
Post Office Box 11280
Columbia, S. C. 29211-1280

Dear Commissioner Tindal:

You have asked for an opinion clarifying your functions and responsibilities as South Carolina Commissioner of Agriculture in light of the fact that the Office of Commissioner is a constitutional office. You wish to know whether the fact that you hold a constitutional office, as opposed to merely a statutory position, insures that your duties - to serve as the chief administrative officer of the Department of Agriculture and to serve as the final authority in running the Department - must remain with you as Commissioner. It is my opinion that, as a constitutional officer, your duties, as head of the Department of Agriculture, cannot be assumed by others, or interfered with, and that even the General Assembly, by statute, cannot remove these duties of your office and bestow them upon another.

Law/Analysis

The office of South Carolina Commissioner of Agriculture dates back over a century. The statutory duties of the Commissioner are generally set forth in Chapter 3, Title 46 of the Code. Section 46-3-30 designates the Commissioner as "[t]he chief officer of the Department of Agriculture." Other specific duties are also prescribed in Chapter 3, of Title 46, among them being that the Commissioner shall "[b]e charged with all work looking to the promotion of agriculture and cattle raising" Section 1-1-110 expressly names the Commissioner of Agriculture as part of the executive department of the State of South Carolina.

Section 46-5-10 et seq. also establishes an Agriculture Commission. The Commission consists of one member from each judicial circuit, appointed by the legislative delegation of that circuit, and one member from the state at large who is designated chairman of the Commission. The chairman of the Commission is appointed by the Governor and the term of chairman is coterminous with the Office of the Governor appointing. A member and other officers serve on the Commission ex officio, including the Commissioner of Agriculture, and the chairman of the respective Agriculture Committees of the House and Senate or their designees.

The powers of the Agriculture Commission are generally listed in § 46-5-20. These include the power to:

- (1) Adopt policies, rules and regulations of the Department of Agriculture for its own government not inconsistent with the laws of the State.
- (2) Annually approve budget requests for the institutions, agencies and services under the control of the Department of Agriculture as prepared by the Commissioner of Agriculture prior to being submitted to the Budget and Control Board and to the General Assembly.
- (3) Appoint such committees and such members of committees as may be required or as may be desirable to carry out the orderly function of the Commission.
- (4) Cooperate fully with the Commissioner of Agriculture at all times to the end that the State's agricultural economy may constantly be improved.
- (5) Assume such other responsibilities and exercise such other powers and perform such other duties as may be assigned to it by law.

In an Opinion dated August 8, 1969, former Attorney General McLeod attempted to articulate the relationship between the Commissioner of Agriculture and the Agriculture Commission under the existing statutes. He noted that the Agriculture Commission was created by an Act approved in 1968 and that its powers and duties are set forth as follows:

1. The Commission may adopt policies, rules and regulations of the Department of Agriculture for its own government, not inconsistent with the laws of the State. The Department of Agriculture is created by Section 3-1 of the Code of Laws [now,

§ 46-3-10]¹, and that section and following sections specify the duties of the Commissioner of Agriculture. These duties are specifically set forth in Section 3-6(1), (2), and (3) [now § 46-3-30(1), (2), and (3)]. The power given to the Commissioner to adopt policies, rules and regulations authorizes the Commissioner to implement the laws pertaining to the Department of Agriculture.

The Commission cannot alter the laws, but merely provide for procedures for which the laws shall be implemented and carried out. The Commissioner of Agriculture is the chief officer of the Department of Agriculture, pursuant to the provisions of Section 3-2 and is the instrumentality through which the Agriculture Commission carried out its policies, rules and regulations. The position of the Agricultural Commissioner with respect to the Agricultural Commission is somewhat similar to that existing between the State Superintendent of Education and the State Board of Education and the Agriculture Commission are similar in many respects . . .

The Commissioner is charged with certain specific duties which are of a rather general nature, and the manner in which these duties shall be carried out is subject to regulations by the Commission to a large extent - the Commission cannot divert the Commissioner of duties which are specifically vested in him, but it may direct how there duties shall be carried out

In summary, the Commission is the supervising body of the Department of Agriculture, and pursuant to its policy making power, direct how the Department shall be administered by the Commissioner. I repeat and emphasize that the policies and the rules and regulations issued by the Commission can only be used to implement the law, and not to charge the law.

It is clear that the General Assembly has designated the Commissioner of Agriculture - who is elected statewide by the people - as the head of the Department of Agriculture and has made that official responsible for the operations of the Department with certain express

1

Section 46-3-10 provides that "[t]he Department of Agriculture shall execute the laws of this State pertaining to agriculture except such laws as are specifically designated for execution by others."

duties assigned him. Even more clear, however, is the fact the authority of the Commissioner of Agriculture as head of the Department is now constitutionally protected. Such was insured in 1983 when the Commissioner of Agriculture was made a constitutional officer. Art. VI, § 7 of the South Carolina Constitution provides in pertinent part that

[t]here shall be elected by the qualified voters of the State a . . . Commissioner of Agriculture . . . who shall hold [the] . . . office. . . for a term of four years, coterminous with that of the Governor. The duties and compensation. . . shall be prescribed by law. . . .

The people made the Commissioner of Agriculture a constitutional office with the full knowledge and understanding that the basic and essential function of that office was to oversee and administer the Department of Agriculture.

It is well recognized that the Legislature "cannot take away the essential duties of an officer authorized by the constitution." 67 C.J.S. Officers, § 199. Where a constitutional provision states that a public officer shall perform such duties as may be required by law, those duties are such as may be implied from the nature of the office and such office may not be deprived or relieved of them. Am. Legion Post No. 279 v. Barrett, 371 Ill. 78, 20 N.E.2d 45 (1939). The Legislature cannot take from a constitutional officer a portion of the characteristic duties belonging to that office and devolve those duties upon an officer of its own creation. Wright v. Callahan, 61 Idaho 167, 99 P.2d 961 (1940).

It is important to note that the 1969 Opinion of former Attorney General McLeod was written well before the Commissioner of Agriculture was made a constitutional office. Thus, the statutes relating to the Agricultural Commission, which Attorney General McLeod interpreted, must now be viewed in that light. In my judgment, the "essential duties" of the Commissioner of Agriculture are to serve as head of the Department of Agriculture, a function which the Commissioner has exercised since the office of Commissioner was first created. The fact that the Commissioner is now a constitutional officer means that this essential function of the office cannot be assumed by another person or body, including the Commission. The Commissioner's basic authority as chief of the Department, therefore, cannot be removed or undermined without a change in the Constitution.

Accordingly, while it is true that § 46-5-20(1) bestows upon the Commission the authority to "[a]dopt policies, rules and regulations of the Department of Agriculture for its

own government not inconsistent with the laws of the State," such statute must be construed consistently with the fact that the Constitution was amended subsequent to the statute's enactment to include the Commissioner. A statute, of course, must always be construed in accordance with the Constitution. Crescent Mfg. Co. v. Tax Commission, 129 S.C. 480, 124 S.E. 761 (1924).

A case which graphically illustrates the importance of making an office constitutional in nature is Hudson v. Kelly, 76 Ariz. 255, 263 P.2d 362 (1953). There, the Arizona Legislature enacted a law providing for the creation of a state purchasing agent. The State Treasurer refused to pay a warrant for a purchase because such purchase had not been made pursuant to the statute. A tire company from which the purchase was made brought suit seeking to have the new Act declared unconstitutional with the result that the warrant would have to be paid.

Pursuant to the Arizona Constitution, the state auditor was deemed a constitutional officer. The Auditor was designated by the Constitution as part of the executive department of the state and the duties of the office were deemed to be those "as prescribed by law." The court noted that, by statute, the Auditor's duties "have been those of auditing, adjusting and settling the amount of claims against the state and payable out of funds of the state." 263 P2d at 366. When Arizona became a state, "the auditor became a constitutional officer. . . ." Id.

In the Court's view, the statute in question violated the State Constitution. The Court emphasized that even though the Constitution enabled the Legislature to prescribe the auditor's duties, such legislation could not dissolve or diminish the essential powers and functions of the office. Concluded the Court,

[i]n name only is the office of auditor not disturbed. The constitutional office of auditor contemplates a free and independent auditor, one whose executive actions and judgments are not subject to the dictates, review and approval of some appointive officer. . . . To make a free and independent constitutional officer subservient to the dictates of some appointive officer is equivalent to abolishing the office and creating another in lieu thereof to exercise the duties and functions belonging to the first office. It was long ago determined that the legislature has no power to take from a constitutional officer the substance of the office itself, and transfer it to another who is to be appointed in a different

manner and will hold the office by a different tenure from that which is provided for by the constitution. . . . A constitutional office cannot be destroyed nor an incumbent legislated out of it in the absence of express constitutional authority, . . . and what may not be done directly cannot be accomplished by indirection.

We therefore, conclude that this Act constitutes an abortive attempt to destroy the independent constitutional office of auditor and to such extent is unconstitutional.

Id., at 368-369. The Court found that the essential duties of the auditor required that no state money be expended except "on claims audited by the constitutional auditor," but that the Act provided that the state's monies would be expended "on the orders of the" controller. Thus, the Act was deemed unconstitutional.

Likewise, in Thompson v. Legislative Audit Commission, 448 P.2d 799 (N.M. 1969), the New Mexico Supreme Court found that the fact that the New Mexico Constitution does not spell out the duties of the state auditor in that document, does not as a result enable the Legislature to remove essential duties from that office and delegate such duties to the legislative audit commission. Such statute provided for a transfer from the state auditor to the commission of all equipment, supplies, records and other property or things held by him in his official capacity; the auditor would not be technically abolished, but the duties of the office would be reassigned to another board or commission.

In its conclusion that the statute was unconstitutional, the Court relied upon the Hudson case, as well as other authorities. Most significant to its conclusion for purposes here, however, was the Court's view that the fact no duties of the auditor were specified in the state Constitution was not controlling. The Court's reasoning in this regard was that

[a]lthough, as stated, the constitution is silent as to the duties of the office (and we would note in passing that there is likewise no specific mention of the duties of the secretary of state, state treasurer, or attorney general), surely it cannot be logically contended that the failure to prescribe specific duties to the office of state auditor meant that the constitution makers felt that, with the passage of time, there might no longer be any need for such office and that the legislature could, by statute, in effect abolish it. It would seem to us that, both

historically and fundamentally, the office of state auditor was created and exists for the basic purpose of having a completely independent representative of the people, accountable to no one else, with the power, duty and authority to examine and pass upon the activities of state officers and agencies who, by law, receive and expend public moneys.

448 P.2d at 802.

Our own Supreme Court has also recognized the clear distinction between a constitutional officer and one merely created by statute. In Joint Legislative Committee for Judicial Screening v. Huff, 320 S.C. 241, 464 S.E.2d 324 (1995), the Court found that the offices of supreme court justices and circuit judges are creatures of the Constitution and the General Assembly may not add conditions to those specified in the constitution for election. In State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956), the Court also said:

[t]he powers of the General Assembly are plenary and not acquired from the constitution and it may enact such legislation as is not expressly or by clear implication prohibited by the constitution. It does not have . . . control of a constitutional office as to abolish, vary its term, prescribe a different mode of filling such office, remove or suspend the office holder unless authority for such action is found in the Constitution

945 S.E.2d at 233. Thus, our Court appears, at least in principle, to adopt the same reasoning and analysis as the other out-of-state cases referenced herein.

CONCLUSION

The same analysis expressed in the foregoing cases applies here to the Commissioner of Agriculture as well. The Commissioner of Agriculture has been made a constitutional officer by the people of South Carolina. The people have elected the Commissioner with the expectation that he, and he alone, will run the Department. The essential function of the Commissioner has always been to serve as the head of the Department of Agriculture which executes the laws and policies relating to agriculture in this State. Any interference by the

Commission (or by the Legislature) in carrying out or diminishing the Commissioner's duties could now be deemed to contravene the Constitution in the same way that the Constitution was violated in the cases referenced above. Thus, the Commissioner's authority, pursuant to the South Carolina Constitution, must be deemed paramount to and controlling over any authority previously bestowed upon the Commission by statutes enacted prior to the constitutional amendment relating to the Commissioner of Agriculture. The same would also be said for any opinions issued by the Attorney General prior to the 1982 Constitutional Amendment and thus such opinions are hereby superseded. I am also advised that, since the constitutional amendment was adopted, there has been no effort by the Commission to exercise any authority with respect to the administration of the Department of Agriculture. This is significant inasmuch as it demonstrates the Commission's understanding that the Commissioner remains the constitutionally-mandated head of the Department of Agriculture. Moreover, § 46-5-20 itself provides that the Commission's policies, roles and regulations must not be "inconsistent with the laws of the State." Such would, of course, include the Constitution. Thus, the Commission could not promulgate any policy, role or regulation which would contradict or conflict with the Commissioner's authority.

Of course, we also recognize that existing statutes purport to bestow upon the Commission certain policymaking authority with respect to agriculture in South Carolina. We respect the fact that the Commission possesses an important role under existing law in proposing policies and suggesting means for improving the agricultural economy in this State. Indeed, § 46-5-20 mandates that the Commission "[c]ooperate fully with the Commissioner of Agriculture at all times to the end that the State's agricultural economy may constantly be improved." (emphasis added). However, the fact is that the members of the Commission are not the constitutional officers and the Commissioner is. The Commission is not elected by the people, and the Commissioner is. Therefore, while the Commission possesses an important policy role in South Carolina agriculture and is required to work with and develop a consensus with the Commissioner for agricultural improvement, the Commissioner, by virtue of his constitutional status and election by the people must remain the final authority in case of conflict or dispute between the Commissioner and the Commission.

Accordingly, the Commissioner of Agriculture has been designated by the people - both through their votes and by constitutional amendment - as the head of the South Carolina Department of Agriculture. Any laws, policies, regulations, or interpretations to

The Honorable D. Leslie Tindal
May 3, 1999
Page 9

the contrary would be in violation of the Constitution. By virtue of the Constitution of South Carolina, the Commissioner must be and is the final word in running the Department of Agriculture.

With kind regards, I remain

Very truly yours,

A handwritten signature in cursive script, appearing to read "Charlie Condon".

Charlie Condon
Attorney General