

1978 WL 34991 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 21, 1978

*1 Mr. P. G. Reeves, Jr.
Deputy Commissioner
Administrative Services
S.C. Department of Mental Health
P. O. Box 485
Columbia, SC 29202

Dear Mr. Reeves:

You have asked this Office for an opinion whether there is any violation of State law if a member of the S.C. General Assembly is also an employee with the Department of Mental Health. You also have asked if such an employee would be ethically restricted from voting on matters involving the Department of Mental Health and whether he would be able to serve on the Legislative Governor's Committee on Mental Health and Mental Retardation.

A member of the S.C. General Assembly holds a position constituting a public office. However, a person serving as a State employee with a State agency such as the Department of Mental Health is an employee, rather than a public officer. 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. 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.

[Sanders v. Belue](#), 78 S.C. 171, 174, 58 S.E. 762 (1907).

Under these circumstances, a position of employment with the state is not incompatible under the provision of [Article 17, Section 1A of the South Carolina Constitution](#) (prohibiting the holding of two offices of honor or profit at the same time) with the holding of a position of public office with the S. C. General Assembly. 1967-68 [Ops. Atty. Gen.](#) No. 2531, p. 223. Providing that the Department of Mental Health determines that an employee has the time to adequately fulfil his job requirements with the state and also serve as a member of the General Assembly, I know of no other law that would be applicable or that would prohibit an individual serving in both capacities.

With regard to ethical restrictions concerning a State employee who is also a member of the General Assembly, the pertinent provisions of the Ethics, Conduct, Campaign Practices and Disclosures Act, [S.C. Code Ann. §§ 8-13-10](#), [et seq.](#) (1976), as amended, would be applicable. The provisions of this law generally prohibit any public official or public employee from using his official position or office to obtain financial gain for himself. In any matters where a member of the General Assembly is voting on a question which might affect his financial interests as a State employee, [S.C. Code Ann. § 8-13-460](#) states:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which in his opinion would substantially affect directly his personal financial interests or those of a member of his household, or a business with which he is associated, shall instead take the following actions:

*2 (a) prepare a written statement describing the matter requiring action or decisions, and the nature of his potential conflict of interest with respect to such action or decision;

(b) if he is a legislator, he shall deliver a copy of such statement to the presiding officer of his legislative branch, the presiding officer if requested by the legislator shall cause such statement to be printed in the journal and, upon request, shall excuse a legislator from votes, deliberations, and other action on the matter on which a potential conflict exists; provided, however, any statement delivered within 24 hours after the action or decisions shall be deemed to be in compliance with this section. . . .

You have also asked whether a member of the General Assembly, who is an employee of the Department of Mental Health can serve on the Legislative Governor's Committee on Mental Health and Mental Retardation (formally the Mental Health Study Committee). This is an advisory committee created under [S.C. Code Ann. § 2-39-10 \(1976\)](#), which provides:

There is hereby created a committee of 12 members, four of whom shall be members of the Senate to be appointed by the President of the Senate; four of whom shall be members of the House of Representatives to be appointed by the Speaker of the House; and four members to be appointed by the Governor, None of the Governor's appointees shall be members of the Legislature

Since the function of the Governor's Committee on Mental Health and Mental Retardation is to act as a liaison group between the legislative and executive branches and the members of the Board do not exercise a portion of the sovereignty, serving in an advisory capacity only, membership on the Committee on Mental Health and Mental Retardation is not an office within the constitutional proscriptions on dual office holding. 1974-75 [Ops. Atty. Gen.](#), No. 4190, p. 242. I hope this provides sufficient information.

With kind regards, I remain
Very truly yours,

Nathan Kaminski, Jr.
Assistant Attorney General

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