



ALAN WILSON
ATTORNEY GENERAL

March 7, 2013

Kenneth E. Gaines, Esquire
City Attorney
City of Columbia
P.O. Box 667
Columbia, South Carolina 29202

Dear Mr. Gaines,

You have requested an opinion of this Office concerning dual office holding. Specifically, you ask whether a member of City Council, who is also a business owner, may also serve as a member of the South Carolina Small Business Regulatory Review Committee (the "Review Committee").

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution provides that "[n]o 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 a violation of this provision to occur, an individual must concurrently hold two public offices which have duties "involving an exercise of some part of the sovereign power" of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E.2d 762, 763 (1907). A public officer is "[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either great or small, in the performance of which the public is concerned, and which are continuing, and not occasional intermittent, is a public officer." Id., 58 S.E.2d at 762-63. Other relevant considerations include: "whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others." State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

This Office has advised on numerous occasions that a member of a town or city council holds an office for purposes of the constitutional prohibition against dual office holding. See, e.g., Ops. S.C. Att'y Gen., 2012 WL 1036294 (March 20, 2012); 2011 WL 380163 (Jan. 14, 2011). Thus, the issue central to your request is whether a member of the Review Committee likewise holds an office for such purposes.

We have never had the occasion to specifically address membership on the Review Committee. We note that the Review Committee was created by the Legislature. See S.C. Code § 1-23-280(A)(1) ("There is established a Small Business Regulatory Review Committee within the South Carolina Department of Commerce"). The Review Committee is composed of eleven appointed members. § 1-23-280(B). Five members are appointed by the Governor, three by the President Pro Tempore, and three by the Speaker of the House. Id. In addition, the chairmen of the House and Senate Labor, Commerce and Industry Committees serve as nonvoting, ex officio members. § 1-23-280(C). All appointed members

are required to be “either current or former owners or officers or a small business.” § 1-23-280(D). Appointed members serve two-year terms and may not serve more than three consecutive terms. § 1-23-280(F). The duties of the Review Committee are set forth in § 1-23-280(A)(2):

(2) The duties of the committee, in determining if a proposed permanent regulation has a significant adverse impact on small businesses, are to:

(a) direct the promulgating agency to prepare the regulatory flexibility analysis described in Section 1-23-270(C)(2) no later than the end of the public comment period that follows the notice of proposed regulation, as provided in Section 1-23-110(A)(3); and

(b) request, at the committee's discretion, the Office of Research and Statistics of the Budget and Control Board to prepare a final assessment report, as provided in Section 1-23-115(B), of the proposed permanent regulation no later than the end of the public comment period that follows the notice of proposed regulation, as provided in Section 1-23-110(A)(3). The committee may request a final assessment report from the Office of Research and Statistics only in cases where the committee determines that information in addition to the agency's economic impact as provided in Section 1-23-270(C)(1) is critical in the committee's determination that a proposed permanent regulation has a significant adverse impact on small business. The Office of Research and Statistics:

(i) within the review and comment period, shall perform a final assessment report of the regulation on small businesses within sixty days of a request for assessment by the committee, and the promulgating agency has sixty days to complete a regulatory flexibility analysis; and

(ii) may request additional information from the agency. The sixty-day final assessment report deadline must be tolled until the time that the Office of Research and Statistics receives the requested additional information. The one-year deadline for submission of regulations to the General Assembly as provided in Section 1-23-120(A) also must be tolled until the time that both analyses are prepared and presented to the committee; and

(c) **submit to the promulgating agency**, no later than thirty days after receipt of the regulatory flexibility analysis prepared by the promulgating agency and, if requested by the committee, after receipt of the final assessment report prepared by the Office of Research and Statistics, **a written statement *advising the agency that a proposed permanent regulation has a significant adverse impact on small business.***

§ 1-23-280(A)(2) (emphasis added).

The Review Committee has the authority to direct an agency promulgating a regulation that has “a significant adverse impact on small businesses” to prepare an “economic impact statement” and a “regulatory flexibility analysis.” § 1-23-270(C). In addition, the Review Committee is empowered to file

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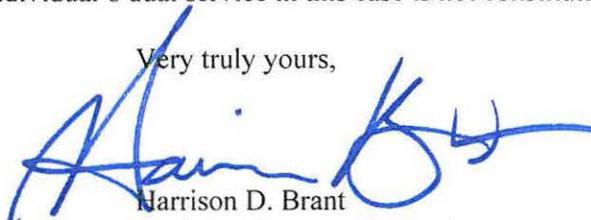
a petition with an agency that has already promulgated regulations opposing any part of a regulation that has a significant adverse impact on small business. § 1-23-290(A). In response, the promulgating agency determines whether the petition warrants the amendment or repeal of a regulation. § 1-23-290(B). If the agency determines that no amendment or repeal is warranted, the Review Committee “promptly shall convene a meeting for the purpose of determining whether to *recommend* that the agency initiate proceedings to amend or repeal the regulation in accordance with the Administrative Procedures Act.” § 1-23-290(C) (emphasis added). If the Review Committee makes such a recommendation to the agency, it must then submit “an evaluation report and the agency’s response as provided in Section 1-23-290(B)” to the Speaker of the House and the President Pro Tempore. § 1-23-290(D). In response, the General Assembly may later take any action it deems appropriate. Id.

Considering the above, a position on the Review Committee certainly has some aspects of a public office as such positions and their qualifications, duties, and powers are established by statute. However, no oath or bond is statutorily required. Furthermore, the duties and powers of the Review Committee are limited to advising promulgating agencies as to its findings concerning the impact of proposed regulations on small businesses and making recommendations to such agencies as to whether to amend or repeal a current or proposed regulation. The Review Committee is given no final authority to determine whether a regulation is to be amended or repealed. We have repeatedly advised that the members of such advisory bodies, although they possess some characteristics of an office, do not exercise a portion of the sovereign authority of the State and thus do not hold offices for purposes of dual office holding. See, e.g., Ops. S.C. Att’y Gen., 2012 WL 682076 (Feb. 23, 2012) (Medical Disciplinary Commission); 2011 WL 4592369 (Sept. 16, 2011) (Clemson University Humanities Advancement Board); 2011 WL 3346427 (July 1, 2011) (Oconee County Parks, Recreation and Tourism Commission); 2007 WL 10311451 (March 28, 2007) (City of Cayce Accommodations Tax Advisory Committee). Accordingly, we conclude that membership on the Review Committee is not an office for purposes of dual office holding.

Conclusion

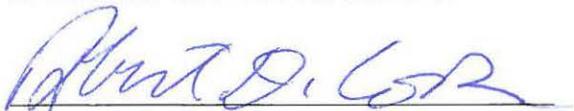
It is the opinion of this Office that the constitutional prohibition against dual office holding is not violated by an individual’s simultaneous membership on City Council and the South Carolina Small Business Regulatory Review Committee. Although we believe a member of City Council undoubtedly holds an office for purposes of the constitutional prohibition against dual office holding, prior opinions indicate that membership on an advisory body such as the Review Committee does not constitute such an office. Accordingly, we believe an individual’s dual service in this case is not constitutionally prohibited.

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General