



ALAN WILSON  
ATTORNEY GENERAL

January 14, 2021

Scott N. Simms  
112 Henston Drive  
West Columbia, SC 29172

Dear Mr. Simms:

You have requested an opinion from this Office regarding whether it would be dual office holding for you to serve on both the Pine Ridge Town Council and on the Respiratory Care Committee.

#### LAW/ANALYSIS

Dual office holding is prohibited by the South Carolina Constitution, which states:

[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.... The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1 A.

The South Carolina Supreme Court explains that an “office” for dual office holding purposes is:

“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

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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 for an office are:

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.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478,266 S.E.2d 61, 62 (1980)).

Our Office has opined that a town council member holds an office for dual office holding purposes. See Op. S.C. Atty. Gen., 2013 WL 5291571 (Sept. 9, 2013) (“[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.”)

We have not previously considered whether a member of the Respiratory Care Committee is an officer. The Respiratory Care Committee (“Committee”) was established by the South Carolina Respiratory Care Practice Act (“Act”), S.C. Code Ann. § 40-47-500 et seq (1976 Code, as amended). It was created “as an advisory committee to the board which consists of nine members to be appointed by the board.” S.C. Code Ann. § 40-47-540 (1976 Code, as amended). According to the definitions section of the Act, “‘Board’ means the Board of Medical Examiners of South Carolina.” S.C. Code Ann. § 40-47-510 (1976 Code, as amended). The definitions reiterate that “‘Committee’ means the Respiratory Care Committee which is established by this article as an advisory committee responsible to the board.” Id.

Members of the Committee are required to have certain qualifications:

Five of the members must be respiratory care practitioners with at least five years' experience each, one member must be a consumer, and three members must be physicians who are licensed to practice in South Carolina who have special interest and knowledge in the diagnosis, treatment, and assessment of respiratory problems. All of the respiratory care practitioners must be certified . . .

S.C. Code Ann. § 40-47-540, supra.

Committee members “shall serve for terms of four years and until their successors are appointed and qualify . . . .” S.C. Code Ann. § 40-47-550 (1976 Code, as amended). Their service is restricted, as “[n]o member may serve more than one full four-year term consecutively, but he is eligible for reappointment two years from the date the full four-year term expires.” *Id.* While members of the Committee do not receive a salary, they do “receive mileage, subsistence, and per diem provided by law for members of state boards, commissions, and committees for each meeting attended.” *Id.* The Act does not address whether a Committee member is required to give an oath or provide a bond.

The Committee is responsible for making recommendations to the Board regarding licensing of respiratory care practitioners. It recommends whether to issue or renew licenses. S.C. Code Ann. § 40-47-590 (1976 Code as amended). It evaluates the qualifications and supervises the examinations of applicants for licensure in order to “make appropriate recommendations.” *Id.* It recommends continuing professional education as well as “additional requirements for license renewal which provide evidence of continued competency.” *Id.*; S.C. Code Ann. § 40-47-640 (1976 Code as amended). It recommends the fees for licensure and renewal. S.C. Code Ann. § 40-47-650 (1976 Code, as amended). It also keeps a register of all persons licensed and makes an annual report to the Board of its duties performed, actions taken, and recommendations. S.C. Code Ann. § 40-47-590, *supra*.

Additionally, it makes recommendations regarding regulations. It recommends regulations relating to professional conduct for both applicants and licensed respiratory care practitioners. *Id.* It also recommends “regulations regarding respiratory care necessary to perform its duties which must be reviewed and approved” by the Board prior to adoption. S.C. Code Ann. § 40-47-560 (1976 Code, as amended).

The Committee furthermore makes recommendations to the Board to revoke or suspend a license, to issue a public or private reprimand, or to “impose any other reasonable limitation” on a respiratory care practitioner. S.C. Code Ann. § 40-47-630 (1976 Code, as amended). It hears all disciplinary cases in order to make these recommendations. S.C. Code Ann. § 40-47-590, *supra*.

The Board, however, conducts the final hearings on the disciplinary cases and makes the final decisions. *Id.* It issues the licenses and temporary licenses. S.C. Code Ann. §§ 620, 625 (1976 Code, as amended). It receives and accounts for all monies collected and pays the money to the State Treasurer. S.C. Code Ann. § 580 (1976 Code, as amended). The Board also has the power to appoint and to remove members of the Committee. S.C. Code Ann. § 40-47-540, *supra*; S.C. Code Ann. § 40-47-550, *supra*.

Although the position, its qualifications, its duties, and its term are provided for by statute, we do not believe that a Committee member is a public officer. We have consistently opined that “members of advisory bodies do not hold an office for dual office holding purposes.” *Op. S.C. Atty. Gen.*, 2002 WL 399636 (Jan. 23, 2002). The Act is clear that the Committee is an advisory

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committee. Furthermore, a review of the duties and responsibilities of the Committee shows that it only makes recommendations to the Board and exercises ministerial duties. The Board, and not the Committee, exercises a portion of the sovereign power of the State. Therefore, it is our opinion that it would not be a violation of the constitutional prohibition against dual office holding for you to serve on both the Respiratory Care Committee and the Pine Ridge Town Council.

CONCLUSION

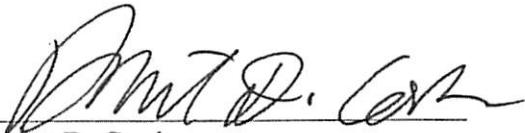
In our opinion, it would not be a violation of the constitutional prohibition against dual office holding for you to serve on both the Respiratory Care Committee and the Pine Ridge Town Council.

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General