

7916 July 5, 2005



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 5, 2005

Mr. Gray T. Culbreath
Chairman, South Carolina Museum Foundation
P.O. Box 100107
Columbia, South Carolina 29202

Dear Mr. Culbreath:

By letter, you requested an opinion of this office regarding dual office holding. In your letter you inquire as to the legality of the following scenario:

May a member of the South Carolina Museum Commission duly appointed by the Governor pursuant to S.C. Code Ann. § 60-13-10, also serve as an officer or director of the South Carolina Museum Foundation, a 501(c)(3) nonprofit organization whose function is to provide fundraising support to the South Carolina State Museum.

We advise that an individual serving simultaneously on the State Museum Commission and the State Museum Foundation does not violate the dual Office holding prohibition. However, we further advise that the individual contact the State Ethics Commission for guidance as to the applicability of the State Ethics Act with respect to such concurrent service.

Law/Analysis

Article XVII, Section 1A of the South Carolina 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). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." *See supra*, 78 S.C. at 174.

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We have previously advised that an individual serving on the South Carolina Museum Commission holds an office for purposes of dual office holding. *See, Op. S.C. Atty. Gen.*, March 28, 1983. Thus, the issue is whether an individual serving on the South Carolina Museum Foundation holds an office for purposes of dual office holding.

As noted, the South Carolina Museum Foundation is a 501 (c)(3) nonprofit organization according to the United States Internal Revenue Code. In its bylaws, the Museum Foundation states its purposes as follows:

[t]he Foundation is organized and at all times shall operate exclusively for the benefit of, to perform the functions of, or to carry out the purpose of the South Carolina State Museum (hereinafter referred to as the "supported organization") by (i) assisting in the creation and continued operation of a State Museum, (ii) promoting the program and welfare of such State Museum, (iii) furthering education and research, mobilizing expert professional advice, and utilizing all available resources in order to accomplish the purpose for which the supported organization has been established, to with: "including but not restricted to the history, fine arts, and natural history and the scientific and industrial resources of the State..."

We have previously concluded that members of the board of directors of a private nonprofit corporation do not hold an office for dual office holding purposes. *Ops. S.C. Atty. Gen.*, February 14, 2003; March 17, 1995; October 18, 1988; and November 10, 1983. Furthermore, the fact that a nonprofit organization receives public funds "does not make it a public body or state agency, or the officers of the body public officers..." *See, Op. S.C. Atty. Gen.*, November 10, 1983 (citing *Ky. Region Eight v. Commonwealth*, 507 S.W.2d 489 (Ky. Ct. App. 1974)). However, we have noted that in rare instances, a nonprofit organization may constitute a state, local or governmental agency when the organization possessed certain attributes of state sovereignty. *See, Op. S.C. Atty. Gen.*, September 6, 1996 (citing *Philadelphia Nat. Bank v. U.S. of America*, 666 F.2d 834 (3d Cir. 1981) (Temple University, a nonprofit organization, was not a political subdivision of the state because it did not possess the power to tax, the power of eminent domain or the police power)).

In light of our previous opinions, we conclude that membership on the South Carolina Museum Foundation does not constitute an office for dual office holding purposes. The Foundation does not appear to exercise any portion of state sovereignty and thus likely would not be considered a governmental agency. In fact, its bylaws plainly state that the Foundation's sole purpose is to "operate exclusively for the benefit of... the South Carolina State Museum..." Accordingly, we conclude that service as a board member on the South Carolina Museum Foundation does not constitute an office for dual office holding purposes.

However, we note that the potential for conflict of interest may arise from simultaneous service on both the South Carolina State Museum Commission and the South Carolina Museum

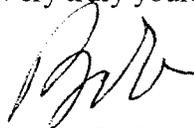
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Foundation. Thus, we suggest that you may wish to contact the State Ethics Commission for guidance.

Conclusion

It is our opinion that an individual serving on the State Museum Foundation does not hold an office for dual office holding purposes. Accordingly, an individual who serves simultaneously on the State Museum Commission and the State Museum Foundation does not violate the dual office holding prohibition. However, as we explain above, the individual in question may wish to contact the State Ethics Commission for guidance as to the applicability of the State Ethics Act with respect to such simultaneous service.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General