



ALAN WILSON
ATTORNEY GENERAL

May 20, 2014

The Honorable Kenneth F. Hodges
Member, House of Representatives
434-B Blatt Building
Columbia, SC 29211

Dear Representative Hodges:

This Office received your request for an opinion as to whether an individual can serve simultaneously as a Colleton County School Board Trustee and as a Colleton County Sheriff's Deputy. If not, you are asking how to resolve the situation. Our understanding is that this individual was a member of the school board prior to becoming a sheriff's deputy.

LAW/ANALYSIS:

The South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention." S.C. Const. art. XVII § 1A.

The South Carolina Supreme Court explains that an "office" for dual office holding purposes is:

"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." *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). "In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that "[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public." *Willis v. Aiken County*, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). "The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority..." 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). "Other relevant considerations [as to whether a position is a public office] include: 'whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.'" See *Op. S.C. Atty. Gen.*, June 17, 2013 (2013 WL 3243063) (quoting *State v. Crenshaw*, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

A school board trustee is a public officer. In a prior opinion, we stated:

this Office has opined on many occasions that a school board trustee would hold an office for dual office holding purposes. See, as examples, Ops. Atty. Gen. dated August 8, 1990. . .; September 26, 1986; and March 2, 1989, among many others.

Op. S.C. Atty. Gen., June 19, 1991 (1991 WL 633003).

A sheriff's deputy is also a public officer for dual office holding purposes. "This office has consistently held deputy sheriffs, as well as other such law enforcement officers, hold an office of 'honor or profit' in regards to the dual office holding prohibition." Op. S.C. Atty. Gen., October 9, 2012 (2012 WL 5078730). Also, see Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313 (1943).

Therefore, it would most likely be a violation of the prohibition against dual office holding for an individual to serve both as a school board trustee and as a sheriff's deputy.¹ Your concern is how to resolve this situation. We addressed what steps must be followed if a dual office holding situation occurs in a prior opinion:

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 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); Dover 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. Macleod v. Court of Probate of Collation 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).

Op. S.C. Atty. Gen., 2007 WL 1651345 (May 9, 2007) (quoting Op. S.C. Atty. Gen., May 27, 2003).

In accordance with the above cited authority, no steps need to be taken because the individual found to hold two offices automatically vacates the first office. However, we reiterate that this individual will

¹ The only exception to the dual office holding prohibition would be if the person holds the second office "ex officio." In other words, if the deputy sheriff is appointed to the school board to serve in his official capacity as deputy sheriff, it would not be dual office holding. We have not received any information indicating that this exception applies in this instance.

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continue to serve in the first office, as a school board trustee, in a de facto capacity until a successor is appointed.

CONCLUSION

1. An individual's service as a Colleton County School Board Trustee and as a Colleton County Sheriff's Deputy would most likely violate the prohibition against dual office holding.
2. If an individual has violated the prohibition against dual office holding, he is deemed by law to have vacated the first office held. However, we reiterate that the individual will continue to serve in the first office in a de facto capacity until a successor is appointed.

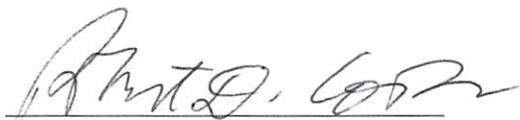
Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General