8116 Library

HENRY MCMASTER
ATTORNEY GENERAL

March 9, 2006

The Honorable Gary R. Smith
Member, House of Representatives
312-A Blatt Building
Columbia, South Carolina 29211

Dear Representative Smith:

We issue this opinion in response to your letter concerning the Greenville Tech Charter School (the "Charter School"). According to your letter, the Charter School has a governing board comprised of current paid employees. Thus, you ask: "Does this violate the servant/master prohibition?"

Charter schools are governed by the South Carolina Charter Schools Act of 1996 (the "Charter Schools Act"). S.C. Code Ann. §§ 59-40-10 et seq. (2004). Section 59-40-50(B)(9) of the Charter Schools Act (2004) provides a charter school must "elect its board of directors annually. All employees of the charter school and all parents or guardians of students enrolled in the charter school are eligible to participate in the election. Parents or guardians of a student shall have one vote for each student enrolled in the charter school . . . ." The Charter Schools Act, however, does not contain an express prohibition on an employee of the charter school serving on its governing board. In contrast, section 59-19-300 of the South Carolina Code (2004), under the South Carolina School Code, provides such a prohibition with regard to teachers employed by a school district. This statute prohibits school trustees from receiving pay as a teacher at a school located within the same school district as a trustee. S.C. Code Ann. § 59-19-300. However, we find this provision inapplicable to the situation described in your letter. The Charter Schools Act contains the following provision: "Except as otherwise provided in this chapter, a charter school is exempt from all provisions of law and regulations applicable to a public school, a school board, or a district, although a charter school may elect to comply with one or more of these provisions of law or regulations." S.C. Code Ann. § 5-40-50(A). Thus, section 59-19-300 does not apply to teachers employed by charter schools.

Because no statutory prohibition exist to prohibit an employee of a charter school serving on its governing board, as you suggest, we look to the common law to determine if such a prohibition exists. Many jurisdictions recognize the common law principle of incompatible offices. 67 C.J.S. Officers § 37. Although dealing more specifically with dual office holding, the South Carolina

Supreme Court recognized the common law doctrine of incompatible offices in Richardson v. Town of Mount Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002).

> The dual office holding provisions are in derogation of the common law which prohibited a person from holding two offices only if they were "incompatible." Incompatibility meant either that the offices involved "such a multiplicity of business" that one person could not adequately perform both, or that they were "subordinate and interfering with each other, [inducing] a presumption that they cannot be executed with impartiality and honesty."

Id. at 293, 566 S.E.2d at 524-25 (quoting State v. Buttz, 9 S.C. 156 (1877)). The situation in which offices are incompatible due to one being subordinate to the other is more commonly referred to in South Carolina as a conflict of interest arising due to the master-servant relationship. We examined the master-servant relationship and the conflict of interests that may arise under such a relationship in an opinion dated January 19, 1994.

> The master-servant relationship is based on common law rather than statutory law and may be summarized as follows:
>
> "[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts."

Op. S.C. Atty. Gen., January 19, 1994 (quoting 67 C.J.S. Officers, § 27). Furthermore, the South Carolina Supreme Court in McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1913), stated:

> No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and, as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

We determined in a prior opinion, outside of the statutory prohibition, a teacher may not serve as a trustee in the district in which that teacher is employed due to a master-servant conflict. Op. S.C. Atty. Gen., March 19, 1980. In addition, in another opinion of this Office dated May 1, 1996, we determined a school district employee, who was not a teacher, was similarly prohibited

from serving on as a school board trustee. Thus, these opinions evidence the application of this common law principle to public schools and school districts. However, charter schools are unlike public schools and public school districts in many ways. Thus, we must determine whether such common law principles are applicable to charter schools.

The Charter Schools Act, defines a charter school as: "a public, nonsectarian, nonreligious, nonhome-based, nonprofit corporation forming a school which operates within a public school district, but is accountable to the local school board of trustees of that district, which grants its charter." S.C. Code Ann. § 59-40-40(1) (2004). Thus, indicating the private nature of a charter school.

However, section 59-40-40(2) under the Charter Schools Act (2004) provides a charter school:

> (a) is considered a public school and part of the school district in which it is located for the purposes of state law and the state constitution;
>
> (b) is subject to all federal and state laws and constitutional provisions prohibiting discrimination on the basis of disability, race, creed, color, gender, national origin, religion, ancestry, or need for special education services;
>
> (c) must be administered and governed by a governing body in a manner agreed to by the charter school applicant and the sponsor, the governing body to be selected, as provided in Section 59-40-50(B)(9);
>
> (d) shall not charge tuition or other charges of any kind except as may be allowed by the sponsor.

Furthermore, section 59-40-50 states a charter school shall "be considered a school district for purposes of tort liability under South Carolina law," and is "subject to the Freedom of Information Act . . . ." S.C. Code Ann. §§ 59-40-50(B)(4) & (10) (2004). Therefore, the Charter Schools Act also alludes to the public nature of charter schools.

We discussed the public and private nature of charter schools in several prior opinions of this Office. In an opinion dated February 26, 2003, we addressed the issue of whether a position on a charter school's governing board is an officer for dual office holding purposes.

> The position of board member is established by statute, a term is set forth therefor, and the board members exercise a portion of the sovereign power of the State. While taxing or bond authority is

> expressly denied, in terms of other authority, it is the board which serves as the "governing body" of the school. Board members decide all matters related to the operation of the charter school, including budgeting, curriculum and operating procedures. Obviously, the board expends public funds. Thus, the board possesses policy-making duties and functions consistent with the operation of the school including the decision to "'elect to comply with' those laws or regulations which are applicable to a public school, a school board, or a district, . . ." which are not otherwise specified as applicable. In essence, board members make policy decisions in keeping with the Legislature's desire that charter schools "take responsible risks and create new, innovative, and more flexible ways of educating children within the public school system." Clearly, board members exercise a portion of the sovereign power of the State.

Op. S.C. Atty. Gen., February 26, 2003 (citations omitted). We recognized the fact section 59-40-40 states charter schools are nonprofit corporations and the fact that members of a nonprofit corporation's board traditionally are not public officers for dual office holding purposes. Id. However, in determining a charter school likely is the alter ego of the State, we concluded a position on a charter school's governing board is an office for dual office holding purposes. Id.

Conversely, in other opinions of this Office, we focused on the private nature of a charter school. In an opinion dated July 9, 1997, we determined because a charter school is an eleemosynary corporation governed by its own board, it was not required to purchase insurance through the Insurance Reserve Fund. Op. S.C. Atty. Gen., July 9, 1997. Additionally, in another opinion, we considered whether a charter school, which previously operated as a public school, was bound by a the terms of a contract entered into by the public school. Op. S.C. Atty. Gen., June 30, 2003.

> Thus, while a charter school may be considered for certain purposes a public entity which retains some affiliation with the school district in which it is located, it is also a separate nonprofit corporation which possesses contractual powers. Furthermore, having such authority to enter into contracts generally means that those contracts to which the charter school is not a party are not be binding upon the charter school.

Id.

Based on the opinions cited above, whether the common law principles of master-servant conflicts of interest apply to charter schools is unclear. However, we acknowledge the sweep of the common law rules of conduct upon public officers is especially broad. See O'Shields v. Caldwell, 207 S.C. 194, 216, 35 S.E.2d 184, 193 (1945) ("'The obligations of public officers as trustees for

the public are established as a part of the common law, fixed by the habits and customs of the people. Among their obligations as recipients of a public trust are to perform the duties of their office honestly, faithfully and to the best of their ability . . . [and] to use reasonable skill and diligence.'") (quoting 43 Am. Jur. 77, 78). Keeping this premise in mind, given the nature of charter schools as gleaned from the Charter Schools Act and for the reasons provided in our opinion finding a member of a charter school's governing board is an officer for dual office holding purposes, we believe a court would find such common law principles applicable. Thus, we must presume the common law rules are applicable subject only to legislative abrogation. However, despite this presumption, in this instance we find the Legislature specifically abrogated such principles in its enactment of the Charter Schools Act.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002). Our courts have held "[t]he Legislature is presumed to enact legislation with reference to existing law, and there is a strong presumption that it does not intend by statute to change common law rules. A statute is not to be construed as in derogation of common law rights if another interpretation is reasonable." Hoogenboom v. City of Beaufort, 315 S.C. 306, 318 n.5, 433 S.E.2d 875, 888 n.5 (Ct. App. 1992) (citations omitted). See also Columbia Real Estate & Trust Co. v. Royal Exch. Assurance, 132 S.C. 427, 430, 128 S.E. 865, 866 (1925) ("There is a very strong presumption that the Legislature did not intend by this statute to change the common-law rule . . . .").

As previously cited, section 59-40-50(A) contained in the Charter Schools Act provides: "Except as otherwise provided in this chapter, a charter school is exempt from all provisions of law and regulations applicable to a public school, a school board, or a district, although a charter school may elect to comply with one or more of these provisions of law or regulations." Courts presume when the Legislature uses a word with a well-recognized meaning in law in a statute, the Legislature intended to use the word in that sense. Coakley v. Tidewater Constr. Corp., 194 S.C. 284, 288, 9 S.E.2d 724, 726 (1940). Although South Carolina courts have not specifically interpreted the term "provisions of law" to include the common law, we find the well recognized meaning of the term "law" to include the common law. See Black's Law Dictionary 900 (8th ed. 2004) (defining "law" as "The aggregate of legislation, judicial precedents, and accepted legal principles."). In addition, the Court of Appeals of New York, stated: "The phrase 'provisions of law' is a broad and general one. It cannot justly be confined to statutes, or legislative enactments. A rule or doctrine established by judicial decision is a 'provision of law' equally with one enacted by the legislature." Clark v. Lake Shore & Michigan S. Ry. Co., 94 N.Y. 217, 220 (1883). As such, we opine the Legislature specifically intended to abrogate this common law master-servant conflict of interest principles through its enactment of section 59-40-50(A).

Furthermore, we believe this interpretation of section 59-40-50(A) comports with the purposes of the Charter Schools Act. "A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Garvin v. State, 365 S.C. 16, 21, 615 S.E.2d 451, 453 (2005). Section 59-40-30(A) specifically recites the intent of the Legislature in its enactment of the Charter Schools Act.

> [I]t is the intent of the General Assembly to create a legitimate avenue for parents, teachers, and community members to take responsible risks and create new, innovative, and more flexible ways of educating all children within the public school system. The General Assembly seeks to create an atmosphere in South Carolina's public school systems where research and development in producing different learning opportunities is actively pursued and where classroom teachers are given the flexibility to innovate and the responsibility to be accountable. As such, the provisions of this chapter should be interpreted liberally to support the findings and goals of this chapter and to advance a renewed commitment by the State of South Carolina to the mission, goals, and diversity of public education.

S.C. Code Ann. § 59-40-30(A). We believe this provision asserts the intent of the Legislature to place responsibility for the administration of charter schools, at least in part, on the teachers employed by the school. Thus, section 59-40-30(A) provides further indication of Legislature's intent to abrogate the common law principles and allow teachers, regardless of their status as employees of a charter school, to serve on its governing board.

This sentiment is further echoed in the legislative history of section 59-40-50 under the Charter Schools Act. Section 59-40-50, as originally enacted, required a charter school to "elect its governing body annually. All employees of the charter school and all parents or guardians of students enrolled in the charter school shall be eligible to participate in the election. Parents or guardians of a student shall have one vote for each student enrolled in the charter school. At all times, the governing body of the charter school shall include one or more teachers." S.C. Code Ann. § 59-40-50(8) (Supp. 1996) (emphasis added). Thus, this provision confirms the Legislature's intent to not only abrogate common law master-servant conflict of interests, but to further require at least one teacher serve on the governing board.

In 2002, the Legislature amended this provision by deleting the last sentence requiring a teacher serve on the governing board. However, "[w]here a statute has been revised, the construction given the original statute will be applied to the revised statute, unless the language of the revised statute plainly requires a change of construction." Chestnut v. South Carolina Farm Bureau Mut. Ins. Co., 298 S.C. 151, 154, 378 S.E.2d 613, 615 (Ct. .App. 1989). Because the statute clearly did not prohibit teachers from serving on the governing board prior to its amendment, we find the same to be true subsequent to the amendment. Although the statute no longer requires a teacher's service

on the governing board, we believe if the Legislature intended to prohibit such service it would have provide for such a prohibition in its amendment to the statute.

Based on our review of the relevant statutory authority, we find some uncertainty as to the applicability of the common law principles of the master-servant conflicts of interests to charter schools. Nonetheless, we believe a court would consider them applicable. However, assuming such principles apply, in our opinion, the Legislature intended to specifically abrogate these common law principles in its enactment of the Charter Schools Act.

Very truly yours,

Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General