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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 18, 1996

Marion Burnside, Member of the Board
South Carolina Natural Resources Board
7071 Bluff Road
Hopkins, South Carolina 29061

Re: Informal Opinion

Dear Mr. Burnside:

You have asked for an "informal opinion regarding DNR officers and employees or their agents purchasing items seized or confiscated by our Law Enforcement Division, as well as other Department surplus equipment (used vehicles, etc.)" You further state:

[a]ll surplus items are sold at public auction, with prior public notice and all auction activities under the direct supervision of an outside auctioneer. Furthermore, the Department strictly adheres to all Budget and Control Board regulations as it relates to this subject matter.

However, is the "spirit" of the law or any other statutes violated when DNR officers and employees or their agents purchase any of these items. There are certain issues that must be considered. For example, Departmental employees are far more knowledgeable about a particular vehicle's maintenance record, who drove the vehicle, what was its primary use, etc. Does such "insider" knowledge cause any possible ethical concerns? Secondly, can Department personnel serve as the auctioneer when seized or confiscated equipment is sold?

Mr. Burnside
Page 2
June 18, 1996

Law/Analysis

In O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945), our Supreme Court observed that "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public." Thus, such is the starting point for any analysis regarding the ethical requirements attendant to the acts and actions of a public official.

In an opinion dated October 5, 1992, this Office addressed the question as to whether "persons employed by the Spartanburg County Sheriff's Office could participate in a sale of abandoned and/or unclaimed items to be conducted by public auction. We stated that

[a] review of S.C. Code Ann. Sec. 27-21-10 et seq., which statutes pertain to disposition of confiscated, recovered stolen property or abandoned property does not reveal any statute which expressly prohibits personnel of the Sheriff's Department from participating in such a sale. By contrast, we note that Sec. 23-17-100 prohibits the purchasing of judgments or decrees which the Sheriff is to enforce or have executed, by the sheriff or his deputies. Specific inclusion in Sec. 23-17-100 of language prohibiting certain actions by the Sheriff or deputies would suggest that a statute devoid of such prohibition be interpreted differently. Cf., Pennsylvania Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (S.C. Ct. App. 1984). Thus, we are aware of no statute in Sec. 27-21-10 et seq. which would prohibit a deputy or other personnel from participating in the public sale.

However, we also stated that "[s]everal cautionary notes are in order." First we suggested that

... the State Ethics Commission should be consulted to advise you of the potential applicability of the ethics laws; this Office defers to that agency for advice and opinions on the ethics laws. Too, we suggest that the auction be conducted "above board" in all respects if your personnel participate therein, so that certain items are not "held back" and/or your personnel are not given any advantage as to the sale not available to the

Mr. Burnside
Page 3
June 18, 1996

public generally. Finally, this Office comments only as to the legal aspects of your personnel participating in such a sale and offers no comment as to the wisdom thereof or other policy considerations.

My review of Title 50 of the Code concerning fish, game and watercraft, likewise reveals no statute absolutely prohibiting participation in the sales which you have outlined. None of the provisions relating to confiscation and sale or auction of property appear to expressly bar participation by Department officers or employees in such sale. However, I would herein particularly reiterate the advice provided in the 1992 opinion which referred the individual there to the State Ethics Commission for interpretation of the various provisions of the State Ethics Act. I would especially note that Section 8-13-775 of the Act states that "[a] public official, public member, or public employee may not have an economic interest in a contract with the State or its political subdivisions if the public official, public member, or public employee is authorized to perform an official function relating to the contract."

Moreover, other previous opinions of this Office should be referenced to you. In an opinion dated February 28, 1974, we stated that "[t]here is a long line of opinions issued by this office as well as a number of South Carolina Supreme Court decisions which regard such actions as contrary to public policy for a public officer to transact business with a body of which he is a member." There, we further concluded that

[i]t is against public policy to permit dealings between a public officer and himself as a private citizen, and public officers are barred from contracting with the public agency which they represent, or from having a private interest in the contracts of such agency. When, therefore, the private interests of one who is seeking a contract for public works conflicts with his public duties as officer of the public body with whom he is contracting, or when a public officer has a pecuniary interest, direct or indirect, in a contract for public work the contract is generally regarded as void or voidable. The fact that the public officer would suffer no financial loss from performance is not material to the question of validity. [Quoting 43 Am. Jur. Pub. Works and Contracts Par. 14].

Even more significantly, an opinion of November 26, 1963, addressed the question whether "a member of the Wildlife Resources Commission [is] barred from transacting business with the Department even though the business he transacts is done on a

Mr. Burnside
Page 4
June 18, 1996

competitive bid basis in connection with a commodity on which other bids are taken?" Attorney General McLeod, although noting that no specific statute expressly prohibited the member from transacting business with the Department, advised that such should not be undertaken. He wrote in that regard:

[i]rrespective of good faith and arms-length dealings by the members, the general view appears to be that public officials are not permitted to place themselves in a position in which personal interests may come into conflict with the duty which they owe to the public. Transactions such as are considered here have universally been criticized and subjected to the highest degree of scrutiny as being inimical to the public interest. In similar circumstances the Supreme Court of this state has expressed the following views:

"No man in the public service should be permitted to occupy the dual position of master and servant; for as master he would be under the temptation of exacting too little of himself as servant; and as servant he would be inclined to demand too much of himself as master. There would be constant conflict between self-interest and integrity."

I am of opinion that it is contrary to public policy for a public officer to transact business with the body of which he is a member, irrespective of whether a statute specifically prohibits such an officer from so acting.

In considering the validity of a contract between a city and a corporation which had among its stockholders members of the City Council, the Supreme Court of South Carolina concluded:

"That the high character of the three gentlemen in question would show that their presence in this contract on both sides so to speak, was due to their great anxiety to promote the best interests of the public ... and not for profit to themselves; still, it is our duty to say

Mr. Burnside
Page 5
June 18, 1996

that their conduct is illegal;" *Duncan v. Charleston*, 60 S.C. 532.

I recognize that contracts for business transactions between public officers and the public bodies they represent are generally bona fide, arms-length transactions, honestly and fairly entered into. Numerous instances have occurred to my certain knowledge whereby school districts were precluded from borrowing money at lesser rates of interest, from acquiring desirable land, and from obtaining printed matter at cost, because school trustees would have been parties to such transactions. In other cases, large sums of money could have been saved had a public official not been prohibited from dealing with the agency of which he was a member. I refer to these instances merely to emphasize that the views which I express are not a reflection upon any business dealings which a public officer has engaged in with an agency of this state, and to point out that in all instances which have come to my knowledge the state has benefited by the action of the officer.

At the same time the rule of law exists in this state which bars a public officer from contracting with the public agency which he represents or from having a private interest in its contracts. The fact that the business is conducted upon a business of competitive bids shows good faith and open above-board dealing and, in fact, financial benefit to the Wildlife Commission may be assumed. Nevertheless, the public policy of this state does not sanction the practice and I advise that, in my opinion, it should not be permitted.

Attorneys General in other jurisdictions have applied the same reasoning as Attorney General McLeod to the practice of an agency's employees purchasing surplus property when the sale is conducted by the State's General Services Department. For example, the Virginia Attorney General concluded in an opinion of June 27, 1984 that although the owning agency is not an actual party to the contract of sale of surplus property, the "employees of both the selling agency and the owning agency would have a prohibited personal interest in a contract with the governmental agency of which they are a part if they purchase surplus property from DPS." Moreover, in an opinion of August 21, 1981, the Attorney General of Mississippi found it to be a conflict for

Mr. Burnside
Page 6
June 18, 1996

"municipal surplus property to be sold to a municipal employee." While in part these interpretations involved particular statutes, such laws simply restated the general law which Attorney General McLeod relied upon.

Thus, the fact that there may not be an explicit statute governing the situation you describe, would not be determinative. As to any provisions of the Ethics Act which may govern this situation, I would refer you to the Ethics Commission for such a determination. However, I would also advise that this Office has determined on a number of occasions in the past that an officer or employee of a government agency should not do business with nor have an interest in a contract of that agency. Such transaction presents the appearance of a conflict of interest and is prohibited as a matter of public policy and the common law, notwithstanding the absence of an express statute forbidding such transaction. Based upon my research and the reading of these opinions, I would advise that, as you suggest, the transactions which you describe would likewise have the appearance of, even if not in fact, a conflict of interest.

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 questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an