

April 3, 2007

Mr. Eddie Nelson  
108 Cartgate Circle  
Blythewood, South Carolina 29016

Dear Mr. Nelson:

We understand from your that you are employed with the Fairfield County School District as a Director of Purchasing. You also state as follows:

I am also a licensed Funeral Director for the State of South Carolina where I am a member of the South Carolina Morticians Inc. District Two, which is one of the six districts which make up the South Carolina Morticians Association Inc. (SCMA, Inc.).

It is time for a member of SCMA District Two to be nominated as a candidate for the State of South Carolina, State Board of Funeral Service.

During a recent District Two meeting, we were informed, if anyone is employed with a State or Governmental Agency, he/she could not be nominated to fill a position on the SC State Board of Funeral Service. I need to know if there is any validity to the statement which was given to the general membership of our District.

### **Law/Analysis**

Chapter 19 of title 40 of the South Carolina Code regulates embalmers and funeral directors. As part of this legislation, the Legislature established the eleven-member Board of Funeral Services (the "Board"). S.C. Code Ann. § 40-19-10 (Supp. 2006). Section 40-19-10 sets for the following criteria for membership on the Board:

Of the eleven members, two must be members from the general public not connected with a funeral service establishment, and the remaining members must have been licensed as funeral directors and embalmers for at least five years immediately preceding their

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appointment and must be actively employed or actively engaged in the funeral service profession. All members must have been residents of this State for not fewer than five years preceding the date of their appointment.

However, in our review of those provisions pertaining to the Board, we did not discover a statute barring employees of state or local governments from serving on the Board.

Furthermore, based on our analysis as follows, we do not believe the dual office holding prohibition contained in the South Carolina Constitution prevents employees of state and local governments from serving on the Board. Article XVII, section 1A of the South Carolina Constitution (Supp. 2006) prohibits a person from holding “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.” 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, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such 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. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980). However, our Supreme Court also held that “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.” Id. at 478, 266 S.E.2d at 62.

In the past, this Office addressed whether a member of the Board holds an office for purposes of dual office holding. Ops. S.C. Atty. Gen., June 13, 1980; May 14, 1985. In two opinions we concluded a member of the Board is an officer for purposes of dual office holding. Id. However, in order for an individual to be in violation of the dual office holding prohibition, both of his or her positions must constitute an office under article XVII, section 1A. Thus, we must determine whether as state or other government employee is also an officer holder.

We believe it unlikely that a position as a state or governmental employee would constitute an office. For instance, with regard to your position as Director of Purchasing for the Fairfield County School District (the “District”), your 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 District’s Board of Trustees. Moreover, we find it unlikely that the Director of Purchasing 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

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serving on the Board, such a determination must be made on a case by case basis considering each position of employment.

In numerous other opinions we noted no statutory provision prohibiting state or public employees from running for office. Ops. S.C. Atty. Gen., August 4, 2006; November 2, 2005; June 12, 1992. However, in those opinions, we also noted some agencies and departments maintain policies regulating the political activities of their employees. Id. Thus, we suggest an individual considering a position on the Board, who also maintains employment with a governmental body, should consider their employer's policies prior to seeking an appointment to the Board. In addition, we also suggest such a potential appointee to the Board contact the State Ethics Commission as to any implication the State's ethics laws may have on the individual's ability to seek an appointment to and serve on the Board.

### **Conclusion**

In our review of the legislation establishing the Board, we do not find a provision preventing the service of state and other governmental employees on the Board. In considering whether a state or other government employee may serve on the Board, we also considered whether such service runs afoul of the dual office prohibition contained in the South Carolina Constitution. While we believe it unlikely that a court would consider such employees officers for purposes of this provision, we suggest one look to some of the factors courts generally consider in determining whether a position is an office. We also suggest an individual seeking an appointment to the Board contact their employer in regard to any policies that may prevent them from seeking appointment to or serving on the Board and the State Ethics Commission as to any ethics laws that may impact their ability to serve on the Board.

Very truly yours,

Henry McMaster  
Attorney General

By: Cydney M. Milling  
Assistant Attorney General

REVIEWED AND APPROVED BY:

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Robert D. Cook  
Assistant Deputy Attorney General