

February 4, 2008

The Honorable Robert W. Harrell, Jr.
Speaker of the House
South Carolina House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Dear Speaker Harrell:

You seek an opinion as to whether “simultaneous service by an individual on the Savannah River Maritime Commission and the Jasper Ocean Joint Project Office Board [would] be a violation of the South Carolina Constitution prohibition on dual office holding set forth in Article XVII § 1A?” By way of background, you provide the following information:

The Savannah River Maritime Commission was created by Act 56 of 2007, which was passed into law on May 1, 2007. The Commission “represent[s] the State in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues” pertaining to the use of the Savannah River as a waterway for commerce. Additionally, the Commission is empowered to negotiate on behalf of the State and enter into agreements with the State of Georgia and the United States Army Corps of Engineers. The Commission is composed of members appointed by State officers, notably by the Governor, the Speaker of the House, and the President Pro Tempore of the Senate.

The Jasper Ocean Terminal Joint Project Office Board was created by an intergovernmental agreement between the Georgia Ports Authority, the Georgia Department of Transportation, and the South Carolina State Ports authority in 2007. The Joint Project Office’s primary duty is to determine the feasibility of and plan the development of a cargo terminal on the Savannah River in Jasper County, SC. To accomplish this objective the Joint Project Office, through the Board, may undertake studies, develop site and business plans, request federal funding, and negotiate with Jasper County and the Army Corps of Engineers. The Board may contract in the name of both ports authorities and each port authority will pay one-half the cost of the undertaking. The Governors of South Carolina and Georgia each appoint one

member of the board and the respective Chairpersons of the Georgia Ports Authority and the South Carolina State Ports Authority appoint two members from their board of directors.

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).

With respect to membership on the Savannah River Maritime Commission, as you indicate, S.C. Code Ann. Section 54-5-10 provides as follows:

(A) In addition to the above provisions of this joint resolution, a commission to be known as the Savannah River Maritime Commission is hereby established to represent this State in all matters pertaining to the navigability, depth, dredging, wastewater and sludge disposal, and related collateral issues in regard to the use of the Savannah River as a waterway for ocean-going container or commerce vessels. The commission as an instrumentality of this State is empowered to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties in regard to the above which bind the State of South Carolina; provided, however, that any such agreements which require state funding are subject to the funding being provided by the General Assembly in a general or supplemental appropriations act or in a bond bill.

(B) The commission shall be composed of twelve members as follows:

- (1) the Governor or his designee;
- (2) the Speaker of the House of Representatives or his designee;
- (3) the President Pro Tempore of the Senate or his designee;
- (4) the Attorney General of South Carolina or his designee;
- (5) the Chairman of the Board of Health and Environmental Control to serve ex officio or his designee;

- (6) the Chairman of the Board of Natural Resources to serve ex officio or his designee;
- (7) the Chairman of the State Ports Authority to serve ex officio or his designee;
- (8) the Chairman of the Senate Finance Committee or his designee;
- (9) the Chairman of the Senate Transportation Committee or his designee;
- (10) the Chairman of the House Ways and Means Committee or his designee;
- (11) the Chairman of the House Education and Public Works Committee or his designee; and
- (12) one resident of Jasper County appointed by the Jasper County Council to serve at the pleasure of the council.

The Governor or his designee shall serve as chairman of the commission.

(C) Any state, county, or municipal officeholder named or designated to serve on the commission shall serve ex officio. Notwithstanding Section 8-13-770 of the 1976 Code, members of the General Assembly may be appointed to serve on this commission as the designee of an appointing official.

(D) Professional and clerical services for the commission must be provided by the staff of the Attorney General's office and supplemented by the staffs of other public officials serving on the commission as required by the commission.

(E) Members serving on the commission shall receive such mileage, subsistence, and per diem as is provided by law for members of state boards, commissions, and committees when engaged in the exercise of their duties as members of the commission to be paid from their approved accounts or the approved accounts of their appointing authority.

(F) Except as provided below, nothing in this section shall supersede the authority of other state agencies, departments, or instrumentalities including the Department of Natural Resources, the Department of Health and Environmental Control, or the State Ports Authority to exercise all powers, duties, and functions within their responsibilities as provided by law. However, on an interstate basis and specifically in regard to the State of Georgia, the responsibilities granted to the Savannah River Maritime Commission in this joint resolution supersede any other concurrent responsibilities of a particular state agency or department. Any requirements for permitting and constructing new terminal facilities on the Savannah River in Jasper County are declared not to be the responsibility of this commission, except as they may relate to this state's responsibility for the navigability or depth of the South Carolina portion of the Savannah River.

(G) The Savannah River Maritime Commission established herein shall exist for a period of twenty-five years after the effective date of this joint resolution and may be continued for additional periods as provided by the General Assembly by law.

As specified above, subsection (C) provides that “[a]ny state, county, or municipal officeholder named or designated to serve on the commission shall serve *ex officio*.” Thus, as a general matter, service on the Maritime Commission is deemed *ex officio* to holding some other office. The prohibition of dual office holding generally does not apply when service in a second position is “by virtue of” (or *ex officio*) to service in another position. So long as there is a “reasonable relation” between the functions of the first office and the duties *ex officio*, the dual office holding prohibition is thus deemed inapplicable. *Ashmore v. Greater Greenville Sewer Dist.*, 211 S.C. 77, 92, 44 S.E. 88 (1947). However, your question is not whether the officer appointed to serve on the Savannah River Maritime Commission *ex officio*, is, by virtue of those two positions, holding two offices simultaneously, but whether a person who is serving on the Maritime Commission may also be appointed to the Jasper Ocean Terminal Joint Project Office Board. To that issue, we now turn.

In our opinion, there is little doubt that the Savannah River Maritime Commission a body created by the General Assembly pursuant to Act No. 56 of 2007, exercises a portion of the sovereignty of the State. The Commission is, among other things, “empowered to negotiate on behalf of the State of South Carolina and enter into agreements with the State of Georgia, the United States Army Corps of Engineers, and other involved parties” regarding the navigability, depth, dredging etc. of the Savannah River. Such agreements “bind the State of South Carolina.” Thus, in our opinion, membership on the Savannah River Maritime Commission constitutes an office for purposes of the dual office holding provision of the South Carolina Constitution.

By contrast, we can find no provision of law (either statute, joint resolution, ordinance, etc.) which creates the Jasper Ocean Terminal Joint Project Office Board. Your letter notes that, instead, the Board “was created by an intergovernmental agreement between the Georgia Ports Authority, the Georgia Department of Transportation and the South Carolina Ports Authority in 2007.” We have obtained a copy of the Agreement which was consummated between the two states several months ago. In our opinion, service on this Board would not constitute an office for purposes of the dual office holding provision of the state Constitution, because the Board is not created by state law.

We have concluded on a number of occasions that a position not created by a state law is not an office. As we stated in *Op. S.C. Atty. Gen.*, March 19, 2003, regarding the Lowcountry Workforce Investment Board

We have located no statute enacted by the General Assembly which deals with this federal program or sets forth additional powers under state law with respect to local boards such as the Lowcountry Workforce Investment Board. You have likewise

indicated that no ordinance exists regarding additional powers of the Lowcountry Workforce Investment Board. Thus, it is evident that the Workforce Investment program in South Carolina is established through the Office of Governor, presumably by executive order. PL 105-220 bestows broad authority upon local boards, including submitting a local plan to the Governor, selection and certification of certain personnel, identification of eligible providers of intensive services, budgetary responsibilities, etc.

Numerous opinions which have been issued by this Office in past years have considered whether positions required by or established *under federal law* would be considered offices for purposes of dual office holding. We have consistently concluded that a position established pursuant to federal law would not be an office for purposes of Article XVII, § 1A. *See, Ops. S.C. Atty. Gen.*, May 31, and opinions cited therein. Moreover, in an Opinion dated April 5, 1994, we concluded that service on the Governor's Workforce Initiative did not constitute an office for dual office holding purposes because such position was created pursuant to executive order of the Governor rather than statute, regulation or ordinance. There, we commented as follows:

The Governor's Work Force Initiative was created by the Governor by Executive Order # 90-31. We can locate no statutory or constitutional authority which specifically mandated that the entity be created. In the absence of such authority, this Office has consistently concluded that membership of an entity created pursuant to executive order by a governor most probably would not constitute an office. As examples, see *Ops. Atty. Gen.* dated May 6, 1992 (as to the Council on Vocational and Technical Education); August 1, 1985 (as to the Youth Employment Coordinating Council (as to the Youth Employment Coordinating Council)); March 27, 1985 (as to the Governor's School for the Arts board); and July 9, 1982 (as to the Governor's Resource Panel for the Elderly), among others.

And in *Op. S.C. Atty. Gen.*, July 12, 1979, we commented that the ETV Community Advisory Board

... is not created by statute but was created by action of the South Carolina Educational Television Commission to meet certain requirements of federal grants. Membership upon this body is not an office within the meaning of the constitutional provision prohibiting dual officeholding. Therefore, one who holds an office at the

The Honorable Robert W. Harrell, Jr.
Page 6
February 4, 2008

present time may also occupy a position as a member of the ETV Advisory Board without violating the dual officeholding provision of the Commission.

Conclusion

Accordingly, based upon the foregoing authorities and concluding that no state law creates the Jasper Ocean Terminal Joint Project Office Board, it is our opinion that a person simultaneously serving on the Savannah River Maritime Commission and the Jasper Ocean Terminal Joint Project Office Board would not violate the dual office holding provision of the South Carolina Constitution.¹

Very truly yours,

Henry D. McMaster
Attorney General

By: Robert D. Cook
Deputy Attorney General

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¹ We assume herein that the person in question holds no other office or position which might invoke the dual office holding provision.