IN THE SUPREME COURT OF FLORIDA

IN RE:

ADVISORY OPINION TO THE GOVERNOR - DUAL OFFICE HOLDING

CASE NO. 82,210

BRIEF OF GOVERNOR LAWTON CHILES

Kerey Carpenter
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STATEMENT OF THE CASE AND FACTS

On August 10, 1993, Governor Lawton Chiles requested the opinion of this Court concerning his executive powers and duties under Article IV, section 1(f) of the Florida Constitution. Specifically, Governor Chiles submitted the following question:

> Whether a member of a community college board of trustees is a district officer or a state officer for purposes of my appointment authority pursuant to Article IV, Section 1(f) of the Constitution of the State of Florida.

This issue is relevant to the Governor's appointment authority because Article II, Section 5(a) of the State Constitution prohibits, with certain exceptions, a state, county or municipal officer from simultaneously holding another state, county or municipal office. If members of a board of trustees of a community college district are district officers, then they are not subject to the dual office holding prohibition.[1] On the other hand, if they are state officers, then the dual office holding prohibition would preclude their eligibility for municipal, county or another state office, unless they resigned from the first office prior to taking the second.

Historically, there has been a divergence of opinion concerning this issue. Since 1975, Florida Attorneys General have concluded that community college district board members are district officers, while since 1979, the Florida Senate has

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[1] As noted in the Governor's request for an advisory opinion, it is apparent that the dual office holding prohibitions do not apply to district officers.

concluded that they are state officers. Because of the conflicting views, Governor Chiles requested this Court to provide an opinion to clarify this matter for the purpose of his appointment authority. Rather than advocating either position, Governor Chiles submits this brief to provide information in order to facilitate the Court's decision.

DISCUSSION

I. THE APPLICATION OF THE DUAL OFFICE HOLDING PROHIBITION TO MEMBERS A BOARD OF TRUSTEES OF A COMMUNITY COLLEGE BOARD HAS BEEN UNCLEAR FOR MANY YEARS.

The dual-office holding prohibition is found in article II, section 5(a), of the State Constitution and provides in part:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein . . .

This constitutional provision applies to both elected and appointed officers and prohibits a person from simultaneously holding more than one state, county, or municipal office. At issue is whether a member of a board of trustees of a community college district is a district officer or state officer for purposes of this dual office holding prohibition.

In 1975, the Honorable Walter C. Young requested the Attorney General's opinion as to whether the dual office holding prohibition prevented a member of the Florida Legislature from serving simultaneously as a member of the board of trustees of a community college district. Op. Att'y Gen. Fla. 75-153 (1975). Clearly, a member of the Florida Legislature is a state officer within the meaning of the dual office holding prohibition. The consideration in that advisory opinion was whether a member of the board of trustees of a community college district was also a state, county or municipal officer within the meaning of that prohibition. Id. The Attorney General concluded that the dual office holding

prohibition did not apply to trustees of a community college district. Id.

This conclusion was based in part on the rationale that such members are officers of a special district created to perform a special governmental function and are not state, county or municipal officers. Id., Accord, Op. Atty. Gen. Fla. 69-49 (1969) (noting that the Supreme Court has distinguished state and county offices from those held under special districts), citing, State v. Reardon, 154 So. 868 (Fla. 1934); State v. Hamilton, 166 So. 742 (Fla. 1936); Town of Palm Beach v. City of West Palm Beach, 55 So. 2d 566 (Fla. 1951).

Additionally, the opinion referred to a previous Attorney General Opinion which held that the dual office holding prohibition did not apply to trustees of a junior college district. Op. Att'y Gen. Fla. 75-153, citing, Op. Att'y Gen. Fla. 73-47 (1973). There, the Attorney General found that a community college district was essentially the same as a junior college district, and that each community college district was an independent, separate, legal entity created for the operation of a community college. Op. Att'y Gen. Fla. 75-153. The Attorney General also noted that section 230.741 of the Florida Statutes (1975) provided that the term "community college" is used interchangeably with the term "junior college" in the Florida Statutes. See also, § 230.753(1), Fla. Stat. (1975). In spite of the Attorney General's opinion, the

Florida Senate did not confirm the appointment of Representative Young.[2]

It appears that this issue was not raised again for several years. In 1979, however, the Florida Legislature amended section 240.317, Florida Statutes, as follows:

> It is the legislative intent that community colleges, constituted as political subdivisions of the state, continue to be operated by district boards of trustees as provided in s. 240.315 . . .

Shortly thereafter, another legislator, Representative Beverly B. Burnsed, was appointed by the Governor to a community college district board of trustees. Her appointment was approved by the State Board of Education; however, the Florida Senate did not confirm her appointment. In a letter to the Senate Executive Business Committee, the Senate President, Philip D. Lewis, stated that:

> [C]hapter 79-222, Laws of Florida, which amended section 248.063, F.S. has now changed the basis on which the earlier opinion [AGO 75-153] was grounded. The law now specifically makes community colleges "political subdivisions of the State of Florida."

Appendix A.

Senator Lewis interpreted this legislation to mean that "by clear implication, community college board members were converted into officers of political subdivisions of the State," and therefore, they were "state officers and accordingly prohibited from holding dual offices." Id. In conclusion, Senator Lewis noted that the

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[2] Senator Jenne implied that the decision had been based upon a perceived conflict, rather than because of the dual office holding prohibition. Appendix C.

Senate would not seek an opinion from the Attorney General, but that Representative Burnsed was not precluded from requesting an opinion. Id.

Representative Burnsed did, in fact, request an opinion from the Attorney General on the issue. Op. Att'y Gen. Fla. 80-16 (1980). In answering her request, the Attorney General addressed the issue of whether chapter 79-222, Laws of Florida, effected a change in the basis on which the earlier Attorney General's opinion (AGO 075-153) was grounded. Op. Att'y Gen. Fla. 80-16 (1980). The Attorney General stated that:

> [T]he basis for the conclusion reached in AGO 75-153 was that a community college district is 'an independent, separate legal entity created for the operation of a community college' and consequently, that a trustee of the district is an officer of a special district, an office not covered by the constitutional prohibition.

Id.

The Attorney General concluded that the 1979 amendment adding the phrase "constituted as political subdivisions of the state" did not have any effect on the result reached in the previous attorney general's opinion for several reasons. Id.

First, the opinion focused on other statutory provisions in chapter 240 dealing with community colleges and district boards. In particular, sections 240.313 and 240.315 expressly denominate the entity of a district and its governing board a district board, and section 240.317 expressly refers to "district boards of trustees." Id. Moreover, section 240.313(1) continues to provide that "[e]ach community college district . . . is an independent, separate, legal entity created for the operation of a community

college." Id. Additionally, former section 230.753(2)(a) and present section 240.315 refer to the board of trustees as a body corporate and as a district board. Id.

Next, the Attorney General reasoned that the new phrase did not dissolve or terminate the existing community college districts or change the nature of those entities or their governing boards of trustees. Id. Similarly, it did not convert those districts into state agencies in the sense that the districts or their governing boards became part of the executive branch of state government or the officers of such districts became state officers. Id.

Finally, the opinion noted that in construing Florida Statutes, where the context permits, section 1.01(9), Florida Statutes provides that the term "political subdivisions" includes "all other districts in this state." Id. Additionally, it was noted under Florida law, that the term "political subdivisions" applies to and governs special districts. Id.

Based on the above reasoning, the Attorney General concluded that the dual office holding prohibition did not prevent Representative Burnsed from holding office and serving as a member of the board of trustees for a community college district. Id. In spite of this opinion, Representative Burnsed's appointment was withdrawn by the Governor (presumably due to the Senate's position). Appendix B.

In a similar scenario, Representative Vernon Peeples was appointed to a community college district board of trustees in 1983. Representative Peeples was advised in a letter from Senator

Jenne that the Senate Committee on Executive Business would not recommend his confirmation based, in part, on the constitutional dual office holding prohibition. Appendix C. In his letter, Senator Jenne noted that prior to 1979, community college boards were considered "district" offices and not state, county, or municipal offices. Id. In agreement with Senator Lewis' previous letter and in contradiction with the subsequent attorney general opinion, Senator Jenne found that the 1979 statutory amendment changed the basis on which the earlier interpretation was grounded. Senator Jenne stated that [t]he Committee on Executive Business . . . will continue to uphold Article II, Section 5 of the Florida Constitution and oppose dual office-holding by junior college trustees." Id.

Finally, in 1991, the Senate Committee on Executive Business, Ethics and Elections, was again confronted with the issue of whether to confirm appointments of two individuals who held other public offices to the position of trustee of a community college board. This time, the appointees were not legislators. One was a member of a county code enforcement board and another was a city council member. Appendix B. The Committee noted that the Governor's appointment of these officers was in harmony with the Attorney General positions, but violated the long-standing Senate interpretation of the law. Id. This long-standing conflict between the Attorney General's position and the Senate position has not been resolved.

II. RELATED ISSUES CONCERNING THE GOVERNOR'S APPOINTMENT DECISIONS SHOULD BE ADDRESSED BY THE COURT IN ITS ADVISORY OPINION.

Notwithstanding the dual office holding prohibition, the issue of separation of powers is also relevant to the Governor's appointment decision when dealing with public officers. Somewhat surprisingly, neither the opinions of the Attorneys General nor the written positions of the Florida Senate raised the issue of separation of powers. In particular, they did not mention the propriety of an officer of the legislative branch serving simultaneously as an officer of the executive branch. Article II, section 3 of the Florida Constitution provides that:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

This provision appears to prohibit legislative officers from being appointed to exercise executive powers and duties.[3] The office of community college district board member falls within the executive branch of government regardless of whether it is a state office or district office. Therefore, even if the dual office holding prohibition does not apply, the separation of powers prohibition may be relevant for the appointments of some public officers.

A similar issue has been raised by the Florida Senate Committee on Executive Business. The Committee has taken the

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[3] We recognize that many laws inappropriately require the appointment of legislative and judicial officers to offices in the executive branch.

position that even without the constitutional dual office holding prohibition, it is a conflict for a member of the Legislature to sit as a community college district board of trustee member. In his letter to Representative Peeples, Senator Jenne stated that "this position by the committee and adopted by the full Senate goes back to June 2, 1975 when, the Senate failed to confirm the reappointment of Representative Walt Young as a trustee of Broward Community College." Appendix C.

Additionally, Senator Lewis raised a similar issue in his letter concerning Representative Burnsed's appointment. There the Senator commented that "[t]here is a separate but related question of the common law doctrine of incompatibility of offices." In that situation, however, the issue arose because Representative Burnsed was sitting in the chair of the House Committee on Higher Education and was seeking membership on the Polk County College Board of Trustees. This issue was not brought before the Committee because the Senate failed to confirm her appointment based on the dual office holding prohibition.

In rendering an advisory opinion to Representative Burnsed, the Attorney General addressed the incompatitibility issue raised in Senator Lewis' letter. Contrary to the Senate's position, the Attorney General concluded that the doctrine did not preclude Representative Burnsed from holding both offices.

These issues are related to Governor Chiles initial inquiry; and therefore, it would be appropriate for the Court to address them in its advisory opinion.

III. FLORIDA'S RESIGN-TO-RUN LAW MAY BE RELEVANT TO THIS COURT'S DECISION.

Florida's Resign-to-Run Law also may be relevant to the Court's consideration of the dual office holding issue. Prior to addressing the question posed by Representative Burnsed in 1980, the Attorney General felt obligated to mention Florida's Resign-to-Run Law, section 99.012, Florida Statutes. Op. Atty. Gen. Fla. 80-16. That law requires, with certain exceptions, that any elected or appointed officer who wishes to qualify as a candidate for another office, the term of which runs concurrently with or overlaps the term of the office he presently holds, to submit an irrevocable letter of resignation, resigning from the office he presently holds before he can qualify as a candidate for the other office. Id. This law was not applicable to the question posed to the Attorney General because a member of the board of trustees of a community college district is not an elected officer for which a person must qualify as a candidate. The Attorney General, however, advised that the Resign-to-Run Law may apply if the legislator sought reelection to the Legislature. Id., citing, Orange County v. Gillespie, 239 So. 2d 132 (Fla. 4th DCA 1970).

CONCLUSION

For the reasons stated herein, Governor Chiles requests the Court to advise him as to whether a member of a community college board of trustees is a district officer or a state officer for purposes of his appointment authority pursuant to Article IV, Section 1(f) of the Constitution of the State of Florida. Additionally, Governor Chiles requests that the Court address the related issues set forth herein.

Respectfully submitted this 17th day of September, 1993.

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Attorney for Governor Chiles

Appendix A

OFFICE OF THE PRESIDENT

November 7, 1979

Senator Sherman Winn, Chairman
Executive Business Committee
104 Senate Office Building
Tallahassee, Florida

Dear Mr. Chairman:

Attorney General's Opinion 75-153 has already answered the question you raised concerning dual officeholding by legislators and that opinion concluded that a legislator also could sit on a community college board because community college board members were independent officers performing a specialized function and were not state, municipal or county officers.

However, §49 of Chapter 79-222, Laws of Florida, which amended §248.063, F.S., effective July 1, 1979, has now changed the basis on which the earlier opinion was grounded. The law now specifically makes community colleges "political subdivisions of the State of Florida." Ironically, it was Rep. Burnsed who was the prime sponsor of the legislation, which by clear implication converted community college board members into officers of political subdivisons of the State.

There is also the separate but related question of the common law doctrine of incompatibility of offices, and the issue there concerns Rep. Burnsed sitting in the chair of the House Committee on Higher Education and also on the Polk Community College Board of Trustees. In my view, had the Legislature not amended §248.063, F.S., it would have been proper for the Executive Business Committee to hold a hearing to determine if in fact Rep. Burnsed's roles were incompatible. However, that question is no longer relevant because community college board members by law are, by clear implication, state officers and accordingly prohibited from holding dual offices.

Rep. Burnsed was reappointed to the Polk County Community College Board of Trustees on July 17, 1979, which was after the effective date of the new law.

I think that we can handle this issue as outlined above without requesting an Attorney General's opinion; however, should Rep. Burnsed be so inclined, there would be nothing to prohibit her from doing so on her own.

Sincerely yours,

Philip D. Lewis
President

Appendix B

THE FLORIDA SENATE

COMMITTEE ON EXECUTIVE BUSINESS,
ETHICS AND ELECTIONS

103 Senate Office Building
Tallahassee, Florida 32399-1100
(904) 487-5828

Arnett E. Girardeau, *Chairman*
Robert Wexler, *Vice Chairman*
Curtis Austin, *Staff Director*

SELECT COMMITTEE ON EXECUTIVE BUSINESS
Robert Wexler, *Chairman*

M E M O R A N D U M

TO: Committee on Executive Business, Ethics and Elections

FROM: Committee Staff

SUBJECT: Dual Officeholding Concerns - Members of Community College Boards of Trustees as State Office Holders

DATE: December 6, 1991

Article II, s. 5(a), Florida Constitution, provides, in part:

> No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein . . .

This language, commonly referred to as the "dual office-holding" prohibition of the Florida Constitution, prohibits a person from simultaneously holding more than one "office" under the government of the state, counties, and municipalities. The prohibition applies to both elected and appointed offices.

Currently pending in this Committee are appointments of two individuals who hold other public offices to the position of Trustee of a Community College Board (a member of a county code enforcement board and a city council member). Our research indicates that holding these positions would constitute holding an office of a county, a county, and a municipality, respectively.

At issue is whether holding a position as a member of a community college board of trustees would constitute holding an office of the state.

The Florida Attorney General concluded in AGO 75-153 that it was not a violation of the dual officeholding prohibition for a member of the Florida legislature to serve simultaneously as a member of the board of trustees of a community college district, stating, that such person "is an officer of a special district which has been created pursuant to law to perform a special governmental function and is not a state, county, or municipal officer within the meaning of Art. II, s. 5(a), Fla. Const." (See also AGOs 69-49, 71-324, 73-47, and 75-60.) The Florida Senate failed to confirm the reappointment of that House of Representative member, in spite of the Attorney General opinion.

In 1979, the Florida Legislature amended section 240.317, Florida Statutes, as follows:

> "240.317 Community colleges; legislative intent. It is the legislative intent that community colleges, constituted as political subdivisions of the state, continue to be operated by district boards of trustees as provided in s. 240.315 . . ."

Shortly after the effective date of that amendment, the Committee on Executive Business dealt with another House member who was appointed to a community college board of trustees. According to a November 7, 1979, letter (copy attached) from the Honorable Philip D. Lewis, President, to the Chairman of the Executive Business Committee, it was apparently the inclination of the Senate to conclude that community college board members were as a result of the change in the statute "by clear implication, state officers and accordingly prohibited from holding dual offices."

The individual who had been appointed, Representative Beverly Burnsed, requested an Attorney General opinion on the issue. The conclusion reach by the Attorney General was not the same as the conclusion which had been reached by the Senate. In AGO 80-16 (copy attached), the Attorney General concluded that the 1979 amendments to s. 240.317, F.S., by adding the phrase

"constituted as political subdivisions of the State of Florida," had no effect on the result reached in AGO 75-153, which opinion concluded that a legislator could serve on a community college board of trustees without violating the dual officeholding prohibition. The opinion went on to state that the fact that the legislation specified that "community colleges are constituted as political subdivisions of the state does not serve to dissolve or terminate the existing community college districts or change the nature of such entities or their governing board of trustees." The opinion noted that s. 1.01(9), F.S., (1979) states "where the context permits, the term 'political subdivision' includes 'all other districts in this state." The opinion further noted "the purview and for the purposes of various laws, such terms as 'public bodies,' 'political subdivisions,' or 'subdivisions' apply to and govern special districts."

Again, in spite of this opinion, the appointment of Representative Burnsed was withdrawn by Governor Bob Graham.

In 1983, Representative Vernon Peeples was appointed to the Board of Trustees of Edison Community College. In an April 11, 1983, letter (copy attached) the Honorable Ken Jenne, Chairman, wrote to Representative Peeples informing him that the Committee on Executive Business would not recommend his confirmation based on the language in s. 240.317, F.S. It was the further opinion of the Committee that, even if that statutory provision did not exist, it was a conflict for a legislator to sit as a community college board of trustees member.

The Governor's appointment of three local officers to the board of trustees of a community college is in harmony with the attorney general positions, but violates the long-standing Senate interpretation of the law. This Committee needs to address this issue and make a determination whether holding office as a member of a community college board of trustees while at the same time holding another office of the state, its counties or municipalities, constitutes holding a "state" office in violation of the dual officeholding prohibition of the Constitution.

/pja

Appendix C

THE FLORIDA SENATE

COMMITTEE ON EXECUTIVE BUSINESS

104 Senate Office Building
Tallahassee, Florida 32301
(904) 487-1476

Senator Kenneth C. Jenne, *Chairman*
Senator Franklin B. Mann, *Vice-Chairman*

Jane B. Love, *Staff Director*

April 11, 1983

Honorable Vernon Peeples
Florida House of Representatives
18, House Office Building
Tallahassee, FL 32301

Dear Mr. Peeples:

DATE REAPP'T

Your reappointment to the Board of Trustees of Edison Community College has been referred to the Senate Committee on Executive Business. As Chairman, I am writing to advise you of this committee's stance with regard to the dual officeholding provision of the Florida Constitution and its impact on the appointment of community college trustees.

Subsection (a) of Article II, Section 5, of the Florida Constitution provides in part:

> "No person shall hold at the same time more than one office under the government of the state and the counties and municipalities therein".

Prior to 1979, community college boards were considered "district" offices and not state, county, or municipal offices. However, in 1979, the Legislature amended the statutory language on which the earlier interpretation was grounded. S. 240.317, F.S., was amended to read:

> 240.317 Community colleges; legislative intent. It is the legislative intent that community colleges, constituted as political subdivisions of the state, continue to be operated by district boards of trustees as provided in s. 240.315 and that no department, bureau, division, agency, or subdivision of the state shall exercise any responsibility and authority to operate any community college of the state except as specifically provided by law or rules of the State Board of Education. (Emphasis added.)

Very soon after the amendment became effective, this committee was faced with the appointment of trustees who were simultaneously holding other offices. In light of the new statutory language which expressly declared community colleges to be "political subdivisions of the state" rather than district offices, the committee began to require appointees to resign from their other office before they could be recommended for confirmation as a trustee. In 1980 and 1982, eight appointees were considered, and some appointees declined to resign their other office and instead requested the Governor to withdraw their appointment from consideration as a trustee. This session, there are several trustees with the same problem, and the Office of the Governor has been so advised. In addition to your appointment, there is a county commissioner, a circuit judge, a member of a city board of adjustment, and a civil service commission member. The committee has been assured by the Governor's Office that future appointments of trustees will be more carefully screened for possible dual officeholding conflicts.

The Committee on Executive Business met on Wednesday, April 6. At that meeting, the committee indicated that they will continue to uphold Article II, Section 5 of the Florida Constitution and oppose dual officeholding by junior college trustees. A thorough discussion occurred at that meeting with Mr. John Blue, Director of the Division of Community Colleges and Mr. Steve Kahn, Senate Attorney, both addressing the issue. Mr. Blue indicated he understood the position of the Senate and, from his statement, a willingness to accept the interpretation of Section 240.317, Florida Statutes, by the Senate.

Even if this provision did not exist in the State Constitution, the Committee on Executive Business is of the opinion that there is, in fact, a conflict for a member of the Legislature to sit as a community college board of trustee member. This position by the committee and adopted by the full Senate goes back to June 2, 1975 when, the Senate failed to confirm the reappointment of Representative Walt Young as a trustee of Broward Community College.

As such, you should be advised that the Senate Committee on Executive Business will not recommend your confirmation based on the Constitution and the stated prerogatives that exist in the confirmation process.

We regret any inconvenience this may cause you; however, the committee wants you to be fully aware of their position and give you an opportunity to resign as a trustee prior to the matter being considered by the committee and the Senate.

Sincerely,

Kenneth C. Jenne
Chairman

KCJ/wp
cc: Members of Executive Business Committee
Office of the Governor