



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 24, 2001

The Honorable Glenn F. McConnell
President *Pro Tempore*
The Senate
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator McConnell:

You have asked for an opinion as to "whether a legislator who has served in the South Carolina General Assembly in 2001 may be employed as Executive Director of the South Carolina Lottery, an employment position created by the legislation that enacted the South Carolina Lottery in 2001."

LAW / ANALYSIS

South Carolina Code Ann. Section 2-1-100 provides as follows:

No Senator or Representative shall, during the time for which he was elected, be elected by the General Assembly or appointed by any executive authority to any civil office under the dominion of the State which shall have been created during the time for which such Senator or Representative was elected to serve in the General Assembly. (Emphasis added).

As you note in your letter, the seminal question is whether the position of Executive Director of the Lottery constitutes a "civil office" within the meaning of §2-1-100. If the position of Executive Director is not a "civil office," then the prohibition of the statute, designed to prohibit so-called "feather bedding," or the creation by the Legislature of a position for one of their own members, is inapplicable. In other words, if § 2-1-100 does not apply, the individual may thus serve in the position of Executive Director.

The terms "civil office" and "public office" are typically used interchangeably with one another. However, it has been held that the former refers to all offices except military offices while the phrase "public office" encompasses both civil and military offices. Lanza v. DeMarina, 160

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N.J.Super. 71, 388 A.2d 1294 (1970). Accordingly, we must examine the question of whether the position of Executive Director constitutes an "office" within the meaning of § 2-1-100.

Guidance as to this question may be found in the closely analogous area of whether an individual holds more than one "office" in violation of the dual office holding prohibition contained in Article XVII, Section 1A of the South Carolina Constitution. For this provision to be contravened, a person 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 similar 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). See also, State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997).

The position of Executive Director of the Lottery is referenced in §§ 59-150-80 and 59-150-910 of S-496 of 2001. Section 59-150-80(A) states that the Lottery Board "shall appoint and provide for the compensation of an executive director." That same Section provides that "the executive director must be an employee of the Commission who directs the day-to-day operations and management of the commission and is vested with powers and duties specified by the board and by law." The executive director "serves at the pleasure of the board."

Section 59-150-90 specifies certain duties of the Executive Director: to direct and supervise all administrative and technical activities of the Lottery; to oversee the initiation of and supervise the games; employ and direct personnel; employ by contract and compensate persons and firms; promote the lottery; prepare a budget for the approval of the Board; require bonds in amounts approved by the Board; report monthly to the State Auditor and Board all lottery revenues and expenses for the preceding 13 months; and perform "other duties generally associated with an executive director of a commission of an entrepreneurial nature."

Subsection (B) of § 59-150-90 authorizes the Executive Director to "suspend, revoke or refuse to renew" contracts in accordance with regulations, policies and procedures of the Board. Subsection (C) empowers the Executive Director or his designee to "conduct hearings and administer oaths to persons for the purpose of assuring the security or integrity of lottery operations or to determine the qualifications of or compliance by a lottery vendor and or a lottery retailer."

Nothing in the statute provides for a specific salary of the Executive Director. Neither does the new statute specify a term of office or tenure or provide for a bond or oath of office. Indeed, the statute makes it clear that the Board sets the Executive Director's compensation and the Executive Director serves at the Board's pleasure. No qualifications are established for the Executive Director in the statute.

With respect to the question of whether or not the Executive Director exercises some portion of the sovereign power of the State, it is our opinion that he or she would not. The General

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Assembly clearly intended that the Executive Director serves under the authority and supervision of and subject to the direction of the Lottery Board. Virtually every duty referred to in the statute so states. See, e.g. § 59-150-50 (executive director "recommends" to the Board the budget and the terms of procurements).

This Office has repeatedly concluded over the years that the position of executive director of a board or commission or president of a college or university does not constitute an "office." See, Op. Atty. Gen., November 24, 1997 (President and Chief Executive Officer of Santee Cooper not an office); Op. Atty. Gen., July 19, 1995 (Executive Director of the Donaldson Development Commission is not an office); Op. Atty. Gen., May 15, 1989 (executive director of the Calhoun County Development Board is not an office); Op. Atty. Gen., March 10, 1988 (executive director of the Children's Foster Care Review Board is not an office); Op. Atty. Gen., June 11, 1985 (executive director of the Abbeville County Research, Planning and Development Board is not an office); Op. Atty. Gen., April 29, 1983 (executive director of Richland Medical Center is not an office.) In each of these opinions, we particularly stressed the fact that the executive director served at the pleasure of the governing board or authority. Generally speaking, no qualifications were set forth in law in those executive director positions. And, most importantly, we referenced the general rule set forth in Sanders v. Belue, *supra* which is stated as follows:

[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business is a mere employee.

78 S.C. at 174. In short, in virtually every previous instance where the question has arisen, we have concluded that an executive director of a governing board or commission is an "employee," rather than an "officer."

In a slightly different, but closely analogous context, we concluded in Op. No. 4203 (November 26, 1975) that the President of South Carolina State is not an officer. There, we quoted from the case of Martin v. Smith, 239 Wis. 314, 1 N.W.2d 163. That case held that the position of college president is not an office, and the decision used language which is also pertinent to our analysis here. There, the Court stated:

The President ... being subject in all things to the action of the Board of Regents, it is the Board ... and not the President that exercises some part of the sovereign authority of the State. The President ... is a subordinate of the Board ... in executing and carrying out the policies and laws laid down by it ... He is an employee, not a public officer.

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CONCLUSION

Similarly, the Executive Director of the Lottery is not an officer, civil or otherwise, but is instead an employee of the Lottery Board or Commission. The Executive Director merely carries out and executes the policies laid down by the Board. Most importantly, the General Assembly itself recognized this fact, referring to the Executive Director in § 59-150-80 as an "employee" of the Board. Statutes must be read together and harmonized with each other. It must be presumed that the Legislature was cognizant of § 2-1-100's prohibition upon "officers." Yet, the Legislature, in enacting the Lottery law, clearly thought of the Executive Director to the Lottery Board not as an officer, but as the Board's employee. Clearly, the General Assembly recognized the distinction between "officers" and "employees," using each term separately in § 59-150-40(E). The characterization of the Legislature must be given considerable weight in determining whether § 2-1-100 is applicable.

Accordingly, in our opinion, § 2-1-100's prohibition does not cover the creation of the position of Executive Director of the Lottery. Therefore, the disqualification to hold a civil office placed upon legislators by this statute is simply inapplicable to the position of Executive Director of the Lottery. In sum, the position of Executive Director of the Lottery Board or Commission is that of an "employee" rather than an "officer."

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

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