



HENRY McMASTER
ATTORNEY GENERAL

October 14, 2010

Marvin Herndon, Chairman
Clearwater Water & Sewer District
365 Church Street
Clearwater, South Carolina 29822

Dear Mr. Herndon:

We received your letter requesting an opinion of this Office concerning the Clearwater Water & Sewer District's secretary's ability to run for one of the three seats for Commissioner of the Clearwater Water & Sewer District in the upcoming election in November. You asked the following two questions:

1. Can she run for this office while she is still employed by the water district?
2. If she is elected, can she remain employed as the secretary for the water district of which she is a commissioner?

As a way of background, you explained that the secretary of the Clearwater Water & Sewer District is a paid position that answers to the commissioners.

This opinion will address prior opinions of this Office and relevant statutes and caselaw to determine if there is a conflict of interest.

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution provides, in pertinent part: "No 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." While the question is a close one, this Office has opined that one who would serve as a member of a County Water and Sewer Authority would probably not be considered an office holder for dual office holding purposes. Op. S.C. Atty. Gen., July 23, 1996. In an opinion dated March 3, 1978, we concluded that a mere employee is not an office holder for dual office holding purposes. Thus, in our opinion, there is no dual office holding violation in this instance.

Mr. Herndon
Page 2
October 14, 2010

Although the situation that you describe does not present a problem with regard to dual office holding, we must also consider whether such relationship creates a conflict of interest arising under the common law master-servant relationship. In past opinions, we summarized this relationship 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.

Ops. S.C. Atty. Gen., April 4, 2006; March 26, 1999 (quoting 67 C.J.S. Officers § 27).

In McMahan v. Jones, the South Carolina Supreme Court explained that the employment of two commissioners by the commission was illegal. The court held as follows:

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. 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.

McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1913).

This Office has considered various situations involving potential violations of common law master-servant principles. In those opinions, we determined whether or not an actual conflict exists

Mr. Herndon
Page 3
October 14, 2010

is a question of fact, which may not be determined in an opinion of this Office. Op. S.C. Atty. Gen., February 19, 2003 (“the ultimate conclusion of whether an actual conflict exist is a factual matter. As we have previously opined, ‘[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able to adjudicate or investigate factual questions.’ See Ops. Atty. Gen., October 9, 1985 & September 3, 1999.”). See also, Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Thus, this opinion is limited to a consideration of the applicable law which a court may consider in making such a determination.

In identifying situations in which a potential conflict may exist, we primarily consider the level of supervision and control the elected position may have over the position in which he or she is currently employed. Op. S.C. Atty. Gen., October 17, 2000. For example, we considered whether a youth counselor, employed by the Department of Social Services (DSS), may run for a position on the Board of Education of Laurens County School District 55. Op. S.C. Atty. Gen., March 26, 1999. In determining a potential conflict existed, we considered the fact that the counselor, although employed by DSS, was on site at a high school in the school district, the high school's principal partially supervised the counselor, and the counselor received ten percent of his pay from the school district. Id.

In that opinion, dated May 21, 2004, we addressed a similar issue of whether a town maintenance worker may serve on the town council. This Office opined that dual service by the employee would violate the common law master-servant principles. In making this determination, we stated:

There are a wide range of . . . matters related to town employees dealt with by the town council on a regular basis that would inevitably result in the type of conflict described in McMahan v. Jones, supra, where “self-interest and integrity” frequently compete. Examples which immediately come to mind are the setting of policies and duties for town employees, as well as considering contracts for the municipality that may be either beneficial or detrimental to the council member's status as a town employee.

Op. S.C. Atty. Gen., May 21, 2004.

In an opinion of this Office dated April 8, 1996, we discussed whether a commissioner of a fire district may also be employed by the fire district as secretary or treasurer. We reached the following conclusion:

Based on the foregoing, I am of the opinion that if an employee (secretary/treasurer) of a fire district were to serve on the governing body of the fire district, the common law principle concerning the master-servant relationship would be contravened, as the governing body would have the right to hire and fire the incumbent of that position and fix the compensation of that position. In so opining, I would point out that **the master-servant relationship would not have prevented the individual from offering for election to the governing**

Mr. Herndon
Page 4
October 14, 2010

body; the problem did not arise until the employee was elected to the governing body and began to so serve.

Op. S.C. Atty. Gen., April 8, 1996 (emphasis added).

Conclusion

Consistent with prior opinions of this Office, it is the opinion of this Office that the secretary may run for the position of commissioner. Op. S.C. Atty. Gen., April 8, 1996. However, if the secretary wins the election, it would be a conflict of interest to serve in both capacities as the master-servant relationship would be contravened.

In the event you believe there may be ethics questions to be addressed, please contact the State Ethics Commission. This Office respectfully defers questions regarding ethics matters to their office.

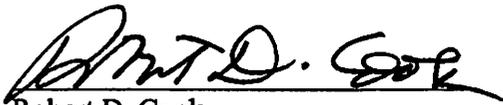
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General