

1983 S.C. Op. Att. Gen. 166 (S.C.A.G.), 1983 S.C. Op. Att. Gen. No. 83-97, 1983 WL 142766

Office of the Attorney General

State of South Carolina

Opinion No. 83-97

December 16, 1983

*1 Arthur G. Fusco
General Counsel
Public Service Commission
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Columbia, South Carolina 29211

Dear Mr. Fusco:

By your letter to the Attorney General dated November 18, 1983, you have asked whether an individual may serve on the State Board of Corrections and as an Administrative Law Judge for the Public Service Commission simultaneously without violating the dual office holding provisions of the Constitution of the State of South Carolina. Based upon the following discussion, it is the opinion of the Attorney General that holding both positions simultaneously would be considered dual office holding in violation of constitutional prohibitions.

[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).

Undoubtedly, one who serves on the State Board of Corrections holds an office within the meaning of dual office holding provisions. The State Board of Corrections was created by Act No. 808, 1960 Acts and Joint Resolutions, which has been codified at [Section 24–1–10, et seq., Code of Laws of South Carolina \(1976\)](#). Board members are appointed for six-year terms by the Governor with the advice and consent of the Senate. The board governs the Department of Corrections, which carries out the policy of the State with respect to the prison system. The board is empowered to make rules and regulations, employ a commissioner, and manage and control the prison system. Among other numerous powers, the board may exercise the power of eminent domain, one of the traditional powers of the sovereign. Thus, a member of the State Board of Corrections would hold an office for purposes of dual office holding.

The Public Service Commission was created by Act No. 18, 1935 Acts and Joint Resolutions, presently codified in Section 58–3–10, [et seq.](#) of the Code. A public service commission is generally regarded as ‘an administrative body whose duties demand the exercise of quasi judicial functions.’ [Village of Bridgeport v. Public Service Commission](#), 125 W. Va. 342, 24 S.E. 2d 285, 287 (1943). A commission or an officer is said to be quasi judicial where both ministerial and judicial duties are exercised. [Dunbar v. Fant](#), 170 S.C. 414, 170 S.E. 460 (1933). A review of the powers and duties granted to South Carolina's Public Service Commission, found in Sections 58–3–140, [et seq.](#) of the Code, supports the conclusion that its duties and powers are both ministerial and judicial, and thus labeling the Commission a quasi judicial body is appropriate.

*2 By Section 11 of Act No. 138, 1983 Acts and Joint Resolutions, Section 58–3–60 was amended to permit the Public Service Commission to appoint administrative law judges. The pertinent portion of the amended statute is as follows:

The Commission may also employ and utilize administrative law judges or hearing officers to preside over rate hearings and other contested matters. The administrative law judge or hearing officer has full authority, subject to being overruled by the Commission, to rule on questions concerning the conduct of the case and the admission of evidence but may not participate

in the determination on the merits of any case. The compensation, costs, and expenses incurred incident to utilization of an administrative law judge or hearing officer must be fixed or approved by the Commission and must be included as expenses of the Commission under Section 58–3–100.

The administrative law judge has limited powers: he is to preside over rate hearings and other contested matters, and he has authority to rule on procedural and evidentiary questions. He is not to participate in the determination of the merits of any case, however. The administrative law judge would be termed a quasi judicial officer, as he would exercise both ministerial and judicial duties, particularly the latter as any action he would take in ruling on procedural or evidentiary questions would be the result of judgment or discretion. Dunbar v. Fant, *supra*. He may be said to be exercising a portion of the sovereign power of the state because, unless his decisions are overruled by the Commission, such rulings become the law of the case just as in any tribunal in the state. The fact that the judge's duties appear limited in scope (excluding him from determining the merits of a case, for example) is immaterial; it is the nature of the duties, and not their extent, which makes the incumbent a public officer. Wiley v. City of Sparta, 154 Ga. 1, 114 S.E. 45 (1922); 63 Am.Jur.2d Public Officers and Employees, § 3. Thus, for the purposes of dual office holding, an administrative law judge of the Public Service Commission would be considered an office.¹

If we may be of further assistance, please advise us.

Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

- ¹ Nothing in Sanders v. Belue is to the contrary. While there is language in Sanders to the effect that the duties of an officer may not be merely occasional or intermittent, 78 S.C. at 174, there is no suggestion in Section 58–3–60 that an administrative law judge would function in that capacity on an occasional or sporadic basis.

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