



ALAN WILSON
ATTORNEY GENERAL

June 30, 2017

Councilman Mark Smith
2716 Canebreak Lane
Mt. Pleasant, SC 29466

Dear Mr. Smith:

We received your opinion request dated January 17, 2017 seeking an opinion on dual office holding. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter):

I was elected to the Town Council for the Town of Mount Pleasant in November of 2013. Subsequently, I was appointed to the [Advisory Council] of the Office on Aging by the Lt. Governor Glenn McConnell in 2013 and continue to serve under Lt. Governor Henry McMaster. I currently serve as Chairman of the Advisory Committee.

It has come to my attention recently that holding these two positions might constitute dual office holding. I do not dispute that my job as an elected official would comprise duties involving an exercise of some portion of the sovereign power of the State¹; however, my association and position with an advisory committee, in my opinion would not. Would you please provide an opinion as to whether or not this is the case, so I can act accordingly?

In our follow-up telephone conversations, you helpfully confirmed that the Advisory Council only provides advice to the Division on Aging, and does not have to power to compel compliance with its advice. While the Division on Aging receives and spends funds appropriated by the General Assembly, the Advisory Council is a separate entity and has no control over those funds. In short, the Advisory Council is a purely advisory body, and does not perform any of the executive functions of the Division on Aging.

Law/Analysis:

It is the opinion of this Office that a court would find that membership on the Advisory Council on Aging is not an office of honor or profit for purposes of the dual office holding prohibition of the South Carolina Constitution because it is a purely advisory body. Our prior

¹ Your assessment here is correct. "This Office has advised on numerous occasions that a member of a city or town council would be considered an officer for dual office holding purposes." *Op. S.C. Att'y Gen.*, 2005 WL 1024602 (April 22, 2005) (internal citations omitted).

opinions consistently have stated that purely advisory bodies do not constitute offices of honor or profit, because they do not exercise any sovereign power of the state. *See, e.g., Op. S.C. Att'y Gen.*, 2010 WL 1370087 (March 18, 2010). In 1981, this Office did opine that membership in the predecessor body to the Advisory Council constituted an office of honor or profit. *See Op. S.C. Att'y Gen.*, 1981 WL 158258 (May 5, 1981). We believe that the reasoning and conclusion of that opinion accurately reflect the law in 1981. Since then, however, subsequent legislative acts created the current Advisory Council, separate from the Division on Aging, and rendered the Council a purely advisory body. *See discussion infra*. For this reason, we now opine that membership on the Advisory Council does not constitute an office of honor or profit.

The key question presented by your request is whether a member of the Advisory Council exercises any part of the sovereign power of the state. The South Carolina Constitution mandates that "[n]o person may hold two offices of honor or profit at the same time." S.C. Const. art XVII, § 1A. Our Office consistently looks to the South Carolina Supreme Court cases of *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907), and *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980), to opine on whether a court would find that a particular office constitutes an "office of honor or profit" for purposes of this constitutional prohibition. *See, e.g., Op. S.C. Att'y Gen.*, 1981 WL 158258 (May 5, 1981). In *Sanders v. Belue*, the South Carolina Supreme Court distinguished between public officers and "mere employees" as follows:

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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Sanders v. Belue, 78 S.C. at 174, 58 S.E. at 763. (emphasis added). More recently, our state Supreme Court set out several factors to aid in determining whether an office "[exercises] some part of the sovereign power" in *State v. Crenshaw*:

Criteria to be considered in making the distinction between an officer and an employee 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. *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970). No single criteria is conclusive; neither is

it necessary that all the characteristics of an officer or officers be present. 67 C.J.S. Officers § 8(a) (1978).

State v. Crenshaw, 274 S.C. at 478, 266 S.E.2d at 61-62. While some subsequent cases have explored each of the factors specifically, *see, e.g., State v. Bridgers*, 329 S.C. 11, 495 S.E.2d 196 (1997), in at least one other subsequent case our Supreme Court forwent a factor-based analysis and simply noted that "a common thread [between *Sanders* and *Crenshaw*] lies in the exercise of the powers of or representation of the sovereign." *State v. Thrift*, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994).

When applying this case law to various questions presented to us, our Office has concluded that purely advisory positions do not exercise any portion of the sovereign power. *See discussion infra*. For example, in 2010, our Office considered whether a position on the Commission on Women, created pursuant to S.C. Code Ann. § 1-15-10 (Supp. 2016), qualified as an office of honor or profit. *Op. S.C. Att'y Gen.*, 2010 WL 1370087 (March 18, 2010). We noted that the Commission did carry some indicia of a public office: its members serve for a term, are required to meet certain qualifications, and receive a per diem and subsistence. *Id.* Our opinion concluded, however, that membership on the Commission did not qualify as an office for dual office holding purposes, because "[t]he functions of [the Commission] appear to be advisory in nature," and it "simply makes recommendations to the Governor." *Id.* We also noted that numerous prior opinions of this Office concluded that "members of advisory bodies are not office holders for purposes of dual office holding."² *Id.*, citing *Op. S.C. Att'y Gen.*, 1987 WL (December 14, 1987); *Op. S.C. Att'y Gen.*, 2007 WL (March 28, 2007); *Op. S.C. Att'y Gen.*, 2008 WL (December 18, 2008).

As noted earlier in this opinion, we understand that the Advisory Council on Aging, as presently constituted, is a purely advisory body and is independent of the Division on Aging. At the time of our 1981 opinion, however, the South Carolina Commission on Aging was a unitary body whose members were appointed by the Governor, as described in S.C. Code Ann. § 43-21-10 (1976) (in relevant part):

There is hereby created the South Carolina Commission on Aging under the Governor's office which shall consist of two members from each congressional district of the State, all of whom shall be appointed by the Governor. Such members shall be citizens of the State who have an interest in and a knowledge of the problems of the aging.

² Our 2010 opinion also contrasted the Commission on Women with the Commission on Aging as described in our 1981 opinion, including description of the statutory powers now held by the Division on Aging.

The Governor and certain members of the General Assembly also served as *ex officio* members of the Commission. *Id.* As noted in our 1981 opinion, the Commission was designated as a state agency, and

the powers and duties of the Commission [included] the acceptance and disbursement of funds, the execution of a program to meet the needs of aging citizens and the receipt on behalf of and in the name of the State grants from government sources and gifts, bequests, grants, funds and property from any other source.

Op. S.C. Att'y Gen., 1981 WL 158258 (May 5, 1981). For these reasons, the opinion concluded that "membership on the Commission would constitute a public office within the meaning of Article XVII, Section 1A [of the South Carolina Constitution]."

Subsequent to our 1981 opinion, the General Assembly amended Chapter 21 of Title 43 several times, and often in ways that made substantive changes to the nature and work of the Commission on Aging. For example, in 1993 the General Assembly revised Section 43-21-10 so as to create the Division on Aging within the Office of the Governor, which was to be supported by the Advisory Commission on Aging. Act No. 181, 1993 S.C. Acts 2319. The same Act also removed the *ex officio* membership of the Governor and certain members of the General Assembly. *Id.* Two years later, the legislature changed the name of the Advisory Commission on Aging to the present Advisory Council on Aging. Act No. 149, 1995 S.C. Acts 1506. And in 2008, the General Assembly removed the requirement (added in 1986) that members of the Council be appointed with the advice and consent of the Senate, and moved the Division to the Office of the Lieutenant Governor. Act No. 272, 2008 S.C. Acts 2273; Act No. 353, 2008 S.C. Acts 3464. The net result of these Acts is that the portion of Section 43-21-10 which we quoted above as it read in 1981 now reads, in relevant part:

There is created in the Office of the Lieutenant Governor, the Division on Aging. The division must be supported by an Advisory Council on Aging consisting of one member from each of the ten planning and service areas under the Division on Aging and five members from the State at large. The director of the division shall provide statewide notice that nominations may be submitted to the director from which the Lieutenant Governor shall appoint the members of the council. The members must be citizens of the State who have an interest in and a knowledge of the problems of an aging population.

S.C. Code Ann. § 43-21-10 (2015). This distinction between the Division and the Advisory Council persists throughout Chapter 21 of Title 43 in several instances too numerous to list here. *See* S.C. Code Ann. § 43-21-10 *et. seq.* (2015 & Supp. 2016).

Given that the Advisory Council is a creature of statute, but its role is not defined beyond supporting the Division on Aging, a court faced with the question presented here likely would construe Section 43-21-10 *et. seq.* to determine the role and power of the Council. The first rule of statutory construction is to give effect to the intent of the legislature which wrote and passed the law. As this Office has previously opined:

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan*, *supra*. Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When construing an undefined statutory term, such term must be interpreted in accordance with its usual and customary meaning. *Id.* When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.*

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

In this case, the structural result of the various Acts cited above is that the Division on Aging is a state agency, under the Lieutenant Governor, which exercises the powers and duties which belonged to the Commission on Aging at the time of our 1981 opinion. *See* S.C. Code Ann. § 43-21-40 (2015); *cf. Op. S.C. Att'y Gen.*, 1981 WL 158258 (May 5, 1981). By contrast, the Advisory Council on Aging is made up of qualified citizen volunteers, and while the Council exists to support the Division on Aging, it is not given any enumerated powers beyond specific provisions for its membership and meetings. *See* S.C. Code Ann. § 43-21-10 *et. seq.* (2015 & Supp. 2016). Our Office has opined previously that "as a creature of statute, the Division [on Aging] and its Council have only that authority expressly conferred or necessarily implied from its enabling legislation for it to effectively fulfill the duties with which it is charged." *Op. S.C. Att'y Gen.*, 2009 WL 276743 (January 7, 2009) (emphasis added). In the absence of any expressly conferred powers, it appears that the primary way that a Council of qualified citizens could support the Division on Aging would be to give its advice. Moreover, while the role of the

Council is not explicitly limited by statute and this particular distinction is not dispositive, the decision of the General Assembly to rename the body the "Advisory Council" lends further support to viewing the Council as intended to fill that role. *See* Act No. 149, 1995 S.C. Acts 1506.

We understand from our communications with you that the Advisory Council's statutory duty to support the Division, in the absence of any enumerated powers beyond specific provisions for the Council's membership and meetings, is interpreted and applied by all persons involved as a duty to serve in a purely advisory capacity. Our Office believes that this interpretation is consistent with the intent of the General Assembly in structuring and empowering the Division on Aging as a state agency under the Lieutenant Governor, with the Division supported by an Advisory Council composed of volunteer citizens. *See* S.C. Code Ann. § 43-21-10 *et. seq.* (2015 & Supp. 2016). We note that membership on the Council does fit some of the *Crenshaw* criteria; for example, our Office has advised that members should take the oath of office prescribed by the South Carolina Constitution. *See Op. S.C. Att'y Gen.*, 2010 WL 4982605 (November 3, 2010). But the Advisory Council has no expressly conferred statutory power to compel the Division on Aging to follow its advice or to take any specific action. *See* S.C. Code Ann. § 43-21-10 *et. seq.* (2015 & Supp. 2016). Additionally, while members of the Council receive "mileage and subsistence authorized by law for members of boards, commissions, and committees," they have no control over the budget or expenditures of the Division. *Id.* In short, the Advisory Council on Aging is a purely advisory body, and any sovereign powers which previously would have been the province of the Commission on Aging at the time of our 1981 opinion are now the province of the Division, not the Council.³

Because the Advisory Council on Aging is a purely advisory body, it is the opinion of this Office that a South Carolina court would find that membership on the Council does not constitute an office of honor or profit for the purposes of Article XVII, Section 1A of the South Carolina Constitution. Our conclusion here is consistent with the prior opinions of this Office concluding that purely advisory bodies, such as the Commission on Women, exercise no sovereign power and therefore are not offices of honor or profit, even if the office does carry some traditional indicia of sovereignty. *See, e.g., Op. S.C. Att'y Gen.*, 2010 WL 1370087 (March 18, 2010) (concluding that membership on the Commission on Women did not constitute an office of honor or profit). While membership on the Council does fit some of the criteria set out in *State v. Crenshaw*, the South Carolina Supreme Court pointed out in that opinion that "no single criteri[on] is conclusive." *State v. Crenshaw*, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980). Rather, the *Crenshaw* criteria are designed to answer the essential question posed in

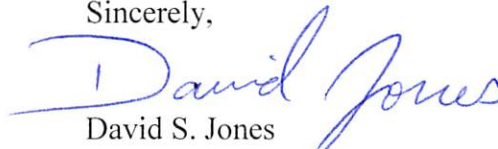
³ This opinion should not be construed as any comment on the comparative powers of the Commission on Aging and the Division as presently constituted. Our focus here is solely on how the sovereign powers expressly conferred and implied by Chapter 21 of Title 43 are divided between the Division and the Council.

Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907): whether the duties of an office "[involve] an exercise of some part of the sovereign power." *See State v. Thrift*, 312 S.C. 282, 309, 440 S.E.2d 341, 356 (1994) ("[A] common thread [between *Sanders* and *Crenshaw*] lies in the exercise of the powers of or representation of the sovereign."). Where there is no such exercise of sovereignty, as in the case of the Advisory Council, the position is not an office of honor or profit.

Conclusion:

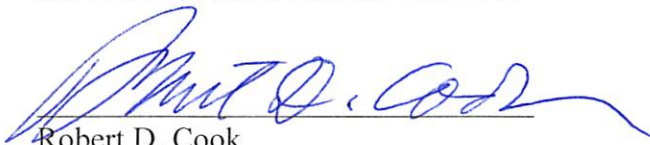
In conclusion, for the reasons set out above, it is the opinion of this Office that a South Carolina court would find that membership on the Advisory Council to the Office on Aging is not an office of honor or profit for the purposes of the dual office holding prohibition of the South Carolina Constitution, because the Council is a purely advisory body. We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt by this Office to establish or comment upon public policy. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. *See* S.C. Code Ann. § 15-53-20 (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General