



Office of the Attorney General

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August 29, 1990

The Honorable McKinley Washington, Jr.
Member, House of Representatives
534 Blatt Building
Columbia, South Carolina 29211

Dear Representative Washington:

You have asked for the opinion of this Office as to whether a hearing officer for the South Carolina Department of Corrections may offer for election or serve on a constituent school board of Charleston County, without running afoul of the dual office holding prohibitions of the State Constitution.

Article XVII, Section 1A of the state 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).

This Office has concluded on numerous occasions that one who would serve on a constituent school board of Charleston County would be considered an officer for dual office holding purposes. Enclosed is an opinion dated March 6, 1989, as representative of the numerous previous opinions so concluding.

This Office has apparently never considered whether a hearing officer for the South Carolina Department of Corrections would be considered an office holder for dual office holding; thus, this is a

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question of first impression and is novel. The only source of information about this position is a position description from the Division of Human Resource Management; we have been unable to locate a statute or regulation of the Department of Corrections creating this position. From the position description it appears that no statute created the position, specifies qualifications for the incumbent, or provides for the duties or responsibilities. No oath is required of the incumbent, apparently. Tenure is not for a specified term of years but is "at will," as any classified position in state government would be. Compensation of the incumbent is paid as for any other position of state employment. Additionally, we understand from officials of the Department that a hearing officer does not carry a weapon or undergo the law enforcement certification process which corrections officers or similar employees must undergo.

The duties specified in the position description include tasks relative to direction, administration, and supervision of the disciplinary and adjustment procedures in the state correctional system. A hearing officer monitors agency, state, and federal requirements relative to inmate disciplinary proceedings and adherence thereto, conducts disciplinary and adjudicatory hearings, and carries out other administrative functions relative thereto. The position description uses the term "quasi judicial" in two places at least; however, it is doubtful that the use of the term is intended to confer judicial authority in the traditional sense, particularly in the absence of legislative authorization.

In an analogous situation, this Office has determined that a labor conciliator for the South Carolina Department of Labor would be an employee rather than an officer. Op. Atty. Gen. dated March 27, 1984. On the other hand, we have concluded that an administrative law judge for the Public Service Commission would hold an office for dual office holding purposes. Op. Atty. Gen. No. 83-97. A major distinction between the conclusions of those two opinions and applicable in the instant case would be the presence or absence of statutory provisions creating the position, describing duties and responsibilities, establishing qualifications, and the like.

Based on the foregoing, it is the opinion of this Office that a hearing officer of the South Carolina Department of Corrections would most probably not be deemed to hold an office for dual office holding purposes but would instead be an employee and thus could serve simultaneously as a member of a constituent school board if elected to the position. Because the position description refers to the incumbent as an officer and details some of the tasks as quasi judicial, the question is a close one, however.

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The foregoing is limited to information from the sources as outlined above. This Office is not aware of any policies of the Department of Corrections which might govern political activity of its employees and thus cannot comment thereon. Absent any agency policy which might be applicable, we are not aware of any state law or policy applicable to state employees generally which would prohibit such a candidacy.

With kindest regards, I am


Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosure

REVIEWED AND APPROVED BY:



Robert D. Cook
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