



HENRY MCMASTER
ATTORNEY GENERAL

August 2, 2006

Mr. Joseph O. Burroughs
Post Office Box 1244
Conway, South Carolina 29528

Dear Mr. Burroughs:

We received your letter inquiring as to whether you may serve simultaneously as a member of the Horry County Higher Education Commission and on the City of Conway Zoning Board of Appeals. You ask whether serving in these positions constitutes "dual office holding and would therefore be prohibited under the State Constitution or Ethics Reform Act or any other such statutory vehicle."

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "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." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In an opinion dated March 16, 1999, we addressed whether service on the Horry County Higher Education Commission is an office for dual office holding purposes. Op. S.C. Atty. Gen., March 16, 1999. In that opinion we stated as follows:

The Horry County Higher Education Commission (the "Commission") was created by Act No. 114, 1959 Acts and Joint Resolutions, as amended. The Commission was empowered to enter into contracts with institutions of higher learning to operate a school or schools of higher learning in Horry County. Powers and duties are specified in Section 3 of Act 131 of 1963 and include the powers to

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sue and be sued, to adopt and use a corporate seal, to adopt rules and regulations, to enter into contracts and leases, to acquire real and personal property, and so forth. Prior opinions of this Office have consistently held that powers such as these clearly involve an exercise of some portion of the State's sovereignty. See, e.g., Ops. Atty. Gen., January 27, 1976; January 9, 1992; and December 14, 1995. Moreover, by an opinion of this Office dated May 28, 1959, "[m]embers . . . of the Horry County Higher Education Commission are officers and are, therefore, subject to the dual office holding provision of our State Constitution." (Emphasis added.)

Id. We concluded members of the Horry County Higher Education Commission are officers for dual office holding purposes. In keeping with this determination, we must only determine whether or not service on the City of Conway Zoning Board of Appeals also is an office for dual office holding purposes.

Although we have yet to address whether membership on the City of Conway Zoning Board of Appeals in particular is an office for dual office holding purposes, in numerous opinions we considered whether members of various municipal zoning appeals boards are officers. In those opinions, we concluded such positions are offices for dual office holding purposes. See Op. S.C. Atty. Gen., June 8, 2000 (citing Ops. S.C. Atty. Gen., March 16, 1999 (City of North Myrtle Beach Zoning Appeals Board); January 27, 1976 (Georgetown County Zoning Appeals Board); May 2, 1977 (City of Greenville Zoning Appeals Board)). In our March 16, 1999 opinion regarding the City of North Myrtle Beach Board of Zoning Appeals, we noted in earlier opinions, "we held that the power to hear and decide appeals made by citizens asking for special exceptions to certain zoning requirements involved an exercise of some part of the State's sovereign power." Op. S.C. Atty. Gen., March 16, 1999 (citing Ops. S.C. Atty. Gen., January 27, 1976; May 2, 1977).

We agree with this conclusion based on our review of the provisions of the South Carolina Code pertaining to local boards of zoning appeals found in chapter 29 of title 6. These statutes provide for the creation of local boards of zoning appeals, their members, the members' term of service, and the members' compensation. S.C. Code Ann. § 6-29-780 (2004). Furthermore, these statutes set forth the powers of these boards, which include hearing and deciding appeals related to the enforcement of zoning ordinances and granting zoning variances. S.C. Code Ann. § 6-29-800 (2004). As we concluded in a prior opinion reviewing the predecessor to these provisions:

The discharge of the duties as described in the statute would be quasi-judicial and would involve an exercise of sovereign power. It is the opinion of this Office that a member of the, if the board was created pursuant to Section 6-7-740, would most probably hold an office for dual office holding purposes.

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Based on our review of the statutes governing local boards of zoning appeals and our previous opinions, we find a position on the City of Conway Zoning Board of Appeals is an office for dual office holding purposes.

Both service on the Horry County Higher Education Commission and on the City of Conway Zoning Board of Appeals are offices for dual office holding purposes. Therefore, pursuant to article XVII, section 1A of the South Carolina Constitution, you are prohibited from simultaneously holding these positions. Furthermore, we also find it pertinent to note section 6-29-780 of the South Carolina Code, describing membership on a local board of zoning appeals, states: "None of the members shall hold any other public office or position in the municipality or county." Thus, in addition to the constitutional prohibition, as we previously concluded in regard to section 6-29-780: "In our view, the General Assembly must have intended to disqualify two different categories of individuals from service on zoning boards of appeals or adjustments: county or municipal officers and employees." Op. S.C. Atty. Gen., April 16, 1991. See also, Op. S.C. Atty. Gen., May 22, 2001. Presuming a member of the Horry County Higher Education Commission is considered a county employee or officer, which we believe he or she would be, this provision also prohibits you from serving both on the Horry County Higher Education Commission and on the City of Conway Zoning Board of Appeals.

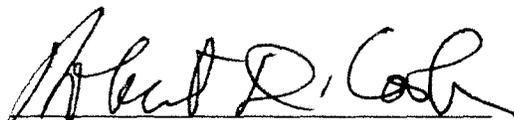
As for your additional request that we provide information as to whether your service in both positions is prohibited under the Ethics Reform Act, we suggest you contact the State Ethic's Commission. The State Ethic's Commission is specifically granted the authority to interpret the Ethics Reform Act.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General