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The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

January 18, 1990

Bobby M. Bowers, Director
Division of Research and Statistical Services
State Budget and Control Board
1000 Assembly Street, Suite 425
Columbia, South Carolina 29201

Dear Mr. Bowers:

By your letter of January 15, 1990, you have asked whether you may serve concurrently as Director of the Division of Research and Statistical Services of the State Budget and Control Board and as a trustee of a state college without contravening the dual office holding prohibitions of the State Constitution.

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).

The board of trustees of Lander College, the entity about which you inquired, is established pursuant to Section 59-135-10 et seq., Code of Laws of South Carolina (1989 Cum. Supp.). The board is comprised of three specified ex officio members, one member appointed from the state at large by the Governor, and fifteen members elected from congressional districts or at large by the General Assembly. Other than a residency requirement for certain of the trustees, no other qualifications are statutorily required of a trustee. Following an initial election plan to establish staggered

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terms of office for the trustees, each trustee elected by the General Assembly will serve a four-year term. No oath is required within Section 59-135-10 et seq. Compensation is provided for in Section 59-135-20 and is comprised of subsistence, per diem, and mileage authorized for members of state boards, committees, and commissions. 1/

Powers of the board of trustees are specified in Section 59-135-30 et seq. and include the powers to sue and be sued; make contracts; condemn land; fix tuition and such charges for students; confer degrees; make regulations; employ personnel; compel, by a subpoena or otherwise, witnesses to testify or papers to be produced for board investigations; remove officers, faculty members, or employees as provided by statute; and other similar duties. Clearly these duties involve an exercise of a portion of the sovereign power of the State of South Carolina.

Your position as Director of the Division of Research and Statistical Services of the Budget and Control Board was not created by statute, nor does any statute specify any qualifications or duties of the incumbent. No oath is required to be taken by the incumbent. Tenure is "at will" rather than a specified term of years. Compensation is paid, in the form of salary and fringe benefits, as it is paid to state employees generally.

You have provided a copy of your Managerial Position Description for our review. Your functions include such activities as determining programmatic goals and objectives; developing policies and procedures for goal accomplishment; assigning priorities; developing specific program plans and milestones; establishing budget and resource allocations; and evaluating progress toward accomplishment of goals. You, with your agency personnel, assist members of the General Assembly, local political subdivisions, health care planners and providers, educational institutions, other state agencies, and the general public with such matters as demographic and statistical services, development of statistical techniques and information technology, revenue forecasting, mapping, health care data, geological concerns (such as economic potential of fuels and minerals, development of geological maps, etc.), census data, and the like. While the services performed by you, as agency head, are vital and valuable, such do not appear to involve an exercise of a portion of the sovereign power of the State.

1/ But see Proviso 129.12, Act No. 189 of 1989, providing for per diem for members of all boards, commissions, and committees; the second sentence provides: "No full-time officer or employee of the State shall draw any per diem allowance for service on such boards, commissions or committees."

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Considering the foregoing, it is our opinion that your position as Director of the Division of Research and Statistical Services of the Budget and Control Board would be a position of employment rather than an "office" in the constitutional sense of the term. In that regard, the following from Sanders v. Belue, supra, is apposite:

[O]ne 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.

Thus, it may be concluded that you, as Director of the Division of Research and Statistical Services of the State Budget and Control Board, could serve concurrently on the board of trustees of Lander College without contravening the dual office holding prohibitions of the State Constitution. 2/

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook
Robert D. Cook
Executive Assistant for Opinions

2/ You originally inquired about service on the board of trustees of Francis Marion College. Subsequently, you have revised your request to have this Office consider Lander College instead.