



ALAN WILSON  
ATTORNEY GENERAL

August 22, 2019

David M. Smalls  
Legislative Delegation Director  
Colleton County Legislative Delegation  
PO Box 2103  
Walterboro, SC 29488

Dear Mr. Smalls:

You have requested an opinion from this Office regarding dual office holding. Specifically, you state the following:

I am writing to your office to obtain an opinion in reference to a matter of a potential dual office holding situation. I am interested in running for city councilman for the City of Walterboro. The filing period starts on August 27<sup>th</sup> and the election is on November 5<sup>th</sup>.

The reason I am seeking an opinion is that I am currently a board member for the SC Research Authority and a commission member for the Technical College of the Lowcountry. I am currently working as the Legislative Delegation Director for the Colleton County Legislative Delegation. I report to the 8 delegation members but I am paid through the county payroll.

In my role on the 2 boards/commissions, I act as board advisor and vote on policy and procedures affecting each organization. I do not receive any payment for my service on either board or commission.

**LAW/ANALYSIS:**

Dual office holding is provided for in the South Carolina Constitution, which states:

[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 ... The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1 A (emphasis added).

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

“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.” 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 for an office are:

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.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

Our Office has previously addressed whether an individual could serve on both a city council and on the Board of the Area Commission of the Technical College of the Lowcountry (“Commission”). See Op. S.C. Atty. Gen., 1990 WL 599272 (August 6, 1990). In the opinion, we stated that “[t]his Office has concluded on numerous occasions that one who serves on a city council would hold an office for dual office holding purposes.” Id. at 1. We reviewed the statutory authority relevant to the Commission<sup>1</sup> and concluded that service on this board would also constitute an office. Therefore, we determined that serving in both positions would violate the Constitutional prohibition against dual office holding. Id.

We have not previously considered whether service on the South Carolina Research Authority Board of Trustees would constitute an office. The South Carolina Research Authority (“SCRA”) and its Board of Trustees (“Board”) were created by the South Carolina Code of Laws. See S.C. Code Ann. § 13-17-10 et seq. (1976 Code, as amended). Pursuant to statute, the Board “shall consist of a board of twenty-four

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<sup>1</sup> S.C. Code Ann. § 59-53-910 et seq. (1976 Code, as amended).

trustees,” which includes thirteen specific ex officio members. S.C. Code Ann. § 13-17-40(A)(1) (1976 Code, as amended). The statute provides for the remaining trustees as follows:

The Governor shall name the chairman who must not be a public official and who serves at the pleasure of the Governor. The remaining ten trustees must be elected by the board of trustees from a list of nominees submitted by an ad hoc committee named by the chairman and composed of the members serving as elected trustees. Each of the Congressional Districts of South Carolina must have at least one of the ten trustees.

S.C. Code Ann. § 13-17-40(A)(2) (1976 Code, as amended).

The terms of the trustees are also covered. Section 13-17-40 provides:

[t]erms of elected trustees are for four years, and half expire every two years. An elected trustee may not serve more than two consecutive four-year elected terms . . .

S.C. Code Ann. § 13-17-40(A)(3) (1976 Code, as amended).<sup>2</sup>

Trustees do not receive a salary, but “a trustee must be reimbursed for actual expenses incurred in service to the authority.” S.C. Code Ann. § 13-17-40(C) (1976 Code, as amended). While there is no provision for the trustees giving a bond or an oath, the trustees are granted certain powers. See S.C. Code Ann. § 13-17-70 (1976 Code, as amended). The trustees are granted the general power “to manage the business and affairs of the authority and to take action as it considers advisable, necessary, or convenient in carrying out its powers granted” by law. Id. Such powers include the authority to sue and be sued; to purchase, mortgage, and sell property; to invest and disperse the authority’s funds; to construct, operate, and maintain research parks; to borrow money; to make bylaws; and to make and execute contracts. Id.

Our opinion is that the trustees serving on the SCRA Board are public officers. The Legislature created the SCRA and its Board and provided for the appointment, qualifications, terms of office, payment of expenses, and the duties of the trustees. With the duties granted, the trustees appear to be exercising the sovereign power of the State. We therefore believe that it would be dual office holding for an individual to serve on both the SCRA Board and on a city council.

We do not have sufficient information to reach a conclusion as to whether or not your position as Legislative Delegation Director is a public office. Your position was most likely created consistent with Section 3 of Act No. 283, 1976 Acts and Joint Resolutions, which states:

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<sup>2</sup> Section 13-17-40(B)(2) provides for the terms of elected executive committee members. However, our understanding is that you are not on the executive committee. See the SCRA website at <https://www.scra.org/about-us/scra-board/>

Under all forms of county government except the board of commissioners form, county councils shall provide office space and appropriations for the operation of the county legislative delegation office including compensation for staff personnel and necessary office supplies and equipment. The amount of such appropriations shall be determined by the legislative delegation and included in the annual county budget by the council. The delegation shall be responsible for the employment, supervision and discharge of all personnel employed in the delegation office.

1975 Act. No. 283 § 3. As your opinion request is time sensitive, we cannot make a determination at this time.

In order to be as responsive as possible to your question, we note also that our Office addressed in a prior opinion how South Carolina law operates to resolve a dual office holding situation:

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); Dove 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. 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 Stob. 92 (S.C. 1848).

Op. S.C. Atty. Gen., 2003 WL 22172235, at \*2 (Sept. 12, 2003). Our Office also has opined that:

[N]o steps are necessary [to resolve a dual office holding situation] because the individual found to hold two offices automatically vacates the first office held by that individual. However, we reiterate that the individual will continue to serve in the first office in a de facto capacity until a successor is appointed.

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Op. S.C. Atty. Gen., 2007 WL 1651345, at \*4 (May 9, 2007).

**CONCLUSION:**

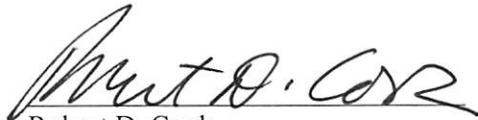
For the reasons set forth above, this Office believes that it would be a violation of the dual office holding prohibition of the South Carolina Constitution for an individual to serve simultaneously as a member of the Walterboro City Council, the South Carolina Research Authority Board of Trustees, and the Technical College of the Lowcountry Area Commission. Because of a lack of sufficient information, we cannot opine regarding your position as the Legislative Delegation Director of the Colleton County Legislative Delegation. When a violation of the prohibition against dual office holding occurs, the individual is deemed by law to have vacated the first office held. However, they continue to serve in the first office in a de facto capacity until a successor is selected.

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General