

1983 WL 182042 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 2, 1983

*1 Jeff Boyd
Staff Attorney
South Carolina Court Administration
Post Office Box 50447
Columbia, South Carolina 29211

Dear Mr. Boyd:

You have asked whether service by an Horry County Magistrate on the Board of Directors of the Horry Electric Cooperative, Inc., constitutes dual office holding in violation of the South Carolina Constitution.

[Article XVII, Section 1A, of the South Carolina Constitution](#) provides that no person shall hold two offices of honor or profit at the same time. In [Sanders v. Belue](#), 78 S.C. 177, 58 S.E. 762 (1907), the Court defined a public office as one which is 'created by law,' includes the exercise of some 'sovereign power, either small or great, which the public is concerned,' and requires some continuing performance. In [State v. Crenshaw](#), 274 S.C. 475, 266 S.E. 2d 61 (1980), the Court elaborated upon the criteria to be examined in determining whether a position is a public office; whether the duties, tenure, salary, bond or oath are prescribed or required, and whether the one occupying the position is a representative of the sovereign are other important factors to be considered.

This Office has held consistently in the past that Magistrates hold 'offices' within the meaning of the dual office holding provisions of the Constitution. 1982 Op. Atty. Gen., dated September 3, (unpublished, copy enclosed).

The remaining question then, is whether the position of director of an electrical cooperative is an office within the constitutional meaning. This question is not an easy one. [See](#), 1976 Op. Atty. Gen. dated March 19, (copy enclosed).

This analysis must begin with what an electric cooperative is not. A cooperative 'is not a charitable organization,' even though it is non-profit. [Byrd v. Blue Ridge Electrical Cooperative, Inc.](#), 215 F. 2d 542, 544 (4th Cir. 1954). A cooperative 'is not free from tort liability either as a public body or a charitable organization.' [Byrd](#), *supra* at 547. A cooperative 'is not a governmental agency,' since:

- a) 'the State does not undertake to control its affairs,'
- b) 'the State has not undertaken to name its governing board,'
- c) 'It may be dissolved at the will of its members' and,
- d) 'upon such dissolution, the state receives none of its property.'

[Black River Electric Cooperative, Inc. v. Public Service Commission](#), 238 S.C. 282, 120 S.E. 2d 6 (1961); [Bush v. Aiken Electric Cooperative, Inc.](#), 226 S.C. 442, 87 S.E. 2d 716 (1955). 'Clearly a cooperative is not an 'electrical utility.'" [Black River Electric Coop., Inc.](#), *supra*: See also, Folk, [Administrative Law](#), 15 S.C.L.R. 2, 8; Sinkler, Guerard, [Public Corporations](#), 15 S.C.L.R., 185, 193. Neither are cooperatives 'private electrical utilities.' [Heath Springs Light and Power Co. v. Lynches River Electric Cooperative](#), 231 S.C. 34, 97 S.E. 2d 79 (1957).

Instead, a cooperative 'is essentially a business project designed to promote the convenience and material welfare of its members rather than the common good.' Byrd, supra at 545. Thus, although 'there is a collateral benefit to the community as a whole,' 'they [cooperatives] are organized primarily for the benefit of their members.' Black River Electric Coop., Inc., supra at 718. But see, Bookhart v. Central Electric Power Cooperative, 219 S.C. 414, 65 S.E. 2d 781 (1951). In summary, a cooperative is 'a voluntary association to provide its members the benefits of electrical service at the lowest possible cost.' supra.

*2 An application of the Sanders and Crenshaw test to the above, clearly points to the conclusion that a director of an electrical cooperative is not an 'officer.' Duties, tenure, salary and oath are not prescribed by the legislature. Instead, they are left to the discretion of the cooperative. Section 33-49-280, SOUTH CAROLINA CODE OF LAWS, 1976. Further, as can be fairly inferred from the above, a director could not be classified as a 'representative of the sovereign.' Admittedly, sovereign powers (i.e., eminent domain) are delegated to electric cooperatives; however, this is only one factor to be considered in determining whether a position is an 'office' within the meaning of the dual office holding prohibitions of the South Carolina Constitution. Crenshaw, supra. This office has reached this same conclusion in a prior opinion (copy enclosed).¹

In conclusion then, while not free from doubt, my opinion that holding simultaneously the positions of director of a rural electric cooperative and Magistrate would probably not violate the dual office holding prohibitions of the South Carolina Constitution, since the former position does not meet the test for an 'office,' as set forth in Sanders and Crenshaw.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

Footnotes

- ¹ In this opinion, it is evident that the writer struggled with the problem of distinguishing agencies such as housing authorities, etc. The Court in Bush, supra at 718 distinguishes these entities from a co-operative. The difference is that these agencies a) are instrumentalities of the state or a political subdivision, b) they operate exclusively for the benefit of the public, and c) the property they own is public property.

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