

The State of South Carolina



Office of the Attorney General

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November 1, 1991

The Honorable Kim Burch
Member, House of Representatives
Post Office Box 276
Pageland, South Carolina 29728

Dear Representative Burch:

By your letter of October 25, 1991, you have requested the opinion of this Office as to whether an individual may serve simultaneously on a school board and as a soil and water conservation commissioner, the latter position being assumed most recently. If such is not permitted, you asked whether the school board position should be automatically forfeited. We assume that your inquiry refers to the dual office holding prohibitions of the state Constitution.

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 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).

This Office has advised on numerous occasions that one who serves as a soil and water conservation commissioner would hold an office for dual office holding purposes. Enclosed is a copy of an opinion dated December 17, 1990 as representative of those opinions.

This Office has similarly advised on numerous occasions that one who serves on a school district board of trustees or on a county board of education would hold an office for

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dual office holding purposes. Enclosed are copies of opinions dated August 8, 1990 (as to a school district trustee) and March 16, 1989 (as to a member of a county board of education) as representative of those opinions.

Based on the foregoing, it is our opinion that one who would serve concurrently on a school board (a county or district board) and as a soil and water conservation commissioner would most probably run afoul of the dual office prohibitions of the state Constitution.

Because the first position assumed was on the school board, you asked whether, in a dual office holding situation, that office would be "automatically forfeited." To summarize the relevant law, we advise that if an individual holds one office on the date he assumes a second office, both offices falling within the purview of Article XVII, § 1A of the state Constitution, he is deemed to have vacated the former office. However, that person may continue to perform the duties of the previously held office as a de facto officer, 1/ 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).

1/ 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).

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We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway
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Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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