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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 29, 2004

R. Allen Young, Esquire
Mount Pleasant Town Attorney
Post Office Box 745
Mount Pleasant, South Carolina 29465

Dear Mr. Young:

You have requested an opinion concerning dual office holding. You have indicated that a current member of the Mount Pleasant Town Council has been informed that he may possibly be appointed as a Commissioner of Pilotage for the Port of Charleston. You have indicated that the council member has asked you to seek an opinion from this Office regarding whether simultaneously holding these two positions would violate the dual office holding provisions in the South Carolina Constitution.

Law/Analysis

As you have noted in your request, Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. For this provision to be contravened, a person concurrently must hold two 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 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).

This Office has advised on numerous occasions that a member of a city or town council would be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated September 12, 2003; July 19, 2001; April 12, 1998; June 12, 1995; February 4, 1994. Therefore, the question is whether a Commissioner of Pilotage for the Port of Charleston would likewise be considered an office holder.

Section 54-15-40 of the South Carolina Code of Laws establishes the Commissioners of Pilotage for the Port of Charleston and the method of appointment thereof. The board is composed of six members, one of whom is the chairman of the South Carolina State Ports Authority, ex officio, one of whom is the president of the International Longshoremen's Association Local 1422 or his designee, ex officio, and one of whom must be a pilot licensed for the port of Charleston, appointed

Re: Mount Pleasant

Mr. Young
Page 2
April 29, 2004

by the Governor. The remaining members are appointed by the Governor upon the recommendation of the Charleston County Legislative Delegation from lists of nominations for the offices submitted to the delegation by the Greater Charleston Chamber of Commerce, the Maritime Association of the port of Charleston, and the Propeller Club of the port of Charleston. In an opinion, dated February 28, 1985, this Office addressed the question of whether pilotage commissioners enjoy immunity from antitrust prosecution, provides a detailed summary of the various statutory powers and duties exercised by the Charleston Pilotage Commissioners:

Section 54-15-60 provides for the Commissioners to appoint a board of examiners to oversee the pilot's examination. The oath which the board of pilot commissioners is to administer to all pilots is prescribed by Section 54-15-110, which also empowers the board to license all pilots for the port of Charleston. Requirements for licensure of pilots is set forth in great detail in Section 54-15-120. Section 54-15-140 empowers the Board [to promulgate rules and regulations for the administration of pilotage within the port] . . . [r]ates and fees for pilotage services for each port (including Charleston) are set by the respective board of commissioners. Section 54-15-290. And the commissioners are authorized to revoke or suspend a pilot's license for misconduct. [Section 54-15-320]. Finally, Section 54-15-340 provides that all fines, forfeitures and penalties for each and every offense relating to the pilotage law may be prosecuted, sued for and recovered in any court of competent jurisdiction for the use of the State.

Section 54-15-170 of the Code gives the Commissioners broad authority over pilotage vessels used in Charleston harbor, stating that:

All boats used in the pilotage for the port and harbor of Charleston shall be entirely and absolutely subject to the inspection, direction and approval of the commissioners of pilotage for the port of Charleston.

As with other professional licensing boards that are authorized and governed by state statute, the Board of Pilotage Commissioners is empowered to examine and license port pilots for Charleston harbor, investigate violations of the pilotage statutes, promulgate and enforce rules and regulations, suspend licenses or take other disciplinary actions, administer oaths to port pilots, and take other appropriate administrative and judicial actions on behalf of the State. This Office has opined that these powers and duties generally demonstrate an exercise of the State's sovereign power. Therefore, members of such licensing boards would be office holders. See Op. S.C. Atty. Gen., April 12, 1993 (specifically as to the State Board of Examiners in Opticianry, State Board of Examiners in Optometry, and State Board of Physical Therapy Examiners). In an opinion dated July 24, 1984, we further advised that the Board of Pilotage Commissioners for the Port of Charleston should be considered an agency of the state, based partly on the principle that the licensing of professions is generally regarded as an exercise of the State's police power. See, South Carolina State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946).

Mr. Young
Page 3
April 29, 2004

Based on the forgoing authorities, it is our opinion that a Commissioner of Pilotage for the Port of Charleston clearly exercises a portion of the State's sovereign power, and thus would be considered an officer for dual office holding purposes. Accordingly, a council member for the Town of Mount Pleasant would violate the constitutional provisions on dual office holding if he or she were to accept an appointment as a Commissioner of Pilotage for the port of Charleston.

When a dual office holding situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General