

March 28, 2007

John C. Sharpe, City Manager
City of Cayce
Post Office Box 2004
Cayce, South Carolina 29171-2004

Dear Mr. Sharpe:

We understand from your letter that your request an opinion of this Office concerning dual office holding and conflicts of interest. In your letter, you provided us with the following information:

A citizen of Cayce currently serves as an appointed member of the City of Cayce Accommodations Tax Advisory Committee and as an appointed member of the Lexington County Recreation Commission. The City Council appoints members of the City's Accommodations Tax Advisory Committee. The Committee considers requests for accommodations tax proceeds made to the City by outside organizations and entities and then, as its name indicates, provides non-binding advice and recommendations to the City Council on appropriate expenditures of those tax proceeds. The Committee has recommended funding for groups that have participated in Lexington County Recreation Commission sponsored events.

As understood by the City, the Lexington County Recreation Commission was created by an Act of the General Assembly (Act 1201 of 1968). That Act subsequently was amended to change the name to its current name and to change the number and terms of the members. The Governor, upon recommendation of the Lexington County Legislative Delegation, appoints the Commission members. Under the 1968 Act, the Commission has broad powers including the power to levy taxes, issue bonds, acquire and condemn lands, and expend money.

In addition, you also informed us that

[s]ituations have and could occur in the future in which the City Accommodations Tax Advisory Committee may affect the Recreation Commission by recommending that the City provide tax revenue for financial support of programs or activities (such as athletic tournaments) sponsored and held at Commission facilities.

Based on this information, you wish to know “whether simultaneous service on both the Committee and the Commission (1) constitutes dual office holding in contravention of the State Constitution and (2) creates a conflict of interest.” In addition, you ask “whether a member of the County Recreation Commission is required to file a statement of economic interests.”

Law/Analysis

Before we address whether an individual’s service both on the City of Cayce Accommodations Tax Advisory Committee (the “Committee”) and the Lexington County Recreation Commission (the “Commission”) may create a conflict of interest, we address whether holding these two positions violates the dual office holding provision of the South Carolina Constitution.

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) 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.” In order to contravene this provision, a person concurrently must hold two offices having duties 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).

As you indicated in your letter, the Legislature established the Lexington County Rural Recreational District (the “District”) to be governed by Rural Recreation Commission of Lexington County in 1968 via act 1201. 1968 S.C. Acts 2763. Since its creation, the Legislature has amended the enabling legislation pertaining to the District and the Commission on numerous occasions, including changing the name of the Commission to the Recreation Commission of Lexington County. 1969 S.C. Acts 398. As amended, the enabling legislation calls for twelve resident electors living in the area of the District to serve on the Commission. 2004 S.C. Acts 3151. Each member is appointed by the Governor upon the recommendation of the Lexington County Legislative Delegation and shall serve a four-year term. 2004 S.C. Acts 3151. The enabling legislation specifies that members of the Commission shall not receive compensation for their service. 1970 S.C. Acts 1934. Furthermore, in the enabling legislation, Legislature gave the Commission the authority, among other things, to sue and be sued; acquire by gift, purchase, or eminent domain property in order to establish physical education and recreation facilities; expend funds; acquire equipment; prescribed rules and regulations governing the use of its facilities; fix rates and charges for use of its facilities; enter into contracts for construction and other services; appoint agents and hire

Mr. Sharpe
Page 3
March 28, 2007

employees; issue revenue bonds; and levy taxes on property located within the area of the District. 1968 S.C. Acts 276, amended by 1970 S.C. Acts 1934; 1971 S.C. Acts 1062.

Based on our review of the enabling legislation, we believe membership on the Commission constitutes an office. The Legislature established the Commission by statute, which sets forth a term of office for its members. Moreover, we believe the authority afforded to the Commission by the Legislature is in the nature of sovereign powers. Therefore, while the enabling legislation states members of the commission may not be compensated for their service and makes no mention of an oath of office, we nonetheless find a position on the Commission to be an office for purposes of dual office holding. Thus, we must determine whether a position on the Committee also constitutes an office.

As you conveyed in your letter, City Council appoints members to the Committee for purposes of advising it on where proceeds from the City's accommodation's tax shall be directed. You did not indicate whether or not City Council established the Committee via ordinance or other legislative act. You also did not indicate whether or not the Committee's members serve for a particular term or take an oath of office. However, from your description of the duties of the Committee's members, we do not believe they exercise any portion of the sovereign power of the State. The Committee's members do not have any authority other than to make recommendations to City Council, which ultimately determines where revenues from the accommodations tax are allocated. Therefore, the Committee's members only appear to serve in an advisory capacity. In numerous opinions of this Office, we determined members of advisory bodies are not office holders for purposes of dual office holding. See Ops. S.C. Atty. Gen., June 1, 2006 (the South Carolina Education and Economic Development Act Regional Education Center Advisory Board); February 24, 2004 (Beaufort County Solid Waste and Recycling Board); December 1, 2000 (local drought response committee); December 14, 1987 (Children's Foster Care Review Board). Thus, we do not believe an individual's service on the Committee is an office. Accordingly, an individual may serve on the Committee while serving on the Commission without running afoul of article XVII, section 1A of the South Carolina Constitution.

You also asked to us to addresses whether an individual's simultaneous service on the Committee and the Commission could result in a conflict of interest. In this regard, we presume you question whether issues may arise under the State Ethics Reform Act as a result of a Commission member's service on the Committee. In reviewing the provisions contained in the State Ethics Reform Act, we alert you to section 8-13-700 of the South Carolina Code (Supp. 2006), which prohibits public officials from using their positions for financial gain. However, we also note that this provision provides a mechanism by which a public official may recuse himself or herself from matters to which they may have an economic interest. S.C. Code Ann. § 8-13-700. Thus, if such a conflict arises, section 8-13-700 may prohibit a member of the Committee from participating in certain matters, but may not result in the Committee member being prohibited from serving.

In addition to section 8-13-700, the State Ethics Reform Act contains numerous other provisions that may be applicable to a member of the Committee. Because the Legislature specifically gave authority to the State Ethics Commission to interpret and issue opinions pertaining to the provisions of the State Ethics Reform Act, we suggest you contact the State Ethics

Mr. Sharpe
Page 4
March 28, 2007

Commission as all potential conflicts of interest that may arise as a result of a Commission member's service on the Committee. S.C. Code Ann. § 8-13-320(11) (Supp. 2006).

With regard to whether a member of the Committee must file a statement of economic interest, we look to section 8-13-1110 of the South Carolina Code (Supp. 2006). This provision, also contained in the Ethics Reform Act, specifies who must file a statement of economic interest. S.C. Code Ann. § 8-13-1110. Among those required to file such statements are public officials. S.C. Code Ann. § 8-13-1110(B)(10). The State Ethics Reform Act defines a public official as "an elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office." S.C. Code Ann. § 8-13-100(27) (Supp. 2006). Because members of the Commission are appointed by the Governor and are in our opinion, officers, we believe they fall within the definition of a public official under the State Ethics Reform Act. Thus, we believe the State Ethics Reform Act requires members of the Commission to file statements of economic interest. However, we again suggest you contact the State Ethics Commission with regard to the interpretation of the statutes contained in the State Ethics Reform Act including whether a member of the Commission must file a statement of economic interest.

Conclusion

Based on the information provided in your letter, we do not believe membership on the Committee is an office for purposes of dual office holding. Thus, holding this position while serving on the Commission does not violate the dual office holding prohibition contained in the South Carolina Constitution. With regard to whether a conflict of interest should arise as a result of an individual's simultaneous service in both of these positions, we suggest you contact the State Ethics Commission. Furthermore, while we believe a member of the Commission is required under section 8-13-1110 of the South Carolina Code to file a statement of economic interest, we again suggest you contact the State Ethics Commission in regard this matter as well.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

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