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Dear Mr. Mathis:

You have requested an opinion from this Office regarding whether an individual can simultaneously serve as a volunteer fireman of the Corinth Volunteer Fire Department, Inc., a nonprofit corporation, and as a fire commissioner of the Corinth Fire District, a special tax district.

Specifically, you ask the following questions:

1. Whether a volunteer fireman of the Corinth Volunteer Fire Department, Inc. may simultaneously be appointed and serve as a fire commissioner for the Corinth Fire District by the Cherokee County Council?
2. If so, would such an appointment violate any dual office rules under the Constitution of this State or any other laws of this State?
3. If so, would such an appointment violate the master/servant relationship?
4. If a volunteer fireman can be appointed to the Corinth Fire District by the Cherokee County Council without violating the dual office rules or the master/servant relationship, may that same fireman serve as an officer within the Corinth Fire District, Inc., without violating those same rules?

You have provided us with Cherokee County Ordinances regarding the Corinth Fire District and its Board of Fire Commissioners.

**LAW/ANALYSIS:**

We will begin with a general discussion of dual office holding. Dual office holding is prohibited by the South Carolina Constitution, which provides:

[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 § 1 A.

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 for an office are:

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.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478; 266 S.E.2d 61, 62 (1980)).

The Corinth Volunteer Fire Department, Inc. (“Corporation”) is a nonprofit corporation that was incorporated on February 14, 1978.<sup>1</sup> You have been informed by your client, Cherokee County, that Corporation recruits its own volunteer firemen, has its own board, and provides fire service within the Corinth Fire District.

It is our opinion that a volunteer fireman working with Corporation does not hold an office for dual office holding purposes. We have previously concluded that a nonprofit corporation was not a state agency; the position of member of its board of directors was not created by a state law; and that private entities did not, except in special circumstances, invoke the sovereign power of the State or any portion thereof, since

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<sup>1</sup> See the South Carolina Secretary of State website at <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/912c6743-a52e-45ef-a31c-29b3a37d0194>.

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their powers and duties were non-governmental in nature.<sup>2</sup> See Op. S.C. Atty. Gen., 2008 WL 608964 (Feb. 4, 2008); 1996 WL 599391 (September 6, 1996); 2005 WL 774153 (Mar. 24, 2005); and 2003 WL 21040140 (Feb. 14, 2003). We have additionally “noted that the fact that a nonprofit body receives public funds ‘does not make the organization a public body or state agency, or the officers of the body public officers . . . .’” Op. S.C. Atty. Gen., 2003 WL 21040140 (Feb. 14, 2003) (quoting Op. S.C. Atty. Gen., November 10, 1983, Op. No. 83-87).

Furthermore, the South Carolina Constitution provides an exemption for a “member of a lawfully and regularly organized fire department.”<sup>3</sup> We have opined that the exemption applies to firemen in their capacity as firefighters. Ops. S.C. Atty. Gen., 2005 WL 1983348 (July 25, 2005); 2012 WL 3142775 (July 19, 2012). Because a nonprofit corporation is not a public body and there is a constitutional exemption for firemen, a volunteer fireman of the Corporation is not a public officer. Accordingly, we believe that service as both a volunteer fireman of Corporation and as a fire commissioner of the Corinth Fire District would not violate the constitutional prohibition against dual office holding.

Your next question is whether service as a volunteer fireman of Corporation and as a fire commissioner of the Corinth Fire District (“Tax District”) would violate the master-servant relationship. This Office has described a conflict of interest arising from common law master-servant principles 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.’

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<sup>2</sup> We have previously determined that “while rare, members of a nonprofit corporation can be deemed to be officers in the constitutional sense if the entity is found to be an alter ego of the state possessing some of its sovereign powers,” such as the power to tax, the power of eminent domain, and the police power. Op. S.C. Atty. Gen., 2014 WL 4382452, at \*5 (Aug. 19, 2014). In this instance, we have not been provided with any information that Corporation is exercising the sovereign power of the State.

<sup>3</sup> S.C. Const, art. XVII § 1 A, supra.

Thus, we recognize if a master-servant conflict exists, a public official is prohibited from serving in both roles.

Op. S.C. Atty. Gen., 2006 WL 2382449 (July 19, 2006). We have further explained that:

In identifying situations in which a potential conflict may exist, we primarily consider the level of supervision and control the elected or appointed position may have over the position in which he or she is currently employed.

Op. S.C. Atty. Gen., 2006 WL 1207271, at \*2 (Apr. 4, 2006) (citing Op. S.C. Atty. Gen., October 17, 2000).

This Office has previously addressed whether an individual who served as a fire department commissioner could serve as a volunteer firefighter with the same entity. Op. S.C. Atty. Gen., 2007 WL 1302776 (Apr. 5, 2007). We determined that simultaneous service in both positions created a conflict of interest in violation of common law master-servant principles. Id. at \*2. Our conclusion was based on the following analysis:

In several prior opinions, we considered whether a master-servant conflict was created when a fire department commissioner also serves as a firefighter in the same department. Ops. S.C. Atty. Gen., February 28, 2001; January 23, 2001; October 9, 1995; April 20, 1994; January 19, 1994. In these opinions, we considered the fact that the commissioners act in a supervisory capacity over the firefighters, have authority to appoint and remove the firefighters, supervise personnel matters, and have authority over the equipment used by the firefighters. Id. Based on these considerations, we concluded a master-servant relationship exists between the commissioners and the firefighters. Id. Thus, simultaneous service in both positions creates a conflict of interest in violation of common law master-servant principles. Presuming the fire department commissioners to whom you refer in your letter act in a supervisory capacity over the firefighters, in keeping with our prior opinions, we believe a master-servant conflict would arise prohibiting such individuals from serving in both capacities.

Id. at \*2.<sup>4</sup>

We stated in a prior opinion that “[t]raditionally, a master-servant conflict arises when an individual serves as an employee for the same body to which he or she services as an officer ... However, we also recognize instances in which master-servant conflicts extend beyond these situations.” Op. S.C. Atty. Gen., 2007 WL 419408 at \*2 (Jan. 19, 2007). This Office has concluded that a master-servant conflict of interest exists where one position exercises indirect control over another position. In Op. S.C. Atty. Gen., 2007 WL 1934805 (June 14, 2007), we determined that a master-servant conflict of interest would arise if

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<sup>4</sup> We believe this answers your question number 4.

an individual served as both a member of Glassy Mountain Fire Service Area's Commission Board and as one of its volunteer firefighters. This situation differed from the norm because the Fire Chief had direct authority over the firefighters. The Fire Chief, and not the Board, hired, fired, and disciplined the firefighters. He also created personnel policies and prepared the budget, which included the firefighters' stipends. Id. at \*2. However, the Fire Chief reported directly to the Board and the Board approved the personnel policies and the budget. Id. at \*2. The Board also had the authority to overturn the Fire Chief's disciplinary decisions. Id. at \*2.

In a March 26, 1999 opinion, we opined that a court would likely find that an individual's service as a youth counselor of the Laurens County Department of Social Services and as a member of the Board of Education of Laurens County School District 55 would violate common law master-servant principles. Op. S.C. Atty. Gen., 1999 WL 397940 (March 26, 1999). Although the Department of Social Services maintained supervision over the youth counselor and the majority of his salary was paid by a federal grant, he was employed to work at a high school located within the school district, was partially supervised by the high school principal, his salary was partially paid by the school district, and youth counselors worked at the pleasure of the school district. Id.

We have determined that service as the Executive Director of the Sumter County Commission on Alcohol and Drug Abuse and as a member of Sumter County Council did not appear to be a direct master-servant conflict of interest but it could be an indirect conflict. Op. S.C. Atty. Gen., 2004 WL 1297822 (June 7, 2004). The Executive Director was not a county employee, was appointed and directly supervised by the Commission, and the Commission received its funding from federal and state sources. Id. However, an indirect conflict of interest could exist because the members of the Board of Commissioners were appointed by the Sumter County Council and this could "evince a degree of indirect authority which county council has over the executive director for the county commission on drug and alcohol abuse." Id. at \*2. We said that "one should be mindful of the indirect correlation between County Council and the Executive Director in this instance." Id. at \*2.

We have also considered funding to be a factor when determining if one position exercises control over another position. In Op. S.C. Atty. Gen., 2006 WL 2382449 (July 19, 2006), we opined that a court would most likely find that service as a member of the Fairfield County Council and as the Director of the Fairfield County Recreation District violated common law master-servant principles. Id. at \*3. The County Council had "no direct supervisory authority" over the Director. The Director served at the pleasure of the Recreation District's governing body, who had the authority to hire, fire, and set the compensation of the Director. Id. at \*3. However, County Council had "significant, although indirect, supervision and control over the District and its Director." Id. at \*3. County Council was the major source of funding of the Recreation District and it supervised the finances. Id. at \*3. Additionally, the members of the governing body of the Recreation District were appointed by County Council, which "may evince a degree of indirect authority held by County Council over the Director of the District." Id. at \*3.

In a January 19, 2007 opinion, we stated that it was a "very close call with regard to whether a master-servant conflict would exist" if the Executive Director of the Bennettsville Downtown Development Association, a nonprofit corporation, served as Bennettsville's Mayor or on its City Council. Op. S.C. Atty. Gen., 2007 WL 419408 (Jan. 19, 2007). We opined that "we are inclined to find that a master-servant conflict would not arise should you serve as Mayor or on City Council" but we cautioned that "this determination is not free from doubt." Id. at \*3. We determined that the City of Bennettsville's "lack of control and authority over the Executive Director's position" was shown by several factors. Id. at \*3. The members of the nonprofit corporation's board were elected by the board itself, the board

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selected the Executive Director and had complete authority over the position, and the Executive Director was not considered an employee of the City and was not included on the City's payroll. Id. at \*3.

However, there were factors that indicated that the City of Bennettsville had some control over the funding of the Executive Director's position. Id. at \*3. The nonprofit corporation received the majority of its funding from the City. Id. at \*3. Although it constituted only a portion of the Executive Director's salary, the City's budget included funds specifically designated for the Executive Director. Id. at \*3.

We discussed how the circumstances of this case differed from our July 19, 2006 opinion in which we opined that simultaneous service as a member of the Fairfield County Council and as the Director of the Fairfield County Recreation District violated common law master-servant principles.<sup>5</sup> Id. at \*3. In this instance, the City of Bennettsville did not supervise the finances of the nonprofit corporation and the board members were appointed by the board itself. Id. at \*3. Other than appropriations to the nonprofit corporation, there were no other indicators of the City exercising control over the nonprofit or its Executive Director. Id. at \*3.

In the case at hand, your letter does not describe in detail the nature of the relationship, contractual or otherwise, between the Corporation, a private corporation, and Tax District, a governmental entity.<sup>6</sup> Generally, a volunteer firefighter for a nonprofit corporation would be under the supervision and control of the fire chief and the nonprofit board and therefore would not be under the direct supervision and control of a special tax district. Accordingly, the scenario described in your letter does not present a master-servant violation per-se. However, we caution that if additional facts not discussed in your letter tended to show that the Tax District's Board of Fire Commissioners had some degree of supervision or control over the Corporation's volunteer firemen, even indirectly, a court could very well find that a master-servant conflict of interest exists. Supervision and control could include the Tax District's Board having the authority to hire, fire, discipline, or set the compensation of the Corporation's volunteer firemen. It could also include, but not be limited to, the Tax District's Board creating personnel policies for Corporation, providing funding to Corporation, supervising the finances of Corporation, or having authority over the fire equipment used by Corporation's volunteer firemen. In the absence of additional facts, we can not opine definitively on the question of a master-servant violation. However, we hope that our discussion of our prior opinions will guide you in reviewing the particular relationship.

We also suggest that you contact the State Ethics Commission to confirm that there are not any ethical conflicts of interest. Our Office defers to the Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13- 320(11) (1976 Code, as amended).

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<sup>5</sup> Op. S.C. Atty. Gen., 2006 WL 2382449, supra.

<sup>6</sup> See Op. S.C. Atty. Gen., 2007 WL 2459748 (July 17, 2007) ("As indicated in numerous prior opinions, this office does not have the jurisdiction of a court to investigate and determine facts.").

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**CONCLUSION:**

It is our opinion that service as both a volunteer fireman of Corinth Volunteer Fire Department, Inc. ("Corporation") and as a fire commissioner of the Corinth Fire District ("Tax District") is not dual office holding. A volunteer fireman working for Corporation is not a public officer because Corporation is not a public body and there is a constitutional exemption for firemen. Accordingly, an individual could hold both positions without violating the constitutional prohibition against dual office holding.

In the case at hand, we are unable to determine if a master-servant conflict of interest would arise if an individual serves on the Tax District's Board of Fire Commissioners and as a volunteer fireman of Corporation. Generally, the scenario described in your letter does not present a master-servant violation per-se. However, we caution that if additional facts not discussed in your letter tended to show that the Tax District's Board of Fire Commissioners has some degree of supervision or control over the Corporation's volunteer firemen, either directly or even indirectly, a court could very well find that a master-servant conflict of interest exists.

We also suggest that the State Ethics Commission be contacted to confirm that there are not any ethical conflicts of interest. Our Office defers to the Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13- 320(11) (1976 Code, as amended).

Sincerely,



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REVIEWED AND APPROVED BY:



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