

The State of South Carolina



Opinion No 86-113
P337

Office of the Attorney General

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November 18, 1986

The Honorable D. N. Holt
Member, House of Representatives
c/o Charleston County Legislative Delegation
Room 317-A, Charleston County Office Building
2 Courthouse Square
Charleston, South Carolina 29401

Dear Representative Holt:

By your letter of November 11, 1986, you have asked whether an individual may serve concurrently on the governing board of the North Charleston Housing Authority and on the Charleston County Aviation Authority without violating the dual office holding prohibitions of the State Constitution.

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).

This Office has concluded on numerous occasions that one who serves on a housing authority holds an office. Enclosed please find representative opinions dated March 7, 1979; September 25, 1980; August 1, 1985; and August 27, 1985.

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Similarly, this Office has concluded many times that one who serves on the governing authority or commission of an airport would likewise hold an office. See Ops. Atty. Gen. dated January 11, 1985; March 19, 1975; January 19, 1983; and November 9, 1982, enclosed herewith. But for one small factor in the enabling legislation of the Charleston County Aviation Authority, the reasoning of these opinions would apply, permitting the conclusion that an Aviation Authority Member would also hold an office. However, Act No. 329 of 1971, amending Act No. 1235 of 1970, expressly provides in Section 2 (amending Section 4 of the previous act) that

[m]embership on the authority shall not be deemed an office of honor or profit within the meaning of the provisions of Section 2 of Article II of the Constitution of South Carolina1/

Thus, the legislature has expressed its intent that Aviation Authority members not fall within the dual office holding prohibitions of the State Constitution. Therefore, dual office holding apparently does not occur in the situation which you have described, according to legislative interpretation of the Constitution.

Please be advised that the legislature's determination that Authority members not be office holders would not necessarily be binding upon a court considering the issue, see Kennedy v. City of Gustine, 199 Cal. 251, 248 P. 910 (1926) and Coulter v. Pool, 187 Cal. 181, 201 P. 120 (1921); though such a determination by the legislature will be considered and adopted where possible, such a determination would not be controlling. Kalber v. Redfearn, 215 S.C. 224, 54 S.E.2d 791 (1949). A court would examine powers granted the Authority and wielded by it, duties and functions performed, and any other factors which would manifest the actual characterization of the position. A court could thus apply the reasoning of our prior opinions to determine that an Authority member would be an office holder. Such a determination is, however, within only the province of the courts and not this Office, as we have no authority to declare an act of the legislature invalid.

1/ Article II, Section 2 is now Article XVII, Section 1A of the State Constitution as quoted earlier in this opinion.

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We trust that the foregoing has adequately responded to your inquiry. Please advise if clarification or additional assistance should be necessary.

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

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