



HENRY McMASTER
ATTORNEY GENERAL

February 17, 2009

The Honorable Jackie T. Holman
Mayor, Town of Blackville
5983 L'Artigue Street
Blackville, South Carolina 29817

Dear Mayor Holman:

We understand you wish to request an opinion of this Office on behalf of the Town of Blackville (the "Town") concerning your concurrent service as Mayor and as operations manager for the Town. You included a letter with your request signed by several members of the Town's council stating as follows:

Our elected Mayor is presently serving and receiving salary of \$400 per month for that office. Additionally, he is serving as operations manager for the Town of Blackville, for which he is paid \$1,200 per month.

During 2005, the town attorney expressed the opinion that this situation did not represent any conflict of interest, nor was it dual office-holding under the Constitution.

In that regard, the undersigned six elected members of Blackville Town Council request that you provide us with your official Opinion as to whether the situation described violates Article VI, § 3 and Article VIII, § 1A of the South Carolina Constitution.

Law/Analysis

Article VI, section 3 of the South Carolina Constitution (Supp. 2008) provides: "No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention." In addition, article XVII, section 1A of the South Carolina Constitution (Supp. 2008) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." To contravene these provisions, a person concurrently must hold two offices having duties

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that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

Numerous opinions of this Office conclude that a mayor is an officer for purposes of dual office holding. Ops. S.C. Atty. Gen., May 6, 2005; May 28, 2002; April 28, 1999. Thus, we must consider whether serving as an operations manager for the Town is also an office. Included with your request, you provided a copy of a service agreement entered into between you and the Town Council. Initially, this agreement indicates that you were hired by Town Council. In addition, according to this agreement, you agreed to "manage, operate and maintain the services, repairs, preventive maintenance, existing projects and any other operations of The Town of Blackville, including but not limited to supervision of engineering studies, water & sewer Facility, existing projects, new projects, etc., beginning March 1, 2004 and ending June 30, 2004" for the sum of \$1,200 per month.

We note no provision under the municipal code establishing the position of an operations manager. According to the services agreement, this position appears to be for a stated term and you will receive specified compensation, however, we found no requirement that you take an oath of office and most important, we found no indication that this position exercises a portion of the sovereign power of the State. As our Supreme Court in Sanders, 78 S.C. at 174, 58 S.E. at 763, expressed "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 employé." As such, we believe your service as operations manager for the Town is that of a mere employee and not as an officer for purposes of dual office holding. Thus, we do not believe your service as Mayor and operations manager runs afoul of article VI, section 3 or article XVII, section 1A of the South Carolina Constitution.

Although we do not believe your simultaneous service as Mayor and operations manager for the Town violates the prohibition on dual office holding, we must express our concern that your service in both positions at the same time may violate section 5-7-180 of the South Carolina Code (2004). This provision states: "Except where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected." S.C. Code Ann. § 5-7-180 (emphasis added). Prior opinions of this Office point out that this provision prevents mayors and members of town councils from being employed by their towns while in office. Ops. S.C. Atty. Gen., May 6, 2005; May 21, 2004; August 4, 1986.

In addition to section 5-7-180, your service as both Mayor and operations manager may create a conflict of interest under the common law principles of master-servant. In a past opinion, we summarized this relationship as follows:

[A] conflict of interest exists 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.

...

[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions.... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality.

Op. S.C. Atty. Gen., March 26, 1999 (quoting 67 C.J.S. Officers § 27). Furthermore, the South Carolina Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1913), declaring the employment of two commissioners by the commission illegal, stated:

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.

In an opinion of this Office issued in 2004, we discussed whether a member of a municipality's council may also be employed by the municipality as a maintenance worker. Op. S.C. Atty. Gen., May 21, 2004. After concluding that such simultaneous service does not constitute dual office holding, but that it likely violates section 5-7-180, we discussed whether such service also creates a conflict of interest inherent in the master-servant relationship. Id. Considering the authority cited above, we stated:

A master-servant conflict would exist where an employee of the town also serves as a member of town council, even if, as you have indicated, that the council member in question does not vote on the budget or any issue affecting direct compensation for his employment. There are a wide range of other matters related to town employees dealt with by the town council on a regular basis that

would inevitably result in the type of conflict described in McMahan v. Jones, supra, where “self-interest and integrity” frequently compete. Examples which immediately come to mind are the setting of policies and duties for town employees, as well as considering contracts for the municipality that may be either beneficial or detrimental to the councilmember’s status as a town employee.

Id.


In addition to our 2004 opinion, we also note several other opinions of this Office concluding that employment of a member of a municipality’s council or its mayor by the municipality creates a master-servant conflict of interest. Ops. S.C. Atty. Gen., October 2, 1995; August 4, 1986; May 21, 1984; November 21, 1973. Thus, following the same reasoning as these opinions, we believe a court would find that your employment as the Town’s operations manager while serving as Mayor creates a master-servant conflict of interest.

Conclusion

We do not believe your concurrent service as Mayor and operations manager for the Town violates the constitutional provisions prohibiting dual office holding. However, we are concerned that serving in both capacities violates section 5-7-180 of the South Carolina Code and create a conflict of interest under the common law master-servant principles. Thus, we advise against your service in both capacities.

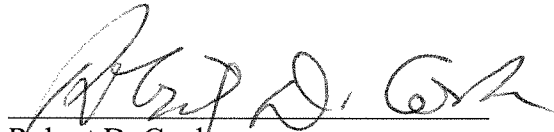
Very truly yours,

Henry McMaster
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