



ALAN WILSON
ATTORNEY GENERAL

March 29, 2024

Chris Loewer
Director
Greenville Technical Charter High School
Post Office Box 5616
Greenville, South Carolina 29606

Dear Mr. Loewer:

We received your request for an opinion of this Office concerning the eligibility requirements to serve on the Board of Directors at the Greenville Technical Charter High School (“GTCHS”). Specifically, you ask “whether a charter school board member would be required to be both a resident *and* be able to vote or if, as charter law states, residency is enough.”

Law/Analysis

Chapter 40 of title 59 of the South Carolina Code governs charter schools. As you reference in your letter, section 59-40-50(B)(9) of the South Carolina Code (2020), provides for the appointment of a board of directors for each charter school. This provision states:

(B) A charter school must:

...

(9) consist of a board of directors of seven or more individuals with the exact number specified in or fixed in accordance with the bylaws. Members of a board of directors may serve a term of two years, and may serve additional terms. A choice of the membership of the board must take place every two years. Fifty percent of the members of the board as specified by the bylaws must be individuals who have a background in K-12 education or in business, and the bylaws of the charter school also must provide for the manner of selection of these members. In addition, at least fifty percent of the members of the board as specified by the bylaws must be elected by the employees and the parents or guardians of students enrolled in the charter school. Parents or guardians shall have one vote for each student enrolled in the charter school. All members must be residents of the State of South Carolina. A person who

has been convicted of a felony must not be elected to a board of directors. If the board of directors consists of an odd number of members, the extra member must be an individual who has a background in K-12 education or in business;

....

S.C. Code Ann. § 59-40-50(B) (emphasis added). As such, the Legislature clearly requires those serving on a charter school board to be South Carolina residents. However, you question whether they must also be eligible to vote.

The South Carolina Constitution provides qualifications to hold office in South Carolina and states as follows: “No person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector” S.C. Const. art. XVII, § 1. Moreover, Article XVII, § 1A of the South Carolina Constitution (2009) provides in relevant part, “Every qualified elector is eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution.” Our Supreme Court, in McLure v. McElroy, 211 S.C. 106, 113, 44 S.E.2d 101, 105 (1947), *overruled on other grounds by Weaver v. Recreation Dist.*, 328 S.C. 83, 492 S.E.2d 79 (1997), clarified this requirement not only applies to all constitutional offices, but also applies to statutorily created offices regardless of whether it is expressly provided for by the Legislature.

We have not specifically addressed the application of Article XVII, § 1 to charter school board members. However, as you acknowledge in your request letter, on several occasions this Office determined a charter school board member is an office holder for purposes of the prohibition on dual office holding contained in Article XVII, § 1A. In a 2019 opinion, citing to several prior opinions, we opined:

We have also determined that a member of a charter school board holds a public office:

In an opinion dated February 26, 2003, we addressed the issue of whether a position on a charter school’s governing board is an officer for dual office holding purposes.

The position of board member is established by statute, a term is set forth therefor, and the board members exercise a portion of the sovereign power of the State. While taxing or bond authority is expressly denied, in terms of other authority, it is the board which serves as the “governing body” of the school. Board members decide all matters related to the operation of the charter school, including budgeting, curriculum and operating procedures. Obviously, the board expends public funds. Thus, the board possesses policy-making duties and functions

consistent with the operation of the school including the decision to “elect to comply with’ those laws or regulations which are applicable to a public school, a school board, or a district, ...” which are not otherwise specified as applicable. In essence, board members make policy decisions in keeping with the Legislature’s desire that charter schools “take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system.” Clearly, board members exercise a portion of the sovereign power of the State.

Op. S.C. Atty. Gen., February 26, 2003 (citations omitted). We recognized the fact section 59-40-40 states charter schools are nonprofit corporations and the fact that members of a nonprofit corporation’s board traditionally are not public officers for dual office holding purposes. Id. However, in determining a charter school likely is the alter ego of the State, we concluded a position on a charter school’s governing board is an office for dual office holding purposes. Id.

Op. S.C. Atty. Gen., 2006 WL 703694, at *3 (Mar. 9, 2006).

Op. Att’y Gen., 2019 WL 5669046 (S.C.A.G. Oct. 21, 2019). Thus, we continue to believe a member of a charter school board holds an office for purposes of Article XVII, § 1A of the South Carolina Constitution.

Posed with a similar question in 2010, we considered whether the requirement that an officer meet the qualifications of an elector under Article XVII, § 1 applied to county veterans affairs officers. Op. Att’y Gen., 2010 WL 3505054 (S.C.A.G. Aug. 2, 2010). Citing to prior opinions finding county veterans affairs officers are officers for purposes of Article XVII, § 1A, we concluded “a county veterans affairs officer would likely be an officer for purposes of article XVII, section 1.” Id. Given the prior opinions of this Office concluding charter school board members are officers for purposes of Article XVII, § 1A, we similarly believe a charter school board member is likely an officer for purposes of Article XVII, §1 and therefore, must meet the qualifications on an elector.

In your letter, you suggest charter school board members “could be considered differently than other elected state officials and traditional school board members.” You list the following reasons to support different treatment of charter school board members:

1. Public Charter School Board Elections are not held in conjunction with the general election.
2. The majority of the Public Charter School Board Elections are not held at the same time period as the general election takes place.

3. Public Charter School Board Elections are only voted on by members of that particular school community.

We agree charter school board members obtain their offices in a manner different than traditional public school boards. However, the requirement that they meet the qualifications of an elector does not change with how they are elected. Notably, as our Supreme Court pointed out in McLure, even if these members were appointed rather than elected, they are still required to meet the qualifications of an elector. McLure, 211 S.C. at 119, 44 S.E.2d at 108. As such, it matters only that they are officers pursuant to Article XVII, § 1 of the South Carolina Constitution and we believe they likely are.

You also point to language in section 59-40-50(A) of the South Carolina Code (2020) that states, “Except as otherwise provided in this chapter, a charter school is exempt from all provisions of law and regulations applicable to a public school, a school board, or a district, although a charter school may elect to comply with one or more of these provisions of law or regulations.” Our Supreme Court interpreted this provision in McNaughton v. Charleston Charter School for Math and Science, Inc., 411 S.C. 249, 768 S.E.2d 389 (2015). The Court considered the application of the state action statutes to charter schools given section 59-40-50(A) and specifically whether the attorney’s fees provision in section 15-77-300 applied to charter schools. McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 268–69, 768 S.E.2d 389, 400 (2015). The Court determined:

The purpose of 59-40-50(A) is to distinguish between charter schools and other public schools, school boards, or school districts by providing charter schools with more flexibility in their operations. While section 15-77-300 is generally applicable to public schools, school boards, or districts, the provision also covers other state actors and “political subdivisions of the State.” In other words, the provision was not enacted especially for public schools, school boards, or school districts, and is not a provision that a charter school may opt out of merely because of its charter school status as opposed to a traditional public school. Therefore, the exemption in section 59-40-50(A) does not cover section 15-77-300, and we hold that a court may find a charter school liable for attorney’s fees under section 15-77-300.

Id. Similarly, Article XVII, § 1 applies to all public officers, not just traditional public school board members. Therefore, we believe a court would similarly find section 59-40-50(A) does not prevent the application of the constitutional requirement that all officers possess the qualifications on an elector.

Moreover, “[t]he provisions of the state constitution are not a grant but a limitation of legislative power, so that the Legislature may enact any law not expressly, or by clear implication, prohibited by the state or federal constitution.” Segars-Andrews v. Jud. Merit Selection Comm’n, 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010). Therefore, section 59-40-50(A) cannot exempt charter

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schools from provisions contained in the South Carolina Constitution. Reading section 59-40-50(A) as exempting charter school board members from Article XVII, § 1 would likely render it unconstitutional. As we stated on many occasions, “It is elementary that a court is bound to construe a statute in a constitutional manner, if possible.” Op. Att’y Gen., 2023 WL 5319324 (S.C.A.G. Aug. 11, 2023). As such, we do not believe a court would construe section 59-40-50(A) as exempting charter school board members from Article XVII, § 1 of the South Carolina Constitution.

Conclusion

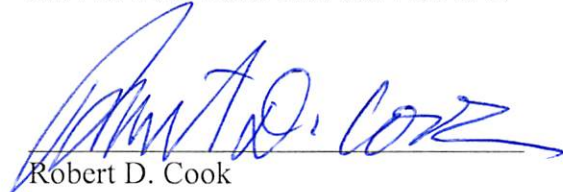
Members of charter school boards are selected in a different manner than traditional public school boards. Nonetheless, Article XVII, § 1 requires all South Carolina officers, regardless of whether they are appointed or elected, to meet the qualifications of an elector. While this Office has not previously considered whether charter school board members are officers for purposes of Article XVII, § 1, on several occasions we determined they are officers for purposes of Article XVII, § 1A. As such, we believe a court would likely find charter school board members must meet the qualifications of an elector in order to serve.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General