



ALAN WILSON
ATTORNEY GENERAL

October 21, 2019

Kalu A. Kalu
2869 Lakeside Drive NE
Orangeburg, SC 29118-1817

Kalu A. Kalu
2867 Lakeside Street
Orangeburg, SC 29118

Dear Dr. Kalu:

You have requested an opinion from this Office regarding whether it would be dual office holding for you to serve simultaneously on the Felton Laboratory Charter School Board and on Orangeburg City Council.

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.

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 opined that a city council member holds an office for dual office holding purposes. See Op. S.C. Atty. Gen., 2018 WL 1160089 (Feb. 21, 2018) (quoting Op. S.C. Atty. Gen., 2013 WL 5291571 (September 9, 2013)) (“[t]his Office has advised on numerous occasions that a member of a town or city council holds an office for purposes of the constitutional prohibition against dual office holding.”)

We have also determined that a member of a charter school board holds a public office:

In an opinion dated February 26, 2003, we addressed the issue of whether a position on a charter school's governing board is an officer for dual office holding purposes.

The position of board member is established by statute, a term is set forth therefor, and the board members exercise a portion of the sovereign power of the State. While taxing or bond authority is expressly denied, in terms of other authority, it is the board which serves as the “governing body” of the school. Board members decide all matters related to the operation of the charter school, including budgeting, curriculum and operating procedures. Obviously, the board expends public funds. Thus, the board possesses policy-making duties and functions consistent with the operation of the school including the decision to “elect to comply with’ those laws or regulations which are applicable to a public school, a school board, or a district, . . .” which are not otherwise specified as applicable. In essence, board members make policy decisions in keeping with the Legislature's desire that charter schools “take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system.”

Clearly, board members exercise a portion of the sovereign power of the State.

Op. S.C. Atty. Gen., February 26, 2003 (citations omitted). We recognized the fact section 59-40-40 states charter schools are nonprofit corporations and the fact that members of a nonprofit corporation's board traditionally are not public officers for dual office holding purposes. Id. However, in determining a charter school likely is the alter ego of the State, we concluded a position on a charter school's governing board is an office for dual office holding purposes. Id.

Op. S.C. Atty. Gen., 2006 WL 703694, at *3 (Mar. 9, 2006).

Based upon our prior opinions, we believe that it would violate the dual office holding provision of the State Constitution for you to serve on both the Felton Laboratory Charter School Board and the Orangeburg City Council.

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 (1933k Dove v. Kirkland, 92 S.C. 313 (1912k 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. Aver, 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.

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

CONCLUSION:

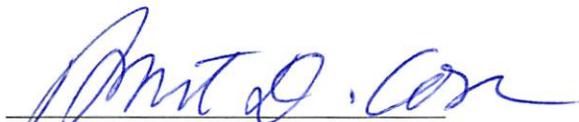
Based upon our prior opinions, this Office believes that it would be a violation of the dual office holding prohibition of the South Carolina Constitution for an individual to serve simultaneously on the Felton Laboratory Charter School Board and on Orangeburg City Council. When a violation of the prohibition 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