

1982 WL 189238 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

April 5, 1982

*1 James R. Davis, Esquire
Long, Bouknight, Nicholson and Davis
206 East Main Street
Lexington, South Carolina 29072

Dear Mr. Davis:

You have requested the opinion of this Office on the question of whether a person concurrently holding positions on the Board of Directors of Lexington County Public Defender Agency, Inc. and the Lexington County Hospital Board of Trustees would be in violation of the provisions in the South Carolina Constitution prohibiting dual office holding.

It is provided in [Article XVII, Section 1A of the South Carolina Constitution](#) that ‘. . . no person shall hold two offices of honor and profit at the same time.’ Also see Article VI, Section 3. For this provision to be contravened a person must hold two public offices concurrently which have duties involving an exercise of some portion of the sovereign power of the State. [Sanders v. Belue, 78 S.C. 171 \(1907\)](#). 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, 266 S.E.2d 61 \(1980\)](#).

This Office has previously expressed the opinion that a position on a board of trustees for a county hospital is an office in the constitutional sense of the word. See, Opinions of August 5, 1981, June 24, 1980, and March 7, 1979, (copies attached hereto). This conclusion is based on the fact that boards of trustees for county hospitals are created pursuant to state statute and their powers and duties are statutorily enumerated. See §§ 44-7-670 and 44-7-720, [Code of Laws of South Carolina](#), 1976 (as amended). More particularly, the Board of Trustees for Lexington County Hospital is established by Act Number 792 of the 1967 Acts and Joint Resolutions and its powers and duties are further delineated therein.

The question of whether a position on the Board of the Lexington County Public Defender Agency, Inc. is an office under the Constitution is a more difficult one. This Office has expressed the opinion previously that the position of Public Defender is not an office for dual office holding purposes. See, Opinion of February 9, 1971; Opinion of May 26, 1975; and Opinion of April 20, 1979 (copies attached hereto). This result was reached on the basis that public defenders are employed by private eleemosynary corporations which the attorneys in the various counties of the State are given the discretion to establish. This result is supported by the recent U.S. Supreme Court case of [Polk County, et al. v. Dodson](#), 50 Law Week 4077 (decided December 14, 1981). The question involved in that case was whether a public defender acts under color of state law in performing his duties for purposes of an action under [42 U.S.C. § 1983](#). The Court held that in representing indigent defendants in a state criminal proceeding a public defender does not act on the state's behalf or in concert with it. This Office has further taken the position in a previous opinion that ‘. . . if the public defender is not exercising any portion of the sovereign power of the state it is doubtful that the board and employees do also.’ 1977 Op. Att’y. Gen. No. 77-100 (copy attached hereto). Furthermore, an examination of [§ 17-3-60 of the Code of Laws of South Carolina](#), which is the statute providing for the creation of Defender Corporations, reveals that the board of directors of these corporations are given no duties involving the exercise of the sovereign power of the State. The only powers that they are specifically granted are those of selecting and dismissing personnel, receiving funds, and the ordinary and usual functions of boards of directors. Therefore a member of the Board of Directors of the Lexington County Public Defender Agency, Inc. would not hold an ‘office’ for constitutional purposes.

*2 Based on the foregoing, it is the opinion of this Office that a person concurrently serving as a member of the Board of Directors of the Lexington County Public Defender Agency, Inc. and a member of the Board of Trustees of the Lexington County Hospital would not be in violation of the South Carolina Constitution prohibiting dual office holding.

Very truly yours,

Helen T. Zeigler
Staff Attorney

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