



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

August 14, 1996

Mr. Steve Mattison  
308 Sharebrook Lane  
Columbia, South Carolina 29212

RE: Informal Opinion

Dear Mr. Mattison:

By your letter of August 9, 1996, to the Office of Attorney General Condon, you have indicated that you are employed by the University of South Carolina as the Business Manager of the College of Education and further that you wish to be a candidate for the Lexington-Richland School District Five Board of Trustees. You are also currently a commissioner of the Irmo Fire District. You wish to be advised of the legality of your being a candidate for the school district board of trustees with respect to applicable laws or other regulations.

As we discussed by telephone, your position with the University of South Carolina would be one of employment by the State of South Carolina. There is no state statute or constitutional provision which would prohibit your being a candidate for the school district board of trustees. I would advise that you inquire as to whether there may be a policy of the University of South Carolina, your employing agency, concerning the outside activities of its employees, as some state agencies have policies concerning political activities of their employees. Another concern which we discussed is that of applicability of the federal Hatch Act, which prohibits certain partisan political activities of public employees whose positions are somehow tied to federal funds. The Office of the Special Counsel of the United States Merit Systems Protection Board gives advice on applicability of the Hatch Act; that agency may be contacted by calling toll-free 1-800-85-HATCH (42824). One final concern would be applicability of provisions of the state's ethics laws; I understand that you have contacted the State Ethics Commission to be apprised of those laws as they relate to your candidacy.

Mr. Steve Mattison  
Page 2  
August 14, 1996

Your other concern was whether you could continue to serve as a commissioner or member of the board of fire control of the Irmo Fire District if you should be elected to the Lexington-Richland School District Five Board of Trustees. The concern here would be whether such concurrent service would run afoul of the dual office holding proscriptions of the South Carolina Constitution.

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 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).

As stated above, your position with the University of South Carolina would be considered a position of employment rather than the holding of an office. No statute or other legislative act created the position, prescribed qualifications therefor, or sets forth the duties to be exercised by the incumbent. Tenure is at the will of the employer rather than for a specific term of years. You are compensated for your services. No oath was required before you assumed your duties. In this regard, the following from Sanders v. Belue is helpful in distinguishing between a position of employment and an office:

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing and not occasional or intermittent, is a public officer. Conversely, 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.

Id., 78 S.C. at 174.

A commissioner or member of the board of fire control of the Irmo Fire District would most probably be considered an office holder for dual office holding purposes. The Fire District was created by a successful referendum as authorized by act of the General Assembly. See Act Nos. 387 of 1963; 892 of 1971; 794 of 1978; and 177 of 1995. In particular, Act No. 794 of 1978 amends section 4 of Act No. 387 of 1963, to establish a

Mr. Steve Mattison

Page 3

August 14, 1996

board of fire control to consist of five members appointed by the Governor upon the recommendation of the Lexington County Legislative Delegation. Members of the board are not to be compensated. The 1978 act specifies that members are to serve "terms of office" of six years and until their successors are selected and qualified (emphasis added). Section 5 of the 1963 act specifies the duties to be exercised by members of the board of fire control and includes such duties as buying fire fighting equipment, selecting sites to house the equipment, selecting drivers and firemen and providing for their training, promulgating rules and regulations, and borrowing funds in anticipation of taxes. These duties involve an exercise of a portion of the sovereign power of the state. A member of the board of fire control appears to possess most of the attributes usually found in a public officer.

Since a member of the board of fire control or commissioner of the Irmo Fire District would most probably be considered an office holder, it must therefore be determined whether a member of the Lexington-Richland School District Five Board of Trustees would be considered an office holder. Reference may be had to §21-199 of the 1962 Code of Laws for provisions relevant to the board of trustees of this school district, as well as to a number of acts of the General Assembly, among them Act Nos. 208 of 1953; 35 of 1963; 72 of 1967; 1016 of 1970; 140 of 1969; 287 of 1987; 218 of 1993; 602 of 1994; and 176 of 1995. Reference may also be had to the general law applicable to school district boards of trustees, Chapter 17 of Title 59, 1976 Code of Laws. It is beyond argument that a member of a school district board of trustees would be considered an office holder. See Ops. Att'y Gen. dated February 23, 1994; January 19, 1994; August 8, 1990; September 8, 1992; March 3, 1989; June 19, 1991; and many more.

Thus, if you were to serve concurrently on the board of fire control of the Irmo Fire District and on the Lexington-Richland School District Five Board of Trustees, you would most probably contravene the dual office holding prohibitions of the South Carolina Constitution. The problem would not arise, however, until you should be elected to the school board and actually begin to exercise the duties thereof. Merely offering as a candidate for election to the school board would not cause a dual office holding problem.

Enclosed herewith is a copy of Op. Att'y Gen. dated February 10, 1984, which on page 2 describes how the common law operates to cure a dual office holding situation, should one exist in the future.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

Mr. Steve Mattison  
Page 4  
August 14, 1996

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Senior Assistant Attorney General

Enclosure