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April 18, 1988

Kennerly M. McLendon, Esquire
General Counsel
South Carolina Department of
Mental Health
Post Office Box 485
Columbia, South Carolina 29202

Dear Ms. McLendon:

By your letter of April 11, 1988, you have requested the opinion of this Office as to whether an individual may serve simultaneously as Executive Deputy Commissioner of the South Carolina Department of Mental Health and as a member of the Lexington-Richland Alcohol and Drug Abuse Commission.

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).

In an opinion dated December 10, 1981, this Office concluded that a member of the Lexington-Richland Alcohol and Drug Abuse Commission would hold an office for dual office holding purposes. A copy of the opinion is enclosed herewith. Thus, it is necessary to examine the individual's position with the Department of Mental Health to determine whether it likewise constitutes an office.

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The position of Executive Deputy Director was not created pursuant to a statute. No statute prescribes qualifications for the position or specifies its duties. No oath is required to be taken before its duties may be assumed. The individual is employed at the will of the Department of Mental Health rather than for a specific term of years.

The position description on file with the Division of Human Resource Management of the Budget and Control Board describes the purpose of the position:

Under general supervision of the State Commissioner, plans and directs service programs and administrative activities of the Department of Mental Health. Performs professional duties requiring the analysis of broad problems and the planning of inter-related service program activities. ...

Specific work activities include such things as development of a long-range state mental health plan; maximizing alternate funding mechanisms; development of accountability systems; evaluating effectiveness and efficiency of mental health programs; budgetary matters; maintenance of standards; assisting community mental health boards; and so forth. These duties or activities do not appear to involve an exercise of a portion of the sovereign power of the State.

Because the position of Executive Deputy Director of the South Carolina Department of Mental Health does not appear to meet most of the criteria usually present in an officer, it must be concluded that the position is one of employment. In that regard, the following from Sanders v. Belue, supra, is appropriate:

[O]ne 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.

78 S.C. at 174.

Based on the foregoing, it is the opinion of this Office that one may serve simultaneously as Executive Deputy Director

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of the South Carolina Department of Mental Health and as a member of the Lexington-Richland Alcohol and Drug Abuse Commission without violating the dual office prohibitions of the State Constitution.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP:sds

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

ROBERT D. COOK
EXECUTIVE ASSISTANT FOR OPINIONS