



ALAN WILSON
ATTORNEY GENERAL

September 23, 2011

The Honorable Edward R. Tallon, Sr.
SC House of Representatives
District 33
140 Bagwell Farm Road
Spartanburg, SC 29302

Dear Representative Tallon:

We received your correspondence requesting an opinion of this Office regarding a conflict of interest. By way of background, you explain that Dr. Glenda P. Sims is seeking appointment for the open position on the Spartanburg County Commission for Technical and Community Education. You also mentioned that Dr. Sims "is currently employed as Director of Nursing for Fortis College in Columbia" which is a "for-profit institution" and is "in direct competition with Spartanburg Community College in that both institutions compete for nursing students." You suggest that if she is appointed to serve, "she would be privileged to confidential information that could possibly create a conflict of interest because of her employment with a competing college." You specifically asked whether it would "create a conflict of interest for Dr. Sims to serve on this board when both institutions are seeking students for the same program."

Law/Analysis

The Spartanburg County Commission for Technical and Community Education was established under S.C. Code § 59-53-1110 which states:

- (A) There is created the Spartanburg County Commission for Technical and Community Education, which is a body politic and corporate and consists of thirteen members. The present members of the Spartanburg County Commission for Technical and Community Education shall continue to hold office as members of this commission for the terms for which they have been appointed, and the new members thereafter are appointed by the Governor for terms of four years each, upon the recommendation of a majority of the Spartanburg County Legislative Delegation. . . .

S.C. Code § 59-53-1110(A).

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The “educational institution created by the commission, in its discretion, may be named . . . Spartanburg Community College.” S.C. Code § 59-53-1120(C). The Commission has specific responsibilities such as receiving and administering “the funds received by it from all sources and make its accounting to the county board of commissioners annually. The commission may receive gifts or grants of funds or property of any nature.” S.C. Code § 59-53-1130. Other duties include the “development and implementation of an adequate vocational and technical training program.” S.C. Code § 59-53-1120(A). In carrying out the necessary programs, the Commission “shall cooperate with all school districts and all county, state, and federal agencies designed to further technical education. The commission may purchase or lease equipment, hire personnel, including a president and instructors, enter into contracts, make regulations, and do other things necessary to carry out the provisions of this act, or to qualify to receive state or federal aid under any present or future statute, policy, or regulation. The commission is considered an operating unit under the general laws governing the lending of funds for capital improvements by the State Educational Finance Commission.” S.C. Code § 59-53-1120(B).

If one serves as a commissioner, he or she would likely be considered a “public member” under the definition set forth in Title 8, Chapter 13, Article 1. Chapter 13 governs ethics and government accountability. A “public member” is defined as “an individual appointed to a noncompensated part-time position on a board, commission, or council. A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.” S.C. Code § 8-13-100(26).

S.C. Code § 8-13-700 establishes the law against using an official position for financial gain and explains that any potential conflict of interest must be disclosed:

(A) No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use which does not result in additional public expense.

(B) No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest. A public official, public member, or public employee who, in the discharge of his official responsibilities, is required to take an action or make a decision which affects an economic interest of himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated shall:

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(1) **prepare a written statement describing the matter requiring action or decisions and the nature of his potential conflict of interest** with respect to the action or decision . . .

(4) if he is a public official, other than a member of the General Assembly, he shall **furnish a copy of the statement to the presiding officer** of the governing body of any agency, commission, board, or of any county, municipality, or a political subdivision thereof, on which he serves, who shall cause the statement to **be printed in the minutes and require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists** and shall cause the disqualification and the reasons for it to be noted in the minutes. . . .

S.C. Code § 8-13-700(A) & (B) (emphasis added).

This Office is not a fact-finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court. Ops. S.C. Atty. Gen., September 29, 2010; September 14, 2006; April 6, 2006. However, the request letter provides that both Spartanburg Community College and Fortis College are competing for the tuition and talent of nursing students in our State. Based upon the information provided, it appears that one serving on the Spartanburg County Commission for Technical and Community Education is in a position to use her office to influence a governmental decision in which she or a business with which she is associated, such as the Fortis College, has an economic interest. Therefore, a conflict of interest may exist.

In 1913, the South Carolina Supreme Court held in McMahan v. Jones that “[n]o man in public service should be permitted to occupy the dual position of master and servant.” McMahan v. Jones, 94 S.C. 362, 365, 77 S.E. 1022, 1023 (1913). It is unlikely that the positions of Commissioner for the Spartanburg County Commission for Technical and Community Education and Director of Nursing for Fortis College would be viewed by a court as master and servant positions. However, under S.C. Code § 8-13-700, a court would likely find that serving in both capacities could create a conflict.

In past opinions, we summarized conflicts of interest 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.

...

[I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, **but the acceptance of the functions and obligations growing out of the two offices.** . . . The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions. . . . In any event, **the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality.**

Ops. S.C. Atty. Gen., October 14, 2010; April 4, 2006; March 26, 1999 (quoting 67 C.J.S. Officers § 27) (emphasis added).

In dicta, the South Carolina Supreme Court explained that a concept “[f]irmly established in our jurisprudence is the doctrine that a person occupying a place of trust should not put himself in a position in which self-interest conflicts with any duty he owes to those for whom he acts.” Gilbert v. McLeod Infirmary, 219 S.C. 174, 188, 64 S.E.2d 524, 530 (1951). As a commissioner, Dr. Sims would occupy a place of trust where she owes a duty to the Spartanburg County Commission for Technical and Community Education and Spartanburg Community College. Acting in her position as Director of Nursing for Fortis College may, on occasion, conflict with her duty to the Commission or the best interest of Spartanburg Community College.

In 2007, the South Carolina Ethics Commission issued an Advisory Opinion on a similar issue where a public officer was involved in a private company as a member of the board of directors.¹ The Ethics Commission concluded as follows:

The Ethics Reform Act does not prohibit a public official, such as a state university president, from serving on the board of a publicly-traded company . . . however, he is advised to follow the provisions of Section 8-13-700(B) on actions affecting the economic interest of the company.

SC Ethics Commission, Advisory Opinion 2007-010.

Conclusion

The South Carolina Ethics Commission has primary jurisdiction over the state’s ethics laws and should be consulted for further advice or information. This Office respectfully defers questions regarding ethics matters to their office.

While Dr. Sims may not be prohibited from simultaneously serving on the Spartanburg County Commission for Technical and Community Education and working as Director of Nursing for Fortis College, it appears, based on the information provided, that serving in both capacities

¹ In this instance, Dr. Sims would be considered a public member who also held a director position at a college.

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would put Dr. Sims in a position² to use her office to influence a governmental decision in which she or Fortis College, a business with which she is associated, has an economic interest. Therefore, a court may find that a conflict of interest exists under S.C. Code § 8-13-700.

Very truly yours,



Leigha Blackwell Sink
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

² This Office in no way implies that Dr. Sims would intentionally use her position on the Spartanburg County Commission for Technical and Community Education to provide an economic interest; however, she would simply be in a position to use her office to influence a decision that may have such an effect. S.C. Code § 8-13-700 simply warns against *being in a position to influence, not actually making* decisions to promote financial gain.