

7500 #Leburn



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

April 18, 2003

J. D. Mosteller, III, Esquire
Barnwell County Attorney
P. o. Box 616
Barnwell, South Carolina 29812

Dear Mr. Mosteller:

You have sought our opinion as to whether it would constitute dual office holding pursuant to the South Carolina Constitution to simultaneously hold the positions of member of the Williston District School Board and member of the Barnwell County Board of Generations Unlimited. The latter Board is the successor to the former Barnwell County Office on Aging. It is our conclusion that such concurrent service would constitute dual office holding.

Law / Analysis

Article XVII, Section 1A of the state 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). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

This Office has advised on numerous occasions that a member of a school board of trustees would hold an office for dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen., September 20, 1999; September 7, 1993; November 1, 1991; May 4, 1982; March 16, 1982.

Thus, the issue is whether a member of the Barnwell County Office of Generations Unlimited would also constitute an office for dual office holding purposes. As you note, the Barnwell County Office of Generations Unlimited is the successor county agency to the Barnwell County Office on Aging. The Office on Aging was renamed by Barnwell County Ordinance, No. 1997-100.

In an opinion dated September 25, 1989, this Office addressed the issue of whether the Barnwell County Office on Aging constituted an office. In that opinion, we noted that the Office

Mr. Mosteller
Page 2
April 18, 2003

... was created by Ordinance 1986-27 of the Barnwell County Council to be designated the single County Authority for providing services to the elderly citizens of Barnwell County pursuant to the Older Americans Act, P.L. 95-478. The board is comprised of eleven members who are appointed for terms of three years. Residence in one of the county's school districts is a requirement for nine members; two members are appointed from the county at large. All members serve without compensation. No oath is required by the ordinance.

The responsibilities and duties of the board are found in Section 5 of the ordinance. The board is to develop and submit to council a plan of services to the county's senior citizens, to receive and expend gifts and the like, to enter into contracts, to employ a director and designate compensation, to coordinate all programs operated by the county's agencies providing services to the elderly and the like. These duties probably involve an exercise of the sovereign power of the State on behalf of Barnwell County.

Thus, we concluded that the positions of member of the Barnwell County Office on Aging most likely constituted an office for dual office holding purposes.

As noted, the Office was renamed Generations Unlimited by Ordinance No. 1995-85. This Ordinance, which amended previous ordinances relating to the County Board on Aging, was adopted by Barnwell County Council on November 14, 1995. Section 1 of the Ordinance states that Generations Unlimited

... shall remain the designated single authority for providing non-institutional services to the elderly citizens of Barnwell County, their caregivers and other members of their support systems. Generations Unlimited may also promote opportunities and provide programs that will enhance the well-being and enrich the quality of life for all Barnwell County residents

Section 2 of the Ordinance creates a new structure for the Generations Unlimited's Board of Directors. This Section provides as follows:

Section 2. Membership and Appointment Generation Unlimited shall be comprised of nine (9) members to be appointed by Barnwell County Council. The nine (9) members of the board shall be comprised of one (1) member from each of the seven Council Districts and two (2) at large members. If no member can be found from within a Council District then that district's appointment shall be at large. A member shall serve no more than three (3) consecutive full terms and a full term shall be three (3) years. To ensure there are at all times a number of experienced and knowledgeable administrative board members, appointments shall be made on a rotated basis as follows: Districts 1 and 2, and member at large #1 shall be up for

appointed in 1996; Districts 3 and 4 and member at large #2 shall be up for appointment in 1997; and Districts 5, 6 and 7 shall be up for appointment in 1998. Rotation of appointments will thereafter occur on a three year cycle. Current Administrative Board Members shall serve until their current appointments expire and they may be reappointed subject to the term limitations set above. If a member continues to serve while awaiting nomination and reappointment by County Council, their next term shall be considered to run uninterrupted from the day after what would have been their expiration date. In case of any vacancy prior to the expiration of a regular term, the appointment to fill the vacancy for the unexpired portion of the term shall be made in the same manner as provided for in the original appointment.

Appointment recommendations shall be made to the County Council Committee responsible for Generations Unlimited. Recommendations made to this Committee, may be made by the Council person for the specific district question, however, other Council members or other individuals from Barnwell County and the Generations Unlimited Administrative Board may also make recommendations regarding appointees to the Council Committee. The Council Committee shall review the submissions for appointment and recommend a slate of nominees as they deem appropriate to the full Council. The Board member or members shall then be chosen by vote of the full County Council.

The members shall be compensated One Hundred Twenty (\$120.00) Dollars per year for travel expenses, but the Board may elect to use this money for other necessary Board purposes in addition to travel such as training, refreshments, plaques to honor a member's service, office and seminar attendance, etc. Members shall otherwise serve without compensation.

Section 3 provides that any board member may be removed for cause by county council.

The duties and responsibilities of the Board are enumerated in Section 5. Many of these duties are the same as those delegated to the former Office on Aging by the earlier Ordinance and which were referenced in our previous opinion, referenced above. These duties are as follows:

SECTION 5. DUTIES AND RESPONSIBILITIES

GENERATIONS UNLIMITED SHALL:

- 5.1 Develop and periodically submit to County Council a plan for provision of services.
- 5.2 Submit an operating budget to County Council each fiscal year beginning July 1 and ending June 30 for the purpose of carrying out the service plan.

5.3 Receive and expend gifts, bequest and devises which may be used to further the efforts of any programs it offers.

5.4 Receive and expend contributions and appropriations from public and private sources; enter into contracts; seek financial support form private and corporate sources, foundations, and state and federal programs to carry out its programs.

5.5 Cooperate with the Lower Savannah Area Agency on Aging and the Office of the Governor Division on Aging in the implementation of the State and Area plan for aging services.

5.6 Employ an executive director, who shall perform such duties as are required to carry out the service plan. Other personnel may be employed by the executive director.

5.7 Designate compensation to be paid to the director and other personnel, and develop personnel system policies and procedures for agency employees by which all agency employees will be regulated.

5.8. Coordinate all aging programs operated by public agencies in the county.

5.9 Facilitate the cooperation of all private agencies having programs directed toward the provision of services for the elderly.

5.10 Review and make recommendations concerning the application of any agency for aging funds to be utilized in Barnwell County and insure such a program is consistent with the service plan.

5.11 Provide County Council an annual programmatic report.

5.12 Establish an efficient set of management and fiscal controls, and as soon after the close of the fiscal year as practical and in accordance with policies of the Office of the Governor Division on Aging and the Lower Savannah Area Agency provide for an audit of the agency operations with a copy of the audit to be filed with the County Council.

5.13 Own, sell, manage, or transfer property for the purposes as set forth in this Section 5.

5.14. Prescribe rules and regulations governing the use of any facilities.

5.15 Determine policy and approve regulations and daily operating procedures.

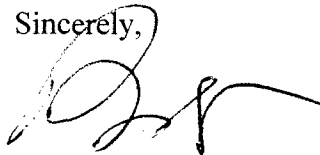
Mr. Mosteller
Page 5
April 18, 2003

- 5.16 Supervise the activities of the Executive Director.
- 5.17 Approve an annual operating budget.
- 5.18 Confirm, modify or reject proposals put forward by the Executive Director, Advisory Committees, or Standing Committees of Generations Unlimited.
- 5.19 Maintain good public relations.

A subsequent Ordinance, No. 1997-100, authorizes Generations Unlimited to "expand its existing services, including transportation, into neighboring counties as deemed appropriate and consistent with its general commission" The Ordinance also authorizes this agency "to request designation from the U.S. Department of Transportation and the S.C. Department of Transportation as the recipient of State and Federal Funds for public mass transportation in Barnwell and neighboring counties." Generations Unlimited is described therein as "a Barnwell County entity"

Based upon the foregoing, we see no reason to alter the 1989 opinion concluding that members of the Barnwell County Office on Aging are officers for dual office holding purposes. If anything, Generations Unlimited exercises a greater portion of the sovereign power than the former Board on Aging did in 1989 when our earlier opinion was written. Moreover, board members serve a specified term and receive compensation. As noted, the position is established pursuant to ordinance. Accordingly, it is our opinion that the simultaneous holding of the positions of member of the Williston District School Board and the Barnwell County Generations Unlimited Board would constitute dual office holding under the South Carolina Constitution.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an