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HENRY MCMASTER
ATTORNEY GENERAL

July 19, 2006

Ms. Nancy T. Welch
122 Rubiwood Circle
Greer, SC 29651

Dear Ms. Welch:

We received your letter inquiring whether "it is possible to be employed as a vice president of a state supported technical college and serve as a state senator in the same county?" We presume you are asking whether simultaneously serving in these two positions violates the dual office prohibition contained in the South Carolina Constitution.

Law/Analysis

Article III, section 24 of the South Carolina Constitution (Supp. 2005) provides:

> No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State, the United States of America, or any of them, or under any other power, except officers in the militia, members of lawfully and regularly organized fire departments, constables, and notaries public. If any member accepts or exercises any of the disqualifying offices or positions he shall vacate his seat.

In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). Our courts also consider such factors as whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position in determining whether an individual holds an office. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

In addition to article III, section 24, article III, section 11 of the South Carolina Constitution (1976) provides: "Each house shall judge of the election returns and qualifications of its own members . . . ." Thus, if a legislator potentially is in violation of article III, section 24, the ultimate determination of whether a violation occurred is in the hands of the legislative body of which the

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legislator is a member, in this case, the Senate. Accordingly, we may only comment on our belief as to how the Senate would resolve this issue.

As we stated in a 2004 opinion: "It is beyond dispute that a state Senator is a state office holder for purposes of dual office holding." Op. S.C. Atty. Gen., April 20, 2004 (citing Ops. S.C. Atty. Gen., February 5, 1988; May 2, 1989; June 5, 1979; May 14, 1986). From our telephone conversation with you, we understand you serve as Vice President of Student Services for Greenville Technical College. Accordingly, we must determine whether this position is an office for dual office holding purposes.

In an opinion dated June 12, 1992, we addressed the similar issue of whether the President of Horry-Georgetown Technical College may also serve as a member of the South Carolina House of Representatives. Op. S.C. Atty. Gen., June 12, 1992. In addressing whether the President's position is an office for dual office holding purposes, we considered the fact that the President's position was not created by statute, but by the institution's board in accordance with its enabling legislation. Id. Furthermore, we found no statutory qualifications for the position, no oath requirement, no statutorily created duties, and no term of service. Id. We concluded: "It is apparent that the individual employed as President of the College does not meet the criteria usually possessed by an office holder. Thus, it is our opinion that such would be a position of public employment rather than a public office." Id. We noted this determination is consistent with our prior opinions finding the President of South Carolina State College and various individuals affiliated with technical colleges not office holders for dual office holding. Id. (citing Ops. S.C. Atty. Gen., November 26, 1975 (President of South Carolina State); June 11, 1992 (technical college counselor); November 26, 1980 (administrative assistant to technical college president); March 21, 1980 (Director of the Physical Plant for Trident Technical College)).

In our 1992 opinion, although we did not find a violation of the dual office holding prohibition, we offered the requester several notes of caution. Id. First, although no statute prohibits a state employee for serving in the House of Representatives, we advised the requester consult with his employer to determine if it had a policy prohibiting employees from engaging in political activity. Id. Second, we noted if the requester's position is partly funded by the federal government, he should be aware of the implications of the federal Hatch Act. Id. Third, we noted certain ethics laws prohibit the use an individual's public employment for personal gain. Id.

In determining whether your position of Vice President of Student Services for Greenville Technical College is an office, we reviewed the enabling legislation creating the Greenville County Commission for Technical Education, which in essence established Greenville Technical College. In our review, we found no mention of the Vice President of Student Services. Like our findings in our 1992 opinion, the enabling legislation allows the Commission to "employ such personnel as may be necessary to enable the Commission to fulfill its functions." 1967 S.C. Acts 259. Thus, this position, like that of the President of Horry-Georgetown Technical College, was created by the institution's governing body. Given that your position is not statutorily created, we also did not find

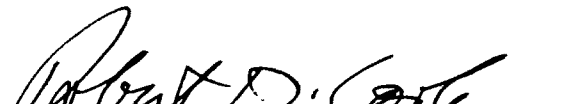
a statute specifying the position's qualifications, term of service, or an oath to be taken. Additionally, in our conversation with you, you indicated your position does not require an oath and is considered a terminable at will. In our conversations, you described your duties as including oversight over financial aid, academic advising, the registrar's office, and admissions. Although, we do not have much information about these roles, we believe none of these involve an exercise the sovereign power of the State. Thus, in with regard to the position of Vice President of Student Services for Greenville Technical College, we believe the Senate would not find this position to be an office for dual office holding purposes. Therefore, your service in the position while serving as a State Senator, would not violate the Constitutional prohibition on dual office holding.

Although, we believe the Senate would not find your employment as Vice President of Student Services to be an office for dual office holding purposes, we caution you as we cautioned the President of Horry-Georgetown Technical College in our 1992 opinion, as to other ramifications of your service in both positions. You should also consult with your employer to ascertain whether it has a policy that would prohibit you from running for Senate. Furthermore, you should consider, based on whether your position is funded at least in part with federal funds, the ramifications of the federal Hatch Act. Finally, we suggest you seek guidance from the State Ethics Commission as to any ethical problems that may arise due to your service in both positions.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General