

The State of South Carolina



Office of the Attorney General

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April 7, 1987

Ms. Hilda D. Gadsden
1434 Amber Lane
Charleston, South Carolina 29407

Dear Ms. Gadsden:

By your letter of April 1, 1987, at the request of the Honorable Daniel E. Martin, Sr., you have asked for the opinion of this Office on whether you might serve as a member of the State College Board of Trustees simultaneously with your employment by the Child Support Unit of the South Carolina Department of Social Services as a chief investigator. Your concerns were any possible conflict of interest or dual office holding. The latter concern will be addressed first.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." 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). 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 State College Board of Trustees was established by act of the General Assembly, now codified at Section 59-105-10 et seq., Code of Laws of South Carolina (1976 & 1986 Cum. Supp.). The Board is comprised of seventeen members, sixteen of whom represent the various judicial circuits and who are elected by the General Assembly. The final member is to be appointed by the Governor from the State at-large. You are seeking election from the Ninth Judicial Circuit.

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Section 59-105-20 of the Code provides for a term of four years and until a member's successor has been elected and qualifies. Board members are entitled to a subsistence, per diem, and mileage authorized for members of state boards, committees, and commissions, by virtue of Section 59-105-30. No oath is specifically required. But see Article VI, Section 5 of the State Constitution. No specific qualifications are required for membership on the Board.

Duties of Board members are specified by Sections 59-105-40, -50, -60, and -70 of the Code and include the making of contracts, purchasing and leasing of real estate, promulgation of rules and regulations, eminent domain, conferring of degrees upon students, compelling witnesses to appear to testify in investigations by the Board, removal of officers and others for incompetence or other specified reasons, to issue bonds, and numerous other duties. These duties clearly involve an exercise of a portion of the State's sovereign power.

Considering all of the indicia, it must be concluded that one who would serve on the State College Board of Trustees would hold an office for dual office holding purposes. This same conclusion has been reached as to the governing boards of The Citadel, South Carolina State College, and Winthrop College; See Ops. Atty. Gen. dated June 25, 1986; March 25, 1986; and January 8, 1962, respectively.

You are currently employed by the Department of Social Services as the chief investigator of the Child Support Unit in Charleston, a position not created by statute. No oath is required to assume this position. Tenure in this position is "at will" rather than for a specific term of years. You do receive compensation for your work in this capacity. Qualifications are specified, though not by statute: you must be a high school graduate or its equivalent and have four years experience which gives you knowledge of the rules, regulations, and laws relevant to your position.

According to the job description for Special Investigator IV, class code 7157 as provided by the State Division of Human Resource Management, your function is to investigate various criminal and civil matters and to coordinate and investigate the activities of an investigative staff. In actuality, you supervise seven or eight child support investigators, assist in processing child support cases, assist clerks of court in setting dockets, preparation of cases, and so forth. You are present in court with an attorney from the Child Support Unit; you may interview clients or attend meetings in which respondents are

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present. Though you are called an "investigator," your position does not involve actual investigative work; you carry out administrative and ministerial activities rather than activities requiring an exercise of discretion on behalf of the State.

Though your position is related to state or sovereign activities, a court would most probably consider you to be an employee rather than a public officer in this regard. The following from Sanders v. Belue is appropriate in this instance:

[O]ne 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., 78 S.C. at 174. Thus, no violation of the dual office holding prohibitions of the State Constitution would likely occur if you were to serve on the State College Board of Trustees while you are employed as a chief investigator with the Child Support Unit of the Department of Social Services.

There does not appear to be a conflict of interest if you were to be a Board member while so employed. The duties and responsibilities of Board members have no relationship at all to your position with the Department of Social Services. We must caution, however, that we cannot speak for the Department of Social Services; we would encourage you to seek the advice or approval of that agency in light of any applicable agency policies of which we would not be aware.

If you are elected to serve on the Board by the General Assembly, you should be aware of Section 141 of Act No. 540 (Part I) of 1986, which provides that

the per diem allowance of all boards, commission and committees shall be at the rate of Thirty-five (\$35) Dollars per day. Provided, Further, That no full-time officer or employee of the State shall draw any per diem allowance for service on such boards, commission or committees.

See also Op. Atty. Gen. dated March 27, 1984, enclosed.

In conclusion, it is the opinion of this Office that you most probably would not violate the dual office prohibitions of

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the State Constitution or encounter a conflict of interest if you were to be elected to the State College Board of Trustees while you are employed in your present capacity with the Department of Social Services. We encourage you to consult with the Department to obtain the views of that agency, to ascertain whether that agency would have any applicable policy in this instance. Finally, you should be aware of the limitation placed upon your compensation as a Board member by the above-quoted law.

With kindest regards, I am

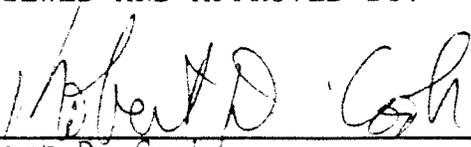
Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
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