

1984 WL 250014 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 26, 1984

\*1 Kent Sharples

President

Horry-Georgetown Technical College

Highway 501 East

Post Office Box 1966

Conway, South Carolina 29526

Dear President Sharples:

You have inquired as to whether a person who has been elected to and has qualified for a seat in the General Assembly is now prohibited from serving as an administrative assistant to the President of Horry-Georgetown Technical College. We would advise that we are aware of no such prohibition.

The first question which must be resolved is whether the situation to which you refer would constitute dual office holding under the South Carolina Constitution. See, Art. III, § 24; Art. XVII, § 1A. For the dual office holding 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. Blue, 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. 476, 266 S.E.2d 61 (1980).

Clearly, a legislator holds an office, as that term is contemplated by the dual office holding provisions. See Op. Atty. Gen., July 21, 1978. Thus, it must be determined whether the position of administrative assistant to the President of Horry-Georgetown Technical College would be that of an employee. For, on a number of occasions, this Office stated that a member of the General Assembly, may also hold a position of state or local employment, consistent with the dual office holding provisions of the Constitution. See, Op. Atty. Gen., February 22, 1982; Op. Atty. Gen., July 21, 1978; Op. Atty. Gen., No. 2531, October 23, 1968.

It is our understanding that the position of administrative assistant to the President of Horry-Georgetown Technical College has not been created by statute, ordinance or regulation. Instead, the position is anticipated to be part of the classified State employment system. Moreover, the position will not be commissioned and no oath will be required. While a salary will be paid, there is no specified term of office and tenure will be simply as a regular classified State employee.

In addition, as communicated to us, the duties of the position will be that of an employee rather than an officer, because there appears to be little or no exercise of the sovereign power in the holding of this position. For example, we understand that the person holding this position will be responsible for coordinating student government functions at the college; he will coordinate programs between the college and Myrtle Beach Air Force Base; he will also be responsible for coordinating conventions and seminars in the Grand Strand area; it is also contemplated that he will exercise some responsibility in the College's continuing education program. Based upon our examination of these duties, the person exercising these duties will not hold an office; instead, as stated in Sanders v. Belue, 78 S.C. at 174:

\*2 . . . 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.

Such a conclusion is consistent with a prior opinion of this Office, concluding that an executive director of a county commission is an employee, rather than an officer. See 1975 *Op. Atty. Gen.*, Op. No. 4000, March 19, 1975. And it is also consistent with the fact that courts have held that similar positions in colleges and universities do not constitute public offices. *McClure v. Whitney*, 120 Miss. 350, 83 So. 259. Thus, in our opinion, the situation you present does not violate the dual office holding provision of the State Constitution.<sup>1</sup>

We have also examined your situation from the standpoint of whether there is any prohibition as to the employment of a legislator as a state employee when he is usually absent from his employment for three days per week during the legislative session. In an opinion of this Office, dated March 11, 1976, this Office examined the question of a legislator concurrently receiving a salary as an elementary school principal and found no statutory prohibition. Likewise, in an opinion, dated August 6, 1984, we found no statutory prohibition as to a member of the General Assembly serving as District Vocational Job Placement Coordinator with the Darlington County Schools. Similarly, in the situation you present, we can find no statute or other law prohibiting a legislator's employment with a local TEC school.

We have also examined a provision in Part I, Section 130 of the Appropriations Act, Act No. 512 of 1984. That section provides in part:

Provided, Further, That no employee of any state department or institution shall be paid any compensation from any other department of the state government except with the approval of the State Budget and Control Board . . . (Emphasis added.)

However, State Personnel regulation, R-19-702.09(D)(1)(c) exempts employees of the General Assembly and of legislative committees from the dual compensation provision and we are informed that the State Personnel Division treats legislators themselves no differently from legislative or committee employees for purposes of this provision. Thus, it would appear that the dual compensation proviso is inapplicable. For further information in this regard, you might wish to contact the State Personnel Division of the Budget and Control Board.

We would also direct your attention to the State Ethics Act. The Act does not expressly prohibit the situation which you reference. However, we would advise that certain provisions of the Ethics Act may be applicable to particular situations and should be adhered to. For example, [Section 8-13-410\(1\), Code of Laws of South Carolina \(1983 Cum. Supp.\)](#) provides that '[n]o public official or public employee shall use his official position or office to obtain financial gain for himself.' Section 8-13-460 provides for action to be taken by a legislator when his financial interest might be affected:

**\*3** Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

(a) Prepare a written statement describing the matter requiring action or decision, and the nature of his potential conflict of interest with respect to such action or decision.

(b) If he is a legislator, he shall deliver a copy of such statement to the presiding officer of his legislative branch. The presiding officer if requested by the legislator shall cause such statement to be printed in the journal and, upon request, shall excuse a legislator from votes, deliberations, and other action on the matter on which a potential conflict exists; provided, however any statement delivered within twenty-four hours after the action or decisions shall be deemed to be in compliance with this section . . .

Moreover, pursuant to Section 8-13-440, a legislator would be prohibited from using or disclosing confidential information gained by him in the course of his official activities in a way that would result in financial gain for himself or any other person. Thus, while the Act does not prohibit a legislator from receiving his salary as an administrative assistant to the President at

Horry-Georgetown Technical College, the guidelines of the Act must be followed by the legislator. See, Op. Atty. Gen., July 21, 1978; see also Op. Atty. Gen., Feb. 7, 1984; Op. Atty. Gen., January 13, 1984.

You have also asked whether there is any legal prohibition in the legislator contracting with the college for employment on a full-time basis and then reimbursing the college for time lost in his service as a legislator. We understand this arrangement is presently being carried out with respect to legislators who are also employed by local school districts. I have consulted with several State agencies involved with the payment of State personnel and am advised that in a similar situation involving a local TEC employee a system of reimbursement was not followed, but instead the member of the General Assembly worked on a pro-rated basis and was paid for the actual time worked.

We are not aware of any express prohibition to the reimbursement method. However, we would note that Section 8-11-30 does make it unlawful for anyone to receive any salary from the State or its departments which is not due. In view of this and the fact that such a reimbursement arrangement here would be on a regular basis, rather than an unexpected occurrence, the TEC school might wish to consider simply paying the individual for work actually done. I am also advised by the Comptroller General's Office that a reimbursement method does present a number of administrative problems.

In summary, this Office is aware of no legal prohibition with respect to the member of the General Assembly also serving as an administrative assistant to the President of the Horry-Georgetown Technical College. The actual terms and conditions of employment must be determined however by the college and its employee.

Sincerely yours,

\*4 Robert D. Cook

Executive Assistant for Opinions

#### Footnotes

- 1 In any event, the General Assembly must determine the qualifications of its own members. See, Culbertson v. Blatt, 194 S.C. 105, 9 S.E.2d 218 (1940).

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