



ALAN WILSON  
ATTORNEY GENERAL

May 19, 2015

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Dear Mr. Thornton:

This Office received your request for an opinion. You inform us that a currently serving member of the Colleton County Fire Commission was recently elected as a write in candidate to be a commissioner for the Colleton Soil and Water Conservation District. You ask if this is dual office holding.

**LAW/ANALYSIS:**

The South Carolina Constitution provides that “[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public.” S.C. Const. art. XVII, § 1A.

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

“[o]ne 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

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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 member of the Colleton County Fire Commission is a public officer. In a prior opinion, we stated:

[o]ur Office has also concluded that an individual serving as a fire commissioner, or serving as a member of a fire commission, would be an office holder for purposes of dual office holding

Op. S.C. Atty. Gen., July 19, 2013 (2013 WL 3960435).

A commissioner for a soil and water conservation district is also an officer for dual office holding purposes. We determined in an April 14, 2005 opinion:

[w]e have advised on numerous occasions that one who serves as a soil and water conservation commissioner would hold an office for dual office holding purposes. See, Ops. S.C. Atty. Gen. dated October 8, 1996; November 1, 1991 and December 17, 1990.

Op. S.C. Atty. Gen., April 14, 2005 (2005 WL 1024608).

Accordingly, we believe it would be a violation of the constitutional prohibition against dual office holding for an individual to serve as both a member of the Colleton County Fire Commission and as a commissioner for the Colleton Soil and Water Conservation District.

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

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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).

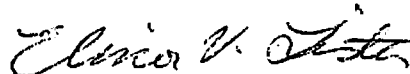
In accordance with the above cited authority, no steps need to be taken to resolve this situation because the individual found to hold two offices automatically vacates the first office. However, we reiterate that this individual will continue to serve in the first office, as a fire commissioner, in a de facto capacity until a successor is selected.

### CONCLUSION

1. An individual's service as a member of the Colleton County Fire Commission and as a commissioner for the Colleton Soil and Water Conservation District 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 selected.

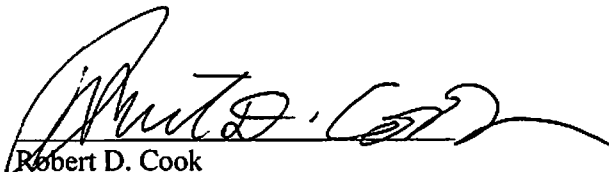
Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General