

The State of South Carolina



Office of the Attorney General

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March 27, 1992

Mr. Marion L. McMillan, Jr.
First Vice President
Smith Barney Harris Upham & Co., Inc.
Post Office Box 2728
Spartanburg, South Carolina 29304

Dear Mr. McMillan:

As you were advised by letter of Gary Baker dated March 12, 1992, your question concerning your possible concurrent service as a member of the governing body of the South Carolina Reinsurance Facility and on the Spartanburg County Commission for Higher Education has been referred to our Office for response. The question pertains to dual office holding, a constitutional issue, rather than the new ethics act.

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 Spartanburg County Commission for Higher Education was created by act of the General Assembly. See Act No. 36 of 1967, as amended by Act No. 504 of 1967 and Act No. 202 of 1991. The Commission is to consist of fifteen members, appointed by the Governor upon the recommendation of a

Mr. McMillan
Page 2
March 27, 1992

majority of the House of Representatives members of Spartanburg County and the "senators from District 4." A term of four years and until one's successor is appointed and qualifies, is specified. A member is to serve without compensation. No mention is made of taking an oath. No qualifications are specified for membership. Certain powers and duties are specified in these acts, including encouraging higher education in Spartanburg County, establishing facilities for college courses in the county, entering into agreements, soliciting funds, accepting donations, exercising eminent domain, and appointing an educational advisory committee.

This Office has previously examined membership on county higher education commissions, concluding that such membership would constitute an office for dual office holding purposes. Enclosed are copies of opinions dated May 12, 1977 (as to the Allendale County commission) and January 27, 1976 (as to the Georgetown County commission). The duties and powers exercised by members of the Spartanburg County commission are very similar to those exercised by similar commissions and appear to involve an exercise of a portion of the sovereign power of the State (particularly eminent domain). Thus, it is our opinion that one who serves on the Spartanburg County Commission for Higher Education would most probably hold an office for dual office holding purposes.

This Office has apparently never considered whether a member of the governing board of the South Carolina Reinsurance Facility would hold an office for dual office holding purposes. The Facility is described in State Farm Mutual Automobile Ins. v. Lindsay, 288 S.C. 327, 342 S.E.2d 599 (1986), as "a nonprofit organization which enables automobile insurers to obtain reinsurance for high risk drivers which they normally would not insure." 288 S.C. at 328. Explained further in Grain Dealers Mutual Ins. Co. v. Lindsay, 279 S.C. 355, 306 S.E.2d 860 (1983),

In essence the Facility exists to achieve a relatively fair distribution of burdens imposed upon automobile insurers by the mandatory provisions of Section 38-37-310, Code. Under the [Automobile Reparation Reform] Act, automobile insurers are permitted to "cede" risks to the Facility for reinsurance. In

Mr. McMillan
Page 3
March 27, 1992

turn, losses incurred on these ceded risks are to be apportioned among the participating insurers. ...

279 S.C. at 358. The Reinsurance Facility was created as a "nonprofit, unincorporated legal entity" pursuant to S.C. Code Ann. § 38-77-510 (formerly § 38-37-710). The Facility is not considered to be an agency of the State of South Carolina, we understand.

The governing board of the Facility is provided for in § 38-77-580, to consist of nineteen members appointed by either the Governor or the Insurance Commissioner (except for the Consumer Advocate, who serves ex officio), who must meet the qualifications specified therein. A term of one year or until one's successor has been appointed and qualified, is specified. No mention is made of taking an oath or receiving compensation for services.

The governing board may prescribe rules for members of the Facility, § 38-77-520; consult with the Insurance Commissioner as to designating producers as to insufficient marketing outlets, govern and control the designated producers, and terminate the designation under specified conditions, § 38-77-590; calculate the Facility recoupment charge as provided in the statutory formula, § 38-77-600; file the recoupment charges with the Insurance Commissioner, § 38-77-610; and perhaps carry out other functions.

Members of the South Carolina Reinsurance Facility's governing board do meet a number of criteria used in determining whether a particular position is an office for dual office holding purposes, but it is an extremely close question as to whether these are sufficient to make such membership an office. See Ops. Atty. Gen. dated January 23, 1989 (member of Procurement Review Panel does not hold an office); July 22, 1986 (Greenville Central Area Partnership, Inc., a charitable organization, not an office); September 8, 1987 (Horry County Council on Aging, Inc., nonprofit corporation, not an office); and October 18, 1988 (Children's Trust Fund, legislatively established, eleemosynary corporation, not an office). While the conclusion cannot be free from doubt, it is our opinion that one who serves on the governing board of the South Carolina Reinsurance Facility probably does not hold an office for dual office holding purposes.

Mr. McMillan

Page 4

March 27, 1992

Thus, it is our opinion that an individual could probably serve on the Spartanburg County Commission for Higher Education and on the governing board of the South Carolina Reinsurance Facility without contravening the dual office holding prohibitions of the state Constitution.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions