

7150 Liberty



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON  
ATTORNEY GENERAL

May 8, 2001

Mr. John L. Weaver, III, Esq.  
Horry County Attorney  
1001 2<sup>nd</sup> Avenue  
Post Office Box 1236  
Conway, South Carolina 29528

Dear Mr. Weaver:

By your letter of April 27, 2001 you have asked whether a dual office holding situation would exist if an individual were to serve simultaneously on the Horry County Planning Commission and the South Carolina State Board for Technical and Comprehensive Education. For the reasons set forth below, it is my opinion that concurrent service on these governmental bodies would violate the dual office holding prohibitions of the South Carolina Constitution. The individual in question, however, 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.

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 Attorney General Daniel 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."

*Respectfully,  
Charles M. Condon*

Mr. Weaver  
Page 2  
May 8, 2001

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).

Numerous prior opinions of this Office have held that a member of a county planning commission would hold an office for dual office holding purposes. *See, e.g., Ops. Atty. Gen.* dated August 6, 1991; January 10, 1990 and January 23, 1989. In fact, in opinions dated June 24, 1982 and January 15, 1985, this Office concluded that members of the Horry County Planning Commission are considered officers for dual office holding purposes. Of course, this Office does not withdraw or overrule a prior opinion unless it is clearly erroneous or unless intervening circumstances warrant such. Our review of the relevant statutes as well as these prior opinions does not compel the determination that the interpretations reached therein are clearly erroneous. Accordingly, we must adhere to the conclusions of these prior opinions. Therefore, it must now be determined whether membership on the State Board for Technical and Comprehensive Education would likewise constitute an office.

The State Board for Technical and Comprehensive Education was created by S.C. Code Ann. §§59-53-10 *et seq.* Pursuant to §59-53-10, board members are appointed by the Governor for terms of six years and until their successors are appointed and qualify. Section 59-53-10 also authorizes the Board to enter into contracts and promulgate regulations. Section 59-53-20 imparts the Board with jurisdiction over "all state-supported technical institutions and their programs that are presently operating and any created in the future." Additional powers and duties are enumerated in §59-53-50, which include: developing, implementing coordinating and operating adequate post-high school vocational, technical and occupational diploma and associate degree courses; establishing criteria for approving and awarding diplomas and degrees; accepting and administering donations of funds, grants and real property from individuals, corporations, foundations and governmental bodies; and employing an executive director and such other personnel as may be necessary to fulfill its duties and responsibilities. Such powers and duties are closely analogous to those exercised by trustees of the State's various colleges and universities. Prior Attorney General's opinions have consistently held that college and university trustees undoubtedly exercise a portion of the State's sovereign power. *See, e.g., Ops. Atty. Gen.* dated October 18, 2000 (Lander University Board of Trustees); March 30, 2000 (Medical University Board of Trustees); November 21, 1996 (South Carolina State University Board of Trustees); and many others. Finally, in an opinion dated March 22, 1995, Attorney General Charles M. Condon concluded that membership on the State Board for Technical and Comprehensive Education "... would constitute an office for dual office holding purposes[.]" Thus, based upon the reasoning and conclusions of these earlier opinions, a member of the State Board

Mr. Weaver  
Page 3  
May 8, 2001

for Technical and Comprehensive Education most likely holds an office within the meaning of Art. XVII, Sec. 1A of the South Carolina Constitution. Accordingly, it is my opinion that a member of the Horry County Planning Commission may not simultaneously serve on the South Carolina State Board for Technical and Comprehensive Education without violating the dual office holding prohibitions of the State Constitution.

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 S.C. Const. Art. XVII, Sec. 1A of the Constitution, 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. Nevertheless, the individual may continue to perform the duties of the previously held office as a de facto officer,<sup>1</sup> 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 Strob. 92 (S.C. 1848).

I trust this information is responsive to your inquiry and that you will not hesitate to contact me if I can be of additional assistance.

Sincerely,



Zeb C. Williams, III  
Deputy Attorney General

---

<sup>1</sup>A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees §495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." *Heyward v. Long*, 178 S.C. 351, 183 S.E. 145, 151 (1936); *see also Smith v. City Council of Charleston*, 198 S.C. 313, 17 S.E.2d 860 (1942) and *Bradford v. Byrnes*, 221 S.C. 255, 70 S.E.2d 228 (1952).