

May 4, 2007

Linda C. McDonald, Chief Counsel
South Carolina Department of Transportation
Post Office Box 191
Columbia, South Carolina 29202-0191

Dear Ms. McDonald:

You have sought an opinion regarding dual office holding. By way of background, you provide the following:

[o]n May 1, 2007 the South Carolina Department of Transportation (SCDOT) Commission appointed H. B. Limehouse as the Executive Director of SCDOT. Mr. Limehouse is currently serving on the Citadel Board of Visitors. Mr. Limehouse has requested your opinion as to whether he can continue to hold his office on the Citadel Board of Visitors now that he is acting as SCDOT Executive Director, or whether this would be a violation of the dual office holding provision of Article XVII, Section 1A of the State Constitution.

Law / Analysis

Article XVII, Section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding “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.” In order to contravene this provision, a person concurrently must hold two offices having duties which involve the exercise of some portion of the sovereign power of the State. *Sanders v. Belue*, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office. These include whether a statute, or other such authority establishes the position, prescribes the position’s duties or salary, or requires qualifications or an oath for the position. *State v. Crenshaw*, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

While these decisions recognize all of the foregoing criteria as providing indicia of a public office, our Supreme Court long ago in *Sanders v. Belue*, recognized the exercise of sovereign power,

Ms. McDonald
Page 2
May 4, 2007

or the lack thereof, to be an important consideration. *Sanders* stated that “[o]ne 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.” Conversely, “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.” *Id.*

Addressing your specific question, we have previously recognized that a member of the Citadel Board of Visitors holds public office. *See, Op. S.C. Atty. Gen.*, June 25, 1986. Thus, the question presented by you is whether the Executive Director of SCDOT also constitutes a public officer such that the simultaneous service on both the Citadel Board and as SCDOT Executive Director would constitute dual office holding. In our opinion, one holding the position of SCDOT Executive Director exercises a portion of the sovereign power of the State. Thus, we conclude that the position is an office for dual office holding purposes.

Pursuant to S.C. Code Ann. Section 57-1-410, the SCDOT Commission is empowered to

... employ a director who shall serve at the pleasure of the commission. A person appointed to this position shall be a citizen of practical and successful business and executive ability who has knowledge in the field of transportation. The director shall receive such compensation as may be established under the provisions of Section 8-11-160 and for which funds have been authorized in the general appropriation act.

Section 57-1-430 further provides

(A) *The director must carry out the policies of the commission and administer the affairs of the department and may exercise all powers belonging to the commission within the guidelines and policies established by the commission, when the commission is not in session. He must represent the department in its dealings with other state agencies, local governments, special districts, and the federal government.*

(B) For each division, the director may employ such personnel and prescribe their duties, powers, and functions as he considers necessary and as may be authorized by statute and for which funds have been authorized in the annual general appropriation act.

(emphasis added)

It is, therefore, clear that the position of Executive Director is established by state statute. Moreover, qualifications for the position are set forth in state law as well. And, there is a provision for compensation. We note, however, that no oath is mandated in these particular statutes. Yet, notwithstanding this omission, Section 8-3-10 makes it unlawful for a person to “assume the duties of any public office” without taking “the oath provided by the Constitution” and being “regularly commissioned by the Governor.” And, the fact that a person serves “at pleasure” does not in itself prevent his being an officer; clearly, a deputy sheriff is an officer, yet a deputy serves at pleasure of the Sheriff. *See, Rhodes v. Smith*, 273 S.C. 13, 254 S.E.2d 49 (1979). Thus, neither the absence of requirement of an oath, nor the lack of a term in the governing statutes is controlling.

Therefore, the question of whether or not the SCDOT Executive Director holds an office hinges largely upon the question of the exercise of sovereign power. As noted, the SCDOT Executive Director must “carry out the policies of the commission and administer the affairs of the department and may *exercise all the power of the commission within the policies and guidelines established by the commission, when the commission is not sessions.*” (emphasis added). This broad delegation in certain situations of the same powers as are possessed by the SCDOT Commission, within the limitations and guidelines established by the Commission, leaves little doubt in our mind that the SCDOT Director exercises the sovereign power of the State. There is no question that the members of the Commission themselves exercise sovereign powers. Thus, the bestowal of similar powers, within the limitations set forth in § 57-1-330, insures that the SCDOT Executive Director is a public officer.

Sanders v. Belue, supra is authority for this conclusion. In *Sanders*, our Supreme Court concluded that the superintendent of the county poorhouse and farm was a public officer. This was so, because

... the position of superintendent of the poorhouse and farm is created by statute law, and not by the county board of commissioners. The person to be appointed to the position is designated by statute a “superintendent,” and that term itself connotes the assumption of responsibility and the exercise of discretion in the details of the management of the poorhouse and farm, though subject to the general supervision of the county board of commissioners. The care for the indigent is universally recognized as falling within the sovereign power of the state, and hence the superintendent, in managing the details of the institution provided by the state for the indigent and helpless, exercises a part of the sovereign power. The public is evidently concerned in the performance of these duties; and it is equally evident the duties are not intermittent or occasional, but continuing throughout every moment from appointment to removal or resignation. The position, therefore, comes within all the terms of the generally accepted definitions of a public officer, as distinguished from an employé.

Ms. McDonald
Page 4
May 4, 2007

Likewise, as was the case with the Superintendent in *Sanders*, here, the Executive Director of SCDOT possesses broad authority to “carry out the policies of the commission and administer the affairs of the department,” subject to oversight by the Commission. This bestowal of such considerable discretion and authority in administering the Department which is responsible for South Carolina’s roads, highways and bridges, establishes the position of SCDOT Director as an office.

Moreover, in 1983, we reached a similar conclusion when we found the Commissioner of DSS to be a public officer. In *Op. S.C. Atty. Gen.*, Op. No. 83-90, as here, we analogized that position to the Superintendent in *Sanders v. Belue*. There, we stated the following:

... it is clear that the Commissioner is authorized by the above provision, as well as a number of other statutes relating to D.S.S., to exercise a portion of the State’s sovereign powers. The Commissioner must execute the decisions and carry, out the policies of the Board and see that the laws relating to the activities and responsibilities of the Board are obeyed. § 43-1-50. Various other sovereign functions are specifically delegated by law to the Department of Social Services, see e.g. Chapter 1 of Title 43; again, as the Department's chief executive officer, the Commissioner must insure that these laws are executed. Therefore, just as in *Sanders*, which also involved a chief executive officer of an agency similar in purpose to D.S.S., the Commissioner of D.S.S. necessarily ‘exercises a part of the sovereign power.’ 78 S.C., *supra* at 175. Accordingly, he holds an ‘office’ for purposes of Article XVII, § 1A.

Conclusion

Thus, for all the foregoing reasons, it is our opinion that, notwithstanding the fact that Mr. Limehouse may have been designated the “interim Director” of SCDOT by the Commission, such position is an office for dual office holding purposes. Clearly, as the person designated by law to administer the Department which is responsible for South Carolina’s roads, highways and bridges, the SCDOT Director exercises the sovereign powers of the State. Moreover, the position possesses a number of other indicia of a public officer. Accordingly, the concurrent holding of the positions of member of the Citadel Board of Visitors and SCDOT Executive Director would, in our opinion, constitute dual office holding pursuant to the proscription of Art. XVII, § 1A.

When a dual office holding situation occurs, the law operates automatically to “cure” the problem. If an individual holds one office on the date he assumes a second office, he is deemed by law to have vacated the first office held. Thus, the law operates to create a vacancy in that first office. However, the individual may continue to perform the duties of the previously held office as a *de facto* officer, rather than *de jure*, until a successor is duly selected to complete his term of office (or to assume his duties if the term of service is indefinite). See *Walker v. Harris*, 170 S.C. 242

Ms. McDonald
Page 5
May 4, 2007

(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). Furthermore, actions taken by a *de facto* officer in relation to the public or third parties will be as valid and effectual as those of a *de jure* officer unless or until a court should declare such acts void or remove the individual from office. See, for examples, *State ex rel. McLeod v. Court of Probate of Colleton County*, 266 S.C. 279, 223 S.E.2d 166 (1976); *State ex rel. McLeod v. West*, 249 S.C. 243, 153 S.E.2d 892 (1967); *Kittman v. Ayer*, 3 Stob. 92 (S.C. 1848).

Very truly yours,

Henry McMaster
Attorney General

By: Robert D. Cook
Assistant Deputy Attorney General

RDC/an