

7284 Library



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

January 7, 2002

The Honorable W. Greg Ryberg
Senator, District No. 24
P. O. Box 1077
Aiken, South Carolina 29802

Dear Senator Ryberg:

You have asked for an opinion concerning Article XVII, Section 8 of the South Carolina Constitution. This provision states that "it shall be unlawful for any person holding an office of honor, trust or profit to engage in gambling or betting on games of chance, and any such officer, upon conviction shall become disqualified from the further exercise of the functions of the office, and the office of said person shall become vacant, as in the case of resignation or death."

Your question relates to the scope of the term "office of honor, trust or profit" in terms of the foregoing Constitutional prohibition? You inquire whether this provision prohibits "the governor, legislators, county and city council members, school board members, magistrates and judges from playing the lottery?" In our opinion, it does.

Law / Analysis

Clearly, the State Constitution, which is the supreme law of our State, prohibits all persons holding an office of honor, trust or profit from engaging in gambling or betting on games of chance. Such activity by the officer is intended to result in the officer's disqualification from holding the office and the office is then deemed vacant.

Playing the State Lottery, which has been authorized pursuant to Article XVII, Section 7 of the South Carolina Constitution and Act No. 59 of 2001 would constitute "gambling or betting on games of chance." As was noted in Darlington Theatres v. Coker, 190 S.C. 282, 2 S.E.2d 782 (1939), a lottery is a form of gambling.

That the State Lottery is now legal in South Carolina does not alter the fact that playing or participating in the Lottery is a form of gambling or betting on a game of chance. Most forms of gambling are illegal in South Carolina. However, the Constitution in Article XVII, Section 8, makes no mention of any requirement that the "gambling" or "betting on games of chance" must be illegal activity. Moreover, as our Supreme Court held in Berkebile v. Outen, 311 S.C. 50, 426 S.E.2d 760

Request Letter

The Honorable W. Greg Ryberg

Page 2

January 7, 2002

(1993), certain remedies relating to gambling or betting are not necessarily limited to illegal gambling. Gambling is gambling.

It is true that the Constitution speaks in terms of disqualification of the officer to hold the office "upon conviction," and thus arguably because the State Lottery is legal, there can be no criminal "conviction" for officials playing the Lottery. This does not mean, however, that the constitutional prohibition does not apply to public officials playing the Lottery. It may well be that such term "conviction" was intended by the framers simply to mean proof in the forfeiture proceeding rather than in a criminal proceeding. See, Davis v. Repp, 79 N.J.C. 394, 75 A. 169 (1910); Sawicki v. Keron, 79 N.J.C. 382, 75 A. 477 (1910). In any event, officeholders are absolutely prohibited from gambling, including playing the Lottery, regardless of whether there is a penalty of forfeiture therefor.

The purpose of Article XVII, Section 8 is to insure that public officers holding an "office of honor, trust or profit" are not compromised in their duties or placed in a conflict of interest by engaging in gambling activities. Gambling has been deemed by our courts to impose tremendous social costs through addiction, crime, and the breakup of families. As the Court in Holliday v. Governor of South Carolina, 78 F.Supp. 918 (W.D.S.C. 1948), aff'd., 335 U.S. 803 (1948) noted, the public policy of South Carolina is to suppress gambling because such activity entails "temptations beyond mere amusement." The Court stressed that gambling "detains business people from their business" and "keeps wage earners from their work." In other words, concluded the Court, gambling and lotteries take a heavy toll upon families, children and society in general. Therefore, the framers of our Constitution wished to make clear that persons holding "offices of honor, trust or profit" should not engage in gambling in any form because to do so would place those sworn to uphold the law in a position of compromise or conflict. If public officers are allowed to gamble or play the Lottery, that must be done by a vote of the people in amending the Constitution.

The critical question thus is the meaning of the phrase "office of honor, trust or profit" as used in the Constitution. It is noteworthy that in the same Article, Article XVII, Section 7, the framers used almost the identical language in prohibiting the holding of two "offices of honor or profit" at the same time. The purpose of this prohibition against dual officeholding is to avoid conflicts or compromises of the duties of public officers by occupying more than one position of honor or profit at the same time.

In defining the term "office of honor or profit" the Court in Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907) found that the duties of the position must involve the exercise of some portion of the sovereign power of the State in order to constitute an office. A holder of a public office, said the Court, is "one who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned and which are continuing and not occasional or intermittent ..." 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes or other authority establish the

The Honorable W. Greg Ryberg

Page 3

January 7, 2002

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 our opinion, these same criteria determine those public officials who are forbidden under the State Constitution from gambling or playing the State Lottery. To hold an office of honor or profit a person does not have to be elected, but may be appointed. The key criterion is whether the person exercises some portion of the sovereign power of the State of South Carolina, great or small. If so, that individual is an officeholder and those is prohibited by the Constitution from playing the State Lottery. The constitutional prohibition would include, among others, the Governor, other constitutional officers, judges, legislators, city and county council members, law enforcement officers, school board members, assistant attorneys general, assistant solicitors, zoning board members, etc. If a person holds an office for dual officeholding purposes, that person is prohibited from gambling or playing the Lottery and if he or she does so, the officer is then subject to forfeiture of his or her office.

Conclusion

The State Lottery is off limits to thousands upon thousands of state and local officials – appointed as well as elected. The State Constitution prohibits any public official who exercises some portion of the sovereign power of the State from gambling or betting on any game of chance. This prohibition includes playing the State Lottery. From the Governor of South Carolina, to legislators and judge, to assistant attorneys general and assistant solicitors, to county and city officials such as tax assessors or law enforcement officers or zoning board members, the State Lottery is off limits. No public official – state, county, municipal or other – may play the State Lottery without being subjected to forfeiture of his or her office.

Sincerely,



Charlie Condon
Attorney General