

February 1, 1985

The State of South Carolina



Office of the Attorney General

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ATTORNEY GENERAL

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August 20, 1985

Mrs. R. H. Kennette
Greenwood Highway
Ware Shoals, SC 29692

Dear Mrs. Kennette:

This Office has been asked for its opinion on whether your holding a position on Greenwood County Council and being employed as executive secretary for the Association for Retarded Children under the Piedmont Multi-County Mental Retardation Board would contravene the dual office holding prohibitions of the Constitution of the State of South Carolina.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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).

In numerous opinions of this Office, we have concluded that one who serves on a county council would hold an office for dual office holding purposes. Enclosed is an opinion of this Office dated June 26, 1984, as to the Greenwood County Council in particular.

You are contemplating being employed as executive secretary for the Association for Retarded Children under the Piedmont

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Multi-County Mental Retardation Board, with responsibilities in the area of public relations. You would be paid a salary and would be employed "at will" rather than for a specific term of years. The position was not created by a statute or ordinance, and its qualifications and duties are not specified by statute or ordinance. You would work under the direction of and be responsible to the Director of Diversified Skills of the Piedmont Multi-County Mental Retardation Board. There appears to be no exercise of sovereign power by one who holds this position. The court in Sanders v. Belue; supra, has stated that "one who merely performs the duties required by 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." 78 S.C. at 174. Thus, it is the opinion of this Office that the position of executive secretary for the Association for Retarded Children under the Piedmont Multi-County Mental Retardation Board would be employment rather than an office.

If you were to be employed in the capacity described and serve on the Greenwood County Council simultaneously, then the dual office holding prohibitions of the State Constitution would not be contravened.

A potential ethical problem may exist if you were to vote, as a member of Greenwood County Council, on any appropriations for the Piedmont Multi-County Mental Retardation Board, by which body you would be employed. This Office has previously determined that the Board is a political subdivision of the State for retirement benefit purposes; see Ops. Atty. Gen. dated January 8, 1979, and November 8, 1978. While the Board is not a county agency, it does receive county funds appropriated by Greenwood County Council as a portion of its total funding. We would advise that, should you accept employment with the Board, you observe the ethical procedures specified by various statutes enumerated below.

A portion of South Carolina's Ethics Act, Section 8-3-410, Code of Laws of South Carolina (1984 Cum. Supp.) provides in part (1) that "[n]o public official or public employee shall use his official position or office to obtain financial gain for himself." Because a portion of the Board's funding would come from your county council, your voting on the Board's appropriation could possibly be viewed as using your position on council

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for financial gain through your employment by the Board. The steps to be taken to avoid an ethics problem are specified by Section 8-13-460 of the Code:

Any public official...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...shall instead take the following actions:

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

* * *

(c) ... If the public official is a member of the governing body of any...county, ...he shall furnish a copy to the presiding officer and to the members of that governing body, who shall cause such statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists, and shall cause such disqualification and the reasons therefor to be noted in the minutes.

If you accept employment with the Board, you should follow the guidelines specified in the Ethics Act to avoid any appearance of impropriety or conflict of interest during your tenure on Greenwood County Council. You may wish to consult the State Ethics Commission for further advice or information; the Commission may be reached by calling 758-7408 or by writing Gary R. Baker, Executive Director, SCN Center, Suite 930, 1122 Lady Street, Columbia 29201.

If the Board receives federal funds, you may wish to check with the United States Civil Service Commission to determine whether you may be in violation of the Hatch Act, if your membership on County Council resulted from a partisan election.

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The Commission's address is Office of the Special Counsel, Civil Service Commission, 1120 Vermont Avenue NW, Washington, D.C. 20419; telephone number, (202) 653-7143.

Please advise this Office if clarification or additional information is needed.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:hcs

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions

cc: The Honorable Marion P. Carnell
Member, House of Representatives