798S Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 22, 2005

Edwin G. Foulke, Jr., Esquire
Jackson Lewis LLP
55 Beattie Place, Suite800
Greenville, South Carolina 29801

Dear Mr. Foulke:

You note that you currently "serve as an at-large member of the State Board for Technical and Comprehensive Education with the term ending in 2008." You further state that you "have been asked to consider being appointed by the Greenville County [Council] ... to a seat on the Donaldson Development Commission. The Donaldson Development Commission manages the Donaldson Center Industrial Air Park jointly owned by the City of Greenville and Greenville County." Your concern is that the simultaneous service on the state TEC Board and the Donaldson Development Commission would constitute dual office holding under the South Carolina Constitution. Thus, you seek an opinion as to whether the holding of both positions concurrently would be dual office holding.

Law / Analysis

Article XVII, Section 1A of the State Constitution provides that "no person may hold two offices of honor or profit at the same time...." with certain exceptions. 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 duties or salary, or require qualifications for an oath for the position. *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980).

This Office has previously concluded that the position of member of the State Board for Technical and Comprehensive Education constitutes an office for dual office holding purposes. *See, Ops. S.C. Atty. Gen.*, July 26, 2002, May 8, 2001 and March 22, 1995. In those opinions, we noted that the State Board for Technical and Comprehensive Education was created by S.C. Code Sec. 59-53-10 *et seq.* Pursuant to § 59-53-10, board members are appointed by the Governor for terms of six years and until their successors are appointed and qualify. Section 59-53-10 also authorizes the Board to enter into contracts and promulgate regulations. Pursuant to § 59-53-20, the Board is given jurisdiction over "all state-supported technical institutions and their programs that are presently

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

operating and created in the future." Section 59-53-50 specifies additional powers of the Board, including: the development, implementation, coordination and operation of adequate post-high school vocational, technical and occupational diploma and associate degree courses; the establishment of criteria for approval and awarding of diplomas and degrees; the acceptance and administration of the donation of funds, grants and real property from individuals, corporations, foundations and governmental bodies; the employment of an executive director and such other personnel necessary to fulfill its duties and responsibilities. Based upon the foregoing powers and duties, we have consistently recognized there can be little doubt that membership on the Board for Technical and Comprehensive Education constitutes an office for dual office holding purposes.

On the other hand, we have apparently not yet addressed the question of whether membership on the Donaldson Development Commission constitutes an office for dual office holding purposes. It is our understanding that the Donaldson Development Commission was established in 1976 by the joint action of the City and County of Greenville to control the development of the Donaldson Center. See *Joint Resolution*, City Council of Greenville and County Council of Greenville County dated January 13, 1976 and April 20, 1976. A review of the Joint Resolution reveals that the Donaldson Development Commission, as appointed by the City and County Councils, has been given the authority to employ "a staff to operate, maintain, protect, develop and plan the development of the Center." The Commission is further empowered to provide for the "development of long range development plans" and for the "management and administration of the Center" including the authority to "make rental and lease agreements for land and facilities. ..." The purpose of the Commission "shall be to control, protect, and promote the development of the Center by all reasonable means ...."

Pursuant to this Joint Resolution, the Commission consists of seven members, three appointed by Greenville County Council, three by the City Council of Greenville and one member "to serve at large to be elected by the other members of the Commission." Each member serves a term of three years. The specific responsibilities of the Commission are set forth in the Joint Resolution as follows:

3. RESPONSIBILITIES OF THE COMMISSION:

a. To receive, hold, and use gifts, grants, service fees and other income and revenue to fulfill the purpose of the Commission, and then to divide all remaining income between the City and the County annually; except those funds required to provide for insurance reserve fund, development reserve funds, and ordinary operating expenses.

A priority task of the Commission shall be to review and make written recommendations to the City and County concerning any inequities existing or which shall occur with regard to the distribution of expenses and revenues at Donaldson Center.

b. The Commission shall develop an annual budget within six months after adoption of this resolution and annually thereafter and present said budget to the joint Councils for review and approval, and this budget shall include specific recommendations concerning:

1) A plan to equalize rental and lease fees based on an annual appraisal with comparative local commercial properties. Further, this plan shall incorporate rental fees for both City and County properties in use at the Center at the same rates as charged other firms and agencies.

2) A plan to implement reasonable service fees for fire protection and aircraft usage of the Center.

c. The Commission shall prepare annually a public report of its activities, income, development status and other information; and further that this report be submitted to the City and the County Council each year before January 1.

d. The Commission shall hold such meetings as are considered appropriate upon the call of any two members of the Commission; but in any case such meetings shall be held at least quarterly. All meetings called of the Commission shall have full and complete minutes of the meetings made and copies shall be submitted to the Chairman and each member of the City and the County Councils, and such other officials as may be considered appropriate.

e. The Commission shall publish a comprehensive policy and operational procedure manual to guide the Commission members and others in the operations and management of the Center.

f. The Commission shall host an annual joint meeting of the City and the County Councils to review activities of the Center and its Development status.

g. It is the intention of the City and the County that the establishment of this Commission shall in no manner surrender any portion of the sovereign power of the bodies participating so as to result in its members being considered to hold public office in contravention of S. C. Constitution Article 17, Section 1 A.

It is clear from a reading of the powers and duties of the Commission, delegated by the County and City Councils of Greenville, as well as the establishment of the Commission's

membership, that the Commission exercises sovereign power, and its members are thus public officers. Accordingly, based upon the foregoing criteria enunciated by our Supreme Court in *Sanders, Crenshaw, and Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 566 S.E.2d 523 (2002), it is our opinion that simultaneously serving on the state TEC Board and the Donaldson Development Commission would likely constitute dual office holding for purposes of the South Carolina Constitution.

We must note, however, that the Joint Resolution creating the Donaldson Development Commission provides that "[i]t is the intention of the City and County that the establishment of this Commission shall in no manner surrender any portion of the sovereign power of the bodies participating so as to result in its members being considered to hold public office in construction of S. C. Constitution Article 17, Section 1 A." If such provision is determinative, then members of the Development Commission are not "officers" for dual office holding purposes. Thus, the issue is what deference may be given the Joint Resolution's declaration that Commission members do not exercise sovereign powers.

In *Richardson v. Town of Mt Pleasant, supra*, our Supreme Court noted that the South Carolina Constitution recognizes only a few exceptions to the dual office holding prohibition. As the Court there stated,

> [t]he 1895 Constitution extended the dual office holding proscription to all persons holding positions of "honor or profit," exempting from the prohibition only notaries public and militia officers. Art. II, § 2. An exemption for delegates to constitutional conventions was added, but the provisions remained otherwise unchanged until 1988, when the Constitution was amended to exempt from the prohibition the offices of "constable" and "member of a lawfully and regularly organized fire department." The record does not suggest any persuasive reason why these two offices were added in 1988.

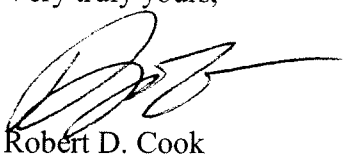
350 S.C. at 293. The Court also made it clear in *Richardson*, that it is the Court which makes the ultimate determination of the meaning of the word "constable" as used in the Constitution, concluding as follows:

> [a]t the time the General Assembly enacted the legislation providing for the referendum to add to the constable exception to the dual office holding provisions, the office of 'constable' had fixed meanings under South Carolina law. A constable is a person who holds a state commission, is employed in such capacity by a magistrate, or otherwise meets one of the statutory definitions. A municipal police officer is a person employed by a municipality pursuant to § 5-7-110. The office of 'constable' does not subsume the office of 'municipal police officer.'

would be controlling in any interpretation of the Constitution by a court. If a legislative body could validly exempt certain offices from the dual office holding prohibition, there would be no need to place exemptions in the Constitution itself, and the prohibition could be rendered meaningless. Thus, as the Court recognized in the *Town of Mt. Pleasant* case, only those exemptions contained in the Constitution itself are controlling. Although the "intention" of the City and County may be given weight, we do not think a court would find this provision in the Joint Resolution dispositive. A legislative body or bodies such as the City or County Council or even the General Assembly may not alter the Constitution by joint resolution, ordinance or statute.

Therefore, as discussed above, the position of member of the Donaldson Development Commission exercises the sovereign power of the State and is an office for dual office holding purposes. Accordingly, we would advise great caution in accepting this position while at the same time holding the office of member of the state TEC Board.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/an