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ATTORNEY GENERAL

October 25, 2010

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Dear Mr. Ryan:

We received your letter requesting an opinion of this Office concerning dual office holding. You asked whether service as a Commissioner on the South Carolina Commission on Indigent Defense and service as a member of the Charleston County Aviation Authority would violate the prohibition against dual office holding.

This opinion will address prior opinions of this Office as well as relevant statutes and caselaw to determine if there is a dual office holding violation.

Law/Analysis

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold 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." For this provision to be contravened, a person concurrently must hold two public 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). "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." Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, 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).

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In an opinion dated November 18, 1986 we explained as follows:

This Office has concluded many times that one who serves on the governing authority or commission of an airport would likewise hold an office. See, Ops. S.C. Atty.Gen., January 11, 1985; March 19, 1975; January 19, 1983; and November 9, 1982. But for one small factor in the enabling legislation¹ of the Charleston County Aviation Authority, the reasoning of these opinions would apply, permitting the conclusion that an Aviation Authority Member would also hold an office. However, Act No. 329 of 1971,² amending Act No. 1235 of 1970, expressly provides in Section 2 (amending Section 4 of the previous act) as follows:

[m]embership on the authority shall not be deemed an office of honor or profit within the meaning of the provisions of Section 2 of Article II of the Constitution of South Carolina.³ . . .

Thus, the legislature has expressed its intent that Aviation Authority members not fall within the dual office holding prohibitions of the State Constitution. Therefore, dual office holding apparently does not occur in the situation which you have described, according to legislative interpretation of the Constitution.

Op. S.C. Atty. Gen., November 18, 1986 (emphasis added).

Since serving on the Charleston County Aviation Authority does not constitute an office for dual office holding purposes, there would be no dual office holding violation.

We have not previously addressed the question of whether one serving as a Commissioner for the SC Commission on Indigent Defense is considered an office. Even though there will be no dual

¹ The South Carolina Supreme Court has never addressed whether the legislature can determine that a position is not an office by statute; the criteria for dual office holding is a constitutional provision. However, under Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986), the court held that considerable weight will be given to legislative determinations regarding constitutional standards. Nichols, 290 S.C. 415, 424 (“Every legislative act must be presumed constitutional and should be declared unconstitutional only when its invalidity is manifest beyond a reasonable doubt. Poulnot v. Cantwell, 129 S.C. 171, 176, 123 S.E. 651, 653 (1924), *citing* Battle v. Willcox, 128 S.C. 500, 122 S.E. 516 (1924)”).

² This Office will not address the constitutionality of the provision establishing the Charleston County Aviation Authority.

³ Article II, Section 2 is now Article XVII, Section 1A of the State Constitution as quoted earlier in this opinion.

office holding violations in this specific situation, we will address this position for future reference and benefit.

S.C. Code § 17-3-310 established the Commission on Indigent Defense and set forth the terms, powers, and duties of the Commission as follows:

- (A) There is created the Commission on Indigent Defense consisting of thirteen members.
- (B) Nine members shall be **appointed by the Governor**
 - (1) One member from each of the four judicial regions of the State appointed upon recommendation of the South Carolina Public Defender Association. Members shall serve for **terms of four years** and until their successors are appointed and qualify. Vacancies must be filled in the manner of original appointment for the unexpired portion of the term. A person may not be appointed to the commission pursuant to the provisions of this item or, once appointed pursuant to the provisions of this item, may not continue to serve on the commission unless the person is a public defender.
 - (2) A member of the South Carolina Bar whose practice is principally in family law, appointed upon recommendation by the South Carolina Bar membership for a **term of two years** and who may be reappointed.
 - (3) Two members of the South Carolina Bar whose practice is principally in criminal defense law, appointed upon recommendation of the South Carolina Bar membership, who shall serve for a term of two years and may be reappointed.
 - (4) Two members of the South Carolina Bar whose practice is principally neither criminal defense nor family law, appointed upon recommendation of the South Carolina Bar membership, who shall serve for **two-year terms** and who may be reappointed.
- (C) The remaining four members must be appointed as follows:
 - (1) two members appointed by the Chief Justice of the South Carolina Supreme Court, one of whom must be a retired circuit court judge and one of whom must be either a retired family court judge or a retired appellate court judge, each of whom shall serve for a **term of four years** and until a successor is appointed and qualifies; and
 - (2) the Chairmen of the Senate and House Judiciary Committees, or their legislative designees, for the terms for which they are elected.
- (D) The chairman must be elected by the commission from its membership and shall serve for a **term of two years**. A chairman may be re-elected.
- (E) Members currently serving as of July 1, 2005, shall continue to serve until the expiration of their term and may be reappointed as provided in subsection (B)(1).
- (F) The commission may adopt an appropriate seal and promulgate regulations consistent with the provisions of this article to govern its operations and procedures and shall

supervise the operations of the Office of Indigent Defense including all the divisions of the office.

(G) The commission:

- (1) may **establish divisions within the office** to administer the services and programs as it considers necessary to fulfill the purposes of this article;
- (2) shall **develop rules, policies, procedures, regulations, and standards** as it considers necessary to carry out the provisions of the article and comply with state law or regulations and the rules of the Supreme Court, including the nature and scope of services to be provided, the clientele to be served, and the establishment of criteria to be used in the determination of indigency and qualifications for services for indigent legal representation;
- (3) shall **cooperate and consult with state agencies, professional associations, and other groups** concerning the causes of criminal conduct, the rehabilitation and correction of persons charged with and convicted of crimes, the administration of criminal justice, and the improvement and expansion of defender services;
- (4) shall **assist the public defenders** throughout the State in their efforts to provide adequate legal defense to the indigent. This assistance includes, but is not limited to:
 - (a) the preparation and distribution of a basic **defense manual and other educational materials**;
 - (b) the preparation and distribution of model forms and documents employed in indigent defense;
 - (c) the **promotion of and assistance in the training** of indigent defense attorneys;
 - (d) the provision of **legal research assistance to public defenders**; and
 - (e) the provision of other assistance to public defenders as may be authorized by law;
- (5) shall **collect, maintain, review, and publish records and statistics** for the purpose of evaluating the delivery of indigent defense representation in the State; and
- (6) shall have the **authority to negotiate and enter into contracts, as appropriate, with independent counsel for the provision of indigent defense services in cases in which a conflict of interest exists in a public defender office and in other cases in which indigent representation by independent counsel is necessary or advisable**. This authority may be delegated by the commission to a circuit public defender, but is at all times subject to standards established by the commission.
- (7) The commission shall **establish and administer the rules and procedures for selection of members to serve on the Circuit Public Defender Selection Panels**, and shall establish the rules and procedures under which the selection panels shall operate.

S.C. Code § 17-3-310 (emphasis added).

This section provides for the appointment, qualifications, and terms of its members. Also, this section prescribe the duties of the Commission. In State v. Crenshaw, the South Carolina Supreme Court set forth the criteria to determine whether a position is an office. The court explained that the “[c]riteria 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. State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E.2d 482 (1970). No single criteria is conclusive; neither is it necessary that all the characteristics of an officer or officers be present. 67 C.J.S. Officers s 8(a) (1978).” State v. Crenshaw, 274 S.C. 475, 478.

There are factors that weigh in favor of commissioners being considered officers. For example, this position was created by the legislature, there are qualifications established for appointment, and the duties and terms are prescribed in S.C. Code § 17-3-310. However, there are also factors to the contrary: commissioners do not receive a salary⁴ nor are they required to take an oath. Nonetheless, members of the commission have responsibilities that arguably involve the exercise of sovereign powers of the state. Considering the authority and duties mentioned above, it is the opinion of this Office that a court would likely find that membership on the SC Commission on Indigent Defense would constitute a public office within the meaning of Article XVII, Section 1A.

As a side note, on many occasions our office has concluded that county public defenders are not officers for dual office holding purposes. See, Ops. S.C. Atty. Gen., May 4, 2005; April 5, 1982; April 20, 1979; May 26, 1975; February 9, 1971. “This result was reached on the basis that . . . a public defender does not act on the state’s behalf or in concert with it.” Op. S.C. Atty. Gen., May 4, 2005 (quoting Op. S.C. Atty. Gen., April 5, 1982). The 2007 Act No. 108, § 3 established Circuit Public Defenders and explained that county public defenders “shall serve at the pleasure of the circuit public defender.” See, S.C. Code § 17-3-520 et seq. (Supp. 2009). This Office has not opined on whether Circuit Public Defenders are considered officers for dual office holding purposes. However, because of the long-standing notion that county public defenders are not officers, it is likely that a court would find that Circuit Public Defenders are not considered officers for dual office holding purposes.

⁴ The “members of the commission shall receive no compensation for their services but will be reimbursed for their actual expenses incurred in the performance of their duties.” S.C. Code § 17-3-340(G).

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Conclusion

It is the opinion of this Office that simultaneously holding the positions of Commissioner on the South Carolina Commission on Indigent Defense and member of the Charleston County Aviation Authority is not a violation of dual office holding. Even though serving as a Commissioner on the South Carolina Commission on Indigent Defense would likely constitute an office, Act No. 329 of 1971 makes it clear that membership on the Charleston County Aviation Authority shall not be deemed an office.

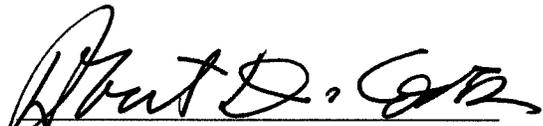
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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