

The State of South Carolina



Office of the Attorney General

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January 11, 1991

The Honorable Hugh K. Leatherman, Sr.
Senator, District No. 31
513 Gressette Building
Columbia, South Carolina 29202

Dear Senator Leatherman:

By your letter of December 21, 1990, you have requested the opinion of this Office as to two questions:

1. Whether a person serving on the Francis Marion Foundation and the Francis Marion Board of Trustees is considered to be a dual office holder under the South Carolina statute?
2. Whether a State Senator serving on a college or university board of trustees holding the office of chairman is considered to be a dual office holder?

After a brief discussion of the principles of dual office holding, each of your questions will be addressed.

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).

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Question 1

The Board of Trustees of Francis Marion College is established pursuant to S.C. Code Ann. § 59-133-10 et seq. (1990) and is composed

of the Governor of the State or his designee, the chairman of the Senate Committee on Education (or his designee from that committee), and the chairman of the House Committee on Education and Public Works (or his designee from that committee), which three are members *ex officio* of the board, and sixteen members, with fifteen of these members to be elected by the General Assembly and one member to be appointed from the State at large by the Governor. ...

Certain of the elected members must be residents of the respective congressional districts; otherwise, no qualifications are otherwise specified. The statute provides for a four year term. No provision for an oath of office is apparently made by the pertinent statutes. Compensation of members of the board is authorized by § 59-133-20; they are entitled to receive "subsistence, per diem, and mileage authorized for members of state boards, committees, and commissions."

Powers of the Board of Trustees are found in § 59-133-30 et seq. The Board is declared to be a body politic and corporate and is authorized to do such things as make contracts; employ faculty members, agents, and employees; make bylaws and regulations; condemn land; fix tuition and fees; confer degrees; compel, by subpoena, etc., witnesses to appear and testify before the Board in investigations; make regulations; issue revenue bonds; and so forth. Clearly these duties involve an exercise of a portion of the sovereign power of the State.

Considering all of the foregoing factors, it is our opinion that one who would serve as an elected member of the Board of Trustees of Francis Marion College would hold an office.^{1/} This conclusion is strengthened by the fact that in § 59-133-10 there are numerous references to holding office ("the term of office of the at-large trustee," "Each position on the board constitutes a separate office," "term of office of an elective trustee," and "an elective office.").

^{1/} Ex officio service on the Board of Trustees by the Governor or his designee, chairman of the Senate Committee on Education or his designee from that committee, and chairman of the House Committee on Education and Public Works or his designee from that committee would not constitute dual office holding. See Op. Atty. Gen. dated July 18, 1989.

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The Francis Marion College Foundation is an eleemosynary corporation not established pursuant to an act of the General Assembly. Election of members is provided for in Article IV, Section 2 of the Foundation's Bylaws. No statute provides for qualifications or duties of these members, or a term of office or an oath. Thus, a member of the Foundation would most likely not hold an office, since none of the usual criteria are met. See also Ops. Atty. Gen. dated September 8, 1987 (Horry County Council on Aging, Inc.); July 22, 1986 (Greenville Central Area Partnership, Inc.); and others.

Based on the foregoing, a dual office holding problem would not exist if one were to serve simultaneously on the Board of Trustees of Francis Marion College and on the Board of the Francis Marion College Foundation.

Question 2

Without question, a state senator would be considered to be an office holder. If the senator's membership on a college or university board of trustees is ex officio, by virtue of his chairmanship of or membership on the Senate Committee on Education, such ex officio service is not considered to be within the purview of dual office holding. See footnote 1. Therefore, there would be no dual office holding problem. Further, unless restricted by statute, an ex officio member of a body enjoys all rights, privileges, powers, and responsibilities as other board members, including voting and holding office. See Ops. Atty. Gen. dated January 3, 1985; March 4, 1976; December 22, 1981; August 2, 1977; March 9, 1977 (holding office mentioned); January 2, 1974; August 25, 1972 (holding office mentioned); and others.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions