



ALAN WILSON
ATTORNEY GENERAL

October 9 2012

John E. James, III, Esquire
Fairfield County Attorney
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Dear Mr. James:

Attorney General Alan Wilson has referred your letter of September 27, 2012 to me for a response. The following is my understanding of your question presented and the opinion of this Office concerning the issue as I understand it.

Issue: Can a deputy sheriff also hold a position such as a board member on the Fairfield County Council on Aging without violating the dual office holding provision of Article XVII, Section 1A of the South Carolina Constitution?

Short Answer: No, the deputy sheriff may not hold such a position as a board member on the Fairfield County Council on Aging based on the information provided.

Law/Analysis: Article XVII, Section 1A of the South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). "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." Id., 58 S.E. 762, 763. Other relevant considerations include "whether the position was created by the legislature; whether qualifications for appointment are established; whether duties, tenure, salary, bond and oath are prescribed or required; (and) whether one occupying position is representative of sovereign." State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). The only exception to dual office holding prohibition would be if the person holds the second office "ex officio." Op. S.C. Atty. Gen., 2012 WL 4459270 (September 19, 2012) (citing Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947)). In other words, if the deputy sheriff is appointed to the board to serve in his official capacity as deputy sheriff, it would not be dual office holding.

I. The first issue presented in your letter is whether a deputy sheriff is an office of "honor or profit" as to fall under the dual office holding prohibition under Article XVII, Section 1A of the South Carolina Constitution. As you mentioned in your letter, this office has consistently held deputy sheriffs, as well as other such law enforcement officers, hold an office of "honor or profit" in regards to the dual office

holding prohibition. See, e.g., Op. S.C. Att'y. Gen., 2012 WL 4459270 (September 19, 2012) citing Ops. S.C. Att'y. Gen., July 19, 2012; March 16, 2012; March 7, 2008; June 12, 1995; November 2, 1994; February 4, 1994; December 19, 2003; June 21, 1999; June 13, 1996.

II. The second issue presented in your letter is whether a position such as a board member of the Fairfield County Council on Aging is an office of "honor or profit" as to fall under the dual office holding prohibition under Article XVII, Section 1A of the South Carolina Constitution. Generally, a nonprofit corporation is not a state agency, nor would the position of a board member on a nonprofit corporation be considered an office "of honor or profit". Op. S.C. Att'y. Gen., 1996 WL 599391 (September 6, 1996). Consistent with that finding, this office has previously held that a board member of a county council on aging was not such an office where the county council on aging was chartered as an eleemosynary corporation and where the individuals on the board of directors were serving pursuant to by-laws as opposed to statutes. See Op. S.C. Att'y. Gen., 1987 WL 342467 (September 8, 1987) (citing Ops. S.C. Att'y. Gen., July 9, 1986; November 10, 1983; July 1, 1997; October 25, 1984). This office has interpreted a board member position on a nonprofit council on aging not to be a separate office for dual office purposes where the council on aging received funds from the local county council but had no authority to select its members or other indicators of sovereign powers. See Op. S.C. Att'y. Gen., 1989 WL 508487 (January 6, 1989). This office has also previously opined an executive director of a county council on aging chartered as an eleemosynary corporation that received public funds was not an office of "honor or profit" for dual office holding purposes. See Op. S.C. Att'y. Gen., 1983 WL 142750 (October 20, 1983) (citing Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907)). Additionally, this office previously found a board of directors position on a nonprofit economic development corporation (subject to the South Carolina Nonprofit Corporation Act, Title 33, Chapter 31 of the S.C. Code of Laws) funded mostly by local government, where there was no oath of office, no compensation, no election, no tenure, no statute or ordinance governing such and where there was no exercise of the sovereign power of the State, was not an office for dual office holding purposes in spite of a mission with "public aspects". Op. S.C. Att'y. Gen., 2011 WL 2214072 (May 31, 2011).

The South Carolina Secretary of State lists the Fairfield County Council on Aging, Inc. as a nonprofit corporation in South Carolina, which you have indicated is the same entity to which your letter refers. In this instance the Fairfield County Council on Aging would be similar to the previous opinion in that it is a nonprofit corporation, no compensation is given, and no election is held. The Fairfield County Council on Aging appears to differ in that its members are appointed by county council, term is set for two years, county council sets the responsibilities and duties, and county council promulgates this council by Fairfield County Ordinance Division 5, sections 2-196 through 2-202.

The issue in this opinion hinges on whether a board member of the Fairfield County Council on Aging is considered an office holder for dual office purposes. The criteria in the Crenshaw case consist of four questions:

- 1) Was the position created by the legislature?
- 2) Are there established qualifications for appointment?
- 3) Are duties, tenure, salary, bond and oath required or prescribed?
- 4) Is the position representative of sovereign duties?

None of the four questions is conclusive, nor are all the questions required to be answered consistently for an officer to be established. State v. Crenshaw, supra. Based on the ordinances and information given, the

answers to the criteria above for the board member position being an office would be (among other things):

- 1) No, this position was not created by the legislature, but it was created by the Fairfield County Council (see Fairfield County Ordinance Division 5, Sec. 2-196).
- 2) Yes, there are established qualifications for appointment (see Fairfield County Ordinance Division 5, Sec. 2-199).
- 3) Yes, there are duties prescribed for the position (see Fairfield County Ord. Division 5, Sec. 2-201). No, there is no tenure, salary, bond or oath required.
- 4) It appears the council on aging may be representative of sovereign duties and may operate as a county agency, as discussed below (see Fairfield County Ord. Division 5, Sec. 2-201(a)(11)(b)).

Traditionally there are three principal attributes of sovereignty: the power to tax, the power of eminent domain and the police power. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3rd Cir. 1981)). Based on the information given, no direct sovereign power appears to exist in the Council on Aging. However, there are aspects of the relationship county council has with the Council on Aging, which make it concerning. These aspects include:

- a) the ability of county council to appoint all members and vacancies on the board of the Council of Aging (see Fairfield County Ordinance Division 5, Sec. 2-196);
- b) the fact that county council maintains control of whether or not the Council on Aging may accept any money over \$1000 (Fairfield County Ord. Division 5, Sec. 2-201 (a)(3));
- c) the fact that county council approves the council's budget and operating plans (Fairfield County Ord. Division 5, Sec. 2-201(a)(11)(b));
- d) that the Council on Aging is authorized to draw from the county treasury (Fairfield County Ord. Division 5, Sec. 2-201(a)(11)(c)); and
- e) that the Council on Aging is the "single county authority for providing services to the elderly citizens of the county pursuant to the Older Americans Act" (Fairfield County Ord. Division 5, Sec. 2-196).

Based on the foregoing, it would appear the Council on Aging is likely exercising sovereign powers by being an extension of county council. As your letter references, this office found a similar holding where Barnwell County had a similar board with some identical language in the ordinances and held the board likely exercised some sovereign powers of the State. See Op. S.C. Atty. Gen., 2003 WL 21043499 (April 18, 2003). Additionally, this office previously held the Fairfield County Council on Aging was an "employer" within the context of the South Carolina Retirement System. See Op. S.C. Atty. Gen., 1984 WL 249951 (August 2, 1984). In this instance, it appears the Council on Aging is merely an "alter ego" of the county council. Even though it is nonprofit corporation, as an "alter ego" of Fairfield County council, the Council on Aging could be held to be a State agency. See Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Ops. S.C. Atty. Gen. 1980 WL 120684 (February 6, 1980) (where an eleemosynary corporation was found to be separate from the State even though it functioned for "a public purpose...whose financial support is derived mainly from public sources" because it was not found to be "an integral part" of State government)). If we maintain the position that a board member on the Council on Aging is an office for dual office purposes that leaves the presumption that the Council on Aging is also acting as a state agency.

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III. As you are probably aware, pursuant to Article X, Section 11 of South Carolina Constitution, neither the State nor any of its political subdivisions are allowed to become a "joint owner of or stockholder in any company, association or corporation." Whether county council is the sole owner or the joint owner of a nonprofit corporation is a factual determination that would require more information than we were given, and this office only issues legal opinions. Op. S.C. Atty. Gen., 1996 WL 599391 (September 6, 1996) (citing Op. S.C. Atty. Gen., December 12, 1983). However, this office has previously opined a State agency has the authority to create and fund a nonprofit corporation. See Op. S.C. Atty. Gen., 2009 WL 276743 (January 7, 2009).

IV. It is my understanding this deputy sheriff has not accepted the position yet. As we discussed, an officeholder may give up the first office to hold the second office, but if he takes the second office while in office, he forfeits the first office. His service in the first office while in dual offices would be de facto until that position is replaced. Op. S.C. Atty. Gen. 2012 WL 4459271 (September 13, 2012) (citing Ops. S.C. Atty. Gen., July 28, 2003; July 13, 1995).

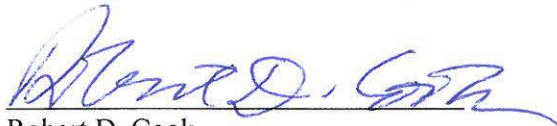
Conclusion: Based on the conclusion that being a board member on the Fairfield County Council on Aging is an office of "honor or profit" for dual office purposes, it appears a deputy sheriff would not be allowed to serve on the Fairfield County Council on Aging without violating the dual office provision of the South Carolina Constitution unless he was holding that position by virtue of his position as a deputy sheriff. If it is later determined being a board member on the Fairfield County Council on Aging is not such an office or if you have any additional questions or issues, please let me know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General