



ALAN WILSON
ATTORNEY GENERAL

March 23, 2018

Mr. W.H. McAbee, III
6925 Liberty Hwy.
Pendleton, SC 29670-9313

Dear Mr. McAbee:

We received your opinion request dated March 12, 2018 regarding dual office holding. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter):

I . . . serve as an elected District Director of the Three & Twenty Creek Watershed District. This watershed district was created by the S.C. General Assembly and is a political subdivision of the State. *See* S.C. Code Ann. § 48-11-10(1); *see also* S.C. Code Ann. § 48-11-210(A)(30). I have also accepted a position to serve as a law clerk to [a circuit judge] starting in August, 2018.

My question is [whether] serving as a judicial law clerk to a circuit court judge [would] be considered an office of honor or profit so that I could not [concurrently] serve as a member of the Three & Twenty Creek Watershed District? I assume for this opinion, and believe that your office has already decided, that service on such a district commission constitutes an office of trust or honor for purposes of S.C. Const. art. VI, § 3.

Law/Analysis:

It is the opinion of this Office that a court would hold that concurrently serving as a district director of a watershed district and as a judicial law clerk does not violate the dual office holding prohibition of the South Carolina Constitution because a judicial law clerk is a "mere employee" and not a public official as contemplated by our state's constitution. *See Sanders v. Belue*, 78 S.C. 171, 172, 58 S.E. 762, 763 (1907).

As alluded to in your letter, the South Carolina Constitution prohibits any persons from holding two offices of honor or profit simultaneously. S.C. Const. art XVII, § 1A. As this Office set out in a 2009 opinion,

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, 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." 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). "One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing, and not occasional or intermittent, is a public officer." *Id.*, 58 S.E. 762, 763. 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).

Op. S.C. Att'y Gen., 2009 WL 3208462 (September 1, 2009). In *Sanders v. Belue*, the seminal South Carolina Supreme Court case quoted above, the Court also opined that "one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere [employee]." *Sanders v. Belue*, 78 S.C. at 172, 58 S.E. at 763.

Our Office has previously opined that serving as a director of a watershed district while concurrently holding another office of honor or profit violates the dual office holding prohibition of the South Carolina Constitution. *Op. S.C. Att'y Gen.*, 1977 WL 24384 (February 2, 1977) ("Such districts are created [by statute, and] have the authority to acquire property by purchase or by condemnation, to borrow money, to sue and be sued, to levy taxes and issue bonds."). Accordingly, the answer to your question turns on whether the position of judicial law clerk constitutes an office of honor or profit for constitutional purposes. *See id.*

The position of judicial law clerk squarely fits the definition of a "mere employee" as contemplated in *Sanders v. Belue*, in that the law clerk only "performs the duties required" of the clerk by the employing judge, even while that judge is a public officer and the clerk is employed in the state judicial system. *See Sanders v. Belue*, 78 S.C. at 172, 58 S.E. at 763. Although a circuit judge unambiguously exercises the sovereign power of the state, their law clerk simply assists the judge in that exercise and the clerk does not independently exercise any sovereign powers. *Cf. id.* Therefore, a court faced with the question presented in your letter most likely would hold that a judicial law clerk is a "mere employee" as contemplated in *Sanders v. Belue*, and absent some fact not stated in your request letter the court would conclude that concurrently


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holding a public office and serving as a judicial law clerk does not violate the dual office holding prohibition of the South Carolina Constitution. *Id.*; see also *Op. S.C. Att'y Gen.*, 1985 WL 259109 (January 11, 1985) (opining that a county Department of Social Services employee who is employed "below the level of county director[] would be an employee rather than an officer.").

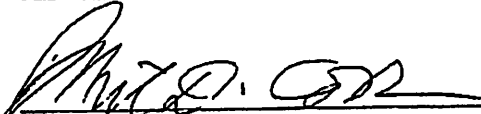
Conclusion:

For these reasons, we opine that concurrently holding the positions district director of a watershed district and judicial law clerk does not violate the dual office holding prohibition of the South Carolina Constitution.

Sincerely,


David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:


Robert D. Cook
Solicitor General