

RETWAY 166

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-758-3970

February 20, 1985

Mr. Barry Thigpen
Leonard Call Taylor & Associates, Inc.
Post Office Box 1373
Myrtle Beach, South Carolina 29578

Dear Mr. Thigpen:

By your letter of February 14, 1985, you have asked whether you may serve simultaneously on the Board of Adjustment for the City of Myrtle Beach and on the Horry County Board of Education.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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 tenure, 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 held repeatedly that one who serves on a county board of education would hold an office for dual office holding purposes. In particular, by an Opinion of the Attorney General dated February 8, 1983, enclosed, this Office addressed the Horry County Board of Education and determined that Board members would hold an office for dual office holding purposes.

By an opinion dated July 1, 1977 (enclosed), this Office considered the question of whether a member of the City of

REQUEST LETTER

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Greenville Board of Zoning Appeals would be a public officer. Noting that boards of adjustment or boards of zoning appeals were created pursuant to statutory authority and involved an exercise of a portion of the sovereign power of the State, the opinion concluded that a member of such board would be a public officer. This opinion would be applicable to the Board of Adjustment for the City of Myrtle Beach, and one who would serve on that board would be considered a public officer.

Based on the foregoing, you would most probably be considered to hold dual offices in contravention of the State Constitution.

You have advised this Office that you were appointed to the Board of Adjustment two years ago. According to Section 5-23-70, Code of Laws of South Carolina (1976), the members serve a term of years to be specified by city ordinance "and until successors are appointed and qualify." You were elected to the Board of Education in November and began serving following election. As to the first office, you are a de facto officer; as to the second, you are a de jure officer. ^{1/} You are deemed to have vacated the first office by virtue of accepting the second but would continue to serve de facto until your successor is appointed and qualifies. It should be noted that anything which you have done as a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court should declare such acts void or remove you from office. See, for example, 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 Strob. 92 (S.C. 1848); 67 C.J.S. Officers, § 276.

^{1/} A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am.Jur.2d Public Officers and Employees § 495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

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I trust that this information and the prior opinions will respond satisfactorily to your inquiry. Please let me know if you have additional questions about this matter.

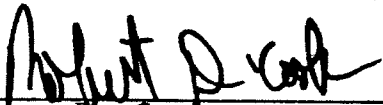
Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP:djg

Enclosures

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions