

May 9, 2007

The Honorable Robert E. Walker
Member, House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Walker:

We understand from your letter you desire an opinion concerning dual office holding. You explained you were recently informed that a member of the Spartanburg Planning Commission (the "Planning Commission") has been appointed to the Spartanburg County Commission for Higher Education (the "Higher Education Commission"). You state the appointee has been notified that serving in both positions may violate the dual office holding prohibition contained in the South Carolina Constitution. Thus, you ask: "Why would a person who is currently serving on the Spartanburg County Planning Commission be considered dual office holding if they were to serve on the Spartanburg County Commission for Higher Education, while others who serve on the Spartanburg Regional Hospital Board and the Spartanburg County Commission for Higher Education are not be considered dual office holding?" In addition, you ask: "If serving on the Spartanburg County Commission for Higher Education and the Spartanburg Regional Hospital Board is considered dual office holding what will be the necessary steps that need to be taken for those that are currently serving on both boards?"

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).

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On numerous occasions, this Office addressed whether a position on a county or municipal planning and zoning commission is an office for purposes of dual office holding. In these opinions, we concluded an individual serving in such capacity holds an office. *Ops. S.C. Atty. Gen.*, December 1, 2006 (Myrtle Beach Planning Commission); April 10, 2006 (Town of Bluffton Planning Commission); May 8, 2001 (Horry County Planning Commission); August 3, 2000 (Charleston County Planning Commission). Furthermore, in an opinion dated December 10, 2002, we specifically opined that a position of the Planning Commission is an office. *Op. S.C. Atty. Gen.*, December 10, 2002.

Next, we consider whether a position on the Higher Education Commission is also an office. In an opinion dated March 27, 1992 we considered whether a position on the Commission for Higher Education is an office for purposes of article XVII, section 1A of the South Carolina Constitution. *Op. S.C. Atty. Gen.*, March 27, 1992. We reviewed the enabling legislation and concluded “it is our opinion that one who serves on the Spartanburg County Commission for Higher Education would most probably hold an office for dual office holding purposes.” *Id.* Citing to this opinion, in 2001, we reiterated our conclusion in determining an individual may not serve as a member of the Higher Education Commission while holding another office. *Op. S.C. Atty. Gen.*, February 27, 2001. Finding no changes in the enabling legislation since the issuance of these opinions, we continue to believe a position on the Higher Education Commission is an office. *See Op. Atty. Gen.*, September 29, 2006 (“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.”).

Thus, both a position on the Planning Commission and a position on the Higher Education Commission are offices within the purview of article XVII, section 1A of the South Carolina Constitution. Therefore, an individual simultaneously serving in these two positions is in violation of the dual office holding prohibition.

You also inquire as to how individuals serving on the Higher Education Commission may also serve on the Spartanburg Regional Hospital Board (the “Hospital Board”) without running afoul of the dual office holding prohibition. Based on our analysis as follows, these individuals would also be in violation of article XVII, section 1A. As previously stated, a member of the Higher Education Commission is an office holder. Furthermore, we believe an individual serving on the Hospital Board is also an officer.

The Spartanburg County Council (“County Council”) established the Spartanburg Health Services District (the “District”) by ordinance in 1995 pursuant to articles 15 and 16 of chapter 7 of title 44 of the South Carolina Code governing regional health services districts. Spartanburg County, S.C. Ordinance No. 557 (1995). As part of its establishment of the District, County Council created a Board of Directors (the “Board”) to govern the District. *Id.* According to the ordinance, the Board consists of eleven members, who must be residents of Spartanburg County and are appointed by County Council. *Id.* Members of the Board serve four-year terms and do not receive compensation

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for service on the Board. Id. Further, the ordinance specifies as follow with regard to who shall serve on the Board:

According to the procedure provided hereafter Spartanburg County Council shall appoint one (1) member from each county single member election district who shall be a resident of that district . . . and five (5) at large members. Of such five (5) at large members, one (1) shall be a member of the medical staff of Spartanburg General Hospital System

Id.

In addition, the ordinance describes the powers, duties, and authority given to the Board by County Council. Id. First, the ordinance incorporates by reference the provisions of articles 15 and 16 of chapter 7 of title 44 of the South Carolina Code (2002). Section 44-7-2060 of the South Carolina Code (2002), contained within these provisions, sets forth the powers and duties of boards of directors for regional health services districts. These powers include the power to make bylaws; acquire real and personal property; expend funds; build, maintain, equip, and operate regional health care facilities; exercise the power of eminent domain; hire personnel; lease land or hospital facilities; and issue bonds. S.C. Code Ann. § 44-7-2060. In addition, section 44-7-2157 of the South Carolina Code (2002) gives additional powers to incorporated districts. These powers include the power to lease health care facilities and other assets; provide instruction and training to various personnel and students; contract for the operation of departments, sections, and equipment; assume obligations of entities conveying property to the district; expend funds on necessary expenses; provide scholarships to students; and enter into agreements with other institutions concerning the “furnishing of services, referral of patients, management of facilities, . . .” and other activities. S.C. Code Ann. § 44-7-2157. In addition to the power and authority provided to the District under chapter 7 of title 44, the ordinance gives the District the authority to “sell, convey and dispose of real and personal property owned by the District” with the exception of “the original Spartanburg General Hospital and B.J. Workman Memorial Hospital campus properties,” which the District may do so only after three readings with notice and hearing. Spartanburg County, S.C. Ordinance No. 557.

The ordinance establishing the Board indicates a position on the Board constitutes an office because County Council established these positions through legislative action, setting forth terms of office and qualifications for the Board’s members. The ordinance does not specify an oath requirement and states members of the Board do not receive compensation. However, in our opinion, the powers and duties afforded to Board constitute the exercise of the sovereign power of the State.

An opinion of this Office issued in 1980 further supports of our conclusion. Op. S.C. Atty. Gen., June 24, 1980. In that opinion, we considered whether the Board of Trustees of Spartanburg General Hospital (the “Board of Trustees”) held an office for dual office holding purposes. The Board

of Trustees was created via an enactment by the Legislature. Id. Based on our review of this enactment, we concluded the act “indicates that membership on the Board of Trustees would be the holding of a public office within the meaning of Article XVII, § 1A.” Id. As we indicated above, subsequent to this opinion, County Council reestablished the District and the Board of Trustees under local law. However, finding the composition and authority of the Board of Trustees to be similar to that of the Board and in keeping with this prior opinion, we believe members of the Board hold an office. Moreover, we note the consistency of our conclusion with prior opinions of this Office finding members county hospital boards hold offices. See Ops. Atty. Gen., February 26, 2007 (Barnwell County Hospital Board of Trustees); June 1, 2005 (Bamburg County Hospital Board); April 20, 2004 (Abbeville County Memorial Hospital Board of Trustees); January 17, 2000 (Edgefield County Hospital Board); January 11, 1999 (board of trustees for the Regional Medical Center of Orangeburg and Calhoun Counties).

Accordingly, we find both a position on the Higher Education Commission and a position on the Board to be offices. Therefore, to answer your question as to how members of the Higher Education Commission may continue to serve on the Board, we believe such individuals’ simultaneous service in both positions likely is in violation of the South Carolina Constitution.

Finally, we address your last question as to what steps must be followed if a dual office holding situation occurs. As we explained in a 2003 opinion:

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). See Walker v. Harris, 170 S.C. 242 (1933); Dover 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. Macleod V. Court of Probate of Collation 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).

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Op. S.C. Atty. Gen., May 27, 2003. In accordance with the above cited authority, no steps are necessary because the individual found to hold two offices automatically vacates the first office held by that individual. However, we reiterate that the individual will continue to serve in the first office in a de facto capacity until a successor is appointed.

Conclusion

Based on our analysis above, positions on the Planning Commission, the Higher Education Commission, and the Board all constitute offices for purposes of article XVII, section 1A. Thus, an individual holding two of any of these positions at the same time is in violation of the dual office holding prohibition. As a result, the individual vacates the position he or she first held by operation of law. However, this individual may continue to serve in a de facto capacity.

Very truly yours,

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