



HENRY McMASTER
ATTORNEY GENERAL

June 25, 2010

Mr. Steve S. Kelly, Jr.
Post Office Box 995
Columbia, South Carolina 29202

Dear Mr. Kelly:

We understand from your recent letter addressed to Attorney General Henry McMaster that you desire an opinion of this Office as to your ability to serve on the Appellate Panel for the Department of Employment and Workforce.

Law/Analysis

The Legislature recently passed act 146 (the "Act") creating the Department of Workforce to replace the Employment Security Commission. 2010 S.C. Act No. 146. The Act added section 41-29-300 of the South Carolina Code, which creates the Workforce Appellate Panel (the "Appellate Panel"). We understand from your letter that the Legislature recently appointed you to serve as a member of the Appellate Panel and you are concerned, based on your service on other boards and committees, about your ability to serve on the Appellate Panel.

We presume your concern arises from the prohibition on dual office holding found in the South Carolina Constitution. Article XVII, section 1A of the South Carolina Constitution 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." Thus, we must first consider whether your position as a member of the Appellate Panel constitutes an office for purposes of dual office holding.

To contravene section 1A of article XVII, 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).

Mr. Kelly
Page 2
June 25, 2010

As we previously mentioned, section 41-29-300 establishes the Appellate Panel and calls for the election of its members by the Legislature. Section 41-29-300 states the purpose of the Appellate Panel is to “hear and decide appeals from decisions of the department’s divisions.” The Department of Workforce is charged with administering South Carolina’s Unemployment Insurance program. Thus, we presume the Appellate Panel is making decisions regarding such things as employers’ responsibility to pay unemployment insurance premiums and employees’ receipt of unemployment benefits. We view these decisions as quasi-judicial in nature. In prior opinions, this Office opined that “members of bodies whose duties are quasi-judicial in nature and involve the exercise of discretion are office holders.” Op. S.C. Atty. Gen. May 27, 2003 (citing Ops. S.C. Atty. Gen., August 3, 2000; August 6, 1991; and June 1, 1984). Accordingly, we believe membership on the Appellate Panel involves an exercise of the sovereign power of the State.

In addition, section 41-29-300 states that the Appellate Panel’s members shall serve for a term of four years and receive “such compensation as may be established under the provisions of section 8-11-160.” S.C. Code Ann. § 41-29-300(B)(2) & (4). Section 41-29-300(E)(1) requires members of the Appellate Panel to possess several specific qualifications including a baccalaureate degree and at least five years of experience in business administration, business management, management at the Department of Workforce, human resource management, finance or law. Finally, section 41-29-300(F)(1) requires members of the Appellate Panel to adhere to the Code of Judicial Conduct and chapter 13 of title 8 of the South Carolina Code, governing the ethical requirements of public officers and employees. We believe all of these factors further indicate that holding a position on the Appellate Panel constitutes an office. Thus, we are of the opinion that a member of the Appellate Panel is an officer for purposes of the constitutional prohibition on dual office holding.

With this determination in mind, we now look to the list of affiliations you provided us to determine if one of these also constitutes an office. Most of the affiliations you provided to us consist of membership in or service on the boards of nonprofit organizations such as the S.C. Residential Home Builders Association, the South Carolina Association of Counties, church membership, Eagle Scouts, YMCA, Agape Senior Foundation, and United Way of South Carolina. In several prior opinions, this Office concluded that membership on the board of directors of a private nonprofit eleemosynary corporation would not constitute an office for purposes of dual office holding. Ops. S.C. Atty. Gen., November 27, 2007 (Mauldin Cultural Center Board); September 14, 2005 (Rubicon Counseling Center Board); July 5, 2005 (South Carolina Museum Foundation); April 12, 1993 (Charleston Citywide Local Development Corporation and Community Young Men’s Christian Association of Rock Hill, S.C.); January 11, 1991 (Francis Marion Foundation); October 18, 1988 (Children’s Trust Fund of South Carolina); September 8, 1987 (Horry County Council on Aging); October 20, 1983 (York County Council on Aging, Inc.). Thus, we do not believe you are prohibited by article XVII, section 1A from serving as a member of the Appellate Panel while being a member of or holding a board position on one of these organizations.

Mr. Kelly
Page 3
June 25, 2010

You also disclosed your service on a regional board for a private financial institution in your letter to us. We believe your service on such a board does not violated article X, section 1A for the same reasons your service on a private nonprofit corporation's board does not violate this constitutional provision.

We also understand you served as a member of the South Carolina Workforce Investment Board. We are of the understanding that the South Carolina Workforce Investment Board was established through federal legislation, which charges state governors with the responsibility of creating such boards to implement a state plan outlining a strategy for statewide workforce investment systems aimed increasing employment, retention, and earnings of the state's workforce. 29 U.S.C.A. §§ 2811 & 2821(a). An opinion of this Office issued in 2008 addressed whether a position on a local workforce investment board created under the Governor's Workforce Initiative constituted an office for purposes of dual office holding. Op. S.C. Atty. Gen., February 4, 2008. We stated:

Numerous opinions which have been issued by this Office in past years have considered whether positions required by or established under federal law would be considered offices for purposes of dual office holding. We have consistently concluded that a position established pursuant to federal law would not be an office for purposes of Article XVII, § 1A.

Id. We cited a 1994 opinion in which we concluded that "service on the Governor's Workforce Initiative did not constitute an office for dual office holding purposes because such position was created pursuant to executive order of the Governor rather than statute, regulation or ordinance." Id. (citing Op. S.C. Atty. Gen., April 5, 1994). Accordingly, we do not believe that a position on the State Workforce Investment Board constitutes an office for purposes of dual office holding. Therefore, we do not believe your simultaneous service on the State Workforce Investment Board and the Appellate Panel would run afoul of article XVII, section 1A of the Constitution.

Lastly, we understand that until recently, you served as a member of the Kershaw County Council. In numerous opinions, this Office opined that service on a county council constitutes an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., March 7, 2008; January 18, 2006; November 2, 2005; March 18, 2004. Thus, continuing to serve on the Kershaw County Council while accepting a position on the Appellate Panel would, in our opinion, be dual office holding in violation with the South Carolina Constitution. However, we understand you resigned from your position as a councilmember prior to accepting a position on the Appellate Panel. Because you no longer serve as a member of the Kershaw County Council, we do not believe you are in violation of the constitutional prohibition on dual office holding for this reason.

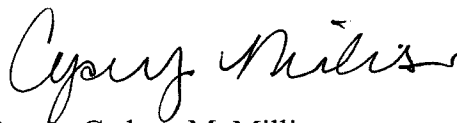
Mr. Kelly
Page 4
June 25, 2010

Conclusion

Based on the analysis above, we are of the opinion that your service on the Appellate Panel is an office for purposes of dual office holding. Thus, this position would prevent you from holding another office so long as you serve on the Appellate Panel. However, in reviewing the listing of affiliations you provided to us, we believe that for the most part these positions do not constitute offices for purposes of dual office holding. The only position that we believe would be considered an office is your position on the Kershaw County Council. Nonetheless, it is our understanding that you no longer hold this position and that you resigned prior to your appointment to the Appellate Panel. Thus, we do not believe, based on the information you provided, that you are currently in violation of article XVII, section 1A.

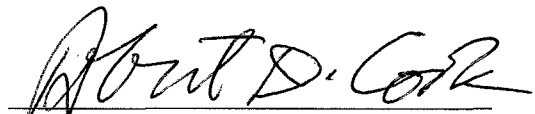
Very truly yours,

Henry McMaster
Attorney General



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