

June 11, 2008

Brian T. Grier, Esquire
Town Attorney, Town of Great Falls
P.O. Box 808
Chester, South Carolina 29706-0808

Dear Mr. Grier:

We received your letter requesting an opinion of this Office concerning dual office holding. You stated that “[i]n a recent election, a Chester County Sheriff’s Department deputy who is also a school resource officer was elected to the Great Falls Town Council.” You inquired “whether or not this individual’s service as a council member would make him a dual office holder within Chester County.”

Law/ Analysis

Article XVII, Section 1A of the South Carolina Constitution provides that “No person may 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).

On numerous occasions, we have opined that a position on a city or town council constitutes an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., May 9, 2006; May 21, 2004; June 27, 1997. This office has concluded on previous occasions that a deputy sheriff would be considered an office holder for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen. dated July 30, 2007; March 3, 2004; June 11, 1992; September 24, 1982.

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Moreover, in an opinion dated July 13, 1995, this Office advised that “if an individual were to serve on a city council and as a deputy sheriff simultaneously, dual office holding would most probably result.” Please see the enclosed copy of that opinion. In an opinion dated January 8, 1986, we reached a similar conclusion.

We understand from your letter that the Sheriff’s deputy in question is also a school resource officer. In a prior opinion dated May 9, 2007, we examined the statute describing the position of school resource officer, S.C. Code Section 5-7-12 (A), which states as follows:

The governing body of a municipality or county may upon the request of any other governing body or of any other political subdivision of the State, including school districts, designate certain officers to be assigned to the duty of a school resource officer and to work within the school systems of the municipality or county. The person assigned as a school resource officer shall have statewide jurisdiction to arrest persons committing crimes in connection with a school activity or school-sponsored event. When acting pursuant to this section and outside of the sworn municipality or county of the school resource officer, the officer shall enjoy all authority, rights, privileges, and immunities, including coverage under the workers' compensation laws that he would have enjoyed if operating in his sworn jurisdiction.

For purposes of that section, the term “school resource officer” is further defined in Subsection (B) as follows:

[A] person who is a sworn law enforcement officer pursuant to the requirements of any jurisdiction of this State, who has completed the basic course of instruction for School Resource Officers as provided or recognized by the National Association of School Resource Officers or the South Carolina Criminal Justice Academy, and who is assigned to one or more school districts within this State to have as a primary duty the responsibility to act as a law enforcement officer, advisor, and teacher for that school district.

The foregoing statute describes the duties of a school resource officer and the qualifications for the position, two factors described in Crenshaw, above, that tend to indicate that the position is an office. Moreover, it is clear from the statute that a school resource officer is a sworn law enforcement officer with the power of arrest. The exercise of such powers is another factor leading us to the conclusion that, like other Sheriff’s deputies, a school resource officer exercises part of the sovereign power of the State. Therefore, the position of school resource officer would most probably be considered an office for purposes of dual office holding.

Since the positions of town councilman and Sheriff’s deputy serving as a school resource officer involve an exercise of part of the sovereign power of the State, holding both positions at the same

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time would most probably violate the constitutional prohibition on dual office holding. In a prior opinion dated July 13, 1995, we addressed the issue of what happens if a person who holds an office assumes a second 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). 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).

Op. S.C. Atty Gen., July 13, 1995.

Thus, as we have previously recognized, “[u]ntil such time as the de facto officer is replaced, any actions taken by that individual would be considered as valid and effectual as those of a de jure officer unless and until a court should declare otherwise; thus, it is possible that a court could nullify the actions taken, but such actions are not automatically nullified merely because a dual office holding situation existed and the individual became a de facto officer as a result.” Id.

Conclusion

Consistent with our prior opinions, we advise that a court would most probably consider the positions of Sheriff’s deputy and town councilman to be offices for purposes of dual office holding. Moreover, the position you described of a Sheriff’s deputy serving as a school resource officer is provided for in S.C. Code Section 5-7-12, which describes the duties and the qualifications of a school resource officer. As described in Crenshaw, above, those factors tend to indicate that the position is an office. Moreover, according to the statute, a school resource officer is a sworn law enforcement officer with the power of arrest. Like other Sheriff’s deputies, a school resource officer exercises part of the sovereign power of the State, and would therefore most likely be considered as holding an office for purposes of dual office holding. Since the positions of town councilman and Sheriff’s deputy serving as a school resource officer involve an exercise of part of the sovereign

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power of the State, simultaneously serving in these two positions would most probably violate the dual office holding provision of the South Carolina Constitution.

Sincerely,

Henry McMaster
Attorney General

By: Elizabeth H. Smith
Assistant Attorney General

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General