

1975 WL 29085 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 19, 1975

*1 The position of Commissioner of the South Carolina Aeronautics Commission constitutes an 'office' within the purview of Article XVII, Section 1A of the State Constitution which prohibits dual office holding; however, Director of the State Energy Management Office does not constitute an 'office' and therefore, both positions may be held simultaneously without violating the Constitution.

TO: Honorable Thomas M. Marchant, III
Member
District Number 20
South Carolina House of Representatives
Box 5656
Greenville, SC 29206

QUESTION PRESENTED:

You have asked this office to advise you as to whether or not it is a violation of state constitutional provisions for an individual to serve simultaneously as Director of the State Energy Management Office and Commissioner of the South Carolina Aeronautics Commission.

STATUTES, CASES, ETC. INVOLVED:

Article XVII, Section 1A, Constitution of the State of South Carolina; Sections 2-51, 2-55 South Carolina Code of Laws (1962), as amended; Executive Order—February 16, 1973, Amendment to Executive Order—December 20, 1973; Act No. 1293 of 1973 Joint Acts and Resolutions of General Assembly of State of South Carolina; Act No. 1136 of 1974 Joint Acts and Resolutions of General Assembly of State of South Carolina.

DISCUSSION OF ISSUE(S):

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. Sanders v. Belue, *supra*, and Edge v. Town of Cayce, *supra*, state the criteria for determining what is a public office:

One who is charged by law with the 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.

Sections 2-51 and 2-55 provide for the establishment of the Aeronautics Commission as an official governmental agency and therefore empower it through the actions of its Commissioner to exercise a portion of the sovereign authority of the State. Accordingly, membership on the Commission would constitute the holding of an office of honor or profit.

There is no apparent constitutional authority for the establishing of the State Energy Management Office nor is there any enabling legislation which creates, structures, or in any manner spells out the duties of this office. The legislature provided

supplemental appropriations for the Energy Management Office in 1973 (Act No. 1293, Joint Acts and Resolutions of General Assembly of State of South Carolina 1973) and subsequently, allocated funds in excess of \$200,000.00 under the Disaster Preparedness Agency in 1974. (Act No. 1136, Joint Acts and Resolutions of General Assembly of South Carolina 1974). However, such action by the legislature is not considered enabling legislation for the creation of the agency, but only tacit approval of its creation. Furthermore, there is no official executive order establishing the State Energy Management Office under Governor West and no order keeping it active under the present administration, although there is an Executive Order of February 16, 1973, establishing and setting forth the duties of the Governor's Energy Management Policy Council, forerunner of the State Energy Management Office.

*2 The findings therefore indicate that the State Energy Management Office was established simply as an arm of the Governor's office of administration pursuant to an executive directive and there is no evidence that the office is anything other than an administrative creation.

The established criteria for determining public office under Sanders v. Belue, supra and Edge v. Town of Cayce, supra, requires that the office be 'charged by law with the duties involving an exercise of some part of the sovereign power . . .'. It is the opinion of this office that an executive order of the Governor does not qualify under the term 'charged by law' since it is of no force and significance from a legal standpoint if it is issued without specific statutory authority. Therefore, an office created at the whim of the Governor and alterable at his will is considered merely an organizational arm of the Governor's Office for administrative purpose and not a legal entity. It is concluded then that the title Director of the State Energy Management Office having been created by executive whim does not constitute an office of honor or profit.

CONCLUSION:

Only the position of Commissioner of the South Carolina Aeronautics Commission constitutes an 'office' and therefore it can be held simultaneously with Director of the State Energy Management Office without directly contravening state constitutional provisions prohibiting dual office holding.

Dudley Saleeby, Jr.
Assistant Attorney General

1975 WL 29085 (S.C.A.G.)