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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 27, 2003

The Honorable Vida O. Miller
House District No. 108
P.O. Box 11867
434-A Blatt Building
Columbia, SC 29211

Dear Representative Miller:

You have requested an advisory opinion from this Office regarding dual office holding. By way of background, you have inquired whether a position on the South Carolina Occupational Safety and Health Review Board that is held simultaneously with a position on the Georgetown County Election Commission, appointed by County Council, violates the South Carolina Constitution.

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 previously advised on numerous occasions that one who would serve on an election commission or voter registration board is considered an office holder for dual office holding purposes. See, Op. Atty. Gen. dated February 23, 1995 (City of Bishopville Election Commission); September 12, 1990 (Florence County Election Commission); and July 24, 1980 (City of Greenville Election Commission) as representative of those opinions concluding that county election commission members would be office holders; and see Op. Atty. Gen., May 6, 1992; June 19, 1987; and July 11, 1984 as representative of those opinions concluding that one who would serve on a voter registration board would be an office holder. See also, Op. Atty. Gen., March 23, 1995, concluding that members of the Union County Board of Election and

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Registration Board holds an office for dual office holding purposes. Therefore, based upon the reasoning and conclusions of these earlier opinions, this Office advises that a member of the Georgetown County Election Commission would hold an office for dual office holding purposes.

Turning now to the question of whether a member of the South Carolina Occupational Safety and Health Review Board would be considered an office holder for dual office holding purposes, to be an office holder, one must exercise some portion of the sovereign power of the state. For example, the court in Sanders v. Belue, supra, acknowledged that there is a generally accepted distinction between an official who exercises the sovereign power of the state, and someone who is simply an employee that does not hold an office. Furthermore, this Office on occasion has issued opinions concerning certain positions that are advisory in nature and do not constitute an office for dual office holding purposes. See, Op. Atty. Gen., March 19, 2003, concluding that members of the Hampton County Economic Development Board, and other similar county development entities do not hold an office for purposes of dual office holding.

The threshold issue is a determination of whether a member of the South Carolina Occupational Safety and Health Review Board exercises some portion of the sovereign power of the state. Sanders v. Belue. The Review Board was created legislatively by S.C. Code Ann. §41-15-310. Section 41-15-310 states:

Notwithstanding the above provisions of this section, on October 1, 1983, or such later time as the South Carolina Occupational Health and Safety Review Board is duly constituted, the Director of the Department of Labor, Licensing, and Regulation or his designee shall cease to provide administrative review pursuant to this section. All matters pending before the Director of the Department of Labor, Licensing, and Regulation or his designee pursuant to this section and the regulations hereunder shall be transferred to the South Carolina Occupational Safety and Health Review Board on October 1, 1983, or such later time as it is duly constituted.

The South Carolina Occupational Safety and Health Review Board has been entrusted with the enforcement of the health and safety regulations of the state of South Carolina. SC ADC R.71-400, et seq. The primary purpose of the Review Board is to review citations and fines that are issued by health and safety compliance officers. SCADC R.127-1.1 et seq. Further, the Review Board's decision becomes the final order on the validity of the citation for safety and health violations, as well as reasonableness of the fine to be paid. Id. Thus, the Review Board is imparted with significant quasi-judicial responsibilities. This Office has concluded on numerous occasions that members of bodies whose duties are quasi-judicial in nature and involve the exercise of discretion are office holders. See, e.g., Ops. Atty. Gen. dated August 3, 2000; August 6, 1991; and June 1, 1984. Therefore, based upon the reasoning and conclusions of these earlier opinions, such a position would clearly involve an exercise of the sovereign power of the state.

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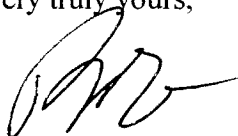
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This office therefore advises that in regards to both the Georgetown County Election Commission and the South Carolina Occupational Safety and Health Review Board, a member thereof would hold an office for dual office holding purposes. Accordingly, in our opinion serving simultaneously on the Georgetown County Election Commission as well as on the South Carolina Occupational Safety and Health Review Board would constitute dual office holding.

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).

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General