

1367 P1

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

January 4, 1985

Albert D. McAlister, Esquire
McAlister, Compton & McAlister, P.A.
Post Office Box 247
Laurens, South Carolina 29360

Dear Mr. McAlister:

By your letter of December 12, 1984, you have asked whether one person serving simultaneously on the Laurens County Council and on the Laurens County Water Resources Commission would violate the dual office holding prohibition 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).

As you are already aware, this Office has determined on numerous occasions that a member of a county council holds an office: See Ops. Atty. Gen. dated December 20, 1983 and November 15, 1983, copies of which are enclosed.

The Laurens County Water Resources Commission was created by Act No. 1885, 1972 Acts and Joint Resolutions. Section 4 of

Continuation Sheet Number 2
To: Albert D. McAlister, Esquire
January 4, 1985

that Act, dealing with membership on the Commission, was amended by Ordinance No. 97 by Laurens County Council in 1979, acting pursuant to Section 4-9-80, Code of Laws of South Carolina according to your letter. By Section 2 of the Ordinance, members of the Laurens County Water Resources Commission are to be appointed as follows:

- a. One by the Commission of Public Works of the City of Laurens
- b. One by the City Council of the City of Laurens
- c. One by the Town Council from the Town of Gray Court
- d. One by the Board of Directors of the Rabon Creek Rural Water District
- e. One by the Laurens County Council
- f. One by the other five to serve as chairman

The individual in question was nominated to the Commission by the City Council of the City of Clinton for a second four-year term in November 1983; he was elected to County Council on November 6, 1984 and will take office in January 1985. You have asked whether the language concerning ex officio membership on the Commission in Act No. 1885 may be relied upon to permit the individual to hold both positions, in accordance with an Opinion of this Office dated November 14, 1979.

One who would serve on the Commission would hold an office for dual office holding purposes. The Commission was created by statute. The members of the Commission serve for four-year terms and until their successors are appointed and qualify. No provisions for salary or an oath appear in the Act or the ordinance. Powers and duties of the Commission are specified in Section 8 of Act No. 1885; these duties include prescribing rates and regulations, making contracts, borrowing money, issuing bonds, exercising the power of eminent domain, and many more powers. The Commission does exercise a portion of the sovereign power of the State. All factors considered, a Commission member would thus hold an office.

Continuation Sheet Number 3
To: Albert D. McAlister, Esquire
January 4, 1985

As noted in the opinion dated November 14, 1979, Act No. 1885 contained a provision for ex officio service of certain members. Section 4 of that Act provided for four additional members who were deleted by County Council's passage of Ordinance No. 97. That Section also provided that "[r]epresentatives of municipal corporations may be elected officials serving ex officio or any elector of the municipal corporation." That language was apparently not made a part of Ordinance No. 97 and in fact was the only provision of Section 4 of Act No. 1885 not addressed in some fashion by the Laurens County ordinance.

The opinion of this Office dated November 14, 1979, supra, contained the following:

You indicate in your letter that the Water Resources Commission is to soon be restructured. Assuming that a similar statement allowing a representative of a municipal corporation to serve ex officio is retained when the membership of the Water Resources Commission is restructured, it would not violate the dual office holding provision if an individual simultaneously served on the Commission of Public Works of the City of Laurens and the Laurens County Water Resources Commission.

As noted previously, the key language was not retained in the ordinance. While obviously a county council cannot amend or repeal an act of the General Assembly, Laurens County Council did undertake to modify the membership on the Water Resources Commission acting pursuant to Section 4-9-80 of the Code; because every other aspect of Section 4 of the Act is addressed in the ordinance; it may be assumed that the omission of the language concerning ex officio membership was intentional. Thus, that language may no longer be relied upon. Cf., Windham v. Pace, 192 S.C. 271, 6 S.E.2d 270 (1940).

Even if the key language were in the ordinance, it is doubtful that a member of Laurens County Council would be considered as serving ex officio if he were appointed by the City Council of the City of Clinton. Ex officio membership in a second office is derived by virtue of one's holding a first office, where the functions of the second office are related to the functions of the first. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947). To serve ex officio, the councilmember would be appointed by the governmental body on

Continuation Sheet Number 4
To: Albert D. McAlister, Esquire
January 4, 1985

which he is serving; that is, he would be appointed by Laurens County Council rather than the Clinton City Council. Because Laurens County Council is not entitled to make an appointment to the Commission, the councilmember would not be able to serve ex officio, if the language were deemed to be retained, to avoid the dual office holding prohibition. See also Op. Atty. Gen. dated February 19, 1981, enclosed.

To summarize, given the language of Ordinance No. 97, an individual who would serve concurrently on Laurens County Council and on the Laurens County Water Resources Commission would most probably contravene the dual office holding prohibitions of the State Constitution.

You asked too whether the City Manager of the City of Clinton might be nominated and appointed to serve on the Commission should it be determined that the individual in question might fall within the dual office holding prohibition. The City of Clinton is governed by the council-manager form of government prescribed by Section 5-13-10 et seq. of the Code. The position of the city manager is created by Section 5-13-50, with responsibilities of the manager specified by Section 5-13-90. While there are several references to "employment" of a manager, Section 5-13-90, inter alia, mandates that "[t]he manager shall be the chief executive officer and head of the administrative branch of the municipal government." Tenure, qualifications, and salary are mentioned by Section 5-13-70 and 5-13-50, though specific terms and salary amounts are left to the discretion of city council. Considering all of these factors, and especially Section 5-13-90 which refers to the manager as an officer, the City Manager most probably would be considered to hold an office for dual office holding purposes and would encounter dual office holding problems if he should be appointed to the Commission.

As noted above, the language of Act No. 1885 concerning ex officio membership on the Commission was omitted from the ordinance. If it should be determined that the language was intended to be carried over, or if such language should be added to the ordinance, then the City Manager of the City of Clinton could be appointed as an ex officio appointment by the City Council of the City of Clinton. Until such time as a court might interpret the ordinance or the ordinance might be amended, however, it is the opinion of this Office that the City Manager would most probably hold dual offices if he were appointed to the Commission.

Continuation Sheet Number 5
To: Albert D. McAlister, Esquire
January 4, 1985

We trust that we have satisfactorily responded to your inquiry. Please advise if we may provide additional assistance or clarification.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:djg

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions