



9300-9850

ALAN WILSON
ATTORNEY GENERAL

November 18, 2014

Phillip Bowers
S.C. Education Oversight Committee
PO Box 9
Six Mile, SC 29682

Dear Mr. Bowers:

This Office received your request for an opinion on whether service on both the South Carolina Education Oversight Committee and the Pickens County School Board would constitute dual office holding. You have several questions regarding this issue. Each of your questions and its analysis follows.

LAW/ANALYSIS:

I. Does service on both the South Carolina Education Oversight Committee and the Pickens County School Board constitute dual office holding?

The South Carolina Constitution provides that “no person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention.” S.C. Const. Art. XVII § 1A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“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.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). “In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority...” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). “Other relevant considerations [as to whether a position is a public office] include: ‘whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties,

tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.” See Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61,62 (1980)).

We have consistently advised that a school board trustee is an office for dual office holding purposes. See Op. S.C. Atty. Gen., May 20, 2014 (2014 WL 2591468); Op. S.C. Atty. Gen., June 19, 1991 (1991 WL 633003). We have also concluded that serving on the South Carolina Education Oversight Committee (“EOC”) constitutes a public office. In our January 23, 2002 opinion, we explained:

the general duties, manner of appointment and length of terms of the members of the Education Oversight Committee are set out in S.C. Code Ann. §59-6-10. That Section provides, in pertinent part, as follows:

(A)In order to assist in, recommend, and supervise implementation of programs and expenditure of funds for the Education Accountability Act and the Education Improvement Act of 1984, the Education Oversight Committee is to serve as the oversight committee for these acts. The Education Oversight Committee shall:

- (1)review and monitor the implementation and evaluation of the Education Accountability Act and Education Improvement Act programs and funding;
- (2)make programmatic and funding recommendations to the General Assembly;
- (3)report annually to the General Assembly, State Board of Education, and the public on the progress of the programs;
- (4)recommend Education Accountability Act and EIA program changes to state agencies and other entities as it considers necessary.

This Office has consistently opined that “members of advisory bodies do not hold an office for dual office holding purposes.” See OPS. ATTY. GEN. September 14, 2001; April 26, 1977; March 11, 1982; and March 1, 1983. While certain of its enumerated duties involve reviewing, monitoring, reporting and recommending, the Committee seems to have a more substantive role in the State's public education arena than merely that of an advisory body. As set out in Section 59-6-10, the Committee is to “... assist... and supervise the implementation of programs and expenditure of funds for the Education Accountability Act and the Education Improvement Act of 1984....” Clearly, there is a great deal of

public concern in public education and the large amount of public funds invested in such. The Committee's ability to assist in and supervise these functions is indicative of a body which is exercising some part of the sovereign power of the State.

Further, in addition to the duties prescribed in Section 59-6-10, several other Sections of the Code enumerate additional powers and duties of the Committee. Examples of such are found in the following: Section 59-18-320(B) (Educational Oversight Committee to review and approve standards based assessment of mathematics, English/language arts, etc. which are administered to all public school students); Section 59-18-320(C) (Educational Oversight Committee to review and approve end of course assessments of benchmark courses administered to all public school students); Section 59-18-320(D) (any new standards and assessments be developed and adopted upon advice and consent of Educational Oversight Committee); Section 59-18-1560(B) (Education Oversight Committee to approve eligibility guidelines for grant programs and methods for distributing funds as developed by the State Board of Education); Section 59-18-900(A)(B) (Education Oversight Committee to establish annual report cards and criteria for academic performance ratings for public schools and districts); Section 59-18-360 (Education Oversight Committee to approve recommended revisions to state standards and assessments); Section 59-18-920 (Education Oversight Committee to develop report cards for vocational schools); Section 59-1-453 (Education Oversight Committee to oversee planning, development, and implementation of Target 2000 program).

While the above list is not an exhaustive one, it does indicate that the Education Oversight Committee possesses a great deal of influence over both policy and financial decisions made in reference to South Carolina's public education system. In fact, the extent of the authority given the Education Oversight Committee caused some state legislators to question the constitutionality of its existence. In November of 1998, this Office was asked to comment on "the constitutionality of the General Assembly placing [the Education Oversight Committee] in position to have authority over the State Board of Education, the State Superintendent of Education and/or the State Department of Education." After reviewing the situation, we opined that the delegation of such powers to the Committee would pass constitutional muster, but we recognized the extensive authority that had been granted to the Committee. See OP. ATTY. GEN. November 24, 1998.

Based on the foregoing, I am compelled to conclude that a member of the Education Oversight Committee would hold an office for dual office holding purposes.

Op. S.C. Atty. Gen., January 23, 2002 (2002 WL 399636).

Based upon our prior opinions, we determine that service on both the EOC and the Pickens County School Board would constitute a violation of the constitutional prohibition against dual office holding.

II. Does the fact that three State Senators and three House members are currently serving on the South Carolina Education Oversight Committee indicate that elective office does not preclude service on the South Carolina Education Oversight Committee?

Since “this Office has consistently held the office of South Carolina legislator is an office of ‘honor or profit’ in regards to the dual office holding prohibition,” (see Op. S.C. Atty. Gen., July 26, 2013 (2013 WL 4636665)), it would appear at first blush that serving as both a member of the General Assembly and as a member of the EOC would violate the constitutional prohibition against dual office holding. Our prior opinions belie this, however. We have previously stated:

we find it pertinent to note despite the prohibition on dual office holding, our Supreme Court found this prohibition generally does not apply when the individual in question holds one office in an ex officio capacity. In Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947) the Court stated:

The rule here enforced with respect to double or dual officeholding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.

The Court then explained the term ex officio means “by virtue of his office.” Id. (internal quotations omitted). Thus, if membership on a board or committee is ex officio, or by virtue of the person's office, it does not constitute an office for dual office holding purposes. Op. S.C. Atty. Gen., May 27, 2004; July 18, 1989.

Op. S.C. Atty. Gen., July 7, 2006 (2006 WL 2382436).

The South Carolina Code provides for the composition of the EOC. Section 59-6-10(A) provides:

The committee [EOC] consists of the following persons:

- (1) Speaker of the House of Representatives or his designee;

- (2) President Pro Tempore of the Senate or his designee;
- (3) Chairman of the Education and Public Works Committee of the House of Representatives or his designee;
- (4) Chairman of the Education Committee of the Senate or his designee;
- (5) Governor or his designee;
- (6) Chairman of the Ways and Means Committee of the House of Representatives or his designee;
- (7) Chairman of the Finance Committee of the Senate or his designee;
- (8) State Superintendent of Education or the superintendent's designee who shall be an ex officio nonvoting member;
- (9) five members representing business and industry who must have experience in business, management, or policy to be appointed as follows: one by the Governor, one by the President Pro Tempore of the Senate, one by the Speaker of the House, one by the Chairman of the Senate Education Committee, and one by the Chairman of the House Education and Public Works Committee; and
- (10) five members representing public education teachers and principals to be appointed as follows: one by the Governor, one by the President Pro Tempore of the Senate, one by the Speaker of the House, one by the Chairman of the Senate Education Committee, and one by the Chairman of the House Education and Public Works Committee.

Initial appointment must be made by July 31, 1998, at which time the Governor or his designee shall call the first meeting. At the initial meeting, a chairman elected from the members representing the business and industry appointees and a vice chairman representing the education members shall be elected by a majority vote of the committee. The members appointed pursuant to items (1) through (8) may serve notwithstanding the provisions of Section 8-13-770. Their terms of office on the committee must be coterminous with their terms of office as Governor, Superintendent of Education, or members of the General Assembly. . .

S.C. Stat. Ann. § 59-6-10(A) (1976 Code, as amended).

Section 59-6-10 provides for the service of three Senators and three House members on the EOC. Although the statute does not specifically state that these legislators are serving in an “ex officio” capacity, it does state that the legislators’ service on the EOC does not violate section 8-13-770¹ and that it must be coterminous with their terms of office on the General Assembly. Therefore, there is no doubt that the six legislators serving on the EOC are serving in an ex officio capacity.

III. South Carolina Education Oversight Committee members are not required to file state ethics reports. Does this mean that they are not officers for dual office holding purposes?

You refer to an informal advisory opinion that you provided from the South Carolina State Ethics Commission (Op. S.C. State Ethics Commission, October 19, 2006). In the advisory opinion, the Ethics Commission relied on sections 8-13-100 and 8-13-1110(B)² to conclude that members of the EOC did not

¹ Section 8-13-770 provides:

A member of the General Assembly may not serve in any capacity as a member of a state board or commission, except for the State Budget and Control Board, the Advisory Commission on Intergovernmental Relations, the Legislative Audit Council, the Legislative Council, the Legislative Information Systems, the Judicial Council, the Commission on Prosecution Coordination, the South Carolina Tobacco Community Development Board, the Tobacco Settlement Revenue Management Authority, the South Carolina Transportation Infrastructure Bank, the Commission on Indigent Defense, the South Carolina Research Authority, and the joint legislative committees.

S.C. Stat. Ann. § 8-13-770 (1976 Code, as amended).

² The Ethics Commission advisory opinion provides:

Section 8-13-100 states in part:

(26) ‘Public member’ means an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.

(31) ‘State board, commission, or council’ means an agency created by legislation which has statewide jurisdiction and which exercises some of the sovereign power of the State.

Section 8-13-1110(B) states:

(B) Each of the following public officials, public members, and public employees must file a statement of economic interests with the appropriate supervisory office, unless otherwise provided:

(11) a public member who serves on a state board, commission, or council.

need to file a Statement of Economic Interests. The Ethics Committee found that the EOC was not a state board, commission, or council under the statutes because it was advisory in nature and did not exercise the sovereign power of the State.

However, the advisory opinion of the Ethics Commission was clear that it was “based on information provided.” And the information provided from the person who requested the advisory opinion was that:

The EOC is a legislative committee which provides advice and recommendations to the General Assembly and other public bodies as outlined in the Education Accountability Act of 1998. The committee is composed of elected officials, business leaders and educators. While our members serve per diem and travel, they do not receive salaries or any financial benefit from service. The EOC does not direct funds to other agencies or entities except through its normal procurement actions. The EOC does not promulgate regulations.

Id.

It would be improper for our Office to address this issue since it has already been determined by another state agency. See Op. S.C. Atty. Gen., Nov. 27, 2007 (2007 WL 4284627), which provides:

Courts, as well as this Office, generally give great difference to interpretations of statutes by an administrative agency charged with its interpretation. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 26, 579 S.E.2d 334, 338 (Ct. App. 2003); Op. S.C. Atty. Gen., March 20, 2007. “Where an agency is charged with the execution of a statute, the agency’s interpretation should not be overruled without cogent reason.” Nucor Steel, a Div. of Nucor Corp. v. South Carolina Pub. Serv. Comm’n, 310 S.C. 539, 543, 426 S.E.2d 319, 321 (1992).

However, the Ethics Commission may want to re-address this issue based on the supplemental information that we have provided in this opinion.

IV. What happens if a dual office holding situation occurs?

We addressed what steps must be followed if a dual office holding situation occurred in a prior opinion:

When a dual office holding situation occurs, the law operates automatically to “cure” the problem. If an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, Section 1A of the Constitution (or one of the other applicable constitutional prohibitions against dual office holding), he is deemed by law to have vacated the first office held. Thus, the law operates automatically to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a de facto officer, rather than de jure, until a successor is duly

selected to complete his term of office (or to assume his duties if the term of service is indefinite). See Walker v. Harris, 170 S.C. 242 (1933); Dover v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). Furthermore, actions taken by a de facto officer in relation to the public or third parties will be as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, State Ex rel. Macleod v. Court of Probate of Collation County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel. McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Aver, 3 Stob. 92 (S.C. 1848).

Op. S.C. Atty. Gen., May 20, 2014 (2014 WL 2591468) (quoting Op. S.C. Atty. Gen., 2007 WL 1651345 (May 9, 2007)).

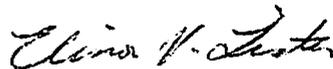
CONCLUSION:

In conclusion, this Office believes that the law is as follows:

1. Service on both the South Carolina Education Oversight Committee and the Pickens County School Board would constitute a violation of the constitutional prohibition against dual office holding.
2. There is no doubt that the six legislators serving on the South Carolina Education Oversight Committee are serving in an ex officio capacity.
3. If an individual has violated the prohibition against dual office holding by having two offices, he is deemed by law to have vacated the first office held.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

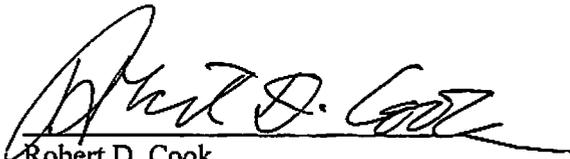
Sincerely,



Elinor V. Lister
Assistant Attorney General

Phillip Bowers
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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "Robert D. Cook", written over a horizontal line.

Robert D. Cook
Solicitor General

cc: Cathy L. Hazelwood
S.C. State Ethics Commission