



ALAN WILSON
ATTORNEY GENERAL

October 8, 2019

The Honorable Jerry N. Govan, Jr.
Member
South Carolina House of Representatives
Post Office Box 77
Orangeburg, South Carolina 29116

Dear Representative Govan:

We received your letter addressed to Attorney General Alan Wilson requesting an opinion of this Office concerning dual office holding. Specifically, you ask whether a member of the General Assembly would be prohibited from “serving in an administrative capacity with a state agency such as president to a public or private two or four year institution of higher learning?”

Law/Analysis

As our Supreme Court explained in South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013):

The South Carolina Constitution prohibits members of the General Assembly from holding another office during their service in the legislature, both expressly and by virtue of the repeated general prohibitions against dual office holding. See S.C. Const. art. III, § 24 (“No person is eligible to a seat in the General Assembly while he holds any office or position of profit or trust under this State....”); S.C. Const. art. VI, § 3 (“No person may hold two offices of honor or profit at the same time.”); S.C. Const. art. XVII, § 1A (“No person may hold two offices of honor or profit at the same time . . .”).

Thus, we must determine whether serving as the president of a public or private college or university is an office for purposes of dual office holding.

In Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 124, 691 S.E.2d 453, 461 (2010) our Supreme Court provided us with the following guidance in determining what positions constitute offices for purposes of the constitutional prohibition on dual office holding.

“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.” Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that “[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public.” Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). “The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority. The duties must be performed independently and without control of a superior officer, other than the law, unless they are those of an inferior or subordinate officer, created or authorized by the legislature and by it placed under the general control of a superior officer of body.” 63C Am Jur.2d Public Officers and Employees § 5 (2009).

In an opinion issued in 1992, this Office considered whether serving as the President of Horry-Georgetown Technical College is an office for purposes of dual office holding. Op. Att’y Gen., 1992 WL 682817 (S.C.A.G. Jun. 12, 1992). We considered the fact that the President’s position was created by the college’s board of trustees in accordance with its enabling legislation rather than by statute. Id. We also consider the fact that the position had no statutory qualifications, no oath requirement, no statutory duties, and no term of service. Id. As such, we concluded: “It is apparent that the individual employed as President of the College does not meet the criteria usually possessed by an office holder. Thus, it is our opinion that such would be a position of public employment rather than a public office.” Id.

We have similarly determined that other college presidents, vice presidents, and employees of colleges and universities were not office holders for purpose of dual office holding. See Op. Att’y Gen., 1975 WL 22500 (S.C.A.G. Nov. 26, 1975) (finding the President of South Carolina State College was not an officer holder); Op. Att’y Gen., 2006 WL 2382453 (S.C.A.G. July 19, 2006) (concluding a vice president for a technical college is not an officer); Op. Att’y Gen., 1980 WL 121115 (S.C.A.G. Mar. 21, 1980) (opining a director of a physical plant at a technical college is an employee not an officer).

In your letter, you did not specify a college or university or the position, so we are unable to provide you with specific guidance. However, based on our prior opinions, we believe serving as a president or employee of a college or university would not be considered an office for purposes of the prohibition on dual office holding as these positions general serve at the pleasure of a board and do not have any statutorily created duties or authority. This would be especially true for a position at a private college or university as it would be unlikely that such a position would be created by statute and involve the exercise of some part of the sovereign power of the state.

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Although we do not believe a member of the General Assembly serving in an administrative capacity at a public or private college generally is prohibited as dual office holding, we offer the same guidance as we did in our 2006 opinion.

First, although no statute prohibits a state employee for serving in the House of Representatives, we advised the requester consult with his employer to determine if it had a policy prohibiting employees from engaging in political activity. Second, we noted if the requester's position is partly funded by the federal government, he should be aware of the implications of the federal Hatch Act. Third, we noted certain ethics laws prohibit the use an individual's public employment for personal gain.

Op. Att'y Gen., 2006 WL 2382453 (S.C.A.G. July 19, 2006).

Conclusion

While we do not have enough information to provide you with specific guidance as to whether a member of the General Assembly may serve in an administrative capacity at a public or private college or university, based on our prior opinions, we do not believe such service in both capacities would be prohibited under dual office holding. However, we caution that such service may have other implications due to employment policies, ethics considerations, and federal law.

Sincerely,

A handwritten signature in blue ink, appearing to read "Cydney Milling".

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink, appearing to read "Robert D. Cook".

Robert D. Cook
Solicitor General