

The State of South Carolina



Office of the Attorney General

Opinion No 87/19

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December 14, 1987

Ms. Jo Kramer
Sumter County Legislative Delegation
Sumter County Courthouse
Sumter, South Carolina 29150

Dear Ms. Kramer:

By your letter of November 30, 1987, you asked whether several positions to which individuals are appointed by the Governor would be considered offices for dual office holding purposes. In my letter of December 3, 1987 I forwarded opinions on many of the offices detailed in your letter. Today's opinion will respond to the remaining positions named in your letter: Sumter County Forestry Commission, Regional Transportation Authority, Athletic Commission, and Children's Foster Care Review Board.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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). With these criteria in mind, each of the positions listed above will be examined.

Forestry Commission

County forestry boards were established pursuant to Section 48-33-50 et seq., Code of Laws of South Carolina (1976, as revised). Board members are appointed by the State Commission of Forestry on the recommendation of a majority of members of the House of Representatives and the Senator of a particular county. Board members must be residents of the county from which they are appointed. A term of five years is specified.

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Powers and duties are specified in Sections 48-33-60 and 48-33-80 of the Code and include conducting the county forestry program, adoption of an annual forest fire protection plan, consent to employment or dismissal of county forest fire protection personnel, and the right of entry upon any land for the purpose of preventing or controlling forest fires. These duties appear to involve an exercise of a portion of the sovereign power of the State as related to public health and safety. No provision is made for taking an oath (other than Article VI, Section 5 of the State Constitution) or for compensation.

Because so many of the criteria usually found in offices are present with respect to a county forestry commission, it is the opinion of this Office that one who serves on a county forestry commission would most probably hold an office for dual office holding purposes.

Regional Transportation Authority

Regional transportation authorities are formed pursuant to Section 58-25-10 et seq. of the Code; depending upon when the particular authority was established, the statutes in either the 1976 Code or the 1986 Cumulative Supplement to the Code would have been followed. An authority would be established by agreement of various cities and counties; it must be noted that, for purposes of this opinion, no agreement of a particular authority has been furnished to this Office and our comments are necessarily general.

For an authority established pursuant to the newer law, the governing body would be chosen pursuant to new Section 58-25-40 of the 1986 Cumulative Supplement. Section 4 of Act No. 169 of 1985 also requires that as appointments to boards of authorities established under the old law expire, new appointments are to be made in accordance with new Section 58-25-40. Members of the board would be appointed by the governing bodies of the member cities and counties. A term of three years is specified. Members may be reimbursed for expenses incurred in their service on the authority, but no salary or other compensation is to be paid. In case extensive services have been rendered, however, a per diem may be paid by a two-thirds vote of the authority. No qualifications are specified by statute, nor is an oath required by statute.

Powers and duties are specified by Section 58-25-50 in both the 1976 Code and the 1986 Cumulative Supplement. In either instance, the authority through its governing body is authorized to provide transportation services, exercise eminent domain,

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enter into contracts, sue and be sued, establish rates, borrow money, issue negotiable bonds and notes, promulgate rules and regulations, and exercise many other powers and duties.

Based on the foregoing, it is the opinion of this Office that one who would serve on the governing body of a regional transportation authority would most probably be an officer for dual office holding purposes. If, however, an elected official of a city or county should serve on the governing body, such service would be in an ex officio capacity according to Section 58-25-40 and would not be considered to be a separate office. Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947).

Athletic Commission

A county athletic commission would be established pursuant to Section 52-7-310 of the Code (1986 Cum. Supp.), which section provides the appointment procedure for the five members. The term which a member serves is coterminous with the term of office of persons by whom he was appointed (two years if appointed by members of the House of Representatives, coterminous with the Representatives' terms, for example). Members are to serve without compensation. No oath is required by statute. To be qualified to serve on the commission, a member must not have "any financial interest, direct or indirect, in the promotion, management, or result of any boxing, wrestling, or sparring event." Section 52-7-310.

The duties of the county athletic commission are specified in Section 52-7-310:

It is the responsibility of each commission that the health and safety of participants in boxing matches is safeguarded and that good sportsmanship is encouraged by the manner in which matches are conducted.

Due to the responsibility of commission members to protect the health and safety of participants in athletics under the control of the athletic commission, it appears that the members would exercise a portion of the sovereign power of the State in fulfilling their duties.

Based on the foregoing, it is the opinion of this Office that one who would serve on a county athletic commission would most probably hold an office for dual office purposes. In so concluding, we note that Section 52-7-310 of the Code itself

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refers to "persons holding office" and "terms of office" of members.

Children's Foster Care Review Board

Local foster care review boards have been established pursuant to Section 20-7-2376 et seq. of the Code (1986 Cum. Supp.). In particular, Section 20-7-2385 establishes in each judicial circuit a review board whose members are appointed by the Governor upon recommendation of the legislative delegation of each county within a specific judicial circuit. A term of four years is specified. Members of local review boards must reside within the judicial circuit which they represent. Members do not receive compensation, but Section 20-7-2388 specifies that mileage, per diem, and subsistence must be allowed.

Powers and duties are specified by Section 20-7-2376 and include the periodic review of cases of children in foster care with views toward continued placement of those children in foster care, returning them to their parents, making various recommendations, and so forth. At the conclusion of Section 20-7-2376 it is stated that "[a]ny case findings or recommendations of a local review board are advisory."

Because the statute denominates the findings or recommendations undertaken by a local foster care review board to be advisory, it would appear that such board is not exercising sovereign power in fulfilling its duties. See Ops. Atty. Gen. dated November 20, 1975; March 11, 1982; July 9, 1982; September 7, 1978 as examples of members of other advisory bodies who are not deemed to be authorized to exercise any portion of the sovereign power of the State.

While service on a local foster care review board would fulfill many criteria which are generally present with an office, the exercise of sovereign power is lacking. Thus, 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.

Conclusion

It is the opinion of this Office that a member of a county forestry commission, regional transportation authority, or county athletic commission would most probably hold an office for dual office holding purposes. One who would serve as a member of a local children's foster care review board would most proba-

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bly be deemed to be not holding an office for dual office holding purposes.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/rhm

REVIEWED AND APPROVED BY:

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