



HENRY McMASTER
ATTORNEY GENERAL

October 29, 2009

The Honorable Ralph E.G. Patterson, Sr.
Mayor, Town of Due West, S.C.
P.O. Box 278
Due West, South Carolina 29639

Dear Mayor Patterson:

We received your letter requesting an opinion of this Office concerning dual office holding. In your letter, you stated as follows:

I am requesting an opinion from your office for our upcoming mayoral election of the Town of Due West, SC. I am not seeking re-election and am not a candidate in this election.

An individual that currently serves on our Town Council and as Mayor Pro-Tem also serves as president of a member owned private telephone cooperative. This individual desires to seek election as mayor of an incorporated municipality. Would this individual's service as president of a member owned private telephone co-op and as mayor of an incorporated municipality violate the prohibition against dual office holding?

From our telephone conversation, we understand that the position about which you are inquiring is that of the president or chairman of the board of directors of a non-profit telephone cooperative.

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, 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." For this provision to be contravened, a person concurrently must hold two public 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). "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the

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performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer.” Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, 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).

In numerous prior opinions of this Office, we have concluded that a mayor holds an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., February 17, 2009; January 25, 1999; January 17, 1983.

We have not previously addressed the question of whether a member of the Board of Directors of a telephone cooperative holds an office for purposes of dual office holding. However, in a prior opinion, we addressed the question of whether a member of the Board of Directors of an electric cooperative holds an office for purposes of dual office holding. Citing Byrd v. Blue Ridge Electrical Cooperative, Inc., 215 F.2d 542 (4th Cir. 1954), we noted that a cooperative “‘is not a governmental agency,’” and that it “‘is essentially a business project designed to promote the convenience and material welfare of its members rather than the common good.’” Op. S.C. Atty. Gen., November 2, 1983. We stated in summary that “a cooperative is ‘a voluntary association to provide its members the benefits of an electrical service at the lowest possible cost.’” Id. In reaching a conclusion based on the factors described in Sanders and Crenshaw, we noted as follows:

An application of the Sanders and Crenshaw test to the above, clearly points to the conclusion that a director of an electrical cooperative is not an ‘officer.’ Duties, tenure, salary and oath are not prescribed by the legislature. Instead, they are left to the discretion of the cooperative. Section 33-49-280, South Carolina Code of Laws, 1976. Further, as can be fairly inferred from the above, a director could not be classified as a ‘representative of the sovereign.’ Admittedly, sovereign powers (i.e., eminent domain) are delegated to electric cooperatives; however, this is only one factor to be considered in determining whether a position is an ‘office’ within the meaning of the dual office holding prohibitions of the South Carolina Constitution. Crenshaw, supra.

We therefore concluded that “while not free from doubt...holding simultaneously the positions of director of a rural electric cooperative and Magistrate would probably not violate the dual office holding prohibitions of the South Carolina Constitution, since the former position does not meet the test for an ‘office,’ as set forth in Sanders and Crenshaw.” Id. That conclusion was re-affirmed in an opinion of this Office dated August 1, 1988, in which we advised that “an individual who is a coroner, legislator, sheriff or who holds any other position which constitutes an office could serve on the board of directors of an electric cooperative.” Op. S.C. Atty. Gen., August 1, 1988. We cautioned, however, that any public officer must abide by the provisions of the State Ethics Act, S.C. Code Section 8-13-10 et seq.

The powers of a telephone cooperative and its directors are described in the Telephone Cooperative Act, located in S.C. Code Section 33-46-10 et seq. Section 33-46-210 describes the purpose of a telephone cooperative as follows:

Telephone cooperative nonprofit membership corporations may be organized under this chapter for the purpose of rendering communication and information services and for such other and further acquisitions, construction, and extensions as may be reasonably necessary and expedient for the proper control and operation of said communication and/or information system.

Section 33-46-300 provides that the powers of a telephone cooperative operating under the Act include “all the powers conferred on private corporations by Section 33-3-102 unless restricted herein or by the bylaws of the telephone cooperative.” Telephone cooperatives also have the power to “construct, maintain and operate lines for communications and information services along...public thoroughfares...”; to “provide communication services...”; and to purchase and sell property. Section 33-46-300 (1), (3), (4). Like electric cooperatives, telephone cooperatives also have the power of eminent domain. S.C. Code Section 33-46-300 (7). As we stated in our prior opinion dated November 2, 1983 concerning electric cooperatives, admittedly, this sovereign power is being delegated to the cooperative; however, this is only one factor to consider when determining whether its directors are “officers” within the meaning of the constitutional prohibition on dual office holding.

Section 33-46-320 provides that the “[t]he original bylaws of a telephone cooperative must be adopted by its board of directors” and that the bylaws “shall set forth the rights and duties of members and directors...” Section 33-46-500 contains provisions regarding the number and qualifications of directors and the removal and election of successors. With provisions similar to the parallel statute relating to electric cooperatives (S.C. Code Section 33-49-610), it states as follows:

(A) The business affairs of a telephone cooperative must be managed by a board of not less than three directors, each of whom must be a member of the telephone cooperative or of another cooperative which is a member of the telephone cooperative. The bylaws must prescribe the number of directors, their qualifications (other than those qualifications provided for in this chapter), the manner of holding meetings of the board, and the filling of vacancies on the board. [...]

(B) The bylaws also may provide for the removal of directors from office and for the election of their successors as follows [...]

S.C. Code Section 33-46-500.

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We have previously opined that in general, "membership on a board of a nonprofit corporation, created by legislative action on the part of the General Assembly or a county or city council, is not an office for dual office holding purposes." Op. S.C. Atty. Gen., February 14, 2003. We recognized that "in certain rare instances, a nonprofit corporation has been held to constitute a state, local or other governmental agency," and that "courts sometimes look beyond a non-profit corporation's status as such to determine whether, in reality, the corporation is an 'alter ego' of the State." *Id.*, citing Op. S.C. Atty. Gen., September 6, 1996. However, based on the above statutory provisions, we do not believe that is the case here. It is the opinion of this Office that the powers and duties of members of the board of directors of a private, non-profit telephone cooperative, much like the powers and duties of members of a board of directors of an electric cooperative, which we addressed in prior opinions dated November 2, 1983 and August 1, 1988, do not render those members officeholders for purposes of the dual office holding prohibition of the South Carolina Constitution.

Conclusion

As we have stated in prior opinions, the mayor of a municipality holds an office for purposes of dual office holding. However, in the opinion of this Office, a member of a board of directors of a private, non-profit telephone cooperative does not hold an office for purposes of dual office holding. Therefore, in the opinion of this Office, serving simultaneously in both capacities would not violate the constitutional prohibition on dual office holding.

Yours very truly,

Henry McMaster
Attorney General



By: Elizabeth H. Smith
Assistant Attorney General

REVIEWED AND APPROVED BY:



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