



HENRY McMASTER
ATTORNEY GENERAL

February 2, 2009

Walter H. Sanders, Jr., Esquire
Walter H. Sanders, Jr. P.A.
Post Office Box 840
Fairfax, South Carolina 29827

Dear Mr. Sanders:

We understand you are the attorney for Allendale County (the "County") and wish to request an opinion on the County's behalf. You informed us that "Allendale County Council wants to appoint an individual to the Allendale County Aeronautics and Development Commission who is currently a member of the Denmark Technical College Board." Accordingly, you ask that we "advise if the prohibition against holding a dual office would apply to this appointment."

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2007) 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." To contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the 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).

In 2005, this Office addressed whether serving as a commissioner for Denmark Technical College Board is an office for purposes of dual office holding. Op. S.C. Atty. Gen., April 14, 2005. In that opinion, we initially cited to prior opinions of this Office concluding that "area commissioners for other statewide technical colleges are officers for purposes of dual office holding." Id. In addition, we reviewed the statutes authorizing the position and found the authority given to area commissioners "would constitute the exercise of a portion of the sovereign power of the State." Id. As such, we concluded that serving as an area commissioner for the Denmark Technical College Board would be an office for purposes of dual office holding. Id.

Thus, we must consider whether an individual serving on the Allendale County Aeronautics and Development Commission (the “Aeronautics and Development Commission”) also holds an office for purposes of dual office holding. We understand that the Legislature created the Aeronautics and Development Commission pursuant to act 842 of 1973. 1973 S.C. Acts 1884. According to this legislation, the Aeronautics and Development Commission “shall consist of five members who are residents of the county and who shall be appointed by the governing body of the county upon the approval of the Allendale County Legislative Delegation, including the resident Senators.”¹ Id. The members of the Aeronautics and Development Commission shall serve a term of four years and are not entitled to compensation. Id. The powers afforded to the Aeronautics and Development Commission include the ability to acquire property by grant, purchase, lease, or condemnation and sell, lease, trade, convey, and exchange such property. In addition, the Aeronautics and Development Commission’s enabling legislation states:

It is the intent of this act that the commission shall act for the county in all matters related to airports and aviation in the county and shall, in addition to the rights, powers and authorities set out in this act, have all the rights, powers and authorities extended and given to the counties in this State under the provisions of Article 1, Chapter 4, Title 2, Code of Laws of South Carolina, 1962, the Uniform Airports Act.

¹The general law applying to the Aeronautics and Development Commission allows for the membership of a county aviation commission to be increased as follows:

(A) Any county aviation commission or like authority may be increased by two members, one of whom must be appointed by the House of Representatives’ delegation of the county and one of whom must be appointed by the Senatorial delegation of the county. The additional members shall serve terms of the same length as other members of the commission or like authority.

(B) Any county governing body who has the authority to appoint members to the aviation commission or like authority may add two members for terms as provided in this section.

...

Id.

The Uniform Airports Act is currently found in chapter 9 of title 55 of the South Carolina Code. Under these provisions, the Legislature gives the Aeronautics and Development Commission similar authority given to it in its enabling legislation. Section 55-9-30 of the South Carolina Code (Supp. 2007) allows municipalities, counties and other political subdivisions to establish airports. Section 55-9-50 of the South Carolina Code (Supp. 2007) provides these entities with the authority to acquire land for purposes of constructing landing fields and airports, including the authority to acquire land by use of condemnation. Sections 55-9-80 and 55-9-90 of the South Carolina Code (Supp. 2007) allow counties, municipalities, and political subdivisions to acquire additional property rights over private property including air rights and easements allowing the entity to place and maintain safety markers and lights. These provisions explicitly state that the entity may acquire these additional property rights by means of grant, purchase, lease, or condemnation. S.C. Code Ann. §§ 55-9-80; 55-9-90. Section 55-9-190 of the South Carolina Code (Supp. 2007) gives counties, municipalities, and political subdivisions the authority to construct, equip, improve, maintain, and operate airports and landing fields; adopt regulations and establish charges for the use of the airports and landing fields; and lease airports and landing fields.

While the only qualification of office for a position on Aeronautics and Development Commission is that the member must be a resident of Allendale County and the Aeronautics and Development Commission's enabling legislation does not call for members to take an oath of office, we believe members of the Aeronautics and Development Commission are officers for purposes of article XVII, section 1A of our constitution. First, as explained above, the Aeronautics and Development Commission is created by statute, which calls for members to serve a specified term of office. Second, and most important, we believe members of the Aeronautics and Development Commission exercise a portion of the sovereign power of the State. By the Aeronautics and Development Commission's enabling legislation, members of its board are authorized to acquire property via condemnation. This authority is expanded in the general law governing the Aeronautics and Development Commission in that its members may use condemnation to acquire other property rights. Furthermore, the general law allows the Aeronautics and Development Commission to adopt regulations and charge fees and tolls for the use of its facilities. Based on these powers, we are of the opinion that the Aeronautics and Development Commission exercises a significant portion of the sovereign power of the state of South Carolina. Therefore, we believe a position on the Aeronautics and Development Commission is an office for dual office holding purposes. Accordingly, we do not believe an individual may simultaneously serve as a member of the Aeronautics and Development Commission and as a commissioner for Denmark Technical College Board.

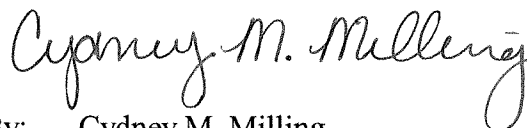
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Conclusion

We find both a position on the Denmark Technical College Board and a position on the Aeronautics and Development Commission to be offices. Therefore, we believe an individual is prohibited by article XVII, section 1A from serving in both positions at the same time.

Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General