



ALAN WILSON
ATTORNEY GENERAL

November 10, 2014

Mr. Arrigo P. Carotti
Horry County Attorney
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Dear Mr. Carotti:

Thank you for your letter dated July 15, 2014 requesting the opinion of this Office as to whether membership on the South Carolina Real Estate Commission would constitute as an office for dual office holding purposes. Based upon the analysis below, we conclude that it would.

Law/Analysis

Article XVII, Section 1A of the South Carolina Constitution states that “[n]o person may hold two offices of honor or profit at the same time . . .” with the exception that individuals serving as officers in the militia, a member of a lawfully and regulated organized fire department, constable, or notary public may hold an additional office. A person not falling into this exception would violate the dual office holding prohibition by concurrently serving in two offices “involving an exercise of some part of the sovereign power [of the State], either small or great, in the performance of which the public is concerned. . . .” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). It has been said that the public policy behind the dual office holding prohibition is “to prevent public officials from acting in circumstances in which their personal interests conflicts with the public whose interest they have been elected to represent.” 63C Am. Jur. 2d Public Officers and Employees § 63 (2014) (citing Dykeman v. Symond, 54 A.D.2d 159, 388 N.Y. S.2d 422 (NY 4th Dep’t 1976)).

In considering whether a particular position is an office in the constitutional sense, South Carolina courts look to whether “[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). More specifically, our Supreme Court has clarified that the criteria to be considered includes “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 v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980). However, it has also been determined that “no single criteria is conclusive” and it is not “necessary that all the characteristics of an officer or officers be present.” Id. (citing 67 C.J.S. Officers § 8(a) (1978)).

In a prior opinion of this Office, we addressed whether the position of “Executive Director” of the South Carolina Real Estate Commission would be considered an office for dual office holding purposes. See Op. S.C. Att’y Gen., 1994 WL 378006 (June 24, 1994). Concluding that this position

was not an office, we looked to the “sweeping” 1994 statutory amendments that significantly changed the former legislation governing the Real Estate Commission. *Id.* at *2. In particular, we focused on S.C. Code Ann. § 40-57-80 (1994), which read “[t]he Director of the Department of Labor, Licensing, and Regulation shall appoint any *employees* as may be necessary to carry out the work of the Real Estate Commission and the South Carolina Real Estate Commission and the South Carolina Real Estate Appraisers Board defined in Section 40-60-20.” We therefore opined that the person acting as Executive Director of the Real Estate Commission “would be an employee rather than an officer” for dual office holding purposes. *Id.* at * 2.

Subsequent to the 1994 statutory amendments and our June 24, 1994 opinion, significant changes to the South Carolina Real Estate Commission have again resulted through legislation passed in 1997. *See* 1997 Act. No. 24, 1997 S.C. Acts 147-176 (“Act No. 24”). Act No. 24 modified the former S.C. Code Ann. § 40-57-80 (1994), which we relied on in reaching our conclusion in the June 24, 1994 opinion. In what appears to be the functional equivalent to former S.C. Code Ann. § 40-57-80 (1994), under the currently law, § 40-57-50 (2011) states in part that “[t]he commission annually shall elect from its total membership a chairman, vice-chairman, and other *officers* the commission determines necessary.” S.C. Code Ann. § 40-57-50 (2011) (emphasis added). Thus, members of the Commission are now referenced as officers rather than employees.

We point out our June 24, 1994 opinion as a preliminary matter due to this Office’s long-standing policy that a prior opinion will not be overruled unless it is clearly erroneous or a change has occurred in the applicable law. *See Op. S.C. Att’y Gen.*, 2009 WL 959641 (March 4, 2009); *Op. S.C. Att’y Gen.*, 2006 WL 2849807 (Sept. 29, 2006); *Op. S.C. Att’y Gen.*, 2005 WL 2250210 (Sept. 8, 2005). As Act No. 24 revised the enabling legislation of the South Carolina Real Estate Commission, in part to “conform this chapter to the statutory organizational and administrative framework established for professional and occupational licensing boards in Chapter 1, Title 40,” it is our opinion that the passage of Act No. 24 constitutes a clear change in the applicable law. 1997 Act. No. 24, 1997 S.C. Acts 147-48.

The South Carolina Real Estate Commission (“the Commission”) was created by the Legislature pursuant to the current S.C. Code Ann. § 40-57-10 (2011): “[t]here is created the South Carolina Real Estate Commission under the administration of the Department of Labor, Licensing and Regulation.” Furthermore, the Legislature makes clear that “[t]he purpose of this commission is to regulate the real estate industry so as to protect the public’s interest when involved in real estate transactions.” S.C. Code Ann. § 40-57-10 (2011). To effectuate this purpose, the Commission is given the authority to set the standards for qualifications and eligibility for licensure, conduct and decide on disciplinary actions for violations, recommend changes to legislation and regulations affecting the real estate industry, and to set a fee schedule through regulation. S.C. Code Ann. § 40-57-60 (2011). The Commission consists of ten members: seven members are elected by a majority of house members and senators representing the house and senate districts in each of the seven congressional districts; two members are appointed by the governor; and one member is elected at large by the other nine elected and appointed members. S.C. Code Ann. § 40-57-40(A) (2011 & Supp. 2013). All members must be engaged in the practice of real estate except the two appointed members must not be professionally engaged in the practice of real estate. *Id.* Members of the Commission serve a term of four (4) years and are required to take an oath promising to perform the duties of the office and to uphold the Constitutions of the state and of the United States. S.C. Code Ann. § 40-57-40(B)-(C) (2011).

Comparing the Commission's enabling legislation to the criteria established by our Courts to determine whether a position is an office in the constitutional sense, we point out that service on the Commission meets nearly all of the applicable criteria. Specifically, the Commission was created by the Legislature, detailed requirements must be met in order to serve as a Commission member, certain members are appointed by the Governor, all members serve for four-year terms, and members are required by statute to take an oath prior to serving. In addition, the authority given to the Commission strongly indicates that its members have the ability to exercise some portion of the sovereign power of the State. As such, we believe a court would find membership of the South Carolina Real Estate Commission is an office.

We find additional support in prior opinions of this Office cited below, all of which conclude that service on a certain state professional and occupational licensing board is an office for purposes of the constitutional prohibition on dual office holding. See Op. S.C. Att'y Gen., 2009 WL 1266915 (April 1, 2009) (State Board of Examiners in Psychology); Op. S.C. Att'y Gen., 2007 WL 1934799 (June 14, 2007) (South Carolina Environmental Certification Board); Op. S.C. Att'y Gen., 2004 WL 1182085 (April 29, 2004) (Commissioner of Pilotage for the Port of Charleston); Op. S.C. Att'y Gen., 2003 WL 22378700 (Oct. 8, 2003) (State Board of Law Examiners); Op. S.C. Att'y Gen., 1993 WL 720100 (April 12, 1993) (Board of Examiners in Opticianry, State Board of Examiners in Optometry, and State Board of Physical Therapy Examiners); Op. S.C. Att'y Gen., 1979 WL 42852 (March 8, 1979) (Board of Pharmaceutical Examiners). We believe service on the Real Estate Commission, as the licensing board for members of the real estate profession, is precisely in line with the conclusions reached in these former opinions.

Conclusion

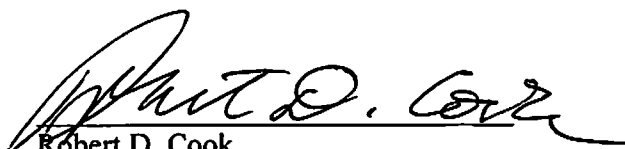
Based on the forgoing analysis, we believe a court would find that a position on the South Carolina Real Estate Commission constitutes an office for dual office holding purposes.

Very truly yours,



Anne Marie Crosswell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General