

1983 S.C. Op. Atty. Gen. 143 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-87, 1983 WL 142756

Office of the Attorney General

State of South Carolina

Opinion No. 83-87

November 10, 1983

*1 The Honorable D. M. McEachin, Jr.

Member

House of Representatives

District No. 63—Florence County

Drawer 150

Florence, South Carolina 29503

Dear Representative McEachin:

You have requested the opinion of this office on the question of whether the dual office holding provisions of the South Carolina Constitution prohibit a person from serving concurrently on the Florence County Election Commission and on the governing board of the South Carolina Protection and Advocacy System for the Handicapped, Inc.

It is provided in [Article XVII, § 1A of the South Carolina Constitution](#) that ‘. . . no person shall hold two offices of honor or profit at the same time.’ 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 \(1980\)](#).

This Office has previously determined that a member of the Florence County Election Commission holds an office for dual office holding purposes. [See, 1982 Op. Atty. Gen., dated September 24, 1982. \(copy enclosed\)](#)

The South Carolina Protection and Advocacy System for the Handicapped, Inc. (SCP&A System) was created by Act No. 48, 1979 Acts and Joint Resolutions, to advocate on behalf of developmentally disabled and other handicapped persons. Whether a member of the governing board serves as a public officer has not been previously addressed by this Office, and while it appears to be a close question, it is the opinion of this Office that a board member of the SCP&A System would not be a public officer for the purposes of dual office holding.

Legislative intent as to the type of body to be created may be found in at least two instances within the Act. In Section 1 of Act No. 48, codified as [Section 43–33–310, Code of Laws of South Carolina \(1982 Cum. Supp.\)](#), it is stated: ‘It is the purpose of this act to permanently establish as advocate under Section 113 of Public Law 94–103, as amended by 95–602, an eleemosynary corporation already formed under the corporate name, South Carolina Protection and Advocacy System for the Handicapped,’ Inc.’ (Emphasis added.) Further, the Act is entitled:

An Act To Transfer The Responsibility For Advocacy For The Developmentally Disabled Citizens Of This State From The Advocacy Of Handicapped Citizens, Inc., To The South Carolina Protection And Advocacy System For the Handicapped, Inc., and Provide For The Appointment Of A Governing Board For The Latter Named Organization.

(Emphasis added). While the title of an act is not a part of the act, it is valuable in determining legislative intent. 2A [Sutherland Statutory Construction](#), § 47.03. Reading the title of the Act with the body of the Act, it thus appears clear that the legislature intended to create an eleemosynary corporation or organization. There is no language to indicate that a public body or state agency has been created.

*2 For a position to be a public office, it is necessary that some portion of the sovereign powers of the State be exercised. Sanders v. Belue, *supra*. According to [Section 43-33-310](#), the governing board is to ‘monitor and supervise the four regional offices in Charleston, Greenville, Columbia and Florence from a central office in Columbia.’ While the powers and duties of the System itself are enumerated in [Section 43-33-350](#), no additional duties are specified for the governing board. Thus, it is questionable whether members of the governing board are exercising a portion of the sovereign powers of the State.

The SCP&A System is currently authorized and funded under federal legislation, but this basic allotment is supplemented by State funds and in-kind contributions from other sources.¹ In 1983, the legislature appropriated \$247,500.00 for the SCP&A System. 1983 Acts and Joint Resolutions, p. 535. Therefore, the SCP&A System's financial support is derived mainly from public funds. This fact does not make the organization a public body or state agency, or the officers of the body public officers, however. See, [Kentucky Region Eight v. Commonwealth](#), 507 S.W. 2d 489 (Ky. Ct. App. 1974) and [John Grace & Co., Inc. v. State University Construction Fund](#), 44 N.Y. 2d 84, 375 N.E. 2d 377 (1978); Opinion of the Attorney General dated February 26, 1980 (copy enclosed). By that opinion, this Office has previously concluded that the SCP&A System is not a State agency.

Provisions for appointment of board members are set forth in [Section 43-33-330](#). The pertinent portions of that section are as follows:

The South Carolina Protection and Advocacy System for the Handicapped, Inc., shall be governed by a board consisting of twelve members appointed by the Governor, with the advice [sic] for terms of three years and until their successors are appointed and qualify[.] . . . No board member shall serve more than two successive three year terms.²

Retention of the power to appoint by the State (in the form of the Governor) does not necessarily characterize this body as a public one. [Hope Natural Gas Company v. West Virginia Turnpike Commission](#), 143 W.Va. 913, 105 S.E. 2d 630 (1958). Further, the existence or absence of a definite tenure (here, three years) may be considered in determining whether a position is a public office, but that factor is not conclusive. See, [State ex rel. Gibson v. Fernandez](#), 40 N.M. 288, 58 P.2d 1197 (1936); 67 C.J.S. [Officers](#), § 8(c). In addition, this Office has been advised that half of the board members appointed pursuant to [Section 43-33-330](#) have taken an oath of office. The oath is not required by the above-cited statute, and the fact that such an oath has been taken by a person would not necessarily make that person a public officer. See, [State ex rel. Gibson v. Fernandez](#), *supra*; 63 Am.Jur.2d, [Public Officers and Employees](#), § 6.

Based on the foregoing, although the question is a close one, it is the opinion of this Office that one person may serve concurrently on the Florence County Election Commission and on the governing board of the South Carolina Protection and Advocacy System for the Handicapped, Inc., without violating the dual office holding provisions of the Constitution of South Carolina.

Sincerely,

*3 Patricia D. Petway
Staff Attorney

Footnotes

- ¹ U. S. Code Cong. & Ad. News 7360 (1978).
- ² Section 3 of Act No. 48 contains the original language now codified as [Section 43-33-330](#); the phrase ‘with the advice’ is omitted in the original Act.

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