

1990 WL 599318 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 1, 1990

*1 The Honorable Jasper Salmond
Wilbur Smith Associates
Post Office Box 92
Columbia, South Carolina 29202

Dear Mr. Salmond:

You have requested the opinion of this Office as to the following situation. You were currently serving on the Lexington and Richland Counties Board of Commissioners of Midlands Technical College at the time you were appointed to the Board of School Commissioners of Richland County School District One, to fill an unexpired term. You were scheduled to be installed as a member of the school board on September 25, 1990, to serve until sometime in January 1991, when a successor is elected and sworn in. You have asked about your continued service on the Midlands Technical College board following assumption of your duties on the school board.

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public offices 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). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980).

This Office has concluded on numerous occasions that one who would serve on a school district board of trustees would hold an office for dual office holding purposes. See *Op. Atty. Gen.* dated September 26, 1986, as representative of these numerous opinions; a copy is enclosed herewith.

Similarly, this Office has concluded that one who would serve on the Richland-Lexington Counties Commission for Technical Education would hold an office for dual office holding purposes. *Ops. Atty. Gen.* dated February 15, 1984 (copy enclosed) and December 10, 1981. Thus, as you note in your letter, one serving in both capacities simultaneously would most likely run afoul of the dual office holding prohibitions of the State Constitution.

As you note in your letter, acceptance of a second, incompatible office by an individual creates a vacancy in the first office. However, that 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. See, *Walker v. Harris*, 170 S.C. 242 (1933); *Dove v. Kirkland*, 92 S.C. 313 (1912); *State v. Coleman*, 54 S.C. 282 (1898); *State v. Buttz*, 9 S.C. 156 (1877).¹ Such legal principles would be in accordance with the bylaw of the governing commission of Midlands Technical College which provides that a member may serve until a successor has been named. It should also be noted that any act you might undertake as a *de facto* officer in relation to the public or third parties will be considered as valid or effectual as those of a *de jure* officer unless or until a court should declare such acts void or remove you from office. See, for example, *State ex rel. McLeod v. Court of Probate of Colleton 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 Stro. 92 (S.C.1848); 67 C.J.S. Officers § 276.

*2 I trust that the foregoing satisfactorily responds to your inquiry. If I may assist you further, please advise. With kindest regards, I am

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees § 495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

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