

January 19, 2007

Mr. Ken Harmon
502 Fayetteville Ave., Apartment 2
Bennettsville, South Carolina 29512

Dear Mr. Harmon:

In a recent letter to Attorney General Henry McMaster you informed us that currently you serve as the Executive Director of the Bennettsville Downtown Development Association, a nonprofit 501(c)(3) entity. You also stated that “[a]bout 60% of our yearly budget comes from the City of Bennettsville. This is money given to us for general purposes and for a portion of the ED’s salary.” Given this information, you request an opinion as to whether “this precludes [your] running for Mayor or a seat on City Council?”

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) states: “No person may hold two offices of honor or profit at the same time” Thus, this provision often prohibits one individual from serving in two capacities. However, we do not believe article XVII, section 1A prevents you from serving as Executive Director of the Bennettsville Downtown Development Association (“Executive Director”) while holding a position as Mayor or as a member of the Bennettsville City Council (“City Council”). “[T]his Office has repeatedly concluded over the years that the position of executive director of a board or commission does not constitute an office.” Op. S.C. Atty. Gen., January 27, 2004. Therefore, because your employment as Executive Director is not an office, if elected to a position with the City of Bennettsville (the “City”), you would not simultaneously hold two offices and would not be in violation of article XVII, section 1A of the South Carolina Constitution.

Despite finding your simultaneous services in these positions does not violate the dual office holding prohibition, we find it pertinent to consider whether such service could result in a master-servant conflict of interest. This conflict of interest generally arises

“where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the

other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.”

Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994). The Supreme Court described such a conflict of interest as follows:

No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913).

As we stated in a prior opinion, “[t]raditionally, a master-servant conflict arises when an individual serves as an employee for the same body to which he or she services as an officer. For example, a maintenance worker for a town also serving on the town’s council or a fireman simultaneously severing as a commissioner for the fire district where he is employed.” Op. S.C. Atty. Gen., July 19, 2006. However, we also recognize instances in which master-servant conflicts extend beyond these situations.

For example, in an opinion issued in 1989, we considered whether a master-servant conflict exists when an individual serves as both the executive director of the Calhoun County Development Board while serving on the Calhoun County Council. Op. S.C. Atty. Gen., May 15, 1989. In that opinion, we discovered the executive director “is viewed as a county employee, on the county’s payroll, subject to the county’s personnel policies and practices.” Id. Ultimately, we concluded these factors should be further explored, but commented: “Applying these common law principles to your question, it may well be that a master-servant situation, and thus a conflict of interest, may exist.” Id.

In another opinion issued in 2004, we applied the principles of master-servant conflicts of interest to a situation involving the Executive Director of the Sumter County Commission on Alcohol and Drug Abuse’s potential service on the Sumter County Council. Op. S.C. Atty. Gen., June 7, 2004. In that opinion, we determined:

Since the executive director is not a county employee and is under the direct supervisory authority of the Board of Commissioners for the SCCADA, which receives its funding primarily from federal and state sources, there would not appear to be any of the direct master-servant conflicts described above. However, the fact that members of the Board of Commissioners for the SCCADA are

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appointed by the Sumter County Council may evince a degree of indirect authority which county council has over the executive director for the county commission on drug and alcohol abuse. Accordingly, while it is our opinion that there are no apparent master-servant conflicts inherent in the situation about which you have inquired, the question is not beyond dispute. Certainly, one should be mindful of the indirect correlation between County Council and the Executive Director in this instance.

Id.

In July of this year, we again considered issues regarding master-servant conflicts of interest. Op. S.C. Atty. Gen., July 19, 2006. In that instance, we contemplated whether such principles prevented the Director of the Fairfield County Recreation Commission from also serving on the Fairfield County Council. Id. The requester of that opinion informed us that a Fairfield County provided a major source of funding for the Recreation Commission. Id. Thus, leading us to believe the County Council had some degree of control over the Recreation District's Funding. Id. In addition, the requester added that the fiscal record keeping responsibilities for the Recreation Commission were being handled by Fairfield County. Id. This information again led us to believe the County Council has some degree of control over the Recreation District and the Director. Id. Finally, we considered the fact that Fairfield County Council appointed the Recreation Commission members. Id. We stated: "this fact may evince a degree of indirect authority held by County Council over the Director of the District." Id. Thus, we concluded: "although not free from doubt, we believe a court may find a member of County Council's service as the Director of the District in violation of common law master-servant principles." Id.

In your letter, you told us that the Bennettsville Downtown Development Association ("BDDA") is a nonprofit corporation. In a telephone conversation with you, you informed us that the members of BDDA's board are elected by the board itself. Additionally, you noted that the board selects the executive director and has complete authority over this position with no involvement of the City, City Council, or the Mayor. Furthermore, you are not considered an employee of the City and are not included in the City's payroll. These factors indicate the City's lack of control and authority over the Executive Director's position. However, you also stated in your letter that the BDDA receives a majority of its funding from the City. The BDDA receives the balance of its funding from other sources such as fund raisers and membership fees. You added that a portion of your salary is included in the money BDDA receives from the City. In fact, the City's budget contains a line item for the appropriation of funds specifically for the Executive Director's position. Thus, these factors indicate the City has some control over the funding of your position and therefore, your salary.

The circumstances of your position as executive director present a very close call with regard to whether a master-servant conflict would exist should you serve as Mayor or on City Council. The circumstances of your position indicate both supervision and control over your position and the lack

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of such supervision and control. Although our recent 2006 opinion focused on the fact that Fairfield County Council provided funding for the Recreation Commission in our determination that a court would likely find a conflict of interest exists, we also considered the fact that the Fairfield County Council supervises the finances of the Recreation Commission and the fact that the Fairfield County Council appoints the members of the Recreation Commission. To the contrary in this instance, to our knowledge, the City does not supervise the finances of the BDDA and the members of the BDDA are appointed by the members themselves rather than City Council. Moreover, other than making appropriations to the BDDA, we find no other indications of the City's ability to exercise control over the BDDA or its Executive Director. Finding less evidence of supervision and control with regard to the Executive Director's positions in this instance than we did in our 2006 opinion, we are inclined to find that a master-servant conflict would not arise should you serve as Mayor or on City Council. However, we caution that this determination is not free from doubt. Because some evidence of supervision and control appear to be present, a court could very well rule otherwise.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General