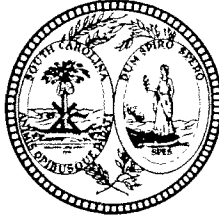


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The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

March 22, 1995

The Honorable Fred R. Sheheen  
Commissioner, South Carolina Commission  
on Higher Education  
1333 Main Street, Suite 200  
Columbia, South Carolina 29201

Dear Commissioner Sheheen:

You have requested an opinion as to whether institutional trustees serving on the Commission on Higher Education, as proposed in pending legislation, would encounter statutory or constitutional difficulties. You have sought this opinion at the advice of the State Ethics Commission, which agency has provided guidance as to ethics matters but has no authority to give guidance as to constitutional or other statutory issues. Two bills are pending before the legislature: H. 3607 and S. 365.

House Bill 3607 would, inter alia, amend S.C. Code Ann. §59-103-10, as amended, to revise the membership on the Commission on Higher Education and the manner in which the members are selected. If this bill should be adopted, the Commission would consist of nineteen members, six of whom would be appointed by the Governor, with advice and consent of the Senate, to represent the public colleges and universities. The bill in relevant part provides:

Equitable representation by sector must be given on the commission by appointing members from public senior research institutions, four-year public institutions of higher learning, and technical colleges or the State Board for Technical and Comprehensive Education. These six members must be members of the governing boards thereof and serve as ex officio members of the commission. These members shall be appointed as the terms of the six members appointed from the State at large expire. Members must be appointed for terms of four years and until their successors are appointed and qualify. ... [T]hose members who represent public colleges, universities, and technical colleges may not serve more than

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one term. A term served by a member which is less than a full four-year term must not be counted in determining when a member has served the maximum number of terms. ...

Senate bill 365 would also, inter alia, amend §59-103-10, as amended, to revise the membership of the Commission and the manner in which the membership and the chairman would be selected. Under this proposal the Commission would consist of eleven members appointed by the Governor, three of whom would be representatives of public colleges and universities. In relevant part the bill provides:

(2) Three members to serve ex officio to represent the public colleges and universities. One member must be serving on the board of trustees of one of the following public senior research institutions: Medical University of South Carolina, Clemson University, and University of South Carolina. One member must be serving on the board of trustees of one of the following four-year public institutions of higher learning: Francis Marion University, Coastal Carolina University, Lander University, Winthrop University, The Citadel, South Carolina State University, College of Charleston, University of South Carolina-Spartanburg, and University of South Carolina-Aiken; provided that if the representative for this group of schools is chosen from either the University of South Carolina-Spartanburg or the University of South Carolina-Aiken, the representative must be chosen from the local area Higher Education Commission rather than a board of trustees; and provided further that the representative may not be chosen from either the University of South Carolina-Spartanburg or the University of South Carolina-Aiken when the research institution represented on the board is the University of South Carolina. One member must be a member of one of the local area technical education commissions or the State Board for Technical and Comprehensive Education to represent the State Board for Technical and Comprehensive Education. These members must be appointed to serve terms of two years. No institution may be represented for more than one consecutive term. ...

Because each of the prospective members of the Commission on Higher Education would also be serving on a board of trustees of a public college or university, a county higher education commission, a local technical college board of trustees, or the State Board for Technical and Comprehensive Education, each of which would constitute an

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office for dual office holding purposes,<sup>1</sup> one constitutional difficulty which could arise is that of dual office holding.

Article XVII, Section 1A of the state 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 a notary public. 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).

But for the ex officio status accorded these members of the Commission on Higher Education, it is my opinion that these members would most probably be considered office holders for dual office holding purposes. The positions are created by statute. Certain qualifications must be met by the appointees (for example, being a trustee of a public institution of higher education). A specific term of service is provided, four years in the House bill and two years in the Senate bill. No oath of office is specifically required by these statutes. But see Article VI, Sections 4 and 5 of the State Constitution. Section 59-103-80 authorizes the Commission members to be paid such per diem and mileage as is authorized by law for members of state boards, commissions, and committees. The powers and duties to be exercised by the Commission members are specified in the various statutes in Chapter 103 of Title 59 and include studying the short and long-range programs of the state's institutions of higher education; approving requests for supplemental appropriations from the institutions; approving degree programs to be undertaken by the institutions; making recommendations to the Budget and Control Board as to policies,

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<sup>1</sup>As examples, see Op. Att'y Gen. dated January 11, 1991 (elected member of the Francis Marion University Board of Trustees would hold an office); July 27, 1989 (trustee of the Medical University of South Carolina would hold an office); October 14, 1994 (member of the Aiken County Higher Education Commission would hold an office); March 27, 1992 (member of Spartanburg County Commission for Higher Education would most probably hold an office); August 6, 1990 (member of the Board of the Area Commission of the Technical College of the Low Country would hold an office); April 5, 1994 (member of the governing board of Spartanburg Technical College would likely be considered an office for dual office holding purposes); and January 22, 1993 (member of Midlands Technical College Board would hold an office for dual office holding purposes).

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programs, curricula, facilities, and the like, of the institutions as the Commission may consider desirable; making various reports as may be required; approving new construction; entering into contracts for the provision of teacher training programs; and more. These powers and duties appear to exercise a portion of the sovereign power of the State. Thus, one who would serve on the Commission of Higher Education in a status other than ex officio would most probably be considered an office holder.

As to the membership of the representatives of the public colleges and universities on the proposed Commission on Higher Education under either bill, such membership is declared to be ex officio. The phrase ex officio is defined as "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position...." Lobrano v. Police Jury of Parish of Plaquemines, 150 La. 14, 90 So. 423, 425 (1921). The South Carolina Supreme Court has commented extensively on ex officio memberships in Ashmore v. Greater Greenville Sewer District, 211 S.C. 77, 44 S.E.2d 88 (1947):

The rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is ex officio membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office. [Cites omitted.] Ex officio means "by virtue of his office." ... Similar observation may be made with respect to ex officio membership upon a governing board, commission or the like of an agency or institution in which the unit of government of the officer has only a part or joint ownership or management. In mind as an example is an airport operated by two or more units of government. A governing board of it might be properly created by appointment ex officio of officers of the separate governmental units whose duties of their respective officers have reasonable relation to their functions ex officio....

Ashmore, 211 S.C. at 92.

Courts in other jurisdictions have also recognized that ex officio membership in a second office by one who already holds a public office does not constitute dual office holding. In State ex rel. McManamon v. Felger, 102 N.E.2d 369, 370 (Ind. 1951), the court stated: "Whenever a public officer ex officio performs the duties of another office, he is not holding two offices." The court in Texas Turnpike Authority v. Shepperd, 279 S.W.2d 302, 308 (Tex. 1955), stated: "The Legislature may impose upon statutory

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officials extra duties." But see State ex rel. Hennepin County v. Brandt, 31 N.W.2d 5 (Minn. 1948) ("Where by law an incumbent of one office is ex officio the incumbent of another office, such incumbent occupies two separate and distinct offices if the duties of the two official capacities are different in their general nature and are separate and distinct so that the incumbent, while acting in one capacity, is governed by one law, and while acting in the other is governed by a different and independent law." 31 N.W.2d at 9.)

Applying the foregoing legal principles to the two proposed bills, it is my opinion that a dual office holding problem would most probably not be present should members of the boards of trustees serve in an ex officio capacity on the Commission of Higher Education. While neither bill contains legislative findings, it would certainly appear to be reasonable and rationally related for such trustees to use their expertise and experiences for the benefit of the commission which would oversee and advocate on behalf of all institutions of higher education, within the limits as described by the State Ethics Commission.

The foregoing does not address the ex officio membership of the representative of the independent colleges and universities. It is assumed that members of boards of trustees of these private institutions would not be considered public officers for dual office holding purposes, in accordance with the principles of Sanders v. Belue and State v. Crenshaw, both supra.

One difficulty is identified with respect to both bills. To be an ex officio member of the Commission on Higher Education, one must necessarily be a member of an institution's board of trustees. Under either bill, it would be possible that a trustee nearing the end of his term of office on a board of trustees could be appointed to the Commission on Higher Education. Under the House bill, the commissioner-trustee would serve a four-year term; under the Senate bill, the commissioner-trustee would serve a two-year term. Should the trustee not be reelected to the institution's board of trustees for whatever reason, his ex officio service on the Commission would end when his service on the board of trustees ended, due to the nature of ex officio status. It is possible that a vacancy could thus occur during the middle of an ex officio member's tenure on the Commission. Accordingly, the legislature may want to address this issue before either bill is enacted.

Sincerely,

  
Charles Molony Condon  
Attorney General

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