



ALAN WILSON
ATTORNEY GENERAL

January 23, 2017

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Dear Ms. White,

Attorney General Alan Wilson has referred your letter to the Opinions section regarding whether a person can serve as a member of the Denmark Technical College's Local Area Commission ("LAC") and as a member of the board for the OCAB¹ Community Action Agency, Inc. ("OCAB") without violating the prohibition on holding dual offices contained in the South Carolina Constitution. Your letter states as follows:

By way of background, the LAC for the College is created by statute, with the law noting that LAC members are charged with multiple sovereign duties. See S.C. Code Ann. §§ 59-53-610 (creation of Denmark Technical College Local Area Commission, members, and terms); 59-53-620 (member selection); 59-53-630 (powers of Commission); and 59-53-640 (Commission to maintain records, reports to be filed, and audits to be conducted). There is no question that, for the purposes of this inquiry, LAC members hold an office as contemplated by Sanders, et al. v. Belue, et al., 78 S.C. 171, 58 S.E. 762 (1907) (cited by 1977 S.C. Op. Atty. Gen. 157 (S.C.A.G.)).

Here, the question is whether someone who serves on the board for [OCAB] holds an office and is subject to Article III, Section 2 of the S.C. Constitution. For your information, OCAB was founded in 1966 and is described as a private, non-profit eleemosynary corporation that receives funds from the government and private sources. Additionally, OCAB is overseen by the S.C. Office of Economic Opportunity ("OEO"), an extension of the Governor's Office. Specifically, the OEO was created by the Community Economic Opportunity Act of 1983 (the "Act") and is currently administered by the S.C. Department of Administration. S.C. Code Ann. § 43-45-10, et seq. The Act goes on to prescribe the composition for its community-based boards – like OCAB, their composition, and rules and procedures. See S.C. Code Ann. § 43-45-50. South Carolina Code Ann. §§ 43-45-60 and -70 set forth the capabilities required of these specific community-based organizations and prescribe their authority.

¹ OCAB stands for Orangeburg-Calhoun-Allendale-Bamberg.

Law/Analysis

It is this Office's opinion that a person who serves as a member of the Denmark Technical College's Local Area Commission ("LAC") and on the board for the OCAB Community Action Agency, Inc. ("OCAB") does not violate the prohibition on holding dual offices contained in the South Carolina Constitution. Article XVII, § 1A of the South Carolina Constitution prohibits a person from holding "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." A person violates this provision if he holds two or more public offices which "involv[e] an exercise of some part of the sovereign power...." Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the South Carolina Supreme Court stated that relevant considerations for determining whether a position would be considered a public office include whether statutes, or other such authority, establish the position, the qualifications for appointment, duties, tenure, require an oath for the position, or otherwise authorizes the position to exercise a sovereign power of the state.² No single criterion is dispositive and it is not necessary that a position exhibits all the criteria to find that an individual is a public officer. Id.

For this Office to provide an opinion on whether an individual violates the prohibition on dual office holding, we must examine the positions to determine whether they are both public offices. This Office has opined that a member of a technical college area commission holds a public office within the meaning of Article XVII, § 1A of the South Carolina Constitution. See Ops. S.C. Atty. Gen., 1990 WL 599272 (August 6, 1990) (serving on the Technical College of the Low Country Area Commission constitutes an office for dual office holding purposes); 1985 WL 259119 (February 1, 1985) (member of the Horry-Georgetown Commission for Technical Education is an office holder); 1984 WL 249832 (February 15, 1984) (serving on the Midlands Technical College Commission constitutes an office for dual office holding purposes).

Similarly, it is this Office's opinion that a member of Denmark Technical College's LAC is an office holder for dual office holding purposes. The LAC was established by Section 59-53-610 as "a body politic and corporate." Members are appointed to the commission as specified in the statute to four year terms and until successors are appointed and qualified. Id. The statutes relevant to the LAC do not require an oath nor specify that commission members are to be compensated. Section 59-53-630 grants the LAC the "same powers as provided by Article 1, Chapter 53, Title 59 of the 1976 Code, and in addition must prepare and submit its annual budget for approval to the State Board of Technical and Comprehensive Education." Article 1 of Chapter 53 of Title 59 states the powers and duties of area commissions include adopting bylaws, rules, and regulations; acquiring sites and constructing facilities; acquiring property by various means; operating institutional facilities; employing a college president and other personnel; applying for, receiving and expending moneys from all state, local and federal governmental agencies; exercising the right of eminent domain; as well as awarding degrees and certificates. S.C. Code Ann. § 59-53-52 Further, Section 59-53-53 authorizes area commissions to borrow funds for capital improvements. This list of powers clearly grants the LAC a portion of the State's sovereign power. After reviewing the Crenshaw considerations, it is this Office's opinion that a court would likely find a member of Denmark Technical College's LAC is an office holder for dual office holding purposes.

² See Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (sovereignty traditionally includes power to tax, power of eminent domain, and police power).

Your letter describes OCAB as a private, non-profit eleemosynary corporation which receives funds from both private and government sources. The letter additionally notes that this Office has previously opined as follows:

If these community action agencies are created by law and are charged with a sovereign function with which the public is concerned, then service in such agency would constitute service in an 'office.'

As I understand your question it concerns non-profit charitable organizations which are private except that they receive public funds. Any connection with these private corporations would not fall under dual office-holding.

Op. S.C. Atty. Gen., 1977 S.C. Op. Att'y Gen. 157 (July 1, 1977). While this opinion provides some guidance for our analysis, we base our opinion of whether serving as a member on the board for OCAB constitutes an office on the Crenshaw considerations discussed above.

As you note in your letter, OEO oversees community-based organizations including OCAB. The Community Economic Opportunity Act of 1983 (the "Act"), S.C. Code Ann. § 43-45-10, et seq., prescribes many aspects of the community-based boards administered by the OEO. Section 43-45-50 directs how the boards are to be composed³, but leaves the rules governing elections and administrative procedures for selection to such an organization's board to be incorporated into its bylaws subject to approval by the administering agency. Id. The Act does not require board members to take an oath or establish term limits for holding such a position. Further, the Act requires community-based organizations to have the capability to carry out the following: strengthening community capabilities for planning and coordinating federal, state, and other assistance; organizing of services related to the needs of the poor; using new types of services and innovative approaches in attacking causes of poverty; broadening of the resource-based programs directed to the amelioration of poverty; and conforming to supplementary requirements the administering agency may prescribe. S.C. Code Ann. § 43-45-60. Finally, such community-based organizations are authorized "to receive and administer funds, to receive funds and contributions from private or local public sources to be used in support of a community-based program, and funds received under any federal or state assistance program," as well as to transfer funds and to delegate powers to other agencies, subject to the administering agency's approval. S.C. Code Ann. § 43-45-70. While the Act does establish that the board members of a community-based organization meet some of the Crenshaw considerations, it is this Office's opinion that such a position would likely not be classified as an office for dual office holding purposes.

Therefore, it is this Office's opinion that a court would likely find an individual who serves as a member of the board of Denmark Technical College's LAC and as a member of the board for OCAB simultaneously would not violate the prohibition on dual office holding contained in the South Carolina Constitution.

³ Notably, one-third of the board members "must be elected public officials currently holding office." Id.; See Op. S.C. Atty. Gen., 1998 WL 746919 (September 28, 1998) (discussing ex officio exception to dual office holding prohibition).

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Conclusion

We hope that the guidance provided above will assist you and Denmark Technical College in assessing its LAC members' status regarding the dual office holding prohibition contained in the South Carolina Constitution. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General