

The State of South Carolina



Office of the Attorney General

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April 12, 1993

George L. Schroeder, Director
Legislative Audit Council
400 Gervais Street
Columbia, South Carolina 29201

Dear Mr. Schroeder:

By your letter of March 31, 1993, you have asked whether persons serving on various professional licensing boards may also serve in other capacities without violating the dual office prohibitions of the State Constitution. The positions about which you have inquired are the following:

1. One serving on the State Board of Examiners in Opticianry also serving on the Board of Directors of the Charleston Citywide Local Development Corporation.
2. One serving on the State Board of Examiners in Optometry also serving as a commissioner for the Combined Utility System of Easley.
3. One serving on the State Board of Physical Therapy Examiners also serving on the Rock Hill YMCA Board of Directors.

After a brief discussion about the principles of dual office holding, each of these questions will then be addressed separately.

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 a notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of

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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 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).

Question 1

The Board of Examiners in Opticianry was established pursuant to S.C. Code Ann. § 40-38-30 et seq. The Board consists of seven members appointed by the Governor, having been nominated by the state's opticians (five optician members) or any individual, group, or association (two lay members). Section 40-38-30 specifies qualifications for board members: five must be licensed opticians, and the two lay members must be "members of the general public who do not derive their income or support from any optical or related business or who are not related to any members of these professions." Members are appointed for terms of four years and until their successors are appointed and qualify. Taking an oath is required by § 40-38-40. Compensation is provided for by § 40-38-50.

Duties are specified in §§ 40-38-30, 40-38-60, 40-38-100, 40-38-130, 40-38-140, 40-38-180, 40-38-210, 40-38-220, 40-38-230, and other statutes. The Board is empowered to examine and license opticians, investigate complaints about opticians, investigate violations of the opticianry statutes, make rules and regulations, suspend licenses or take other disciplinary actions, administer oaths, issue subpoenas, and more. It is clear that these duties involve an exercise of a portion of the sovereign power of the State.

Based on the foregoing, it appears that a member of the Board of Examiners in Opticianry would be considered an office holder for dual office holding purposes. Thus, it is necessary to examine the Board of Directors of the Charleston Citywide Local Development Corporation.

Documents furnished to this Office relative to the Charleston Citywide Local Development Corporation indicate that the Corporation is a nonprofit corporation chartered by the Secretary of State, whose purpose is to further economic development, promote and assist in developing residential housing, and so forth in the City of Charleston. It appears that membership is governed by the Corporation's bylaws. It does not appear that any statute or ordinance has established the Corporation, provided for membership therein, established qualifications for board members, provided for an oath or compensation, or the like; nor does it appear that members of the Corporation are exercising a portion of

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the sovereign power of the State. Thus, a member of the Board of Directors of this Corporation most probably would not be considered an office holder.

In conclusion, it is most probable that an individual could serve simultaneously on the Board of Examiners in Opticianry and on the board of the Charleston Citywide Local Development Corporation without violating the dual office holding prohibitions of the State Constitution.

Question 2

The Office has advised previously that one who would serve on the State Board of Examiners in Optometry would hold an office for dual office holding purposes. Enclosed is a copy of an opinion dated May 11, 1972, so concluding. Thus, we must examine the position of commissioner for the Combined Utility System of Easley.

From information provided to your office by the affected individual, we understand that one elected commissioner must reside in the City of Easley. The term for which one is elected is six years. The commissioners take an oath prior to assuming their duties. Utilities are provided to the commissioners at no charge; presumably this is some form of compensation. The commission sets rates for the utilities that are provided by the Combined Utility System of Easley.

Comparing this information to the state statutes on municipal commissions of public works found in Chapter 31 of Title 5, it is possible that the Combined Utility System was established pursuant to this statutory scheme when it was formed in 1911. Section 5-31-210 provides for election of commissioners of public works and for six-year terms of office. Section 5-31-240 requires that commissioners take an oath. Section 5-31-250 sets forth the powers of commissioners of public works.

It appears that a commissioner of public works would be considered an office-holder. From information provided, it appears that a commissioner of the Combined Utility System of the City of Easley meets the criteria usually found in an office-holder; this conclusion would be reinforced if the Combined Utility System was formed pursuant to present § 5-31-210 et seq.

Based on the foregoing, it is our opinion that an individual serving simultaneously on the State Board of Examiners in Optometry and as a commissioner of the Combined

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Utility System of the City of Easley would likely hold dual offices in contravention of the State Constitution.

Question 3

The State Board of Physical Therapy Examiners was established pursuant to § 40-45-30 et seq. Section 40-45-30 provides that the Board consist of three members who are licensed physical therapists, one physical therapy assistant, and one lay member. The physical therapists and physical therapy assistant must have three years' experience prior to their appointments and must continue to practice while serving on the Board. The statute sets a four-year term of office. No oath is required by statute, but an oath must be taken before the Secretary of State issues commissions to gubernatorial appointees generally. See Art. VI, § 4 of the State Constitution. Duties of the Board are prescribed by statutes such as §§ 44-45-60, 40-45-70, 40-45-90, 40-45-110, 40-45-120, 40-45-130, 40-45-140, 40-45-200, and others, such duties including the examination and licensing of physical therapists and physical therapy assistants, disciplining licensees, investigating complaints against licensees, etc. It appears that these duties involve an exercise of a portion of the sovereign power of the State. Thus, a member of the State Board of Physical Therapy Examiners meets most of the criteria usually found in office holders and would be considered an office-holder for dual office holding purposes.

The Community Young Men's Christian Association of Rock Hill, S.C., was established as an eleemosynary corporation and chartered by the Secretary of State on November 25, 1949. A review of the charter and of state law, as well as information provided to your office by the affected individual, shows that this board member is not holding a statutorily-created office or exercising a portion of the sovereign power of the State. Thus, we must conclude that a board member of Rock Hill YMCA would not hold an office for dual office holding purposes, in keeping with past opinions that members of boards of eleemosynary corporations would not be considered office-holders. See Ops. Atty. Gen. dated October 18, 1988; September 8, 1987; July 9, 1986; and others.

Based on the foregoing, it is our opinion that an individual may serve simultaneously on the State Board of Physical Therapy Examiners and on the board of the Rock Hill YMCA without violating the dual office prohibitions of the State Constitution.

We trust that we have satisfactorily responded to your inquiry. Please advise if additional information or clarification should be needed.

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With kindest regards, I am

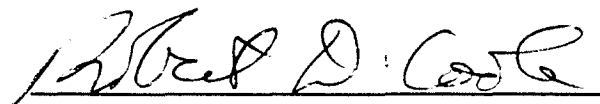
Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions