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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

January 23, 2001

The Honorable Daniel L. Tripp
Member, House of Representatives
P.O. Box 454
Mauldin, South Carolina 29662

Dear Representative Tripp:

By your recent letter to this Office you have requested an opinion on whether your constituent can serve simultaneously as the Commissioner of the Dunklin Fire District and Fire Chief of the District. You have asked whether holding these positions concurrently would violate South Carolina law.

The creation of the Dunklin Fire District upon favorable referendum of the people was authorized by Act No. 1182 of 1968. Section 4 of the act provides for selection of the members of the governing body of the fire district. Section 5 establishes the powers and duties of the governing body: subsection (c) empowers them to "provide and select drivers and other volunteer firemen who shall serve without compensation to man the equipment;" and subsection (d) allows them to "procure and supervise the training of the volunteer fireman selected so that the equipment is utilized in the best interest of the area." These acts are silent as to whether a member of the board may also serve as the chief of the fire department, but other principles of South Carolina law provide the necessary guidance.

A common issue arising when two government positions are in question is South Carolina's dual office holding prohibition. Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for 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). 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).

Rembert C. Dennis

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As stated in the preceding paragraph, the Constitution exempts from dual office holding those persons who are members of a lawfully and regularly organized fire department. Thus, by operation of the Constitution, the position as fire chief would not be considered an office for dual office holding purposes. See Ops. Atty. Gen. June 13, 1996; Jan. 19, 1994 (copies enclosed). Thus, your constituent's service as both fire chief and commissioner of the Dunklin Fire District would not violate the Constitution's prohibition against dual office holding.

The analysis does not there, however. Having a fireman or officer on the governing body of the fire district which employs or selects the volunteers and officers to man the fire fighting equipment would most probably be viewed as creating a situation in which the individual is both master and servant. The master-servant relationship is based on common law rather than statutory law and may be summarized 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 but on rare occasions... . In any event, the applicability of the doctrine does not turn upon the integrity of the office-holder or his capacity to achieve impartiality. ...

67 C.J.S. *Officers* §27. See also Ops. Atty. Gen. Oct. 9, 1995; May 21, 1984; May 15, 1989; March 3, 1978; January 19, 1994; and others.

The Supreme Court, in McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), declared employment of two infirmary management commission members, by the commission, to be illegal. The court 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.

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Should Richardson, as chairman of the commission, appoint the committee to investigate his own management of the infirmary, or check his accounts as treasurer? Should he be present, when his administration of the institution is being considered and discussed? Should he and Butler participate, when their own duties are being prescribed and their compensation fixed? It requires only a moment's reflection to see that the positions are utterly inconsistent, and ought not to be held by the same persons. Propriety, as well as public policy, forbids it.

If it be said that there are three other members of the commission, who would make a quorum, the answer is that the legislature has expressed the intention that the State should have the benefit of the judgment and discretion, individually and collectively, of a commission of five members,--not three,-- in the administration [sic] of this charity. By disqualifying two of their number, the commission has practically reduced its membership to three.

Id., 94 S.C. at 365.

The reasoning applies as well to your constituent's situation. Because the commission has the authority to oversee the personnel manning the fire department and equipment, the fire commissioner would be in a position of authority over himself as the fire chief. Based on the foregoing, I am of the opinion that a master-servant relationship, in contravention of common law and public policy, would be created if an individual were to serve both as a commissioner of the Dunklin Fire District Commission and as an officer or fire-fighter of the district. This opinion is consistent with prior informal opinions of this Office of January 19, 1994 (concerning a fire district commissioner also serving as fire chief) and of October 10, 1996 (concerning an attorney-commissioner representing the commission in court).

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General