



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

February 26, 2003

Nancy B. Gregory, Ed.D.
Mr. Robert New
James Island Charter High School Committee
1000 Fort Johnson Road
Charleston, South Carolina 29412

Dear Dr. Gregory and Mr. New:

You have inquired regarding potential dual office holding situations. You note that on January 27, 2003, the Charleston County School District school board approved the application of James Island High School to be the first converted high school in the state. Pursuant to the charter school statute, you have scheduled elections for the first board of directors for March 4, 2003. You indicate that one candidate presently serves as a publicly elected official of the James Island Public Service District. Another serves as the city's fire chief. You ask whether it would constitute dual office holding under the South Carolina Constitution for these two individuals to continue in their present positions and simultaneously serve on the James Island Charter High School Board of Directors.

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 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).

South Carolina's Charter School Act is established by S.C. Code Ann. Section 59-40-10 et seq. The Legislature's purpose is "to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system." § 59-40-30.

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Section 59-40-40(1) defines a "charter school" as a "public, nonsectarian, nonreligious, nonhome based, nonprofit corporation forming a school which operates within a public school district, but is accountable to the local board of trustees of that district, which grants its charter." Subsection (2) of Section 59-40-40(2) expressly provides that a charter school "is considered a public school and part of the school district in which it is located for the purposes of state law and the state constitution." Pursuant to § 59-40-50(B)(4) a charter school is "considered a school district for purposes of tort liability under South Carolina law ..." except in certain specified instances. The charter school, as well as its governing body, is subject to the Freedom of Information Act. § 59-40-50(B)(10).

The governing body of a charter school is the school's board of directors. Section 59-40-40(c) provides that the charter school "must be administered and governed by a governing body in a manner agreed to by the charter school applicant and the sponsor, the governing body to be selected, as provided in § 59-40-50(B)(9)" Section 59-40-40(7) also refers to the board as the "governing body"

The statute specifies that the charter school must "elect its board of directors annually." § 59-40-50(9). Thus, the Legislature has established a "term" of one year for board members.

The Charter School Act sets forth a number of specific powers of the governing body of a charter school (board). The board may accept gifts, donations or grants in accordance with the conditions prescribed. § 59-40-140(F). Charter schools may acquire by gift, devise, purchase, lease, sublease, installment purchase agreement, land contract, option or other means and hold and own in its own name buildings for schools purposes. § 59-40-140(I). The board may sue and be sued, but may not levy taxes or issue bonds. § 59-40-190(A). The board may obtain insurance for activities performed in the course of official duties. § 59-40-190(C).

This Office has never addressed the question of whether board members of a charter school hold an office for dual office holding purposes. However, it appears that members meet the basic criteria set forth in Sanders v. Belue. The position of board member is established by statute, a term is set forth therefor, and the board members exercise a portion of the sovereign power of the State. While taxing or bond authority is expressly denied, in terms of other authority, it is the board which serves as the "governing body" of the school. Board members decide all matters related to the operation of the charter school, including budgeting, curriculum and operating procedures. Obviously, the board expends public funds. Thus, the board possesses policy-making duties and functions consistent with the operation of the school including the decision to "elect to comply with" those laws or regulations which are applicable to a public school, a school board, or a district, ..." which are not otherwise specified as applicable. § 59-40-50. In essence, board members make policy decisions in keeping with the Legislature's desire that charter schools "take responsible risks and

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create new, innovative, and more flexible ways of educating children within the public school system.”¹ Clearly, board members exercise a portion of the sovereign power of the State.

The problem arises in that a charter school is defined under § 59-40-40(1) as a nonprofit corporation. Historically, this Office has opined that a member of a board of directors of a nonprofit corporation does not occupy an office for dual office holding purposes. Similarly, we have concluded that membership on a board of a nonprofit corporation created by legislative action on the part of the General Assembly or a county or city council is not an office. These various opinions are discussed at length in a recent opinion of this Office dated February 14, 2003. See also, Ops. S.C. Atty. Gen., December 3, 2002; September 20, 2002; Op. No. 93-24 (April 12, 1993); October 18, 1988; September 8, 1987; June 21, 2000; Op. No. 83-87 (November 10, 1983).

However, in the February 14, 2003 opinion, we recognized that even though an entity is created as a nonprofit corporation, it may, nevertheless, serve as an “alter ego” of the State. In that opinion, we set forth the test which courts apply in determining whether the nonprofit corporation is, in reality, acting on behalf of the State. There, we stated:

Of course, in certain rare instances, a nonprofit corporation has been held to constitute a state, local or other governmental agency. In Op. S.C. Atty. Gen., September 6, 1996, this Office, citing a number of authorities, recognized that “courts sometimes look beyond a non-profit corporation’s status as such to determine whether, in reality, the corporation is an ‘alter ego’ of the State.” We referenced the case Philadelphia Nat. Bank v. U.S. of America, 666 F.2d 834 (3d Cir. 1981) which held that Temple University, a nonprofit corporation, is not a “political subdivision” of the State. The Court observed that Temple did not possess the three principal attributes of sovereignty – the power to tax, the power of eminent domain or the police power. Therefore, the Court looked to whether there was any “identity of interest, control, or intent” such that Temple might be seen as the “alter ego of the State.” 666 F.2d at 841. No such alter ego status existed, concluded the Court.

Here, § 59-40-40(1) specifies that a charter school “is accountable to the board of trustees of that district, which grants it charter.” Moreover, pursuant to § 59-40-40(2), the charter school “is considered a public school and part of the school district in which it is located for the purposes of state law and the state constitution.” By virtue of § 59-40-50(B)(4), a charter school is considered

¹ We have previously recognized that the policy-making body for a school district is the school board. Op. S.C. Atty. Gen., Op. No. 92-72 (November 19, 1992). School board members are officers for dual office holding purposes even though particular school boards may not exercise taxing authority. By analogy, the governing board of a charter school is the policy-making body for that school even though the statute denies such governing board taxing authority.

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a "school district for purposes of tort liability under South Carolina law" In view of these provisions and others contained in the Act, as well as the fact that board members of the charter school are exercising a portion of the sovereign authority of the State, it is our opinion that board members of a charter school are "public officers" for dual office holding purposes. We believe the earlier opinions, referenced above, are clearly distinguishable. In our opinion, as a "public school," the charter school and its governing board, which administers the school, function as the "alter ego" of the State and should be so treated for dual office holding analysis. Here, there is an "identity of interest, control or intent" between the charter school and the school district as well as the State of South Carolina. Phil. Natl. Bank, supra.

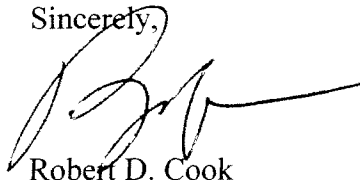
Clearly, members of the James Island Public Service District hold office. Op. S.C. Atty. Gen., Op. No. 3991 (March 10, 1975). Thus, in our opinion, it would constitute dual office holding to simultaneously occupy the positions of member of James Island Public Service District's board and member of the governing board of the James Island Charter High School Board of Directors.

With respect to your question concerning the fire chief serving on the charter school board of directors, such would not be dual office holding. Art. XVII, § 1A excepts from its prohibition those members of a lawfully and regularly organized fire department. Thus, by operation of the Constitution, the position of fire chief would not be considered an office for dual office holding purposes. See, Op. S.C. Atty. Gen., January 23, 2001.

Of course, the fact that an individual occupies an office does not prevent that individual from offering for another office. The individual may simply choose to give up the first office in favor of the second.

However, if a person assumes the second office while still holding the first, the law dictates the result. Basically, when an officer accepts a second office, he vacates the first office but continues to serve as a de facto officer until the vacancy is filled. As an officer de facto, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer de jure unless or until a court should declare those acts invalid or remove you from office.

Sincerely,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an