1984 S.C. Op. Atty. Gen. 292 (S.C.A.G.), 1984 S.C. Op. Atty. Gen. No. 84-126, 1984 WL 159932

Office of the Attorney General

State of South Carolina
Opinion No. 84-126
October 29, 1984

**\*1** Arthur G. Fusco
General Counsel
Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

Dear Mr. Fusco:

By your letter of October 18, 1984, you have advised that an individual who is a gubernatorial appointee to the Juvenile Parole Board has been appointed by the Public Service Commission to preside as Administrative Law Judge for the upcoming Southern Bell rate case Commencing November 7, 1984. You have asked whether one person concurrently serving in both positions may contravene the dual office holding provisions of the State Constitution and whether he should resign from his position on the Juvenile Parole Board.

Article XVII, § 1A of the South Carolina Constitution provides 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 considered the question of whether an Administrative Law Judge for the Public Service Commission would be an office for dual office holding purposes, concluding that such would be an office. See Op. Atty. Gen. No. 83–97, dated December 16, 1983, a copy of which is enclosed.

Because of the language of the statute creating the position of Administrative Law Judge, Section 58–3–60, Code of Laws of South Carolina (1983 Cum. Supp.), a question has been raised whether the Judge would be an officer or an employee. The pertinent portion of Section 58–3–60 provides that '[t]he Commission may also <u>employ</u> and utilize administrative law judges . . ..' (Emphasis added.) The term 'employ' means to make use of, to keep at work, or to entrust with some duty. Holland v. Celebrezze, 223 F. Supp. 347 (E.D. Tenn. 1963); Morganthau v. Barrett, 108 F.2d 481 (D.C. App. 1939). The term 'employ' has been used to 'emphasize the idea of service rendered or to be rendered. The meaning of the word is not limited to services which are rendered for wages.' Lutkevicz v. Brennan, 128 Conn. 651, 25 A.2d 66, 67 (1942). In the same context, Section 14–25–25 of the Code provides in part that a 'municipal judge shall not be required to be a resident of the municipality by whom he is employed.' We do not believe that the use of the term 'employ' could be used to defeat the conclusion that an Administrative Law Judge is an officer for dual office holding purposes.

The Juvenile Parole Board was created by Section 2, Part 2 of Act No. 124, 1981 Acts and Joint Resolutions, now codified as Section 20–7–3350 of the Code. The Board acts as the paroling authority to determine the release of children who have been committed by Family Court to correctional facilities of the South Carolina Department of Youth Services; the Board reviews records and conducts hearings to determine whether parole should be granted or, in some cases, revoked. In so acting, the Board is exercising a portion of the sovereign power of the State. Furthermore, Board members are appointed by the Governor for four-year terms. Duties for Board members are specified in Sections 20–7–2115 and 20–7–2095. Board members receive per diem and compensation for actual expenses pursuant to Section 20–7–3370 of the Code. Considering the criteria in Sanders v.

Belue and State v. Crenshaw, supra, this Office concludes that a member of the Juvenile Parole Board would hold an office for dual office holding purposes.

**\*2** You have also asked whether the individual should resign from the Juvenile Parole Board if concurrently holding both positions would constitute dual office holding. In Section 20–7–3350, it is stated that Board members hold office for terms of four years and until their successors are appointed and qualify; the Governor may appoint to fill a vacancy when the Senate is not in session, such member serving in a de facto capacity until the Senate acts upon the appointment. Thus, it would appear that the individual would serve until his successor has been appointed and has qualified. He would be serving in a de facto capacity on the Board, as he would be deemed to have vacated the first office by having accepted a second office, which he would then hold as a de jure officer. See, Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). [1] As a practical matter, the individual may wish to notify the Governor of his appointment as Administrative Law Judge so that the Governor may appoint someone to fill the vacancy, though he would continue to serve on the Board until the vacancy is filled.

We trust that the above satisfactorily responds to your inquiry. Please advise this Office if additional information or clarification should be necessary.

 Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

1    A de jure officer is 'one who is in all respects legally appointed and qualified to exercise the office.' 63 Am.Jur.2d Public Officers and Employees & 495. A de facto officer is 'one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority.' Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

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