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OPINION NO. 85-123 10334

The State of South Carolina



Office of the Attorney General

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ATTORNEY GENERAL

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October 28, 1985

Albert D. McAlister, Esquire
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Post Office Box 247
Laurens, South Carolina 29360

Dear Mr. McAlister:

By your letter of October 16, 1985, you have asked whether the general manager of the Laurens Commission of Public Works may be appointed by the Commission to serve on the Laurens County Water Resources Commission without violating the dual office holding prohibition of the State Constitution. You have advised that the same individual serves on the board of directors of the Piedmont Municipal Power Agency by virtue of his employment with the City of Laurens.

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 (1960).

As you are aware, this Office examined the Laurens County Water Resources Commission governing body by an opinion dated January 4, 1985, determining that membership on the Commission's governing body would constitute an office for dual office holding purposes. A copy of the opinion is enclosed for reference.

REQUEST LETTER

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This Office has apparently never reviewed membership on the governing body of the Piedmont Municipal Power Agency (PMPA) with regard to dual office holding. PMPA was created pursuant to Section 6-23-10 et seq., Code of Laws of South Carolina (1984 Cum. Supp.). Members of the board of directors are appointed by the governing bodies of the member-municipalities. Section 6-23-70 of the Code in part provides that "[t]he representative, at the discretion of the municipality, may be an officer or employee of the municipality and may also serve ex officio as a member of the board of directors of the joint agency." You have advised that the individual is serving on the PMPA board ex officio, by virtue of his municipal employment. Without determining herein whether a member of the board of directors of PMPA would be an officer, we would advise that one who serves in a second position by virtue of his holding another position, or ex officio, would not be deemed to be an officer as to the second position for dual office holding purposes. Ashmore v. Greater Greenville Sewer Authority, 211 S.C. 77, 44 S.E.2d 88 (1947).

The individual's position as general manager for the City of Laurens Commission of Public Works, by virtue of which he serves on the PMPA board, must also be considered. This position was not created by statute or ordinance; tenure would be at will rather than for a specified term; and no oath, qualifications or duties are specified by statute. A salary is paid to the individual, and his duties involve supervision of the daily operations of the public works for the City of Laurens. The individual would not hold an office in this regard; instead,

one 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.

Sanders v. Belue, 78 S.C. at 174.

Summarizing all of the foregoing, we would advise that one employed as general manager of the Laurens Commission of Public Works and serving ex officio on the Piedmont Municipal Power Agency would not contravene the dual office holding prohibition of the State Constitution if he were to be appointed to serve on the Laurens County Water Resource Commission.

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One other point is mentioned for your consideration. The powers and duties of the Laurens County Water Resources Commission are specified by Act No. 1885, 1972 Acts and Joint Resolutions. We are unaware of the precise nature of the duties and responsibilities of the individual as general manager of the Laurens commission but would advise that all duties, powers, and responsibilities be examined to be certain that there would be no conflict of interest if the general manager should be appointed to the Water Resources Commission.

We trust that the foregoing satisfactorily responds to your inquiry. Please advise if you need additional assistance or clarification.

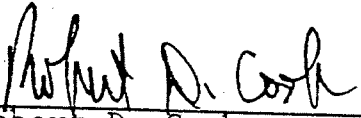
Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions