



ALAN WILSON
ATTORNEY GENERAL

March 29, 2016

Ms. Darra James Coleman, Esq.
S.C. Dept. of Labor, Licensing and Regulation
110 Centerview Drive
Post Office Box 11329
Columbia, South Carolina 29211-1329

Dear Ms. James:

You have requested the opinion of this Office as to whether service as a hearing officer, as designated in S.C. Code Ann. § 40-1-90(A) (2011), would constitute as an office for purposes of the dual office holding prohibition in the South Carolina Constitution. You also include that the individual in question previously served on the board or commission that he or she will potentially serve as the hearing officer for. Our analysis follows.

Law / Analysis

Article XVII, Section 1A of the South Carolina Constitution states that “[n]o person may hold two offices of honor or profit at the same time . . .” with the exception that individuals serving as officers in the militia, a member of a lawfully and regulated organized fire department, constable, or notary public may hold an additional office. A person not falling into this exception would violate the dual office holding prohibition by concurrently serving in two offices “involving an exercise of some part of the sovereign power [of the State], either small or great, in the performance of which the public is concerned. . . .” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). It has been said that the public policy behind the dual office holding prohibition is “to prevent public officials from acting in circumstances in which their personal interests conflicts with the public whose interest they have been elected to represent.” 63C Am. Jur. 2d Public Officers and Employees § 63 (2014) (citing Dykeman v. Symond, 54 A.D.2d 159, 388 N.Y. S.2d 422 (NY 4th Dep’t 1976)).

In considering whether a particular position is an office in the constitutional sense, South Carolina courts look to whether “[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). More specifically, our Supreme Court has clarified that the criteria to be considered includes “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.” State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

As noted above, your question pertains to S.C. Code Ann. § 40-1-90 (2011) which relates to disciplinary action proceedings conducted by a licensing board or commission charged by law with the responsibility of licensing or otherwise regulating an occupation or profession within the State. Specifically, Section 40-1-90(A) provides as follows:

[t]he results of an investigation must be presented to the board. If from these results it appears that a violation has occurred or that a licensee has become unfit to practice the profession or occupation, the board, in accordance with the Administrative Procedures Act, may take disciplinary action authorized by Section 40-1-120. No disciplinary action may be taken unless the matter is presented to and voted upon by the board. The board may designate a *hearing officer* or hearing panel to conduct hearings or take other action as may be necessary under this section.

S.C. Code Ann. § 40-1-90(A) (2011) (emphasis added).

To place this statute into context, we note that it was enacted as part a comprehensive statutory scheme for regulating the licensing boards that come under the umbrella of the Department of Labor, Licensing, and Regulation. See Act No. 453, 1996 S.C. Acts 2843-58. As indicated by S.C. Code Ann. § 40-1-40(A) (2011 & Supp. 2015), the purpose of the various professional and occupational licensing boards within the Department of Labor, Licensing, and Regulation is to protect the public at large through the regulation of professional and occupational licensees. In furtherance of this purpose, licensing boards are, in part, given the power to determine the eligibility of applicants for licensure, to establish criteria for licensure, and to discipline licensees for violations of their respective occupation for profession. See S.C. Code Ann. § 40-1-70(1), (6) (2011 & Supp. 2015) (providing the powers enumerated to each of the licensing boards, which, among others, include the power of “determining the eligibility of applicants for examination and licensure” and “conducting hearings on alleged violations of this article and regulations promulgated under this article”).

LLR, through its director, has the authority to initiate an investigation upon receiving a written complaint from any person or if the director has reason to believe a person is in violation of a provision of the Article 1 of Title 1, Chapter 40, the applicable licensing act, or a regulation of the board. S.C. Code Ann. § 40-1-80(A) (2011 & Supp. 2015). Thereafter, the results of the investigation must be presented to the licensing board, as set forth in S.C. Code Ann. § 40-1-90 (2011). If it appears a disciplinary action has occurred or that the licensee has become unfit to practice his or her profession or occupation, the board is authorized to take disciplinary action. S.C. Code Ann. § 40-1-90(A) (2011). However, the board is not permitted to take disciplinary action “unless the matter is presented to and voted upon by the board.” Id. Section 40-1-90 goes on to state that, “[t]he board may designate a hearing officer or hearing panel to conduct hearings or take other action as may be necessary under this section.” Id.

With this background in mind, we turn to whether appointment as a hearing officer, as authorized by Section 40-1-90, would constitute an office for dual office holding purposes. Our Office has issued numerous opinions concluding that members of state professional and occupational licensing boards do hold an office for purposes of dual office holding. See, e.g., Op.

S.C. Att'y Gen., 2014 WL 6569896 (Nov. 10, 2014) (Real Estate Commission); Op. S.C. Att'y Gen., 2009 WL 1266915 (April 1, 2009) (State Board of Examiners in Psychology); Op. S.C. Att'y Gen., 2007 WL 1934799 (June 14, 2007) (South Carolina Environmental Certification Board); Op. S.C. Att'y Gen., 2004 WL 1182085 (April 29, 2004) (Commissioner of Pilotage for the Port of Charleston); Op. S.C. Att'y Gen., 2003 WL 22378700 (Oct. 8, 2003) (State Board of Law Examiners); Op. S.C. Att'y Gen., 1993 WL 720100 (April 12, 1993) (Board of Examiners in Opticianry, State Board of Examiners in Optometry, and State Board of Physical Therapy Examiners); Op. S.C. Att'y Gen., 1979 WL 42852 (March 8, 1979) (Board of Pharmaceutical Examiners). However, our Office has never addressed whether a hearing officer designated by a licensing board pursuant to S.C. Code Ann. § 40-1-90 would also be an office for purposes of dual office holding.¹

The only source of authority as to the general powers and duties of a hearing officer designated by a licensing board or commission to conduct a hearing for disciplinary proceedings that we have located is contained in Section 40-1-90.² In relevant part Section 40-1-90(A) (2011) states “[n]o disciplinary action may be taken unless the matter is presented to and voted upon by the board. The board may designate a hearing officer or hearing panel to conduct hearings or take other action as may be necessary under this section.” Furthermore, Subsection (B) provides that

[f]or the purpose of a proceeding under this article, the department [LLR] may administer oaths and issue subpoenas for the attendance and testimony of witnesses and the production and examination of books, papers, and records on behalf of the board or, upon request, on behalf of a party to the case. Upon failure to obey a subpoena or to answer questions propounded by the board or its hearing officer or panel, the board may apply to an administrative law judge for an order requiring the person to comply with the subpoena.

S.C. Code Ann. § 40-1-90(B) (2011). You also clarify in your letter that the hearing officer must be appointed by the respective board or commission and conducts evidentiary hearings in disciplinary matters. You also provide that thereafter, the hearing officer submits a *recommendation* to the board or commission setting forth findings of facts and conclusions of law for the board or commissioner’s final action.

From the limited information relating to hearing officers appointed by a board or commission pursuant to S.C. Code Ann. § 40-1-90 that we have found, it does not appear that a court would find holding such position would constitute as an office for purposes of dual office holding. Comparing the functions and duties of a hearing officer to the criteria established by

¹ However, as have concluded in Op. S.C. Att'y Gen., 1990 WL 599282 (Aug. 29, 1990) that a hearing officer for the South Carolina Department of Corrections would not be considered an office holder for dual office holding purposes.

² We note that legislation pertaining to certain boards or commissions reference the authority to appoint a hearing officer and prescribe further duties which they can perform. The determination made in this opinion is based upon your indication that the hearing officer in question is permitted to conduct an evidentiary hearing in disciplinary matters and then “submits a recommendation to the board or commission setting forth findings or facts and conclusions of law for the board or commission’s final action.”

our Courts to determine whether a position is an office in the constitutional sense, service as a hearing officer lacks several components of the relevant considerations. While the appointment of hearing officers by a board or commission is authorized by statute, the legislature has provided no requirements as to the qualifications for appointment. Furthermore, no mention is made as to a hearing officer's tenure or salary and it does not appear a hearing officer is required to post bond or take an oath prior to service.

As to the duties prescribed by law, a hearing officer or panel is permitted to "conduct hearings or take other action as may be necessary under [Section 40-1-90]." S.C. Code Ann. § 40-1-90(A)(2011). While the duties of a hearing officer could be considered "quasi-judicial" in nature,³ we believe the most relevant consideration to our analysis is that a hearing officer is limited to providing recommendations to the board or commission. Thus, it is the board or commission that ultimately retains all disciplinary authority. See S.C. Code Ann. § 40-1-90(A) ("No disciplinary action may be taken unless the matter is presented to and voted upon by the board.").

We have repeatedly concluded that while members of such advisory bodies possess some characteristics of an office, they do not exercise a sovereign power of the State and therefore do not hold offices for purposes of dual office holding. See Ops. S.C. Att'y Gen., 2012 WL 682076 (Feb. 23, 2012) (Medical Disciplinary Commission of the State Board of Medical Examiners); 2011 WL 1740744 (April 18, 2011) (Uniform Law Commission); 2008 WL 4146003 (Aug. 5, 2008) (Commission for Lawyer Conduct); 2008 WL 5476553 (Dec. 18, 2008) (Cherokee County Foster Care Review Board); 2000 WL 33120657 (Dec. 1, 2000) (Local Drought Response Committee); 1989 WL 406147 (May 15, 1989) (Work Support Advisory Council); 1989 WL 508533 (May 9, 1989) (Indigent Care Advisory Board); 1975 WL 22418 (Sept. 18, 1975) (State Personnel Advisory Council). In line with these opinions, it is our opinion that a court would likely find a hearing officer appointed by a licensing board or commission pursuant to Section 40-1-90 does not hold an office for purposes of dual office holding due to the advisory nature of the position.

³ In Op. S.C. Att'y Gen., 1990 WL 599282 (Aug. 29, 1990), we concluded that the position of hearing officer for the South Carolina Department of Corrections was likely not an office for purposes of dual office holding despite the fact that the position used the term "quasi-judicial" in the description of the position. We reasoned as follows:

[i]n an analogous situation, this Office has determined that a labor conciliator for the South Carolina Department of Labor would be an employee rather than an officer. Op. Atty. Gen. dated March 27, 1984 [Op. S.C. Att'y Gen., 1984 WL 249849 (March 27, 1984)]. On the other hand, we have concluded that an administrative law judge for the Public Service Commission would hold an office for dual office holding purposes. Op. Atty. Gen. No. 83-97 [Op. S.C. Att'y Gen., 1983 WL 142766 (Dec. 16, 1983)]. A major distinction between the conclusions of those two opinions and applicable in the instant case would be the presence or absence of statutory provisions creating the position, describing the duties and responsibilities, establishing qualifications, and the like.

Id. at *1-2. While some of the Crenshaw factors indicating a position is an office for dual office holding purposes are present in the question before us, *i.e.* the appointment of a hearing officer is authorized by Section 40-1-90 and a hearing officer is given the power to conduct a hearing or take other action as may be necessary pursuant to Section 40-1-90, many factors, as addressed above, are absent. Overall, we believe a court would find the advisory nature of the position as the determining factor in its analysis.

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You also specify that the person who may be appointed as a hearing officer formerly served as a member of the board or commission to which he will potentially serve as a hearing officer for. We do not believe this is relevant to our analysis of dual office holding. If the individual has resigned from his or her service on the board or commission, his role as an officer in the constitutional sense for the board or commission would be severed upon resignation.

Conclusion

Based upon the understanding that a hearing officer appointed by a regulatory board or commission pursuant to S.C. Code Ann. § 40-1-90 (2011) acts only in an advisory capacity to the board or commission by which they have been appointed, and that the ultimate authority to take disciplinary action rests with the board or commission, we do not believe service in such capacity would constitute an office for purposes of the dual office holding prohibition contained in the South Carolina Constitution. This conclusion is consistent with numerous prior opinions of this Office finding that members of advisory bodies are not officers in the constitutional sense.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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