



ALAN WILSON
ATTORNEY GENERAL

February 21, 2017

Henrietta D. Tindal
327 S. Heyward Street
Bishopville, SC 29010-1315

Dear Ms. Tindal:

This Office received your request for an opinion regarding whether service as both a member of the Bishopville City Council and as a board member of the Lee County Archives Commission would constitute dual office holding.

LAW/ANALYSIS:

Dual office holding is defined by the South Carolina Constitution, which provides that “[n]o 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. . . The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.” S.C. Const. art. XVII § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes 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, is a public officer.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). “Other relevant considerations [as to whether a position is a public office] include: ‘whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a

representative of the sovereign; among others.” See Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

A city council member is a public officer. “This Office has advised on numerous occasions that a member of a town or city council holds an office for purposes of the constitutional prohibition against dual office holding.” See Op. S.C. Atty. Gen., September 9, 2013 (2013 WL 5291571) (citing Ops. S.C. Atty Gen., March 20, 2012 (2012 WL 1036294); Jan. 14, 2011 (2011 WL 380163)).

The issue is whether a board member of the Lee County Archives Commission (“Commission”) is an officer. In a prior opinion, we reviewed Lee County Ordinance No. 10-15, which forms the Commission, and summarized it as follows:

it is our understanding that the Lee County Archives Commission was established by Ordinance of the Lee County Council on January 26, 2016. See Lee County, S.C. Ordinance 10-15 (Jan. 26, 2016). Pursuant to the “By Laws” passed as a part of the Ordinance, the Commission consists of a Board of Commissioners to be made of five to seven members, with as many as two additional non-voting advisory members. Id. at § II. Such members are appointed by the Lee County Council on an at large basis to serve for a term of four years. Id. However, two members of the initial board will serve a two year term. Id. The members of the Commission elect officers from their membership consisting of a chairman; vice chairman; and a secretary and treasurer, whose roles can be combined. Id. at § III. The general duties of each of these roles are prescribed within the Ordinance. Id.

Op. S.C. Atty. Gen., June 1, 2016 (2016 WL 3355911).¹

According to the ordinance, the Commission “was needed in Lee County to help preserve the history of the County.” See Lee County, S.C. Ordinance 10-15, supra. The ordinance provides for the location of the Commission. The Commission “shall be headquartered in the Woodward Memorial Library of Archives and Research.” Id. at § I. It directs meetings of the Commission and the attendance of its members. “There shall be regular intervals for Commission meetings; not less than once each quarter. An attendance roster shall be kept for meetings by Commission members. Commission members are expected to attend meetings on a regular basis. Absence of any member from three consecutive meetings without a valid reason, such as illness, shall be considered a voluntary resignation by the member. . .All meetings must have a majority of the Commission present to conduct official business.” Id. at § II, IV.

The ordinance provides for the finances of the Commission. The Commission “shall be financially responsible to the Lee County Council. . .The Lee County Archives Commission shall present requests for support to the Lee County Council in January of each year. All requests should be forwarded to the Lee County Administrator so that necessary recommendations can be prepared for County Council review.” Id. at § I, IV. It directs the Commission to keep records. The Commission “shall keep minutes

¹ In the 2016 opinion, our Office was asked to determine whether a non-voting advisory member of the Commission was a public officer for dual office holding purposes. We concluded that a non-voting advisory member was not an officer.

of its meetings and other documents necessary to detail its activities as a record of its operation. This information shall be available to the county upon request for review.” Id. at § I.²

The ordinance grants the Commission the ability to take certain action. The Commission “has the authority to appoint standing committees, including non-commission membership, to address concerns the Commission determines are appropriate for review in order to develop recommendations to the Commission for implementation.” Id. at § IV. Additionally, the Commission “shall develop a Mission Statement to define its overall purpose as an organization.” Id. at § IV.

The ordinance does not address the qualifications for appointment to the Commission or whether a board member receives a salary or is required to give an oath or provide a bond.

Determining whether a Commission board member is a public officer for dual office holding purposes is a novel question for this Office. Some of the characteristics of an office are present in that the ordinance provides for the creation of the Commission as well as the appointment and terms of its members. Although the ordinance does not address the qualifications for appointment to the Commission, it does address termination of an appointment.³

However, an officer must exercise some part of the sovereign power of the State. At first glance, the majority of the duties prescribed by the ordinance do not appear to involve an exercise of the sovereign power of the State. Lee County Council (“County Council”) dictates the location of the Commission and determines how it conducts official business at meetings. The Commission is financially responsible to the County Council and must request support. County Council requires the Commission to keep records and has the ability to review those records. All of these factors suggest that the Commission is controlled by the County Council and board members do not have the ability to make their own decisions.⁴

But county councils are granted certain powers which can not be delegated. Section 4-9-30 of the South Carolina Code provides for a county council’s powers:

each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:

. . .

² The documents referred to by the ordinance appear to be prepared by the Secretary of the board, whose duties are to “[e]nsure accurate record keeping of Commission activities” and to “[k]eep minutes of each Commission meeting,” and by the Treasurer of the board, whose duties are to “[e]nsure accurate financial records regarding funding received and expended by the Lee County Archives Commission.” Id. at § III.

³ It appears that County Council dictated the number of meetings of the Commission and the attendance at meetings by the board members in order to provide a basis for termination of an appointment.

⁴ We determined in a prior opinion that whether an entity is performing its duties “independently and without control of a superior officer” is pertinent in a dual office analysis. See Op. S.C. Atty. Gen., August 19, 2014 (2014 WL 4382452).

(5)(a) to . . .make appropriations for functions and operations of the county. . .

(6) to establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title. .

...

(8) to provide for an accounting and reporting system whereby funds are received, safely kept, allocated and disbursed. . . .

S.C. Code Ann. § 4-9-30 (1976 Code, as amended).

We have previously opined that whether a county council can “delegate its authority depends on the nature of the duty to be performed.” See Op. S.C. Att’y Gen., March 10, 2004 (2004 WL 736933) (citing 20 C.J.S., Counties, § 89). We explained:

[p]owers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant.

Id.

Section 4-9-30 expressly provides that the powers granted within the statute shall be exercised by the county councils subject to the State constitution and general laws. Making appropriations for county entities, providing for an accounting and reporting system for the disbursement of funds, and establishing and regulating boards and commissions as well as setting forth their functions are clearly duties which require discretion and judgment. County Council can not delegate these duties to the Commission. Therefore, it can not be determined on this basis whether or not Commission members are exercising the sovereign power of the State.

The ordinance provides for more duties of the Commission. It states that the Commission was needed to help preserve the history of the county. To accomplish this function, the Commission was required to develop a mission statement to define its overall purpose as an organization. Our understanding is that the Commission does not have a mission statement.

Additionally, the Commission is given the authority to implement the recommendations of committees it has appointed. The ordinance does not grant the Commission any powers to implement these recommendations. It also does not appear to grant the Commission any other type of powers.

As stated above, the powers and duties of a public office must be defined by the legislature or by legislative authority. See Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, *supra*. In other words, they must be set forth in the language of a statute or ordinance. In this case, the Lee County ordinance does not appear to grant the Commission any type of powers and the duties set forth do not indicate that the Commission is exercising some part of the sovereign power of the State. Based upon the language of the ordinance, our opinion is that a Commission board member is not a public officer for dual office holding purposes. We therefore do not believe that it would violate the dual office holding provision of the State Constitution for you to serve on both the Bishopville City Council and on the Commission.

Whether service as both a member of the Bishopville City Council and as a board member of the Commission would constitute a conflict of interest must also be considered. On prior occasions, this Office has described a conflict of interest arising from a master-servant 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. Op. S.C. Atty. Gen., May 21, 2004 (quoting Op. S.C. Atty. Gen., January 19, 1994).

Moreover, our Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1022 (1913) stated: '[n]o 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.' Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles. See Op. S.C. Atty. Gen., July 19, 2006 (2006 WL 2382449).

Op. S.C. Atty. Gen., February 3, 2014 (2014 WL 1398598).

Our understanding is that Lee County provides certain services to the City of Bishopville, such as fire service and emergency medical service⁵. However, we do not have enough information to determine if a conflict of interest exists.

⁵ This information was provided to us by the Lee County Attorney.

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Furthermore, the State Ethics Commission was given authority by the Legislature to interpret and issue opinions pertaining to the provisions of the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended). You may wish to contact the Ethics Commission regarding any ethical issues holding the two positions may pose.

CONCLUSION:

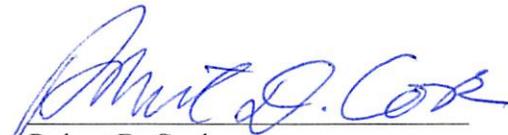
In conclusion, our Office does not believe that it would violate the dual office holding provision of the State Constitution for you to serve as both a member of the Bishopville City Council and as a board member on the Lee County Archives Commission. We do not have enough information to determine if a conflict of interest exists and you may wish to contact the Ethics Commission regarding any ethical issues holding the two positions may pose. Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General