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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 21, 1999

The Honorable Andre Bauer
Senator, District No. 18
504 Gressette Building
Columbia, South Carolina 29202

RE: Informal Opinion

Dear Senator Bauer:

Attorney General Condon has forwarded your opinion request to me for reply. You have informed this Office that a State Highway Patrolman has recently been elected to serve on the Newberry County School Board. You ask whether simultaneous service as a highway patrolman and member of the Newberry County School Board would violate the dual office holding prohibitions of the South Carolina Constitution. If a dual office holding violation does exist, you ask whether such would have any effect on the highway patrolman's law enforcement authority.

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time ...," with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. 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 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 previously advised that one who serves on the Newberry County

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Board of Education holds an office for dual office holding purposes. Op. Atty. Gen. dated January 10, 1995. We have also concluded that a highway patrolman holds an office for dual office holding purposes. Ops. Atty. Gen. dated November 9, 1982 and October 14, 1982; See State v. Bridges, 329 S.C. 11, 495 S.E.2d 196 (1997)(Highway Patrol officers and troopers are "public officials" within the meaning of section 16-3-1040 of the South Carolina Code of Laws). Thus, simultaneous service in both capacities would violate the dual office holding prohibitions of the State Constitution.

When a dual office holding situation occurs, the law operates to automatically "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. 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. 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. Op. Atty. Gen. dated May 7, 1998.

In this situation, the individual in question is deemed by law to have vacated his position as highway patrolman when he assumed his position with the Newberry County School Board. He would, however, continue to serve as a highway patrolman in a de facto capacity until his successor is found. This de facto capacity does carry with it some risk. While a de facto officer's actions are generally held to be valid with regard to third parties, it is possible that a court may find that the actions of a de facto officer are invalid. This is of particular concern here where the de facto officer is charged with enforcing the criminal laws of this State. Therefore, the wisest course of action in this case would be for the highway patrolman to avoid a situation where his law enforcement actions can be called into question.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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With best personal regards, I am

Sincerely yours,

A handwritten signature in black ink, appearing to read "Paul M. Koch". The signature is written in a cursive style with a large initial "P".

Paul M. Koch
Assistant Attorney General