



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
 ATTORNEY GENERAL

December 17, 2002

William F. James, Chairman
 Union County Agricultural Fair Association
 214 Catherine Street
 Union, South Carolina 29379

Dear Mr. James:

You have requested an opinion as to whether a "member of our Union County Fair Board [who is] ... appointed to the Union County Election Commission" may simultaneously hold both positions without contravention of the dual office holding provision of the South Carolina Constitution. It is our opinion that concurrently occupying these two positions would constitute dual office holding for purposes of the constitutional prohibition.

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," with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As concluded by former Attorney General Daniel R. McLeod in an opinion dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that 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). "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., 78 S.C. at 174. Other relevant considerations, as identified by the Court, are whether statutes, or other 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).

This Office has previously advised on numerous occasions that one who would serve on an election commission or voter registration board (it is my understanding that the two offices are consolidated in Union County) is considered an office holder for dual office holding purposes. See, Op. Atty. Gen., September 12, 1990; August 6, 1991; and May 6, 1992 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

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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 Registration Board of Union County holds an office.

Likewise, a member of the Board of Directors of the Union County Fair Association would hold an office for dual office holding purposes. It is our understanding that the Union County Fair Association was created by Section 2-251 et seq., of the Union County Code of Ordinances. Section 2-252 provided for the Board of Directors of the Fair Association as the governing body thereof. Such Section provides as follows:

[t]he fair association shall be governed by a board of directors composed of nine (9) members. Each member of the Union County Council shall recommend appointments to the board of directors with actual appointments being made with a favorable vote of the majority of the members of the county council. Members of the board of directors shall serve four-year terms with the exception of the initial appoints whereby county council members from districts 1, 3 and 5 shall recommend members to serve a two-year term. The county agricultural agent and the county home economics agent and their successors in office shall be members ex officio of the board of directors of the association thus making a total of nine (9) members. No member shall hold any other commission. Note: No more than three (3) members of the board of directors may be changed on the initial appointments unless illness or unforeseen circumstances deem it necessary with the effective date herein stated. Any vacancy or vacancies on the board shall comply with the county council's requirement that vacancies on boards and commissions be advertised publicly before appointments are made as passed in session on September 4, 1984. Each appointee will be screened to verify compliance with state regulations concerning dual office-holding. Ex officio members shall have no voting powers.

Section 2-253 provides for compensation (per diem) for directors and mandates that no director "shall hold any other office or employment under the association." Section 2-254 governs meetings of the board of directors. Pursuant to Section 2-255, the board of directors is required to "elect an executive director of the fair association" who is "in charge of the management and business of the association subject to the direction and control of the board of directors thereof." By virtue of Section 2-257, the "income and revenue derived by the fair association shall be used to defray the expenses of providing the county and the public with a worthwhile educational and recreational annual fair and for the promotion of agricultural and livestock interests in the county and the expansion of the same."

In Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949), the Supreme Court of South Carolina addressed the issue of whether the construction and erection of the Chester County Cattle Barn and Show Ring constituted a valid public purpose. In concluding that it is, the Court articulated

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the nature of agricultural fairs, finding that such fairs serve an important educational purpose. Noted the Court,

[w]e may think it may be reasonably inferred that the proposed undertaking is of an educational nature designed to disseminate among farmers, for practical purposes, scientific knowledge for the improvement of the cattle and milk business. Courses of study in agriculture are being taught in many of the public schools and colleges of this State and such courses are recognized as an important part of the curriculum. In Briggs v. City of Raleigh et al., 195 N.C. 223, 141 S.E. 597, 599, the Court, in sustaining the expenditure of public funds by the City of Raleigh for a state fair said: "The purpose and design of a state fair is to promote the general welfare of the people, advance their education in matters pertaining to agriculture and industry, increase their appreciation for the arts and the sciences, and bring them in closer touch with many things which otherwise might remain in reserve or 'caviare to the general,' to borrow an expressive phrase from Shakespeare's Hamlet." The purpose here is a somewhat similar one. Also, see State ex rel. Leaverton et al. v. Kerns, 104 Ohio St. 550, 136 N.E. 217. It was held in Wright, Comptroller General, v. Atlantic Coast Line R. Co., 40 Ga. App. 785, 151 S.E. 553, that a tax levy for the maintenance of a county demonstration agent was for an educational purpose.

52 S.E.2d at 786. We have concluded previously that "education and administration of education are traditional sovereign powers" Op. Atty. Gen., January 31, 1985. Thus, in view of the fact that the Board of Directors is the governing board of the Union County Fair Association, a member thereof would hold an office for dual office holding purposes.

Accordingly, in our opinion serving simultaneously on the Union Board of Election and Registration as well as on the Board of Directors of the Union County Fair Association would constitute dual office holding.

When a dual officeholding 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.

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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).

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

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