

The State of South Carolina



Office of the Attorney General

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June 24, 1994

The Honorable Herbert Kirsh
Member, House of Representatives
532-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Kirsh:

By your letter of May 4, 1994, you have requested the opinion of this Office as to whether a salaried state employee (administrator of the Real Estate Commission for the Department of Labor, Licensing, and Regulation) may also serve on the governing body of the State Ports Authority without running afoul of the dual office holding prohibitions of the State Constitution. You have also inquired as to compensation for the individual's service on the State Ports Authority.

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 officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public 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 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).

The State Ports Authority was created pursuant to current S.C. Code Ann. § 54-3-10 et seq. (1976, as revised 1992). The governing body consists of nine members, § 54-3-10, who are appointed by the Governor with advice and consent of the Senate, for terms of seven years. § 54-3-20. No qualifications are specified for members of the Authority. No oath is specifically required to be taken by members of the Authority. (But see Art. VI, § 5 as to the oath which must be taken by all officers.) The purposes of the Authority

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are specified in § 54-3-130, to include such matters as developing and improving harbors or seaports of the State; acquiring, etc., port facilities; fostering and stimulating the shipment of freight and commerce through such ports; cooperating with the United States and its various agencies or departments with respect to the needs of the United States; and so forth. Toward these ends, the powers of the Authority are detailed in, among others, §§54-3-140, 54-3-150, 54-3-160, 54-3-170, 54-3-180, 54-3-190, 54-3-200, and others. The Authority is deemed a body corporate, with the powers to sue and be sued; enter into contracts; adopt bylaws, rules and regulations; exercise eminent domain; levy and collect harbor or port charges; issue revenue bonds; and other powers as outlined in the statutes. Unquestionably these duties involve an exercise of a portion of the sovereign power of the State.

Considering all of the foregoing, one who serves on the governing body of the State Ports Authority would be considered an office holder for dual office holding purposes. Thus, it is necessary to consider whether the Real Estate Commissioner would also be considered an office holder for dual office holding purposes.

The position referred to as "Real Estate Commissioner" in your request letter is now called "Executive Director" of the Real Estate Commission, a part of the Department of Labor, Licensing, and Regulation. Formerly, the Real Estate Commission was to appoint a Real Estate Commissioner, pursuant to S. C. Code Ann. §40-57-80 (1976, revised 1986). Powers and duties to be exercised by the Commissioner were quite extensive, as detailed in §§40-57-80, 40-57-110, 40-57-115, 40-57-120, 40-57-160, and others. These statutes were amended in 1994 by H.4458, R-438, so that §40-57-80 now reads:

The Director of the Department of Labor, Licensing,
and Regulation shall appoint any employees as may be necessary
to carry out the work of the Real Estate Commission and the South
Carolina Real Estate Commission and the South Carolina Real Estate
Appraisers Board defined in Section 40-60-20.

Due to the sweeping amendments made by the 1994 act, it would appear the the Executive Director of the Real Estate Commission would now be an employee rather than an officer.

Considering the foregoing, it is the opinion of this Office that the Executive Director (formerly Commissioner) of the Real Estate Commission could concurrently serve as a member of the State Ports Authority without contravening the dual office holding prohibitions of the state Constitution.

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Your final question involved a state employee receiving compensation for that employment and for service on a state board or commission simultaneously. This Office has opined on that issue several times; a copy of the most recent relevant opinion, dated December 20, 1993, is enclosed herewith.

With kindest regards, I am

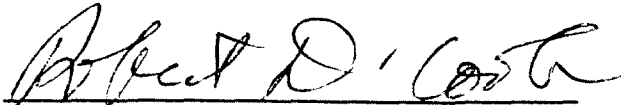
Sincerely,



Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions