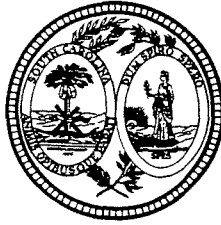


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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 3, 2003

Mr. Wendall P. Gibson, Jr.
Barnwell County Treasurer
57 Wall Street, Room 123
Barnwell, South Carolina 29812

Dear Mr. Gibson:

You have requested an advisory opinion from this Office concerning dual office holding. You have indicated that Mr. Michael Raley currently serves as the Delinquent Tax Collector for Barnwell County. You further indicate that Mr. Raley has filed to run in a special election for a position on the Barnwell County District 45 School Board. Accordingly, you ask whether simultaneously holding the positions of Delinquent Tax Collector for Barnwell County and board member of the Barnwell County District 45 School Board would constitute dual office holding.

Law/Analysis

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 notary public. For this provision to be contravened, a person concurrently must hold two 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 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 advised on numerous occasions that a member of a county school board of trustees holds an office for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated April 18, 2003; September 20, 1999; September 7, 1993; November 1, 1991; May 4, 1982. Therefore, the question turns to whether the position of Delinquent Tax Collector for Barnwell County would likewise be considered an office.

This Office has also consistently opined that a county tax collector holds an office for dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated July 13, 1988 (copy enclosed); March 10, 1980 (copy enclosed); April 30, 1979. This opinion remains unchanged today for several reasons. First, we advised in an April 9, 1997 opinion (copy

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enclosed) that code enforcement officers who work under the authority of a county tax collector clearly exercise a portion of the state's sovereign power, and thus must be considered office holders for dual office holding purposes. It would be a strange result indeed for a group of office holders to act under the authority and direction of an individual who is deemed not to be an office holders. Second, the duties of a county delinquent tax collector are delineated in Title 12 of the Code of Laws of South Carolina, 1976. This Office has held on numerous occasions that an position that is statutorily proscribed by the General Assembly is an office for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated April 21, 1998; January 7, 1991; July 13, 1981; March 6, 1980; August 28, 1974. Lastly, the duties of the Barnwell County Delinquent Tax Collector, as defined by information that you have provided along with your request, include both prosecutorial and law enforcement related powers. The Barnwell County Delinquent Tax Collector has the authority to pursue the prosecution of persons involved in fraudulent tax evasion, to seize property that is subject to county tax liens, and arrange for the sale of such properties at a public auction. We believe that such duties clearly involve an exercise of a portion of the State's sovereign power.

Based on the forgoing authorities, it is the opinion of this Office that as the Delinquent Tax Collector for Barnwell County, Mr. Raley holds an office for dual office holding purposes. Accordingly, we advise that if Mr. Raley were to assume a position on the Barnwell County District 45 School Board while simultaneously serving in his current capacity, he would be in violation of the constitutional prohibition on dual office holding.

When a dual office holding situation occurs, the law operates automatically to "cure" the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dover v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Stob. 92 (S.C. 1848).

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

Enclosures