

8268 Liberty



HENRY McMASTER  
ATTORNEY GENERAL

September 29, 2006

William E. Whitney, Jr., Esquire  
City Attorney, City of Union  
Post Office Box 266  
Union, South Carolina 29379

Dear Mr. Whitney:

We received your letter requesting an opinion of this Office on behalf of Union City Council ("City Council"). Per your letter, you state:

We have a candidate who is running for a seat on the Union City Council. If he is elected we think this would be a violation of the constitutional prohibition against dual office holding.

Robert Garner currently serves as a member of the Union County Fair Association Board of Directors of the Union County Fair Association is appointed by the Union County Council. I have enclosed a copy of the local ordinance concerning the Union County Fair Association.

Robert Garner also currently holds the position as Assistant Director/Coordinator of the Union County Emergency Preparedness Division. According to the local ordinance the coordinator is appointed by the City Council. The Assistant Coordinator is appointed by the Union County Supervisor.

Thus, you request an opinion as to whether Mr. Garner, if elected to City Council would be in violation of the dual office holding prohibition provided for in the South Carolina Constitution.

#### 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 Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763

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(1907), our Supreme Court discussed the difference between one who holds an office as compared to one who act merely as an employee.

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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employé.

Id. at 174, 58 S.E. at 763. In a subsequent case, our Supreme Court again discussed the differences between an employee and an officer.

Criteria to be considered in making the distinction between an officer and an employee include 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. No single criteria is conclusive; neither is it necessary that all the characteristics of an officer or officers be present.

State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62-63 (1980).

Numerous opinions of this Office address whether a position on a city or town council is an office. See, e.g., Ops. S.C. Atty. Gen., May 9, 2006; May 21, 2004; June 27, 1997. Considering these opinions, it is well settled that holding such a position is an office. Id. Thus, in order to determine whether Mr. Garner, if elected to City Council, would be in violation of article XVII, section 1A, we separately consider whether his membership on the Fair Board and his position as Assistant Director constitute offices for dual office holding purposes.

In an opinion of this Office issued in 2002, we considered whether a position on the Fair Board is an office for dual office holding purposes. Op. S.C. Atty. Gen., December 17, 2002. In looking to the ordinances passed by the Union County Council creating the Union County Fair Association, we noted the provisions establishing a nine member board of directors who shall serve four-year terms and providing for the payment of compensation to Fair Board members. Id. We also considered the authority given to Fair Board members, which includes the authority to hire an executive director to manage the business of the association. Id. Further, we addressed a provision requiring “income and revenue derived by the fair association shall be used to defray the expenses of providing the county and the public with a worthwhile educational and recreational annual fair and for the promotion of agricultural and livestock interests in the county and the expansion of the

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same.” Id. (quoting Union County, S.C. Or. § 2-257). Quoting the Supreme Court’s decision in Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949), we found fairs serve an important educational purpose. Id. Based on this finding and previous opinions of this office determining education to be a traditional sovereign power, we concluded individuals serving on the Fair Board are officers for purposes of dual office holding. Id. (citing Op. S.C. Atty. Gen., January 31, 1985).

This Office recognizes a long-standing rule that we will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Op. S.C. Atty. Gen., September 8, 2005. With your request, you provided us with the current provisions of the Union County Code containing the ordinances establishing the Union County Fair Association and its board. We reviewed these ordinances and believe they are in accordance with those addressed in our 2002 opinion. Finding no change in the law since our prior opinion and not finding it clearly erroneous, we reiterate our conclusion that a position on the Fair Board is an office for dual office holding purposes.

As for Mr. Garner’s positions as Assistant Director for the Union County Emergency Preparedness Division (“Assistant Director”), you provided us with a copy of the Union County ordinance establishing the Union County Emergency Preparedness Division (the “Emergency Preparedness Division”). The ordinance states the Emergency Preparedness Division

will ensure the complete and efficient utilization of all county facilities to combat disaster from enemy attack or natural disaster. The division will be the coordinating agency for all activities in connection with emergency preparedness or civil defense; it will be the instrument through which the county council shall exercise its authority under the laws of this state during an attack or natural disaster against this county or any part of the state.

This ordinance does not mention the position of the Assistant Director or its powers and responsibilities. However, by your letter, you informed us that this position is appointed by the Union County Supervisor. We understand from Mr. Garner that he acts under the direction of the Director of the Emergency Preparedness Division (the “Director”). Furthermore, Mr. Garner provided this Office with a copy of his job description. According to the description, his duties include, among other things, supervision of the Emergency Services 911 Center; performance emergency management functions including “planning, mitigation, response and recover programs;” establishment of rules and performance standards for employees of the Emergency Services 911 Center; and conducting employee evaluations and training programs.

Thus, in consideration of the above information we find Mr. Garner’s position as Assistant Director to be that of an employee rather than an office. His position is not established through legislative action, he does not have a term for which he is to serve, and he is not required to take an oath of office. Additionally, he is not authorized to exercise any portion of the sovereign power of the State. He appears to merely perform the duties assigned to him by the Director, thus indicating

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his status as a mere employee. Therefore, we find Mr. Garner's position as Assistant Director is not an office for purposes of dual office holding.

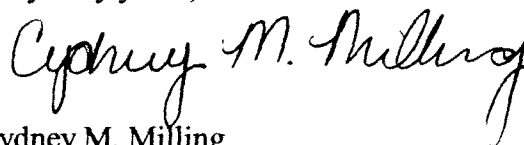
### Conclusion

If elected, Mr. Garner's position on City Council is certainly an office for dual office holding purposes. However, we do not believe his position as Assistant Director is an office for dual office holding purposes. Thus, he may hold a position on City Council while serving as Assistant Director. Contrarily, we find Mr. Garner's membership on the Fair Board to be an office. Accordingly, if elected to City Council, his simultaneous service in both positions would violate the constitutional prohibition on dual office holding. Nonetheless we note, the constitutional prohibition on dual office holding does not prevent an individual from running for office.

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).

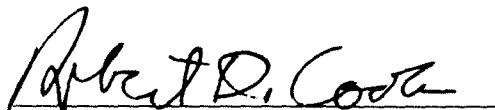
Op. S.C. Atty. Gen., May 27, 2003. Thus, Mr. Garner is not prohibited from seeking a position on City Council. But, should he be elected, he would vacate his position on the Fair Board by operation of law.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General