



ALAN WILSON
ATTORNEY GENERAL

March 26, 2015

Ms. Doris J. Gerrald
511 McEachern Hts.
Marion, SC 29571

Dear Ms. Gerrald:

Attorney General Alan Wilson has referred your letter dated March 12, 2015 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion based on that understanding.

Issue (as quoted from your letter):

I am presently representing Marion County on the Pee Dee Mental Health Center Board of Directors, appointed by the Governor. Pee Dee Mental Health Center (PDMHC) is a division of the S.C. Department of Mental Health. As a PDMHC Board Member, I receive travel and per diem only. Board members are volunteers. Some of our duties include governing, focus on the Center's mission, establishing policies, assisting in hiring the Executive Director, evaluating programs, reviewing and evaluating the community mental health services program, and advising the Executive Director on policies to stimulate effective community relations. The PDMHC Board functions primarily in an advisory capacity.

Recently, I decided to run for the Marion City Council to give back to the City that I live in. As I am retired, I would have the time to do this, if elected. The election will be held in April of this year. I have been made aware that if I am elected and accept a position on the Marion City Council, it may be considered dual office holding and I would have to choose the one I want to serve on. ...

Based on the information you have provided, we will address whether serving on the board of directors of the Pee Dee Mental Health Center and on the Marion City Council would constitute dual office holding, as prohibited by our State's constitution.

Law/Analysis:

By way of background, Article VI, Section 3 and Article XVII, Section 1A of the South Carolina Constitution provide 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, a constable, or a notary public. Article III, Section 24 of the South Carolina Constitution specifically prohibits members of the General Assembly from holding any other office or position of trust or profit. For these provisions to be contravened, a person concurrently must hold two public offices

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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). The Sanders case states:

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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Id. at 174, 58 S.E. at 763. Other relevant considerations include “whether the position was created by the legislature; whether qualifications for appointment are established; whether duties, tenure, salary, bond and oath are prescribed or required; [and] whether one occupying [the] position is representative of sovereign [power or duties].” State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980) (citing State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.R.2d 482 (1970)). The only exception to dual office holding prohibition would be if the person holds the second office “ex officio.” Op. S.C. Att’y Gen., 2012 WL 4459270 (September 19, 2012) (citing Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)).

As you reference in your letter and as this Office has opined before, this Office believes a court would determine a councilmember of the Marion City Council would hold an office for honor or profit. Op. S.C. Att’y Gen., 1989 WL 50861 (November 20, 1989). Therefore, let us examine the position of board of directors for the Pee Dee Mental Health Center to determine if it is also an office for honor or profit. South Carolina Code Section 44-15-10 grants the authority to establish mental health programs and clinics. We will presume the Pee Dee Mental Health Center is established according to this statute. In examining our previous opinions, this Office has consistently opined that a member of a board of mental health would be an office for honor or profit. See, e.g., Ops. S.C. Att’y Gen., 1993 WL 494584 (October 13, 1993); 1986 WL 289862 (June 12, 1986). Moreover, this Office previously opined that such a mental health center, appointed by the Governor is “basically, the administrative agency for community mental health service programs and is eligible to receive grants of public funds from the South Carolina Mental Health Commission.” Op. S.C. Att’y Gen., 1965 WL 8054 (August 31, 1965). That opinion went on to declare that the mental health center was a public agency and thus, immune from tort liability. Id.

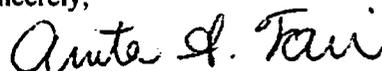
Therefore, we must now look to what we know about the Pee Dee Mental Health Center, which is based on the information you provided in your letter and pursuant to the statutes governing mental health centers in South Carolina. Using the factors in Crenshaw, the position of mental health board member is created by legislature (S.C. Code § 44-15-70), the position is one appointed by the Governor (S.C. Code § 44-15-60), the qualifications for appointment are established (S.C. Code § 44-15-60), and duties and tenure are prescribed (S.C. Code § 44-15-60). While we recognize your assertion that the position is volunteer and only actual expenses are paid, it can still be an office for honor or profit because it meets many of the Crenshaw factors including the authority to allocate taxpayer funds. S.C. Code § 44-15-70. This Office has consistently opined that the expenditure of appropriated funds involves the sovereign power of the State. See, e.g., Ops. S.C. Att’y Gen., 2001 WL 957758 (July 18, 2001); 1985 WL 259236 (December 11, 1985); 1968 WL 8931 (November 1, 1968).

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Conclusion:

Therefore, it is for all of the above reasons that this Office believes a court will determine a board member of the Pee Dee Mental Health Center would be an office for honor or profit for dual office holding purposes. Nevertheless, there are many other sources and authorities you may want to refer to for a further analysis. For a binding determination, this Office would recommend seeking a declaratory judgment from a court on these matters, as only a court of law can interpret the law. S.C. Code § 15-53-20. Until a court or the Legislature specifically addresses the issues presented in your letter, this is only a legal opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita S. Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General