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Office of the Attorney General

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May 14, 1985

The Honorable Frank E. McBride
Member, House of Representatives
306B Blatt Building
Columbia, South Carolina 29211

Dear Representative McBride:

You have asked for the opinion of this Office as to whether one person serving simultaneously as a state employee for the South Carolina Tax Commission and as a member of the South Carolina State Board of Funeral Services would contravene the dual office holding prohibition of the State Constitution.

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).

Membership on the South Carolina State Board of Funeral Services was examined, as to dual office holding, by an opinion of this Office dated June 13, 1980 (enclosed). This Office concluded that a member of the Board would be considered an officer for dual office holding purposes.

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However, for Article XVII, § 1A to be violated, both positions in question must be "offices" within the meaning of the Constitution. Applying the criteria as discussed in Sanders v. Belue and State v. Crenshaw, both supra, to the position of Tax Technician within the South Carolina Tax Commission, it would appear that the position would not be an office but would instead be employment. Section 12-3-90 of the Code of Laws of South Carolina (1976) authorizes the Tax Commission to "employ such other persons as experts and assistants as may by it be deemed necessary to perform the duties that may be required of the Commission and it may fix the compensation of such employees." This general characterization of the person holding such a position as an "employee" by the General Assembly is entitled to considerable weight, Acker v. Cooley, 177 S.C. 144, 181 S.E. 10 (1934), particularly where, as here, the duties of a Tax Technician are not specified by statute.

Furthermore, the position of Tax Technician is not created by statute, and no statute specifies qualifications. A salary is paid, but there is no specified tenure. A review of the job description for Class Code 1242 (positions titled Tax Technician) does not reveal any exercise of a portion of the sovereign power of the State; the position involves audit procedures, telephone assistance to tax payers, training of new auditors, and similar duties, all subject to general supervision. For all of these reasons, the individual would be an employee of the Tax Commission rather than an officer. The following language from Sanders v. Belue, supra, is especially appropriate here:

[O]ne who merely performs the duties required of 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.

Therefore, it is the opinion of this Office that because a Tax Technician employed by the South Carolina Tax Commission would be employment rather than an office, that individual may simultaneously serve on the South Carolina State Board of

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Funeral Services without contravening the dual office holding prohibition of the State Constitution.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:djg

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions