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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 27, 2004

The Honorable George H. Bailey
Member, House of Representatives
519-C Blatt Building
Columbia, South Carolina 29211

The Honorable Robert W. Harrell, Jr.
Member, House of Representatives
519-C Blatt Building
Columbia, South Carolina 29211

The Honorable Annette D. Young
Member, House of Representatives
519-C Blatt Building
Columbia, South Carolina 29211

The Honorable Converse A. Chellis, III
Member, House of Representatives
519-C Blatt Building
Columbia, South Carolina 29211

Dear Representatives:

This is in response to two separate requests for an opinion regarding the appointment of members to the Dorchester County Vocational Education Board of Trustees, in the context of the constitutional provisions relating to dual office holding. The first request was from Representative Bailey dated April 20, 2004. His question was whether a member of the Dorchester County District Four School Board may be appointed by the board to serve on the Dorchester County Vocational Education Board without violating the constitutional provisions on dual office holding. The second request of May 20, 2004 was made by the Dorchester County House Delegation, including Representative Bailey. In the second letter we are requested to provide an opinion as to whether the present requirement in which three of the seven members of the Dorchester County Vocational Education Board are elected from the membership of Dorchester County school district boards, in Districts Two and Four, constitutes dual office holding. You have further indicated that you believe it to be improper for members of both boards to vote on the budgets for both the vocational school and their respective school districts. The Delegation has recently introduced H.5246 to remedy the perceived constitutional problems with the current appointment process. You have asked this Office to review the current process and applicability of H.5246 in light of the relevant constitutional provisions.

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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).

We have advised on a number of occasions that a member of a school board of trustees would be considered an officer for dual office holding purposes. See, Ops. S.C. Atty. Gen. dated April 20, 2004; October 3, 2003; April 18, 2003; June 21, 2001 and August 29, 2000. We have likewise concluded that a member of the Dorchester County Vocational Education Board of Trustees is an office holder for dual office holding purposes, and thus could not concurrently serve as a member of a school board. Ops. S.C. Atty. Gen. dated July 8, 1983. On at least three occasions, we have opined that membership on a the multi-district vocational school board in Barnwell County would constitute an office. Ops. S.C. Atty. Gen. dated September 25, 1989; December 11, 1984; October 25, 1984. Therefore, a person who served as both a county school board member and a vocational school board member would, as a general matter, hold two offices for dual office holding purposes.

However, as we noted in the aforementioned December 11, 1984 opinion, such dual service must be further analyzed in light of the applicable enabling statute to determine whether the service on the multi-district vocational school board is one of ex officio. If membership on a board or committee is ex officio, or "by virtue" of holding a separate office, the dual office holding provision of the state constitution is not violated. See Ops. S.C. Atty. Gen. dated January 7, 2004; March 12, 2003; July 18, 1989 (giving a detailed opinion on the legal concept of ex officio). The phrase "ex officio" is defined as:

[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially.
A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position."

Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423 (1921). In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E. 2d 88 (1947), the South Carolina Supreme Court commented extensively on ex officio memberships:

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The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is *ex officio* membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. *Ex officio* means "by virtue of his office". . . Similar observation may be made with respect to *ex officio* membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the office has only a part or joint ownership or management.

Accordingly, we must determine whether the enabling statute for the Dorchester County Vocational Education Board designates membership on that board as *ex officio*. If membership on the Dorchester County Vocational Education Board is by virtue of membership on a Dorchester County School district board of trustees, no constitutional dual office holding problem is thereby created. The Dorchester County Vocational Education Board of Trustees was created pursuant to Act No. 1627 of the 1972 Statutes at Large. Section 1 of Act 1627 stated that the board was to consist of seven members, appointed as follows:

[O]ne member of the board shall be appointed from each of the three school districts in Dorchester County by a majority of the board of trustees of the district, and four members shall be appointed by a majority of the Dorchester County Legislative Delegation.

The language of Act No. 1627 does not require that the three school district members be appointed from those persons serving on the boards of trustees of the respective school districts. The requirement is instead that these three members must be appointed from each of the school districts in Dorchester County by a majority of the board of trustees for each district. We are aware of no act of the General Assembly which has yet amended or repealed Act No. 1627 of 1972. Inasmuch as the law does not presently require that membership on the Vocational Education Board is by virtue of membership on a Dorchester School board, it is therefore our opinion that membership on the Dorchester County Vocational Education Board is not the result of an *ex officio* capacity pursuant to the Board's enabling statute. Accordingly, it would violate the constitutional provisions concerning dual office holding if a member of the Dorchester School board were concurrently to serve on the Dorchester County Vocational Education Board.

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

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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).

Possible Legislative Remedies

There would appear to be two viable legislative remedies for the dual office holding problem posed by the current situation. First, the legislation which you have recently introduced, H.5246, would dramatically change the appointment process for the Dorchester County Vocational Education Board and remedy the dual office holding problem in the current process. It would immediately operate to terminate the terms of members currently appointed from among the memberships of the district school boards, and have those members replaced with appointments from the Dorchester County Council.

A second solution which would be equally legitimate and viable, would be to amend Act No. 1627 of 1972 to designate the members appointed from among the school district boards as ex officio members, or those who serve by virtue of their membership on their respective district school boards. This solution would be constitutionally valid as well as consistent with the general statute governing multi-district vocational school boards, Section 59-53-1900 et seq. Section 59-53-1900 et seq. was enacted as part of Act No. 90 of 1975, such statute specifies that membership on multi-district vocational education boards which are created under the Act is concurrent with, and by virtue of, service on the boards of trustees for each of the participating school districts. Section 59-53-1900, in relevant part, states that:

[a]ny group of two or more school districts of the State, without regard to county lines, may join to create vocational school boards (hereinafter referred to as boards) to construct, operate, govern, supervise, manage and control vocational schools. Provided, however, that the provisions of this section shall not be applicable to any school district with a vocational center serving only those students residing within its geographical limits. Each board shall consist of six appointed members, to be apportioned among the districts joining in the creation of the board as the districts may agree. Members shall be selected by the school boards of trustees from the

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members of their respective district school boards of trustees. The terms of the members of the board shall be concurrent with their terms on the district school board of trustees.

The statute requires that membership on multi-district vocational school boards created under this provision be composed of board members from the participating school districts, the terms of which are to be served concurrently. Such dual service pursuant to Section 59-52-1900 would likely be deemed by a court as constitutionally valid, inasmuch as membership on the vocational education board is ex officio.

Accordingly, should the General Assembly desire, Act No. 1627 could be amended to reflect the type of appointment process for Dorchester County Vocational Education Board found in Section 59-53-1900. This would also obviate the need for terminating the memberships of the current members of the vocational board who are also district school board members. Of course, it would be a matter for the Dorchester delegation and the General Assembly to determine which legislative solution, outlined above, it deems best for Dorchester.

Conflict of Interest

As to the question of a member voting for the budgets of both the multi-district vocational school and the member's respective school district, this office is aware of no law that would absolutely prohibit such activity if membership on the second board is expressly made ex officio. While ex officio members are often designated as non-voting members, the fact that an ex officio member may vote is not a factor to defeat ex officio membership; an ex officio member of an entity is a member for all purposes, including voting, unless the enabling legislation directs otherwise. See Ops. S.C. Atty. Gen. dated July 18, 1989; January 3, 1985; March 4, 1976.

Furthermore, we are unaware of any per se conflicts of interest which arise by a member voting on both budgets. Certainly, any conflict pertaining to the personal economic interest of the ex officio member would be subject to the requirements of the State Ethics Act, Section 8-13-700 et seq. Moreover, our Supreme Court has observed that "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner to be above suspicion of irregularity, and to act primarily for the benefit of the public." O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945). As stated above however, a Dorchester County school board member under current law may not serve as a voting member of the Dorchester County Vocational Education Board. Presently, such service does not constitute ex officio membership, and thus violates the constitutional provisions relating to dual office holding.

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Conclusion

Based upon the forgoing authorities, we advise as follows: under current law, a member of a Dorchester School Board may not serve as a member of a Dorchester County Vocational Education Board without violating the dual office holding provisions in the state Constitution. To remedy this situation, the General Assembly may either (1) pass the proposed H.5246, which would prohibit Dorchester County district school members from being members of the Dorchester County Vocational Education Board, or (2) designate membership on the Vocational Board as serving ex officio, or by virtue of membership on the participating district school board. The latter solution would be consistent with § 59-53-1900. Both solutions would be constitutionally valid and remedy the existing dual office holding problem. Again, this would be a matter for the General Assembly to address.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General