



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

November 5, 2003

The Honorable John L. Andrews  
Member, Hartsville City Council  
307 Kings Place  
Hartsville, South Carolina 29550

Dear Mr. Andrews:

You have requested an opinion from this Office concerning dual office holding. Currently, you are a member of the Hartsville City Council. You have asked whether simultaneously holding a position on the Darlington County Historical Commission would violate the prohibition on dual office holding in the South Carolina Constitution. We conclude that it would.

**Law / Analysis**

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ...." with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. For this provision to be contravened, a person concurrently must hold two 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). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its 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).

This Office has advised on numerous occasions that a member of a city or town council would be considered an officer for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated July 19, 2001; April 12, 1998; June 12, 1995; February 4, 1994; July 23, 1993. Therefore, the question turns upon whether a member of the Darlington County Historical Commission would likewise be considered an office holder.

This Office has had an opportunity in several prior opinions to advise on whether a member of a local historical commission holds an office for dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated April 16, 1985 (member of Georgetown County Historical Commission is not an office holder); January 17, 1985 (member of Marlboro County Historical Commission is not an office holder); November 7, 1975 (member of Camden Historical Commission is an office holder); and February 24, 1965 (member of York County

The Honorable John L. Andrews  
Page 2  
November 5, 2003

Historical Commission is an office holder). The conclusion in these opinions has turned on the question of whether the General Assembly expressly exempts a commission from being an office holder in the provisions of the enabling statute. Provisions in both the Georgetown County and Marlboro County Historical Commission enabling act state that “[m]embership on the commission shall not be construed to be an office of honor or profit.” We stated in the April 16, 1985 opinion that, “[w]hile there is some question as to the Legislature’s authority to interpret as exempt, by statute, a position from the dual office holding prohibitions of the State Constitution, such an interpretation is nevertheless entitled to much weight.” Acker v. Cooley, 177 S.C. 144, 181 S.E. 10 (1935). As to those Historical Commissions which did not have such an express exemption in their enabling act, we have advised that the duties of the commissioners included a requisite portion of an exercise of the state’s sovereign power and, thus, such commissioners would be office holders.

The Darlington County Historical Commission was created by Act No. 570, 1965 Acts and Joint Resolutions, a copy of which you have provided along with your request. Section I of the Act states that commissioners are to be “appointed by the Governor upon the recommendation of the county legislative delegation.” Duties (or powers) are specified by Section 3 of the Act, and include various corporate powers and duties; acquisition of land, buildings, and such structures; to employ a secretary and set the remuneration and duties of the secretary; prescribing rules and regulations; and other similar powers, all of which appear to involve an exercise of a portion of the sovereign power of the State. Members of the commission are to serve without compensation. No oath or qualifications for service are specified. Furthermore, there is no express provision in Act No. 570 which exempts the commissioners from being considered office holders. Based on the analysis of our prior opinions with respect to this matter, we, therefore, advise that a member of the Darlington County Historical Commission probably holds an office for dual office holding purposes.

Based on the forgoing authorities, it is the opinion of this Office that a member of the Hartsville City Council and a member of the Darlington County Historical Commission would both hold an office for dual office holding purposes. Accordingly, we advise that your holding both positions simultaneously would contravene the constitutional prohibition on dual office holding if you were to accept the position on the Darlington County Historical Commission.

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

The Honorable John L. Andrews  
Page 3  
November 5, 2003

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)

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General

RDC/an