



ALAN WILSON
ATTORNEY GENERAL

March 07, 2018

Walter H. Sanders, Jr., Esq.
Allendale County Attorney
P.O. Box 840
Fairfax, SC 29827

Dear Mr. Sanders:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter states the following:

Allendale County Council wants to appoint an individual to the Allendale-Hampton-Jasper Regional Library Board who is currently an elected member of the Allendale County School Board and also wants to appoint an individual to the Allendale-Hampton-Jasper Regional Library Board that is currently an elected member of Fairfax Town Council. Please advise if there is any general prohibition against an elected official being appointed to this board and more specifically please advise if the prohibition against holding a dual office would apply to these appointments to the Allendale-Hampton-Jasper Regional Library Board.

Law/Analysis

It is this Office's opinion that members of the Allendale County School Board as well as members of Fairfax Town Council are prohibited from serving on the Allendale-Hampton-Jasper Regional Library ("AHJ") Board of Trustees. This Office has not been provided information regarding the formation and specific statutory authority by which the AHJ Regional Library was formed. However, it is this Office's understanding that Jasper County joined the Allendale and Hampton County regional library in October of 1947 forming the tri-county AHJ Regional Library.¹ The statutory authority by which the AHJ regional library was likely established appears to originate with Act No. 873 of 1934 titled "AN ACT to Provide for the Establishment and Maintenance of Regional Libraries in this State." Section 5 of this Act provides for the appointment of the Board of Trustees to these regional libraries. Each county board of education for the territories served by such regional libraries appoints three members to serve on the Board of Trustees for such regional library. Id. Section 5 specifically provided that "no member of a

¹ See Allendale Hampton Jasper Regional Library, About Us <http://www.ahjlibrary.org/?PN=AboutUs> (last visited March 6, 2018).

board of school trustees shall be eligible for appointment as Library Trustee.” 1934 Act No. 873, § 5. This statutory scheme remained codified through the 1962 South Carolina Code of Laws in Chapter 4, of Title 42.² In relevant part, the Act maintained the prohibition on school board members serving as regional library trustees as follows:

In the event a majority of the qualified electors voting at any election provided for in § 42-152 or, in the event the area of such proposed library comprises territory lying in more than one county, a majority of the qualified electors of each county or of the political subdivisions of each county included in such area, voting in such election, shall vote in favor of the establishment of a regional library, the county board of education, within ten days after the declaration of the result, shall appoint three competent citizen residents of the territory of the county comprised in the area of the regional library as trustees of such regional library who, together with the trustees appointed from any other county or counties under the provisions hereof, shall constitute the board of trustees of such regional library. No member of a board of school trustees shall be eligible for appointment as library trustee. The trustees first appointed from each county shall hold office for a term of one, two and three years and until their successors shall have been appointed and qualified. The first trustees from each county shall determine among themselves, by lot, the length of their respective terms. The regular terms of office shall be for three years and until their successors shall have been appointed and qualified and appointment thereto shall, in like manner, be made by the county board of education.

1962 Code § 42-153 (emphasis added).

The plain language of Section 42-153 prohibits school board members from being appointed to serve as regional library trustees. The language used in this prohibition suggests that the exclusion of school board members applies not only to the “trustees first appointed” by the county board of education, but also to successor trustees. In the following two sentences of the statute, the legislature made a distinction between the broader terminology “library trustee,” and instead referred to a narrower classification of the “trustees first appointed” and “[t]he first trustees.” Therefore, it is this Office’s opinion that the prohibition on members of a school board of trustees serving as regional library trustees continues to bar members of the Allendale County School Board from serving as trustees of the Allendale-Hampton-Jasper Regional Library Board.

² Title 42, Chapter 7 of the 1962 South Carolina Code of Laws contains local provisions regarding regional libraries, county libraries and county library boards, commissions, and committees. See 1962 Code §§ 42-301 *et seq.* While the creation of the Newberry-Saluda Regional Library is codified at Section 42-560, this Office has been unable to locate a similar local provision regarding the AHJ Regional Library. Therefore, this Office assumes that the AHJ Regional Library was not established by local legislation and was instead established according to the procedures established by election as set forth in 1962 Code § 42-152.

It is this Office's opinion that the prohibition against holding dual offices applies to the appointments of members of the Allendale-Hampton-Jasper Regional Library Board. It is this Office's understanding that your question regarding dual office holding is based in part on S.C. Code Ann. § 4-9-41 (Supp. 2017) and Article VIII, § 13 of the South Carolina Constitution. In relevant part, Section 4-9-41(A) states, "Any county, incorporated municipality, special purpose district, or other political subdivision may provide for the joint administration of any function and exercise of powers as authorized by Section 13 of Article VIII of the South Carolina Constitution." In relevant part, Section 13 of Article VIII of the South Carolina Constitution states:

(A) Any county, incorporated municipality, or other political subdivision may agree with the State or with any other political subdivision for the joint administration of any function and exercise of powers and the sharing of the costs thereof.

...

(C) The prohibitions against dual officeholding contained in Article VI of this Constitution do not apply to any elected or appointed official or employee who serves on a regional council of government created under the authority of this section.

S.C. Const. art. VIII, § 13 (emphasis added). While the language of Section 4-9-41 and Article VIII, § 13 of the South Carolina Constitution might appear to apply AHJ Regional Library, it is this Office's opinion that they are not applicable to AHJ Regional Library Board of Trustees. First, as discussed above, it is this Office's understanding that the AHJ Regional Library was formed in October of 1947 by election as set forth in 1962 Code § 42-152 and prior versions of the South Carolina Code. Second, the proposed constitutional amendment which was submitted to the voters and became Article VIII, § 13 of the South Carolina Constitution was not adopted by the General Assembly until 1972. See 1972 Act No. 1631, § 13. Finally, S.C. Code Ann. § 4-9-41 did not become effective until April 8, 1992. Because the establishment of the AHJ Regional Library predates both Section 4-9-41 and Article VIII, § 13 of the South Carolina Constitution, it was likely not "created under" such authority. Therefore, it is this Office's opinion that the exemption from the prohibition against dual office holding does not apply to members of the AHJ Regional Library Board of Trustees as the library was not created under the authority of Article VIII, § 13 of the South Carolina Constitution.

It is this Office's opinion that an individual who is appointed to the Allendale-Hampton-Jasper Regional Library Board and concurrently serves as an elected member of Fairfax Town Council violates the prohibition on holding dual offices. Article XVII, § 1A of the South Carolina Constitution prohibits a person from holding "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." A person violates this provision if he holds two or more public offices which "involve an exercise

of some part of the sovereign power..." Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the South Carolina Supreme Court stated that relevant considerations for determining whether a position would be considered a public office include whether statutes, or other such authority, establish the position, the qualifications for appointment, duties, tenure, require an oath for the position, or otherwise authorizes the position to exercise a sovereign power of the State. No single criterion is dispositive and it is not necessary that a position exhibits all the criteria to find that an individual is a public officer. Id.

For this Office to provide an opinion on whether an individual violates the prohibition on dual office holding, we must examine the positions to determine whether they are both public offices. This Office has previously opined that a member of a town council holds an office of honor or profit. See Op. S.C. Att'y Gen., 2016 WL 4698870 (August 24, 2016); 2006 WL 2593079 (August 4, 2006) ("[M]embership on a town council is office holding for dual office holding purposes."). Further, this Office's August 22, 2014 opinion concluded that the members of the Beaufort County Library Board of Trustees held offices of honor or profit because the board exercises a portion of the sovereign power of the State. See Op. S.C. Att'y Gen., 2014 WL 4382449 (August 22, 2014). A regional library established under Chapter 4, of Title 42 of the 1962 South Carolina Code of Laws likewise exercises a portion of the sovereign power of the State. See 1962 Code §§ 42-154 ("Trustees may accept or establish public libraries or contract for library services"); 42-155 (Trustees determine location, establishment, and operation of regional libraries); 42-157 ("Tax support of library"); 42-158 ("Trustees may borrow in anticipation of taxes."). Moreover, the powers described above include further examples of discretionary powers which traditionally have been exercised by the State, and their existence further supports the conclusion that board members are officers for dual office holding 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"). For these reasons, it is this Office's opinion that a court would likely find that member of the AHJ Regional Library Board of Trustees holds an office for dual office holding purposes. Therefore, it is this Office's opinion that a court would likely find an individual who is appointed to the Allendale-Hampton-Jasper Regional Library Board and concurrently serves as an elected member of Fairfax Town Council violates the prohibition on holding dual offices.

In this Office's July 19, 2012 opinion, we explained that the law operates to "cure" the dual office holding problem as follows:

[I]f an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, § 1A (or one of the other applicable constitutional prohibitions against dual office holding), that person is deemed by law to have vacated the first office. See Ops. S.C. Att'y Gen., March 16, 2012; July 28, 2003; July 31, 2000; July 13, 1995. However, the individual may continue to perform the duties of the previously held office as a de facto officer until a successor is duly selected to assume the duties or complete the

term of office. See Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1933); State v. Coleman, 54 S.C. 282, 32 S.E. 406 (1898). While the actions taken by a *de facto* officer are generally held to be valid with regard to third parties, there is no question that such officer is acting under color of law rather than with full *de jure* status which he would possess if there had been no dual office holding. Furthermore, there exists general authority that the protections afforded a *de facto* officer will not be deemed to continue indefinitely, particularly when the public is chargeable with notice that the officer's status has been reduced to one of *de facto* rather than *de jure*. See State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); Ops. S.C. Atty. Gen., March 16, 2012; May 7, 1998. This *de facto* capacity does carry with it some risk, however. While a *de facto* officer's actions are generally held to be valid with regard to third parties, it is possible that a court might find that the actions of a *de facto* officer are invalid. In this instance, for example, an arson investigator charged with police powers in this State may be performing those duties in a *de facto*, rather than *de jure* capacity. Accordingly, we advise that the wisest course of action in this case would be for such individual to avoid a situation where his/her actions could be called into question. See Op. S.C. Atty. Gen., July 28, 2003.

Op. S.C. Atty. Gen., 2012 WL 3142775, at *4 (July 19, 2012). The analysis above can be used as a guide to determine the effect of dual office holding if a member of the Fairfax Town Council has been appointed to serve as a member of the AHJ Regional Library Board of Trustees.

Conclusion

As discussed above, it is this Office's opinion that members of the Allendale County School Board as well as members of Fairfax Town Council are prohibited from serving on the Allendale-Hampton-Jasper Regional Library ("AHJ") Board of Trustees. Section 42-153 of the 1962 South Carolina Code of Laws states, "No member of a board or school trustees shall be eligible for appointment as [regional] library trustee." The plain language of this statute prohibits school board members from being appointed to serve as regional library trustees. Further, it is this Office's opinion that an individual who is appointed to the Allendale-Hampton-Jasper Regional Library Board and concurrently serves as an elected member of Fairfax Town Council violates the prohibition on holding dual offices as both positions would likely be found to be an office of honor or profit. Finally, it is this Office's opinion that the exemption from the prohibition against dual office holding does not apply to members of the AHJ Regional Library Board of Trustees as the library was not created under the authority of Article VIII, § 13 of the South Carolina Constitution.

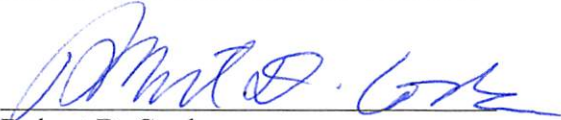
Walter H. Sanders, Jr., Esq.
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Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General