



HENRY McMASTER
ATTORNEY GENERAL

December 18, 2008

The Honorable Olin R. Phillips
Member, House of Representatives
Post Office Box 206
Gaffney, South Carolina 29342

Dear Representative Phillips:

We understand you desire an opinion of this Office concerning dual office holding. You state as follows:

An individual in Cherokee County currently holds positions on the Cherokee County Commission on Alcohol and Drug Abuse (created by local statute, Act 1380, 1974); the local Cherokee County Foster Care Review Board (established by S.C. Code Section 20-7-2376, 1986) and the board for the Division for Review of the Foster Care of Children in the Governor's office (established by S.C. Code Section 20-7-2379, 1986).

Thus, you ask if holding "any two of these positions constitute an 'office of honor or profit' so that holding both simultaneously would violate Article XVII, Section 1A of the South Carolina Constitution?"

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 an opinion of this Office issued in 1984, we considered whether a position on the Cherokee County Commission on Alcohol and Drug Abuse (the "Commission") constitutes an office for purposes of dual office holding. Op. S.C. Atty. Gen., February 13, 1984. Based on our review of the Commission's legislative history and prior opinions of this Office determining that members of county alcohol and drug abuse commissions are officers for dual office holding purposes, we determined that a member of the Commission is an officer for purposes of dual office holding. Id.

Opinions of this Office have also addressed whether a position on a local Foster Care Review Board is an office for purposes of dual office holding. In a 1987 opinion, considering sections 20-7-2376 et seq. of the South Carolina Code (Supp. 2007), which create and give authority to local foster care review boards, we noted that although members of such boards have a term of office and receive a per diem, the powers and duties afforded to such boards are advisory in nature. Op. S.C. Atty. Gen., December 14, 1987. As such, we determined that "it would appear that such board is not exercising sovereign power in fulfilling its duties." Id. Accordingly, we stated: "it is the opinion of this office that one who would serve on a local foster care review board most probably would not be deemed to hold an office for dual office holding purposes due to the advisory nature of the board." Id. See also, Op. S.C. Atty. Gen., May 24, 1995 (also concluding a position on a local foster care review board is not an office).

This Office has yet to address whether or not a position on the board of the Division for Review of the Foster Care of Children (the "Board") constitutes an office. As you mentioned in your letter, the Legislature established the Board via section 20-7-2379 of the South Carolina Code (Supp. 2007). This provision requires the seven-member board to consist of "past or present members of local review boards." S.C. Code Ann. § 20-7-2379(A). In addition, this statute requires the Board to consist of "one member from each congressional district and one member from the State at large, all appointed by the Governor with the advice and consent of the Senate." Id. Section 20-7-2379(B) calls for the members of the Board to serve a four-year term and section 20-7-2379(C) provides for members to receive a per diem, mileage, and subsistence.

As for the Board's duties and responsibilities, section 20-7-2379(D) mandates the Board to meet

to review and coordinate the activities of the local review boards and make recommendations to the Governor and the General Assembly with regard to foster care policies, procedures, and deficiencies of public and private agencies which arrange for foster care of children as determined by the review of cases provided for in Section 20-7-2376(A) and (B). These recommendations must be submitted to the Governor and included in an annual report, filed with the General Assembly, of the activities of the state office and local review boards.

Moreover, section 20-7-2379(E) requires the Board to

promulgate regulations to carry out the provisions of this subarticle. These regulations shall provide for and must be limited to procedures for: reviewing reports and other necessary information at state, county, and private agencies and facilities; scheduling of reviews and notification of interested parties; conducting local review board and board of directors' meetings; disseminating local review board recommendations, including reporting to the appropriate family court judges the status of judicially approved treatment plans; participating and intervening in family court proceedings; and developing policies for summary review of children privately placed in privately-owned facilities or group homes.

While we recognize that membership on the Board has some characteristics of an office as its members serve for a term, are required to meet certain qualifications, and receive a per diem and subsistence. However, in reviewing the duties of the Board, we do not believe its members exercise a portion of the sovereign power of the State. Like the members of the local foster care review boards, the functions of the Board appear to be advisory in nature as the Board does not make the ultimate decisions on foster care policies and procedures, but simply makes recommendations to the Governor and the Legislature on these matters. "In numerous opinions of this Office, we determined members of advisory bodies are not office holders for purposes of dual office holding." Op. S.C. Atty. Gen., March 28, 2007. Accordingly, as we find the authority given to the Board is simply advisory, we do not believe its members are officers.

Several opinions of this Office found that a body's ability to promulgate regulations signals its ability to exercise sovereign power of the State. See Op. S.C. Atty. Gen., April 14, 2005; April 20, 2004. As cited above, section 20-7-2379(E) gives the Board the authority to promulgate regulations. Thus, one may argue that based on this authority, members of the Board are officers pursuant to Article XVII, section 1A of the South Carolina Constitution. However, section 20-7-2379(E) limits the scope of the Board's regulations to procedures relating to the Board's authority given under section 20-7-2379, which consist solely of the authority to review and make recommendations to the Governor or the Legislature regarding foster care policies and procedures. Accordingly, we do not believe the Board's ability to promulgate regulations constitutes an exercise of the sovereign power of the State. As a result, we do not believe a position on the Board constitutes an office for purposes of dual office holding.

Conclusion

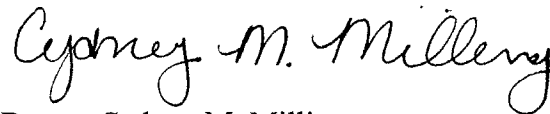
Although we are of the opinion that a position on the Cherokee County Commission on Alcohol and Drug Abuse is an office for purposes of dual office holding, we do not believe either a position on a local foster care review board or on the board supporting the Division for Review of the Foster Care of Children are offices. As such, we do not believe an individual serving on the

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Commission and on the two boards is in violation of the constitutional provision preventing dual office holding.

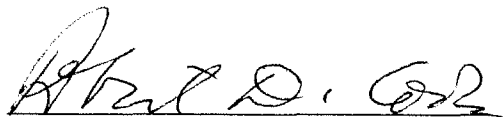
Very truly yours,

Henry McMaster
Attorney General

A handwritten signature in cursive script that reads "Cydney M. Milling".

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in cursive script that reads "Robert D. Cook".

Robert D. Cook
Deputy Attorney General