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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

October 8, 2003

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Harwell, Ballenger, Barth, and Hoefler, L.L.P.  
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Florence, South Carolina 29503

Dear Mr. Hoefler:

You have requested an advisory opinion from this Office concerning dual office holding. You have inquired whether a member the State Board of Law Examiners may serve simultaneously as a member of the City of Florence Housing Authority Board without violating the constitutional prohibition on dual office holding. You have referenced the relevant statute, Section 40-5-210 of the South Carolina Code of Laws, and appellate court rule, South Carolina Appellate Court Rule 402, regarding the State Board of Law Examiners.

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 consistently opined that a board member of a local housing authority holds an office for dual office holding. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated August 12, 2003 (City of Florence Housing Authority)(copy enclosed); March 16, 1990 (Darlington Housing Authority); March 10, 1988 (Columbia Housing Authority); June 1, 1987 (commissioner of a regional housing authority); November 18, 1986 (North Charleston Housing Authority). Accordingly, we advise that a commissioner or member of the board of directors for the City of Florence Housing Authority would undoubtedly be considered as an office holder for dual office holding purposes.

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The question therefore is whether a position on the State Board of Law Examiners would likewise be considered an office for dual office holding purposes. While this Office has not previously had occasion to address this question, we believe that a member of the State Board of Law Examiners would hold an office for the following reasons. First, as you have noted in your request, the South Carolina Board of Law Examiners has been specifically created by statute. S.C. Code Ann. Section 40-5-210. Even though the South Carolina Supreme Court appoints the members of the Board of Law Examiners and proscribes their duties, the Board ultimately exists pursuant to statutory authority. State v. Crenshaw. Second, the Board of Law Examiners is empowered to establish rules and regulations regarding the admission of prospective applicants to the practice of law in South Carolina. S.C.A.C.R. Rule 402(a)(2). The Board also has the power to "determine whether the applicants for admission to the practice of law in South Carolina possess the necessary legal knowledge for admission." We believe that these quasi-legislative and quasi-judicial powers of the Board clearly invoke an exercise of some portion of the sovereign power of the State. Sanders v. Belue. Lastly, this Office has on numerous occasions opined as to other state professional and occupational licensing boards in the context of dual office holding. We have consistently advised that the members of the various boards of examiners are office holders for dual office holding purposes. See, as representative of those numerous opinions, Ops. S.C. Atty. Gen. dated April 12, 1993 (Board of Examiners in Opticianry, Board of Examiners in Optometry, and Board of Physical Therapy Examiners); March 8, 1979 (Board of Pharmaceutical Examiners); and December 22, 1975 (Board of Dental Examiners).

Furthermore, in Richardson v. McFadden, 563 F.2d 1130 (4<sup>th</sup> Cir. 1977), Judge Hall, in his concurring opinion, stated that "[b]y administering the bar examination and judging the intellectual fitness of applicants to practice law, the Law Examiners perform a judicial function on behalf of the South Carolina Supreme Court." 563 F.2d at 1132. This analysis strongly supports our conclusion that the members of the Law Examiners are exercising sovereign powers. Accordingly, we must conclude that a member of the State Board of Law Examiners holds an office for dual office holding purposes.

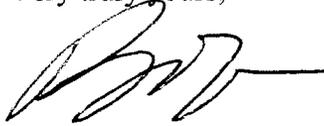
Based on the forgoing authorities, it is our opinion that a person who simultaneously holds the positions of board member for the City of Florence Housing Authority and member of the State Board of Law Examiners would violate the constitutional prohibition on dual office holding. The only question that remains is, what would be the practical effect under state law if the individual in question were to accept an appointment to one of these boards while currently serving on the other?

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

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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

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