



ALAN WILSON
ATTORNEY GENERAL

August 6, 2020

The Honorable Erica Romo Woods
Liberty City Council
311 Mills Avenue
Liberty, SC 29657

Dear Councilwoman Woods:

You are requesting an opinion of this office regarding dual office holding. You currently serve on the Liberty City Council and you are asking if it would be dual office holding for you to also serve on the Pickens County Performing Arts Foundation Board of Directors and on the Liberty Area Chamber of Commerce Board of Directors.

LAW/ANALYSIS:

Dual office holding is prohibited by 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 determined that a city council member holds a public office. See Op. S.C. Atty. Gen., 2013 WL 5291571 (Sept. 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 not addressed whether a member of the Pickens County Performing Arts Foundation Board of Directors (“Foundation Board”) holds an office. Pickens County Council enacted an ordinance authorizing the creation of the Pickens County Performing Arts Foundation (“Foundation”), along with some other foundations. Pickens County, S.C. Code of Ordinances, Ordinance No. 532, § 1 (April 3, 2017). The purpose of the foundations was to “operate as supporting organizations exclusively for the benefit of, to perform the functions of, or to carry out the purposes of the County by assisting the County in its governmental function of promoting and enhancing the provision and appreciation of local arts, culture, history, and the performing arts.” Id. The mission of the foundations was to promote the mission of particular venues, such as the Pickens County Performing Arts Center,¹ and to “undertake fundraising which positively impact the purposes, thereof, for residents of the County and surrounding areas.” Id., § 2.

The foundations were required to become “autonomous, public benefit, South Carolina nonprofit corporations under Section 501(c)(3) of the Internal Revenue Code . . .” Id., § 1. The Chairman of County Council, the County Administrator, and the Clerk of County Council were “authorized to execute such documents as are necessary to establish each Corporation and carry out the purposes of said Corporations.” Id., § 6.

¹ The Pickens County Performing Arts Center was formerly known as the Liberty Civic Auditorium.

The nonprofit corporations were to “have all authority, rights and powers of a nonprofit corporation . . .” Id., § 1. They were authorized to prepare and file articles of incorporation and bylaws “in substantially the forms presented to the Council.” Id., § 3. Any amendments to the articles of incorporation or bylaws were to be “approved by the County Council and filed with the Clerk of County Council.” Id., § 5.

The nonprofit corporations would “[b]e governed by a board consisting of members to be appointed by County Council and in accordance with the Bylaws of the Corporation.” Id., § 1. See also Id., § 4 (“The County Council will appoint initial and successor members of the Board of Directors of each Corporation, in accordance with the Bylaws of said Corporation.”). The county ordinance did not provide for a salary, bond, oath, term of office, or qualifications of a Foundation Board member.

The Foundation was incorporated as a nonprofit corporation on May 23, 2017.² Pursuant to the Bylaws of the Foundation, “[t]he affairs of the corporation shall be managed by the Board of Directors in accordance with the provisions of applicable law, the Articles of Incorporation and these Bylaws.” Bylaws, Art. II, § 1. The only qualification for Foundation Board members was that they “need not be residents of the State of South Carolina.” Bylaws, Art. II, § 2. Conflicting with the county ordinance, the Bylaws provided that “Directors shall be elected by any annual or special meeting of the Board of Directors by a vote of a majority of the Directors at the time in office.” Bylaws, Art. II, § 3. The board members “hold office until the next annual meeting of the Directors and until a successor is elected and qualifies.” Bylaws, Art. II, § 2.

Regarding a bond, the Bylaws stated that “[t]he Board of Directors may by resolution require any or all officers, agents or employees of the corporation to give bond to the corporation, with sufficient sureties, conditions upon the faithful performance of the duties of their offices or positions, and to comply with such other conditions as may from time to time be required by the Board.” Bylaws, Art. VII, § 4. The Bylaws did not provide for a salary, oath, or specific duties of the Foundation Board members.

It is our opinion that a Foundation Board member does not hold a public office. The Pickens County ordinance authorized the creation of the Foundation and provided for its Board of Directors and the method of their appointment. However, the ordinance required the Foundation to incorporate as a nonprofit corporation. The nonprofit corporation was to have all the authority, rights and powers of a nonprofit corporation. The only specific duty that the ordinance assigned to the Foundation was to undertake fundraising for the Pickens County Performing Arts Center.³

² See South Carolina Secretary of State website at <https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/ba133032-fef6-4c0f-a4f0-9b1ed9fc3040>

³ This Office determined in a prior opinion that service on the South Carolina Museum Foundation, whose primary function was fundraising, did not constitute an office for dual office holding purposes. See Op. S.C. Atty. Gen., 2005 WL 1983350 (July 5, 2005).

As we stated in a prior opinion:

“On numerous occasions we have concluded that membership on the board of directors of a private nonprofit eleemosynary corporation would not constitute an office for purposes of dual office holding.” Op. S.C. Atty. Gen., September 14, 2005 (citing Op. S.C. Atty. Gen., July 5, 2005 (South Carolina Museum Foundation); April 12, 1993 (Charleston Citywide Local Development Corporation and Community Young Men's Christian Association of Rock Hill, S.C. not office); January 11, 1991 (Francis Marion Foundation); October 18, 1988 (Children's Trust Fund of South Carolina); September 8, 1987 (Horry County Council on Aging); October 20, 1983 (York County Council on Aging, Inc.)). Furthermore, the fact that the nonprofit corporation was created through the legislative action of a local governing body does not necessarily cause such a position to be an office for purposes of dual office holding. Op. Atty. Gen., February 14, 2003.

Op. S.C. Atty. Gen., 2006 WL 3877516 at 2 (Dec. 1, 2006). Our reasoning has been that “[a]s a non-profit organization, it appears the powers and duties of the Board are non-governmental in nature, not involving an exercise of the State's sovereign powers.” Op. S.C. Atty. Gen., 2002 WL 31958831 (Dec. 3, 2002). Accordingly, we believe that it would not violate the constitutional prohibition against dual office holding for an individual to serve on both the Liberty City Council and on the Foundation Board.

We must now consider whether a chamber of commerce board member would hold an office. The Liberty Area Chamber of Commerce has been incorporated as a non-profit corporation.⁴ Moreover, our South Carolina Supreme Court has stated that chambers of commerce are “purely private organizations, performing no governmental function.” Powell v. Thomas, 214 S.C. 376, 384, 52 S.E.2d 782, 785 (1949) (citing Ashmore et al. v. Greater Greenville Sewer District et al., 211 S.C. 77, 44 S.E.2d 88, 173 A.L.R. 397)). We therefore believe that it would not be dual office holding if an individual serves on both the Liberty City Council and the Liberty Area Chamber of Commerce Board of Directors.

You may wish, however, to contact the State Ethics Commission to confirm that there are not any conflicts of interest. Our Office defers to the Ethics Commission on ethical issues since it was given authority by the Legislature to interpret and issue opinions pertaining to the Ethics Act. See S.C. Code Ann. § 8-13-320(11) (1976 Code, as amended).

⁴ See South Carolina Secretary of State website at:
<https://businessfilings.sc.gov/BusinessFiling/Entity/Profile/fda240b9-910c-4c8b-be01-6f7d729942b4>

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CONCLUSION

It is our opinion that it would not violate the constitutional prohibition against dual office holding if you serve simultaneously on the Liberty City Council, the Liberty Area Chamber of Commerce Board of Directors, and the Pickens County Performing Arts Foundation Board of Directors. You may wish, however, to contact the State Ethics Commission to confirm that there are not any conflicts of interest.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General