



HENRY McMASTER
ATTORNEY GENERAL

December 12, 2007

Ms. Joan Moore
110 Kensington Drive
Goose Creek, South Carolina 29445

Dear Ms. Moore:

We understand from your letter that you are currently on the Mental Health Commission (the "Commission") and would like to continue your service on the Commission, but are also interested in running for the District 3 Berkeley County School Board (the "School Board") in the 2008 election. Thus, you ask whether or not "this violates dual office holding"?

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2006) 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 this provision, 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).

On numerous occasions, this Office determined membership on a county school board or board of trustees constitutes an office for dual office holding purposes. See Ops. Atty. Gen., June 16, 2006; January 29, 1997; July 31, 1992. Accordingly, we must consider whether service as a member of the Commission is also an office for purposes of dual office holding.

The Legislature established the Commission in section 44-9-30 of the South Carolina Code (2002). This provision states as follows:

(A)(1) There is created the governing board for the State Department of Mental Health known as the South Carolina Mental Health Commission. The commission consists of seven members appointed by the Governor, upon the advice and consent of the Senate, as follows:

(a) one member from each of the six congressional districts;

(b) one member from the State at large.

(2) The Governor shall consider consumer and family representation when appointing members.

(B) The members serve for terms of five years and until their successors are appointed and qualify. The terms of no more than two members may expire in one year. The Governor may remove a member pursuant to the provisions of Section 1-3-240. A vacancy must be filled by the Governor for the unexpired portion of the term.

(C) The commission shall determine policies and promulgate regulations governing the operation of the department and the employment of professional and staff personnel.

(D) The members shall receive the same subsistence, mileage, and per diem provided by law for members of state boards, committees, and commissions.

S.C. Code Ann. § 44-9-30.

According to this provision members of the Commission serve a set term of office. Other than the fact that the Governor must consider “consumer and family representation,” we do not find any specific qualifications or an oath requirement. However, according to section 44-9-30, the Legislature afforded significant authority to the Commission by charging the Commission with the duty to set policies and promulgate regulations for the Department of Mental Health. In addition, we find further evidence of the power and authority provided to the Commission by the Legislature in other provisions contained in chapter 9 of title 44. For instance, under section 44-9-40 of the South Carolina Code (2002), the Commission is charged with the appointment and removal authority for State Director of Mental Health. Section 44-9-90 of the South Carolina (2002), providing the general rights, duties, and powers of the Commission, includes the power to “provide a statewide system for the delivery of mental health services to treat, care for, reduce and prevent mental illness and provide mental health services in the areas of mental defectiveness, epilepsy, drug

addiction and alcoholism for citizens of this State, whether or not in an institution.” Furthermore, section 44-9-100 of the South Carolina Code (2002), which also provides for additional duties and powers held by the Commission, states:

The commission may:

- (1) prescribe the form of and information to be contained in applications, records, reports, and medical certificates provided for under this chapter, Chapter 11, Chapter 13, Article 1 of Chapter 15, Chapter 17, Chapter 22, Chapter 23, Chapter 24, Chapter 27, and Chapter 52;
- (2) require reports from the superintendent of an institution relating to the admission, examination, diagnosis, discharge, or conditional discharge of a patient;
- (3) investigate complaints made by a patient or by a person on behalf of a patient;
- (4) adopt regulations not inconsistent with this chapter, Chapter 11, Chapter 13, Article 1 of Chapter 15, Chapter 17, Chapter 22, Chapter 23, Chapter 24, Chapter 27, and Chapter 52 as it may find to be reasonably necessary for the government of all institutions over which it has authority and of state mental health facilities and the proper and efficient institutionalization of the mentally ill, psychotic senile, drug addicted, or alcoholic;
- (5) take appropriate action to initiate and develop relationships and agreements with state, local, federal, and private agencies, hospitals, and clinics as it considers necessary to increase and enhance the accessibility and delivery of emergency and all other types of mental health services.

Finally, section 44-9-110 of the South Carolina Code (2002) allows the Commission to accept gifts on behalf of the Department of Mental Health or its facilities. Based on these powers and duties, we are of the opinion that the Commission exercises a portion of the sovereign power of the State. Thus, based on this fact, in addition to the fact that the Commission was created by statute and that its members hold terms of office, we believe that members of the Commission hold an office for purposes of dual office holding. Accordingly, pursuant to article XVII, section 1A of the South

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Carolina Constitution, an individual would be prohibited from simultaneously holding a position on the Commission while also holding a position on the School Board.

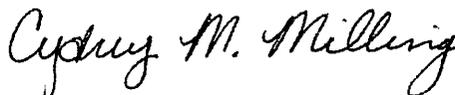
However, we note that per your letter, you question whether or not your service on the Commission would prohibit you from running for a position on the School Board. We stated on numerous occasions that "the constitutional prohibition on dual office holding does not prevent an individual from running for office." Op. S.C. Atty. Gen., April 21, 2006. However, when a dual office holding situation occurs, the law operates automatically to "cure" the problem. Id. When the individual assumes the second office, he or she is deemed by law to have vacated the first office. Id. This process then creates an automatic vacancy the first office. Id. Accordingly, article XVII, section 1A of the South Carolina Constitution would not prevent you, as a member of the Commission, from running for a position on the School Board. However, if you are elected to the School Board and are sworn into that position, we believe you would automatically vacate your position on the Commission.

Conclusion

Based on our analysis above, we find both a position on the School Board and a position on the Commission to be office for purposes of dual office holding. Accordingly, if you serve simultaneously in both positions, you will run afoul of the constitutional provision prohibiting dual office holding.

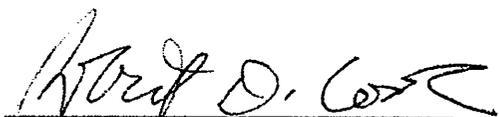
Very truly yours,

Henry McMaster
Attorney General



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