



HENRY McMASTER
ATTORNEY GENERAL

December 11, 2009

The Honorable H. Boyd Brown
Member, House of Representatives
P. O. Box 26
Winnsboro, South Carolina 29180

Dear Representative Brown:

In a letter to this office you questioned whether it would constitute a dual office holding violation for an individual to simultaneously serve as Executive Director of the South Carolina Education Lottery and as a Chairperson of the Centers of Economic Excellence Review Board.

Article XVII, Section 1A of the South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, a constable, or a notary public. For this provision to be contravened, a person concurrently must hold two 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 or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

A prior opinion of this office dated July 24, 2001 dealt with the question of whether the position of Executive Director of the State Education Lottery constitutes an office or is considered an employee of that agency as established pursuant to S.C. Code Ann. §§ 59-150-10 et seq. That opinion stated as follows:

[t]he position of Executive Director of the Lottery is referenced in §§ 59-150-80 and 59-150-90...Section 59-150-80(A) states that the Lottery Board "shall appoint and provide for the compensation of an executive director." That same Section provides that "the executive director must be an employee of the Commission who directs the day-to-day operations and management of the commission and is vested with powers and duties specified by the board and by law." The executive director "serves at the pleasure of the board."

Section 59-150-90 specifies certain duties of the Executive Director: to direct and supervise all administrative and technical activities of the Lottery; to oversee the initiation of and supervise the games; employ and direct personnel; employ by contract and compensate persons and firms; promote the lottery; prepare a budget for the approval of the Board; require bonds in amounts approved by the Board; report monthly to the State Auditor and Board all lottery revenues and expenses for the preceding 13 months; and perform “other duties generally associated with an executive director of a commission of an entrepreneurial nature.”

Subsection (B) of § 59-150-90 authorizes the Executive Director to “suspend, revoke or refuse to renew” contracts in accordance with regulations, policies and procedures of the Board. Subsection (C) empowers the Executive Director or his designee to “conduct hearings and administer oaths to persons for the purpose of assuring the security or integrity of lottery operations or to determine the qualifications of or compliance by a lottery vendor and or a lottery retailer.”

Nothing in the statute provides for a specific salary of the Executive Director. Neither does the new statute specify a term of office or tenure or provide for a bond or oath of office. Indeed, the statute makes it clear that the Board sets the Executive Director's compensation and the Executive Director serves at the Board's pleasure. No qualifications are established for the Executive Director in the statute.

With respect to the question of whether or not the Executive Director exercises some portion of the sovereign power of the State, it is our opinion that he or she would not. The General Assembly clearly intended that the Executive Director serves under the authority and supervision of and subject to the direction of the Lottery Board. Virtually every duty referred to in the statute so states. See, e.g. § 59-150-50 (executive director “recommends” to the Board the budget and the terms of procurements)...

[M]ost importantly, we referenced the general rule set forth in Sanders v. Belue, supra which is stated as follows:

[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business is a mere employee.

78 S.C. at 174. In short, in virtually every previous instance where the question has arisen, we have concluded that an executive director of a governing board or commission is an “employee,” rather than an “officer.”...

The 2001 opinion concluded that

[t]he Executive Director of the Lottery is not an officer, civil or otherwise, but is instead an employee of the Lottery Board or Commission. The Executive Director merely carries out and executes the policies laid down by the Board. Most importantly, the General Assembly itself recognized this fact, referring to the Executive Director in § 59-150-80 as an “employee” of the Board...[T]he legislature, in enacting the Lottery law, clearly thought of the Executive Director to the Lottery Board not as an officer, but as the Board's employee. Clearly, the General Assembly recognized the distinction between “officers” and “employees,” using each term separately in § 59-150-40(E)...In sum, the position of Executive Director of the Lottery Board or Commission is that of an “employee” rather than an “officer.”

As to the position Chairperson of the Centers of Economic Excellence Review Board, such Board is established pursuant to the provisions of S.C. Code Ann. § 2-75-10. Such provision states that

...[t]he review board shall consist of eleven members. Of the eleven members, three must be appointed by the Governor, three must be appointed by the President Pro Tempore of the Senate, three must be appointed by the Speaker of the House of Representatives, one by the chairman of the Senate Finance Committee, and one by the chairman of the House Ways and Means Committee. The terms of members are three years and members are eligible to be appointed for no more than two additional terms. Of the members initially appointed by the Governor, the President Pro Tempore, and the Speaker of the House, one shall be appointed for a term of one year, one for a term of two years, and one for a term of three years, the initial term of each member to be designated by the Governor, President Pro Tempore, and Speaker of the House when making the appointments. The Governor, the President Pro Tempore, and the Speaker of the House shall appoint persons with substantial experience in business, law, accounting, technology, manufacturing, engineering, or other professions and experience which provide an understanding of the purposes of this chapter. The review board shall be responsible for providing annually to the Commission on Higher Education a schedule by which applications for funding are received and awarded on a competitive basis, the awarding of matching funds as provided in Section 2-75-60, and for oversight and operation of the fund created by Section 2-75-30. Members of the review board shall serve without compensation and must provide an annual report by October 1 of each calendar year to the General Assembly as well as the State Budget and Control Board, which shall include an audit performed by an independent auditor. This annual report must include, but not be limited to, a complete accounting for total state appropriations to the endowment and total proposals awarded up to the previous fiscal year.

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See also duties assigned by S.C. Code Ann. §§ 2-75-30(B)(2), 2-75-100 and 11-51-70 et seq. In the opinion of this office, such duties do not involve an exercise of some portion of the sovereign power of the State and, therefore, membership on such Board would not constitute an office for dual office holding purposes.

In conclusion, in the opinion of this office, it would not be a violation of the dual office provisions of the State Constitution for an individual to simultaneously serve as Executive Director of the South Carolina Education Lottery and as a Chairperson of the Centers of Economic Excellence Review Board.

If there are any questions, please advise.

Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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