



ALAN WILSON
ATTORNEY GENERAL

February 21, 2018

Gary H. Smith, III, Esq.
Aiken City Attorney
PO Box 519
Aiken, SC 29802

Dear Mr. Smith:

You have requested an opinion from this Office regarding whether concurrently serving as both a member of the Aiken City Council and as a member of the Aiken County School Board Area 1 Advisory Council would violate the dual office holding prohibition of the South Carolina Constitution.

LAW/ANALYSIS:

Dual office holding is prohibited by the South Carolina Constitution, which provides in relevant part that "[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." S.C. Const. art. XVII, § 1A. The South Carolina Supreme Court has opined on the definition of an "office" for dual office holding purposes and held that:

"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 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. Att'y Gen.*, 2013 WL 3243063 (June 17, 2013) (quoting *State v. Crenshaw*, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

A member of the Aiken County Council holds an office of honor or profit as contemplated by the South Carolina Constitution. *Op. S.C. Att'y Gen.*, 2013 WL 5291571 (September 9, 2013). Indeed, "[t]his Office has advised on numerous occasions that a member of a town or city council holds an office for purposes of the constitutional prohibition against dual office holding." *Id.* (citing *Ops. S.C. Att'y Gen.*, 2012 WL 1036294 (March 20, 2012) & *Op. S.C. Att'y Gen.*, 2011 WL 380163 (January 14, 2011)). Accordingly, the answer to the question presented in your request turns on whether membership on the Aiken County School Board Area 1 Advisory Council also constitutes such an office. For the reasons set out below, we believe that it does.

In 1990 a prior opinion this Office addressed whether service on the Ridge Spring-Monetta Area Advisory Council, which was in the Aiken County School District, constituted dual office holding. *Op. S.C. Att'y Gen.*, 1990 WL 599332 (October 19, 1990). We determined there that membership did in fact constitute a public office for dual office holding purposes. *Id.* We quote here at length from that opinion for its description of the background and the conclusion of law:

This Office has previously examined the area advisory councils relative to the Aiken County Board of Education. In an opinion of this Office dated December 18, 1978, the history of the area advisory councils to that date was detailed; the opinion concluded that the area advisory councils were created to replace the area boards of education eliminated by Act No. 461 of 1967. Opinions dated November 12, 1974 and December 17, 1973 concluded that service on one of the area advisory councils would constitute an office for dual office holding purposes

Act No. 503 of 1982, as amended by Act No. 572 of 1984, repealed Act No. 461 of 1967, and in section 14 provides for area advisory councils. The Ridge Spring-

Monetta representatives are to be appointed by the Saluda County Legislative Delegation from the top candidates of an advisory election. The appointees serve terms of four years. Section 15 of Act No. 503 of 1982 provides that area advisory councils are to determine policy in their respective areas, such policy not to be inconsistent with policies set by the Aiken County Board of Education. The county board may also delegate additional authority to the area advisory councils as may be necessary for effective operation of the area schools. In addition, area advisory councils are authorized to hear grievances of patrons in the administrative areas, appeal from which is to the county board. Notwithstanding the 1982 and 1985 legislative modifications, these area advisory councils would be so similar to the boards set up under the 1967 legislation that our previous opinions would still be valid. Thus, one who would serve on an area advisory council would hold an office for dual office holding purposes.

Id. at *1.¹ We understand that the Aiken County School Board Area 1 Advisory Council is another board which also was established pursuant to the same legislation as the Ridge Spring-Monetta Area Advisory Council. *Cf. id.* Therefore, consistent with our prior opinions we conclude here that membership on the Aiken County School Board Area 1 Advisory Council similarly constitutes an office for dual office holding purposes.

This conclusion also is supported by a portion of the Aiken County Board of Education Policy Manual regarding the area advisory councils, which you provided to us in your letter. According to the Policy Manual, the Aiken County Board of Education has delegated additional authority to the area advisory councils, as permitted by Act No. 503 of 1982. *See* Policy AAA, Legal Status of Area Advisory Councils, Aiken County Board of Education Policy Manual. The Policy Manual provides that the area advisory councils have powers including, but not limited to, approving all of the expenditures in their administrative area and recording them in the official minutes of their meetings; establishing procedures to govern such expenditures within the guidelines of district fiscal policies; and hearing student transfer appeals and adopting a rule or standing procedure with regard to the hearings which will serve to prevent tie votes. *Id.* The area advisory councils, at the discretion of principals, also can be included in the discipline loop as non-action interventions for students who have accumulated office referrals and who may be likely headed for more serious disciplinary action. *Id.* The additional duties delegated to the area advisory councils by the Aiken County Board of Education include examples of

¹ After our October 19, 1990 opinion was issued, the Legislature enacted Act No. 298 of 2010, which stated that it amended Act No. 503 of 1982. However, the language granting the duties and the authority to the area advisory councils did not change in the 2010 legislation. *See Op. S.C. Atty. Gen.*, 2010 WL 4982621 (November 4, 2010) (discussing Senate Bill 442, which was enacted into Act No. 298 of 2010).

discretionary powers which traditionally have been exercised by the state, and their existence further support the conclusion that the members of the area advisory councils in the Aiken County School District are officers for constitutional purposes. *See, e.g., Op. S.C. Att'y Gen.*, 1982 WL 189260 (April 20, 1982) (discussing discretionary control over public funds as an "exercise of the sovereign power of the State"). Accordingly, we believe that a court would conclude that it would violate the dual office holding prohibition of the South Carolina Constitution for an individual to serve concurrently on both the Aiken City Council and the Aiken County School Board Area 1 Advisory Council.²

In order to be as responsive as possible to your question, we note also that our Office addressed in a prior opinion how South Carolina law operates to resolve a dual office holding situation:

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); *Dove 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. McLeod v. Court of Probate of Colleton 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. Ayer*, 3 Stob. 92 (S.C. 1848).

Op. S.C. Att'y Gen., 2003 WL 22172235, at *2 (Sept. 12, 2003). Our Office also has opined that:

² Our Office has opined previously that "purely advisory positions do not exercise any portion of the sovereign power." *See, e.g., Op. S.C. Att'y Gen.*, 2017 WL 3105905 (June 30, 2017). Those opinions are not controlling here, however, because in this instance the Advisory Council evidently exercises some sovereign powers of the state, and is not purely advisory.

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[N]o steps are necessary [to resolve a dual office holding situation] because the individual found to hold two offices automatically vacates the first office held by that individual. However, we reiterate that the individual will continue to serve in the first office in a de facto capacity until a successor is appointed.

Op. S.C. Atty. Gen., 2007 WL 1651345, at *4 (May 9, 2007).

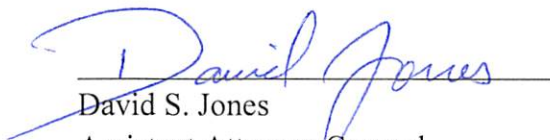
CONCLUSION:

For the reasons set forth above, it is the opinion of this Office that a court most likely would conclude that concurrently serving as both a member of the Aiken City Council and as a member of the Aiken County School Board Area 1 Advisory Council would violate of the dual office holding prohibition of the South Carolina Constitution. When a violation of the prohibition against dual office holding occurs, the individual is deemed by law to have vacated the first office held. However, they continue to serve in the first office in a de facto capacity until a successor is selected.

Sincerely,

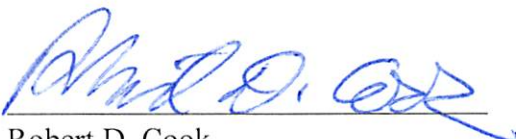


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