



COMMONWEALTH of VIRGINIA

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September 26, 2016

The Honorable Julia H. Sichel
Commonwealth's Attorney
Westmoreland County
175 Polk Street, Suite 256
Post Office Box 967
Montross, Virginia 22520

Dear Ms. Sichel:

I am in receipt of your letter of September 14, 2016, in which you ask three questions regarding the status of an individual who, while serving on the electoral board of a locality, has accepted a position as a part-time town attorney. In accordance with the Attorney General's authority to issue official opinions as provided by § 2.2-505 of the *Code of Virginia*, I will respond to these questions in the order in which they are set forth in your September 14 letter.

Question One: Can a member of an electoral board also serve as a part-time town attorney?

Both the Constitution of Virginia and the *Code of Virginia* establish limitations on membership on an electoral board. Article II, § 8 of the Constitution of Virginia provides, in relevant part:

No person, nor the deputy of any person, who is employed or holds any office or post of profit or emolument, or who holds any elective office of profit or trust, under the governments of the United States, the Commonwealth, or any county, city, or town, shall be appointed a member of the electoral board or general registrar.

The *Code of Virginia* restates this constitutional prohibition on dual office-holding in § 24.2-119.

Prior opinions of this Office have consistently interpreted this language to proscribe public officeholders from concurrently serving as a member of an electoral board.¹ The office of town attorney, established by § 15.2-1542 of the *Code of Virginia*, is undoubtedly a public office.² As a town attorney

¹ See, e.g., 1982-1983 Op. Va. Att'y Gen. 236 (concluding that a member of an electoral board could not simultaneously serve as a Commissioner in Chancery); 1982-1983 Op. Va. Att'y Gen. 229 (concluding that a member of an electoral board could not simultaneously hold a part-time position with the General Assembly).

² "The criteria for determining whether a position is a public office have been stated to be that the position is created by the Constitution or statutes, it is filled by election or appointment, with a designation or title, and duties

receives pecuniary gain in return for service as a public official, a town attorney is barred from simultaneous membership on an electoral board by operation of Article II, § 8 of the Constitution of Virginia and § 24.2-119 of the *Code of Virginia*.³ As a result, and in response to your first question, it is my opinion that a member of an electoral board cannot also serve as a part-time town attorney.

Question Two: If a member of the electoral board is not allowed to serve in both capacities, is the position considered vacant upon the acceptance of the conflicting position?

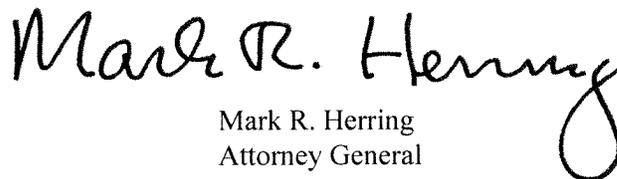
It is a long-held principle of Virginia law that the acceptance of a second incompatible position automatically vacates a prior incompatible position.⁴ Accordingly, if a member of an electoral board accepts the position of part-time town attorney, by the acceptance of that position she vacates her membership on the electoral board. Thus, I answer your second question in the affirmative; an individual's seat on an electoral board becomes vacant upon that individual's acceptance of the position of part-time town attorney.

Question Three: Are decisions made during the time of the vacancy valid?

This Office has previously concluded that where a member of a local governmental body vacates his position by acceptance of an incompatible office, the *de facto* officer doctrine applies to official acts taken by such an individual after he has vacated the first position.⁵ As “[v]acation of an office by qualification in a second incompatible office is within the *de facto* officer doctrine,”⁶ the decisions made by an electoral board following a member's vacancy by acceptance of an incompatible office are valid decisions despite this vacancy. Accordingly, it is my opinion that decisions made by an electoral board during the time of a vacancy due to a member's acceptance of the position of part-time town attorney are valid.

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

concerning the public, which are assigned by law.” 1982-1983 Op. Va. Att’y Gen. 236, 237 (citing 1981-1982 Op. Va. Att’y Gen. 305; 1977-1978 Op. Va. Att’y Gen. 322).

³ Prior opinions of this Office have also concluded that “[this] proscription applies regardless of the locality in which” a general registrar or electoral board member would be employed. 1982-1983 Op. Va. Att’y Gen. 236, 239.

⁴ *Shell v. Cousins*, 77 Va. 328, 331 (1883) (“The acceptance of an incompatible office actually vacates any other office which the officer may hold. The rule has been stated in broad and unqualified terms that the acceptance of an incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed . . .”). See also 1982-1983 Op. Va. Att’y Gen. 229, 230 (“[T]he very acceptance of the part-time public employment in each instance causes the electoral board position to become vacant.”).

⁵ See 1981-1982 Op. Va. Att’y Gen. 294, 295 (“Under the *de facto* officer doctrine, the official acts of a public officer are valid even though the individual inadvertently vacates the office and continues to perform the duties of the office.”).

⁶ *Id.*