



HENRY McMASTER
ATTORNEY GENERAL

May 7, 2010

John E. Batten, IV, General Counsel
South Carolina Vocational Rehabilitation Department
P. O. Box 15
West Columbia, South Carolina 29171-0015

Dear Mr. Batten:

We received your letter requesting an opinion of this Office concerning dual office holding. You asked “whether it is permissible under the state laws and regulations for one of our employees, a Senior Manager for Quality, Training and Policy with the State Agency of South Carolina Vocational Rehabilitation Department-Disability Determination Services (DDS), to simultaneously serve on the Calhoun County Disability and Special Needs (DSN) Board.” This opinion will address prior opinions of this Office, relevant statutes and caselaw to determine if holding both positions would be a violation of the dual-office holding prohibitions.

Law/Analysis

Article XVII, Section 1A of the South Carolina Constitution provides that “[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.” 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). “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, 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

The South Carolina Vocational Rehabilitation Department is established and governed by S.C. Code § 43-31-10 et seq. These sections provide for the appointment, qualifications and terms of its members; compensation of its members; and the general duties and powers of the agency. This

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opinion will first address the authority of the agency as a whole and then address the authority of the specific position in question. “The Governor shall appoint a State Agency of the Vocational Rehabilitation to be composed of seven members.” S.C. Code § 43-31-40. The Agency “shall meet quarterly . . . [and] shall receive such per diem and milage as is provided by law.” S.C. Code § 43-31-50.

S.C. Code § 43-31-60 states the duties and powers of the agency as follows:

The Agency shall provide the vocational rehabilitation services authorized by this chapter to every physically handicapped individual determined by the Commissioner to be eligible . . . and in carrying out the purposes of this chapter, the Agency is authorized among other things:

- (1) To cooperate with other departments, agencies and institutions, both public and private, in providing the services authorized by this chapter to disabled individuals . . . and in establishing, developing and providing in conformity with the purposes of this chapter, such programs, facilities and services as may be necessary or desirable;
- (2) To enter into reciprocal agreements with other states . . .
- (3) To conduct research and compile statistics . . .
- (4) To enter into contractual agreements with the Federal Governments . . .
- (5) To contract with schools, hospitals, and other agencies . . .

S.C. Code § 43-31-60.

The duties and responsibilities of the members of the state agency, SC Vocational Rehabilitation Department, appear to include the exercise of a portion of the sovereign power of the State. Hence, any one of the seven members of the agency would be classified as an officer. However, the position in question here is not a member of the agency but an employee of the agency, the “Senior Manager for Quality, Training, and Policy with the State Agency of South Carolina Vocational Rehabilitation Department - Disability Determination Services (DDS).”

In a prior opinion of this Office, dated April 1, 2009, we answered a similar dual-office holding question, per your request, where the employee was a PhD Senior Psychologist with the State Agency of South Carolina Vocational Rehabilitation Department - Disability Determination Services. We stated as follows:

We note no provision under South Carolina law establishing the position of Senior Psychologist. According to your letter, this position serves at the pleasure of the Department

and there is no indication that this position is for a specified term or is required to take an oath. As our Supreme Court in Sanders, 78 S.C. at 174, 58 S.E. at 763, expressed “**one who merely performs the duties required of him by persons employing him under an express contract** or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, **is a mere employee.**” As such, we believe service as a Senior Psychologist for the Department is that of a mere employee and not as an officer for purposes of dual office holding.

Op. S.C. Atty. Gen., April 1, 2009 (emphasis added).

Similarly, there is no provision under South Carolina law establishing the position of Senior Manager for Quality, Training, and Policy. The Senior Manager serves at the pleasure of the Department.

In another opinion of this Office dated April 3, 2007, we stated as follows:

We believe it unlikely that a position as a state or governmental employee would constitute an office. . . . [Y]our position is not created by statute, to our knowledge you do not have a term of office, and you most likely serve at the pleasure of the [Department]. Moreover, we find it unlikely that the [employee] is in a position to exercise some portion of the sovereign power of the State. Thus, we believe your position is that of a public employee rather than an officer. However, we must note that each position must be considered individually in light of the analysis set forth by our courts. Thus, we do not believe the dual office holding prohibition contained in the Constitution prohibits all state or governmental employees from serving on the Board, such a determination must be made on a case by case basis considering each position of employment.

Op. S.C. Atty. Gen., April 3, 2007.

The position of Senior Manager for Quality, Training and Policy should be classified as a governmental employee. The Senior Manager serves at the pleasure of the Department and does not have the ability to exercise a portion of the sovereign power of the State. **A court would likely find that the Senior Manager for SC Vocational Rehabilitation Department is a mere employee, not an officer.**

The Legislature, via S.C. Code § 44-20-375, established county boards of disabilities and special needs. In an opinion of this Office dated February 17, 2009, we stated as follows:

Several prior opinions of this Office discuss whether a member of a county or multi-county board of disabilities and special needs is considered to be an office holder for purposes of dual office holding. Ops. S.C. Atty. Gen., April 9, 2004 (Marion-Dillon County Disabilities and Special Needs Board); April 5, 1995 (Charleston County Disabilities Board); January

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10, 1995 (Newberry County Disabilities and Special Needs Board); September 10, 1993 (Richland/Lexington Board of Disabilities and Special Needs). These opinions all conclude that a position on these types of boards is an office.

There is no distinguishing factor that would make the Calhoun County Disability and Special Needs Board any different. Therefore, a position on this board should be considered an office.

Conclusion

Consistent with our prior opinions, it is the opinion of this Office that simultaneously holding the position of Senior Manager for Quality, Training and Policy with the State Agency of South Carolina Vocational Rehabilitation Department - Disability Determination Services and serving as a member of the Calhoun County Disability and Special Needs Board does not violate the dual-office holding prohibitions in the South Carolina Constitution.

Although a court would likely find that serving as a member of the Calhoun County Disability and Special Needs Board is an officer position, the position of Senior Manager within the South Carolina Vocational Rehabilitation Department would simply be classified an employee position.

Since only one of the positions is an office for the purposes of dual-office holding, there would be no violation of the dual-office holding prohibitions if an individual were to serve in both capacities.

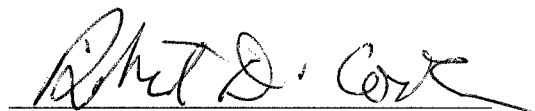
Sincerely,

Henry McMaster
Attorney General



By: Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General