



HENRY McMASTER  
ATTORNEY GENERAL

October 11, 2006

Cathy Hoefer McCabe, Esquire  
Deputy City Attorney, City of Spartanburg  
Post Office Drawer 3188  
Spartanburg, South Carolina 29304

Dear Ms. McCabe:

From your letter, we understand you currently serve as Deputy City Attorney for the City of Spartanburg and may be appointed to the position of City Attorney in 2007. You also informed us that you are being considered for a position on the South Carolina Public Charter School Board of Trustees. Thus, you request an opinion of this Office answering the following questions:

- (1) As Deputy City Attorney, can I serve on the S.C. Public Charter School Board of Trustees and not violate the constitutional restrictions on dual office holding?
- (2) Can I serve as the City Attorney, not as the prosecuting municipal attorney, and serve on the S.C. Public Charter School Board of Trustees and not violate the constitutional restrictions on dual office holding?

Based on our analysis below, we find holding a position of the South Carolina Public Charter School Board of Trustees (the "Board") while serving as the Spartanburg City Attorney ("City Attorney") runs afoul of the dual office holding prohibition contained in the South Carolina Constitution. However, we find your current position as Deputy City Attorney for the City of Spartanburg (the "City") is not an office. Therefore, you may continue to serve in this position while also serving on the Board.

#### **Law/Analysis**

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) 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." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the

*Request Letter*

sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

The Legislature recently passed provisions creating a statewide charter school district. 2006 S.C. Acts No. 274. Section 59-40-230 of the South Carolina Code, contained in this legislation, provides for the creation of the Board, which shall govern the South Carolina Public Charter School District. Id. This statute states the Board shall consist of eleven members, nine appointed by the Governor, one appointed by the Speaker of the House of Representatives, and one appointed by the President Pro Tempore of the Senate. Id. This statute also provides members of the Board shall, with the exception of their initial term, serve a three-year term. Id. Board members are not eligible to receive compensation. Id. However, they may receive a per diem and reimbursement for certain expenses. Section 59-40-230, also contained in this legislation, explains the numerous powers and duties given to the Board. Id.

In a recent opinion, we examined the provisions pertaining to the creation and establishment of the Board and discussed whether a position on the Board constitutes an office for purposes of dual office holding. Op. S.C. Atty. Gen., July 7, 2006.

At first blush, membership on the Board appears to be an office for dual office holding purposes. Section 59-40-230 establishes the Board and proscribes a term for each member. Although this statute does not provide a detailed list of qualifications, it requires "every effort must be made to ensure that all geographic areas of the State are represented and that the membership reflects urban and rural areas of the State as well as the ethnic diversity of the State." S.C. Code Ann. § 59-40-230(A). In addition, it sets forth specific requirements as to the make up of the board with regard to gubernatorially appointed members. Id. However, section 59-40-230 does not indicate an oath requirement. The statute specifically states members "are not eligible to receive compensation," but allows members to be reimbursed for certain expenses they incur. Id. § 59-40-230(D). Subsection (B) states the Board's duties and responsibilities are the same as those of other school district boards of trustees. Id. § 59-40-230(B). Furthermore, subsection (E) affords the Board such powers as general supervision over public charter schools and the right to contract, sue, and be sued. Id. § 59-40-230(E). Prior opinions of this Office recognized members of local school boards exercise sovereign power of the state. Op. S.C. Atty. Gen., May 27, 2004; December 11, 1990; November 18, 1983; February 3, 1978;

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August 26, 1974; October 16, 1970. Given the power and authority granted to the Board pursuant to subsections (B) and (E), we believe it also exercises the sovereign power of the State in employing its powers and duties. Based on these findings, we assume a member of the Board is an officer for dual office holding purposes.

Id. In that opinion, despite finding membership on the Board to be an office, we concluded the particular member of the Board whose position we were asked to comment on was not an officer because he serves on the Board as an ex officio member. Id.

Based on the information provided in your letter, we presume your potential appointment to the Board is not in an ex officio capacity. Thus, in keeping with our prior opinion, we reiterated our finding that a position on the Board generally is an office for purposes of dual office holding. See Op. S.C. Atty. Gen., August 26, 2006 ("This Office maintains the policy that we will not overrule a prior opinion, unless it is clearly erroneous or unless the applicable law changed."). Accordingly, now we must determine whether your current position as Deputy City Attorney and the position of City Attorney constitute offices for purposes of dual office holding.

As we stated in a prior opinion, "Whether or not the position of city attorney is an office would depend on how the position is created and the duties prescribed. If the duties prescribed make the position an 'office' rather than mere employment, it would be violative of the dual office holding prohibitions for one individual to hold the office of city attorney and another office." Op. S.C. Atty. Gen., September 14, 1998.

In a 1993 opinion, we determined the city attorney for the City of Lake City was an independent contractor, rather than an officer. Op. S.C. Atty. Gen., June 11, 1993. We relied on the fact that the attorney is retained for no specific term, takes no oath, and does not participate in the prosecution of criminal cases on behalf of the city. Id. We stated: "Where, as is apparently the case here, the municipal attorney will represent the City in civil legal matters, on a part-time basis, while continuing his private legal practice, it appears that the individual is more an independent contractor than an office-holder." Id.

Contrarily, in an opinion issued in 2000, we found an assistant city attorney for the City of Greenville to be an officer. In that opinion, we acknowledged "many of the traditional indicia of an office are lacking . . ." Id. However, we concluded the assistant city attorney's engagement in the prosecution of criminal cases in municipal court evidenced his exercise of the sovereign power of the State. Id. Thus, we cautioned the requester that "unless this particular duty can be reassigned to another attorney, I must advise that your position with the City of Greenville appears to be an office by virtue of the actual duties performed." Id.

Again in 2003, we considered whether the city attorney for the City of Aiken is an officer. Op. S.C. Atty. Gen., September 8, 2003. In examining the city ordinance creating the position, we

concluded the city attorney exercises sovereign power. Id. First, we found that while the city attorney does not prosecute criminal cases on behalf of the city, he or she oversees and directs the city solicitor, who is charged with this duty. Id. Additionally, nothing in the ordinance prohibited the city attorney from prosecuting such cases. Second, we considered the broad discretion given to the city attorney to handle legal actions on behalf of the city. Id. Finally, we focused on the fact that the Aiken City Attorney serves as the head and director of the department of legal services, and thus, oversees all the city's legal staff. Id. We also added:

Rather than an independent contractor or city employee, it appears to us that the Aiken city attorney is a city officer. Moreover, there is no mention in the portion of the ordinance that we have been provided that the city attorney is "retained" or "employed" by the city council. Instead, the city attorney "serve[s] at the pleasure of, and [is] subject to removal by the city council." Further, § 2-281 makes reference to the term "position or office." Finally, county council itself has recognized in the enabling ordinance creating the position of city attorney that the city attorney must be a member in good standing of the state Bar "throughout his term of office." Such would constitute a recognition by County Council that the position of city attorney constitutes an office. In our view, the terms of the ordinance itself would be controlling.

Id. Based on these facts, we concluded the Aiken City Attorney holds an office for purposes of dual office holding.

With regard to the position of City Attorney, you informed us that an ordinance in the Spartanburg Code of Ordinances pertains to the appointment, powers, and duties of the City Attorney. This ordinance provides:

The city council shall appoint a city attorney in accordance with the provisions of state law. The city attorney shall possess all powers and perform all of the duties required by the laws of the state and such other duties as may be prescribed by the city council.

The city attorney shall appoint or employ from time to time such person or persons to provide legal services to the city and to assist the city attorney in carrying out duties of the legal officer for the city. The city attorney shall appoint and supervise the city prosecutor who shall prosecute criminal and traffic cases on behalf of the city and to perform all other duties required which may be directed by the city attorney. The city prosecutor shall be appointed by the city attorney from attorneys licensed to practice in the State of South Carolina with

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an office for practice in the City of Spartanburg on the advice and consent of the city council.

Spartanburg, S.C., Code of Ordinances § 2-146. In addition to providing a copy of this ordinance with your request, you also informed us that the City Attorney

is not the prosecuting municipal attorney in Municipal Court as prescribed in S.C. Code Ann. § 5-7-230. The prosecuting municipal attorney is an employee of the City and is supervised by the City Attorney. In the previous fourteen (14) years, the City Attorney of Spartanburg has only prosecuted one case when the prosecuting municipal attorney had a conflict. Nor does the City Attorney take and oath of office.

In a telephone conversation with this Office, you told us that the City Attorney serves at the pleasure of the City Manager and City Council and receives a salary. You also stated the duties assigned to the City Attorney by City Council generally include giving general advice to council, drafting ordinances, and monitoring litigation handled by the South Carolina Insurance Reserve Fund. Additionally, you noted the City Attorney's and the Deputy City Attorney's representation of the City in legal actions is generally limited to condemnation cases and foreclosure actions.

Considering the ordinance and the information you provided to us, it is certainly less clear as to whether the City Attorney's position constitutes an office than in our 2003 opinion. Like the city attorney considered in our 1993 opinion, the City Attorney does not serve for a specified term, does not take an oath of office, and does not directly prosecute criminal cases on behalf of the City. However, like the city attorney in our 2003 opinion, the City Attorney has authority over and directs the city prosecutor. Thus, the ultimate decision-making authority over the prosecution of criminal and traffic cases on behalf of the City is placed in the hands of the City Attorney. Moreover, we find no restriction on the City Attorney prohibiting him or her from prosecuting such cases. These facts evidence the City Attorney's ability to exercise some portion of the sovereign power of the State. Therefore, while not free from doubt, we believe the City Attorney holds an office for purposes of dual office holding.

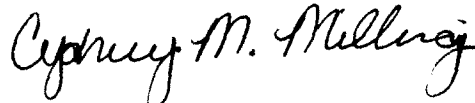
Nonetheless, we do not come to the same conclusion with regard to your current position as Deputy City Attorney. We found no ordinance pertaining to the establishment of this position. In our conversation with you, you informed us that you were hired by the City Attorney and serve at his discretion. You also informed us that your position is part-time and that you receive a salary for performance of your duties. You do not handle any criminal prosecutions and do not supervise or oversee any City employees. Thus, your position is not established by law, does not require an oath, and does not serve for a particular term. Furthermore, because you do not prosecute criminal cases and do not supervise those who do, we find no evidence that your position exercises some portion of the sovereign power of the State. Accordingly, we are of the opinion that your position as Deputy City Attorney is not an office for purposes of dual office holding.

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### Conclusion

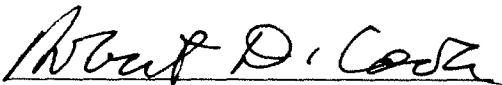
Based on our recently issued opinion, we find a position of the Board is an office for purposes of dual office holding. Although not free from doubt, we also conclude the City Attorney holds an office. Thus, in our opinion, you are prohibited by the Constitution from simultaneously holding both positions. However, we do not believe your current position as Deputy Attorney is an office. Therefore, you may serve on the Board while remaining in this position without violating the dual office holding prohibition.

Very truly yours,



Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Assistant Deputy Attorney General