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May 15, 1989

Mr. David Buyck
Calhoun County Development Board
Courthouse Annex, Room 114
St. Matthews, South Carolina 29135

Dear Mr. Buyck:

By your letter of May 1, 1989, you have asked whether the dual office holding prohibitions of the Constitution of the State of South Carolina would be contravened if one person were to serve simultaneously on Calhoun County Council and as executive director of the Calhoun County Development Board.

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).

This Office has repeatedly determined that a member of a county council would hold an office for dual office holding purposes. See, for example, Ops. Atty. Gen. dated July 9, 1986 (copy enclosed); Op. No. 83-90 dated November 15, 1983; and Op. No. 4176 dated November 7, 1975. We have not opined previously as to the status of executive director of the Calhoun County Development Board, however.

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The Calhoun County Development Board was created originally by Act No. 344, 1955 Acts and Joint Resolutions. By ordinance number 80-6 of Calhoun County Council, effective June 19, 1981, the Board was recreated as permitted under the Home Rule Act. The ordinance provides for the establishment of the Board and specifies its powers and duties. The position of executive director (denominated "secretary" in the ordinance) is established by the ordinance. We are advised that the executive director is selected by the commission governing the Board and that the director serves at the pleasure of the commission. A salary would be paid. No statute or ordinance specifies duties or qualifications for the executive director. There is apparently no requirement that he take an oath. It thus appears that many of the attributes usually found in an office are lacking with respect to the executive director of the Calhoun County Development Board, and that person would most probably be an employee. In that regard, the following from Sanders v. Belue, supra, is appropriate:

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

Id., 78 S.C. at 174. 1/

There are other concerns related to this question which must also be addressed. One is the prohibition expressed in Section 4-9-100 of the South Carolina Code of Laws (1976), which provides in relevant part: "No member of council, including supervisors, shall hold any other office of honor or profit in government ... during his elected term." By an opinion dated July 3, 1980, this Office construed the cited prohibition to mean that a second position must be an office to effectuate the prohibition. In that opinion, the supervisor of the x-ray department of Chester County Hospital was

1/ This conclusion is consistent with prior opinions of this Office dated March 10, 1988 (executive director of Children's Foster Care Review Board, not an office); August 1, 1985 (director, Youth Employment Coordinating Council, not an office); June 11, 1985 (executive director, Abbeville County Research, Planning and Development Board, not an office); December 10, 1984 (director of pretrial intervention, not an office); June 26, 1984 (administrator, Piedmont Multi-County Mental Retardation Board, not an office); April 29, 1983 (executive director, Richland Medical Center, not an office); and July 12, 1979 (executive director, Greenville County Redevelopment Authority, not an office).

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held not to hold an office, so that membership on Chester County Council was permissible for that individual. That opinion also pointed out the applicability of the State Ethics Act, Section 8-13-10 et seq. of the Code, in such a situation. Section 4-9-100 thus would not be applicable to the executive director of the Calhoun County Development Board. However, your attention is directed to the provisions of the State Ethics Act; we are aware that you have communicated with the State Ethics Commission for guidance.

The final concern is that the employment of a county council member as executive director of a county board may be viewed as the individual being both master and servant, particularly if the executive director is viewed as a county employee, on the county's payroll, subject to the county's personnel policies and practices. The master-servant relationship is based on common law rather than statutory law, 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 on but rare occasions In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality. ...

67 C.J.S. Officers § 27. See also Ops. Atty. Gen. dated May 21, 1984 and March 3, 1978. Applying these common law principles to your question, it may well be that a master-servant situation, and thus a conflict of interest, may exist. For this reason, it is suggested that the relationship of the executive director of the Calhoun County Development Board to Calhoun County, with respect

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to personnel policies and practices, and to Calhoun County Council be further explored.

Based on the foregoing, it is the opinion of this Office that:

1. an individual serving concurrently on Calhoun County Council and as executive director of the Calhoun County Development Board would not hold dual offices;

2. the provisions of Section 4-9-100 of the Code would not be violated in this situation;

3. the provisions of the State Ethics Act must be observed by the individual; and

4. further inquiry should be made to be certain that common law master-servant principles are not violated.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
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