HENRY MCMASTER
ATTORNEY GENERAL

April 1, 2009

John E. Batten, IV, General Counsel
South Carolina Vocational Rehabilitation Department
Post Office Box 15
West Columbia, South Carolina 29171-0015

Dear Mr. Batten:

We understand from your letter that you desire an opinion of this Office as to "whether it is permissible under the state law and regulations for one of our employees (a PhD Senior Psychologist with the State Agency of South Carolina Vocational Rehabilitation Department-Disability Determination Services) to simultaneously serve on the South Carolina Board of Examiners in Psychology within the State Agency of the South Carolina Department of Labor, Licensing and Regulation." You also state in your letter that you are specifically "concerned with the dual-office-holding prohibitions found in the South Carolina Constitution, Art. VI, Sec. 3."

Law/Analysis

Article VI, section 3 of the South Carolina Constitution (Supp. 2008) provides: "No person may hold two offices of honor or profit at the same time. This limitation does not apply to officers in the militia, notaries public, members of lawfully and regularly organized fire departments, constables, or delegates to a constitutional convention." In addition, article XVII, section 1A of the South Carolina Constitution (Supp. 2008) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." To contravene these provisions, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

The Legislature created the State Board of Examiners in Psychology (the "Board") via section 40-55-20 of the South Carolina Code (2001). Generally, the Board is charged with the authority to

conduct examinations, license, regulate, investigate, and revoke or suspend the license of those engaged in the practice of psychology. S.C. Code Ann. §§ 40-55-100; 40-55-55; 40-55-40; 40-55-130; 40-55-1540 (2001). Section 40-55-20 calls for the Board to be composed of "three clinical psychologists, two counseling psychologists, one school psychologist, one psychologist who is licensed in experimental, social, industrial/organizational or community psychology, and one lay member." S.C. Code Ann. § 40-55-20. Members of the Board are nominated by various professional organizations and appointed by the Governor for five-year terms. S.C. Code Ann. § 40-55-30 (2001). Members of the Board may receive a per diem and reimbursement for mileage. S.C. Code Ann. § 40-55-40.

Although the Board's enabling legislation does not require its members to take an oath, the fact that the Board was created by the Legislature, its members are required to satisfy certain criteria to be a member of the Board, and the fact that its members are appointed by the Governor for a specified term indicate that a position on the Board is an office. Moreover, the authority given to the Board by the Legislature strongly indicates that the Board has the ability to exercise some portion of the sovereign power of the State. As such we believe membership on the Board is an office.

Our opinion is further supported by several opinions of this Office concluding that service on a professional licensing board constitutes an office for purposes of the constitutional prohibition on dual office holding. See, e.g., Ops. S.C. Atty. Gen., June 14, 2007 (determining that a member of the South Carolina Environmental Certification Board holds an office); April 29, 2004(finding a Commissioner of Pilotage for the Port of Charleston holds an office); October 8, 2003 (concluding that a member of the State Board of Law Examiners holds an office); April 12, 1993 (determining that membership on the State Board of Examiners in Opticianry, State Board of Examiners in Optometry, and the State Board of Physical Therapy Examiners are all offices). Thus, we must only conclude whether or not holding a position as a Senior Psychologist for the South Carolina Vocational Rehabilitation Department (the "Department") is also considered to be an office.

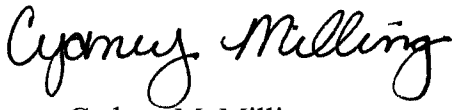
We note no provision under South Carolina law establishing the position of Senior Psychologist. According to your letter, this position serves at the pleasure of the Department and there is no indication that this position is for a specified term or is required to take an oath. As our Supreme Court in Sanders, 78 S.C. at 174, 58 S.E. at 763, expressed "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 employé." As such, we believe service as a Senior Psychologist for the Department is that of a mere employee and not as an officer for purposes of dual office holding. Thus, we do not believe service on the Board and as a Senior Psychologist runs afoul of article VI, section 3 or article XVII, section 1A of the South Carolina Constitution.

Conclusion

We believe that a court is likely to find a position on the Board is an office for purposes of dual office holding. However, we are of the opinion that serving as a Senior Psychologist for the Department constitutes service as an employee rather than an officer. As such, we do not believe simultaneous service in both of these positions constitutes an office for purposes of dual office holding.

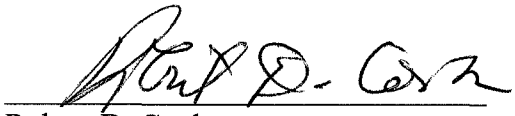
Very truly yours,

Henry McMaster
Attorney General



By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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