

1980 S.C. Op. Atty. Gen. 30 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-9, 1980 WL 81893

Office of the Attorney General

State of South Carolina

Opinion No. 80-9

January 23, 1980

*1 The Honorable L. Marion Gressette
Member
South Carolina Senate
Box 346
St. Matthews, South Carolina 29135

Dear Senator Gressette:

You have inquired whether membership on the South Carolina Public Service Merit Selection Panel constitutes an office within the meaning of the dual officeholding provision of the Constitution.

The most appropriate definition of public officer appears to be that laid down in [Sanders v. Belue, 78 S.C. 171](#), which reads as follows:

One 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.

The Merit Selection Panel is created by an act approved by the Governor July 18, 1979 (79 Acts 351). It is composed of three members elected by the House of Representatives, three members elected by the Senate and five members appointed by the Governor. The Panel meets at least once annually and at such other times as designated by the chairman, who is appointed by the Governor. The Panel nominates Candidates for election to the South Carolina Public Service Commission by a procedure whereby it presents to the General Assembly the names of two persons whom it finds best qualified for election to membership on the Public Service Commission. The Panel, by unanimous vote, may submit only one name or three names to fill any such vacancy. The General Assembly may reject all such candidates to nominated, in which event the same procedures are followed in the nominating process by the Merit Selection Panel, and other names would thereby be submitted to the General Assembly. No person shall be eligible for election to the Public Service Commission unless he is nominated by the Merit Selection Panel.

The position of membership on the Merit Selection Panel appears to meet all of the indicia of a public officer as defined in [Sanders v. Belue](#), with the exception of the exercise of a portion of the sovereign power. I am persuaded by consideration of procedures adopted in naming membership to the other agencies of the State by an equivalent process and in at least one instance by elective process. In those instances, private entities, such as professional organizations or associations, are vested with the nominating power given to the Merit Selection Panel. For example, the South Carolina psychological Association submits a list of five persons considered by it to be qualified candidates for appointment by the Governor to membership on the State Board of Examiners in Psychology, and from this list, the Governor shall select the person to be appointed by him. See, also, Section 40-35-20 (State Board of Examiners for Nursing Home Administrators), Section 40-19-30 (State Board of Funeral Services), Section 40-21-40 (State Board of Engineering Examiners), Section 40-23-20 (Board of Certification of Environmental Systems Operators), and Section 40-37-40 (Board of Examiners in Optometry and Opticianry). In other instances, election to membership is made by similar private organizations or entities. See, Section 59-121-10 (Board of Visitors of The Citadel). Irrespective of whether such authority being vested in private, non-governmental bodies is constitutional, it is statutory recognition that the powers of nomination or election do not involve an exercise of the sovereign power. The function of the Merit Selection Panel is not advisory but, to an extent, is selective with the ultimate power of election between alternative candidates resting in the General Assembly.

*2 The question is extremely close but, in my opinion, the position of membership on the Merit Selection Panel is not an office, and occupancy thereof by an officer of the State would not be violative of the dual office holding provisions of the Constitution.
Very truly yours,

Daniel R. McLeod
Attorney General

Membership on public Service Merit Selection Panel does not constitute an office within the meaning of the dual officeholding provision of the Constitution.

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