



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

December 15, 2004

The Honorable Harvey S. Peeler, Jr.  
Senator, District No. 14  
P.O. Box 142  
Columbia, South Carolina 29202

Dear Senator Peeler:

You have requested an advisory opinion from this Office regarding dual office holding. By way of background, you have inquired whether holding a position on a county election commission simultaneously with a position on the board of directors for the Wil Lou Gray Opportunity School would be considered dual office holding under the State Constitution. We conclude that it would.

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. 762 (1907).

This Office has previously advised on numerous occasions that one who would serve on a local election commission or voter registration board is considered to be an office holder for dual office holding purposes. See, Ops. S.C. Atty. Gen. dated February 23 1995 (City of Bishopville Election Commission); September 12, 1990 (Florence County Election Commission); and July 24, 1980 (City of Greenville Election Commission) as representative of those opinions concluding that county election commission members would be office holders; and see Ops. Atty. Gen., May 6, 1992; June 19, 1987; and July 11, 1984 as representative of those opinions concluding that one who would serve on a voter registration board would be an office holder. See also, Op. S.C. Atty. Gen., March 23, 1995, concluding that members of the Union County Board of Election and Registration Board hold an office for dual office holding purposes. Therefore, based upon the reasoning and conclusions of these earlier opinions, we advise that a member of a county's election commission would hold an office for dual office holding purposes.

Turning to the question of whether a member of the board for the Wil Lou Gray Opportunity School would be considered an office holder for dual office holding purposes, we note that in order to be an office holder, one must exercise some portion of the sovereign power of the State. For example, the court in Sanders v. Belue, supra, acknowledged that there is a generally accepted distinction between an official who exercises the sovereign power of the State, and someone who is simply an employee and thus does not hold an office. Furthermore, this Office, on occasion, has issued opinions concerning certain positions that are advisory in nature and do not constitute an office for dual office holding purposes. See, Op. S.C. Atty. Gen., March 19, 2003, concluding that members of the Hampton County Economic Development Board, and other similar county development entities do not hold an office for purposes of dual office holding.

The threshold issue is a determination of whether a member of the board for the Wil Lou Gray Opportunity School exercises some portion of the sovereign power of the State. Sanders v. Belue. We are of the opinion that a member of the board for the Wil Lou Gray Opportunity School is an office holder for purposes of dual offices pursuant to the relevant factors established in State v. Crenshaw. Wil Lou Gray was established pursuant to S.C. Code Ann. § 59-51-10. The Opportunity School is under the management and control of a board of fourteen trustees, twelve of whom must be elected by the General Assembly. The trustees so elected must be citizens of the State who are interested in the aims and ambitions of the school. Members of the board who are elected by the General Assembly shall serve for terms of four years and until their successors are elected and qualify. S.C. Code Ann. § 59-51-30. S.C. Code Ann. § 59-51-40 provides that the Opportunity School "shall securely invest all funds and keep all property which may come into its possession. It may sue and be sued in its name and may do all things necessary to carry out the provisions of this chapter." Lastly, S.C. Code Ann. § 1-5-40 provides that the office of the Secretary of State is designated with the responsibility of monitoring the board of directors for the Opportunity School. Therefore, based upon the reasoning set forth in State v. Crenshaw as well as our analysis of the statute governing the board of the directors for the Wil Lou Gray Opportunity School, we are of the opinion that a member on the board of the Wil Lou Gray Opportunity School would hold an office for purposes of dual office holding.

### Conclusion

We therefore advise that with respect to both a position on a county election commission and a position on the board of the Wil Lou Gray Opportunity School, a member thereof would hold an office for dual office holding purposes. Accordingly, in our opinion, serving simultaneously on a county election commission and the board for the Wil Lou Gray Opportunity School would constitute 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

The Honorable Harvey S. Peeler, Jr.

Page 3

December 15, 2004

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); Dove 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

RDC/an