



ALAN WILSON
ATTORNEY GENERAL

June 10, 2014

Bert Duffie, General Counsel
Colleton County Board of School Trustees
PO Box 1215
Walterboro, SC 29488

Dear Mr. Duffie:

This Office received your request regarding an opinion we issued on May 20, 2014 in which we opined that an individual's service as a Colleton County School Board Trustee and as a Colleton County Deputy Sheriff would most likely violate the prohibition against dual office holding. We stated the following resolution of the situation:

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., May 20, 2014¹ (quoting Op. S.C. Atty. Gen., 2007 WL 1651345 (May 9, 2007)).

Each of your questions and its analysis follows.

¹ This opinion is not yet on Westlaw.

I. Is the Colleton County School Board required to declare the seat held by the dual office holder vacant and order a special election to fill the seat or can the board member continue to serve de facto until the next general election for his seat?

The Colleton County School board does not have the ability to declare the seat vacant. Only a court can remove a person from office. See Op. S.C. Atty. Gen., June 5, 2003 (2003 WL 21471510). A court could also determine whether a general or a special election should be held. A court would most likely consider Act Number 190, which provides for the Board of Trustees of the Colleton County School District and gives the procedure to be followed when a vacancy occurs on the school board, when determining the type of election to be held:

All members of the board [Board of Trustees of the Colleton County School District] shall serve until their successors are elected and qualify. In the event of a vacancy on the board occurring for any reason other than expiration of a term, the board shall call a special election to fill the unexpired term. If the vacancy does not occur within six months of a regular trustee election, the vacancy must be filled for the unexpired term at the next regular election. . . .

1997 Act Number 190.

Without a court action, the individual would serve de facto the remainder of his term until his successor is elected and qualified.

II. What effect, if any, does the election of a new sheriff have on a deputy sheriff's date of assumption of his office? The issue arises because when a new sheriff is elected, the previously employed deputy sheriffs participate in the swearing-in ceremony for the new sheriff, even though they were originally sworn in when hired for the position. The question is whether the deputy sheriff's participation in the new sheriff's swearing-in ceremony creates a new date of assumption of office for the deputy sheriff even though his employment was not terminated or altered in any manner through the change in sheriffs.

A sheriff appoints his deputies pursuant to law. Section 23-13-10 of the South Carolina Code provides:

The sheriff may appoint one or more deputies to be approved by the judge of the circuit court or any circuit judge presiding therein. Such appointment shall be evidenced by a certificate thereof, signed by the sheriff, and shall continue during his pleasure. . .

S.C. Code Ann. § 23-13-10 (1976 Code, as amended). The legal encyclopedia Corpus Juris Secundum is informative and it states:

Where the term of a deputy sheriff or deputy constable is not otherwise fixed by statute, the deputy holds office during the term and at the

pleasure of the sheriff or constable who appointed the deputy. . .and the term as deputy expires automatically when the sheriff's tenure in office expires. A sheriff lacks the power to extend the term of an under-sheriff beyond the period of the sheriff's own term, or by contract to bind him or herself to keep a deputy in office for a specified period. If the sheriff is reelected, a new appointment is necessary to continue the deputy in office.

80 C.J.S. Sheriffs and Constables § 39. Our State Supreme Court has explained:

Yet it has never been doubted, so far as we are aware, that the term of a deputy sheriff or deputy clerk ends by operation of law with the term of the sheriff or clerk by whom he was appointed. The clerk and sheriff being charged with general responsibility for the conduct of their respective offices, it is so plain that a deputy appointed by a predecessor should not hold over it was deemed unnecessary to say that the term of the deputy should end with the term of the clerk or sheriff who appointed him.

Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907).

The term of a deputy sheriff begins when he is appointed by the sheriff and qualified² and ends when the sheriff decides or when the term of the sheriff ends. If the sheriff is re-elected, the deputy sheriff can be appointed to a new term by the sheriff.

However, a term of office can not be confused with the act of being a public official. Our State Supreme Court stated the following when it determined that a deputy sheriff was a public officer:

Many criteria may be considered, although not regarded as controlling, in determining whether one is a public officer-such as the taking of an oath, giving of a bond, and tenure and duration. The law in this State . . . relating to deputy sheriffs includes all of these requirements. They are required to take the oath of office, give an official bond, and after appointment and qualification they may perform any and all of the duties appertaining to the office of sheriff. The right, authority and duty of a deputy sheriff are thus created by statute. He is invested with some portion of the sovereign functions of the government, to be exercised in behalf of the public, and is, consequently, a public officer within any definition given by the Courts or text writers. It can make no difference that the appointment is made by the sheriff. The 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, 26 S.E.2d 313 (1943) (emphasis added).

² A deputy sheriff also has to make an oath and give a bond before he can begin his duties. See S.C. Code Ann. § 23-13-20 (1976 Code, as amended).

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As explained in Willis, a deputy sheriff exercises governmental power when he is appointed and qualified. If he is serving in a prior office, his exercise of governmental power as a deputy sheriff automatically causes a vacancy in his prior office to occur. For dual office holding purposes, the deputy sheriff assumes his office when he begins exercising governmental powers. It is irrelevant what terms he serves.

CONCLUSION

In conclusion, this Office believes that the law is as follows:

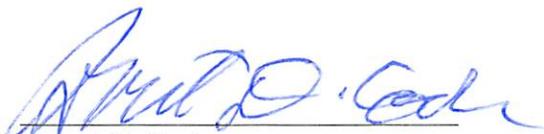
1. Only a court can remove a person from office. Without a court action, a member of the Colleton County School Board who is violating the prohibition against dual office holding would serve de facto the remainder of his term until his successor is elected and qualified.
2. For dual office holding purposes, the deputy sheriff assumes his office when he begins exercising governmental powers.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General