



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 11, 2005

Henry J. White, Esquire
Legal Counsel, Office of the Governor
P.O. Box 12267
Columbia, South Carolina 29211

Dear Mr. White:

By letter, you request an opinion of this Office regarding dual office holding. Specifically, you inquire as to whether service on the Education and Economic Development Coordinating Council would constitute an office for dual office holding purposes. In your letter, you explain that the Governor is permitted, pursuant to Act No. 88, to appoint ten representatives of business to the council and that many of these individuals currently serve on boards that do constitute an office for dual office holding purposes. Following review, we advise that an individual serving on the Education and Economic Development Coordinating Council would not hold an office for dual office holding purposes.

Law/Analysis

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, member of a lawfully and regularly organized fire department, constable, or 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). Furthermore, "[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." *Sanders, supra*, 78 S.C. at 174.

Act No. 88 was signed into law by the Governor on May 27, 2005 and is codified at Section 59-59-170. Section 59-59-170 (A) establishes the Education and Economic Development Coordinating Council and designates the process by which its members are appointed. Section 59-59-170, in part, provides:

Revised 10/11/05

There is created the Education and Economic Development Coordinating Council. The council is comprised of the following members representing the geographic regions of the State and must be representative of the ethnic, gender, rural, and urban diversity of the State:

- (1) State Superintendent of Education or his designee;
- (2) Executive Director of the South Carolina Employment Security Commission or his designee;
- (3) Executive Director of the State Board for Technical and Comprehensive Education or his designee;
- (4) Secretary of the Department of Commerce or his designee;
- (5) Executive Director of the South Carolina Chamber of Commerce or his designee;
- (6) Executive Director of the South Carolina Commission on Higher Education or his designee;
- (7) the following members who must be appointed by the State Superintendent of Education:
 - (a) a school district superintendent;
 - (b) a principal;
 - (c) a school guidance counselor;
 - (d) a teacher; and
 - (e) the director of a career and technology center;
- (8) the following members who must be appointed by the Chairman of the Commission on Higher Education:
 - (a) the president or provost of a research university;
 - (b) the president or provost of a four-year college or university; and
 - (c) the president of a technical college;
- (9) ten representatives of business appointed by the Governor, at least one of which must represent small business. Of the representatives appointed by the Governor, five must be recommended by state-wide organizations representing business and industry. The chair is to be selected by the Governor from one of his appointees;
- (10) Chairman of the Education Oversight Committee or his designee;
- (11) a member from the House of Representatives appointed by the Speaker of the House; and
- (12) a member from the Senate appointed by the President Pro Tempore.

Section 59-59-170 (B) sets forth the duties of members of the Education and Economic Development Coordinating Council and provides as follows:

- (B) The council shall:

- (1) advise the Department of Education on the implementation of this chapter;
- (2) review accountability and performance measures for implementation of this chapter;
- (3) designate and oversee the coordination and establishment of the regional centers established pursuant to Section 59-59-180.
- (4) report annually by December first to the Governor, the General Assembly, the State Board of Education, and other appropriate governing boards on the progress, results, and compliance with the provisions of this chapter and its ability to provide a better prepared workforce and student success in postsecondary education;
- (5) make recommendations to the Department of Education for the development and implementation of a communication and marketing plan to promote statewide awareness of the provisions of this chapter; and
- (6) provide input to the State Board of Education and other appropriate governing boards for the promulgation of regulations to carry out the provisions of this chapter including, but not limited to, enforcement procedures, which may include monitoring and auditing functions, and addressing consequences for noncompliance.

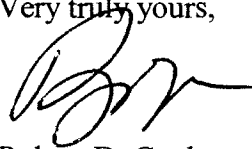
In order for members of boards such as the Education and Economic Development Coordinating Council to be considered an office holder for dual office holding purposes, we have consistently advised that such individual must exercise some portion of the sovereign power of the State. For example, the Court in *Sanders v. Belue, supra*, acknowledged that there is a generally accepted distinction between an official who exercises the sovereign power of the State, and someone who is simply an employee who does not hold an office. Furthermore, on occasion we have issued opinions concerning certain positions that are advisory in nature and do not constitute an office for dual office holding purposes. See, *Op. S.C. Atty. Gen.*, March 19, 2003, concluding that members of the Hampton County Economic Development Board, and other similar county development entities do not hold an office for purposes of dual office holding. Based upon examination of the duties set forth in Section 59-59-170, we conclude that such duties are advisory in nature and, therefore, would not constitute the exercise of a portion of the State's sovereign power. While § 59-59-170 (B) (3) does provide that the Council is to "designate and oversee the coordination and establishment of the regional centers established pursuant to Section 59-59-180" – arguably an exercise of sovereign power – we do not believe such authority in and of itself is sufficient to rise to the level of sovereignty. The term "oversee" simply means to "supervise." *American Heritage College Dictionary* (3rd ed.). Without a more specific expression of authority, we are of the view that such power does not constitute sovereign power. Accordingly, we would advise that service on the Education and Economic Development Coordinating Council does not constitute an office for dual office holding purposes.

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Conclusion

Following review, we advise that the duties set forth pursuant to Section 59-59-170 appear primarily advisory in nature and therefore would not constitute the requisite exercise of a portion of the State's sovereign power to render membership on the council an office for dual office holding purposes.

Very truly yours,

A handwritten signature in black ink, appearing to be 'R. D. Cook', written over the typed name.

Robert D. Cook
Assistant Deputy Attorney General