

7200 Liberty



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

July 18, 2001

Edward M. Shannon, III, Executive Director
South Carolina Higher Education Tuition Grants Commission
101 Business Park Boulevard, Suite 2100
Columbia, South Carolina 29203-9498

RE: Informal Opinion

Dear Mr. Shannon,

By your letter of July 6, 2001, you have requested an opinion of this Office concerning our State's Constitutional provision prohibiting dual office holding. You ask if a South Carolina independent college president may serve simultaneously as the ex officio member representing the independent colleges on the S. C. Commission on Higher Education and as a member of the S.C. Tuition Grant Commission.

Article XVII, Section 1A of the South Carolina 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).

Section 59-113-10 of the South Carolina Code of Laws provides for the Higher Education Tuition Grant Commission and states in part that "[t]he Commission shall administer the provisions of this chapter and shall make those regulations as may be necessary in order to carry out the intent of this chapter." The Higher Education Tuition Grant Commission apparently stands on equal footing with other state agencies, commissions and boards in carrying out the legislative intent in creating such Commission. See OP. ATTY. GEN. Sept. 26, 1979. The Commission exerts some degree of control over the expenditure of appropriated funds, and thus the Commission exercises a sovereign power in its regulating and implementing the statutory tuition grant scheme. It is our

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opinion that membership on the Higher Education Tuition Grant Commission would constitute office holding for purposes of the dual office holding prohibition of the State Constitution.

Because we have opined that one of the positions constitutes office holding, the question turns to whether the position of membership on the S. C. Commission on Higher Education would likewise be considered an office. Section 59-130-10 creates the Commission and designates its membership. The independent colleges and universities representative is described as follows:

One *ex officio* member to represent the independent colleges and universities by the Governor upon the advice and consent of the Senate. The individual appointed must be serving as a member of the Advisory Council of Private College Presidents. This member must be appointed for a term of two years and shall serve as a nonvoting member.

S.C. CODE ANN. § 59-113-10 (3) (emphasis added).

The phrase *ex officio* is defined as "[f]rom office; by virtue of the office" or "[f]rom office; by virtue of office; officially. A term applied to an authority derived from official character merely, not expressly conferred upon the individual, but rather annexed to the official position...." Lobrano v. Police Jury of Parish of Plaquemines, 90 So. 423, 425 (1921). The South Carolina Supreme Court has commented extensively on *ex officio* memberships in Ashmore v. Greater Greenville Sewer Dist., 211 S.C. 77, 44 S.E.2d 88, 95 (1947), stating that the rule of law prohibiting dual office holding "is not applicable to those officers upon whom other duties relating to their respective offices are placed by law."

In an opinion of this Office dated March 22, 1995, we examined the dual office holding ramifications of membership on the Commission on Higher Education. In that opinion it was stated:

But for the ex officio status accorded these members of the Commission on Higher Education, it is my opinion that these members would most probably be considered office holders for dual office holding purposes. The positions are created by statute. Certain qualifications must be met by the appointees (for example, being a trustee of a public institution of higher education). A specific term of service is provided, four years in the House bill and two years in the Senate bill. No oath of office is specifically required by these statutes.... Section 59-103-80 authorizes the Commission members to be paid such per diem and mileage as is authorized by law for members of state boards, commissions, and committees. The powers and duties to be exercised by the Commission members are specified in the various statutes in Chapter 103 of Title 59 and include studying the short and long-range programs of the state's institutions of higher education; approving requests for supplemental appropriations from the institutions; approving degree programs to be undertaken by

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the institutions; making recommendations to the Budget and Control Board as to policies, programs, curricula, facilities, and the like, of the institutions as the Commission may consider desirable; making various reports as may be required; approving new construction; entering into contracts for the provision of teacher training programs; and more. These powers and duties appear to exercise a portion of the sovereign power of the State. Thus, one who would serve on the Commission of Higher Education in a status *other than ex officio* would most probably be considered an office holder. (Emphasis added).

Thus, the Supreme Court of South Carolina, as well as prior opinions of this Office, have concluded that membership on a public body in an *ex officio* capacity should not be considered office holding for purposes of the State Constitution's prohibition against dual office holding. It is our opinion, therefore, that a South Carolina independent college president may serve simultaneously as an *ex officio* member representing the independent colleges and universities on the S. C. Commission on Higher Education and as a member of the S.C. Tuition Grants Commission without violating the dual office holding prohibition.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General