

OFFICIAL OPINION NO. 76-104, Can an employee of the Executive Branch serve in the Legislature?

October 26, 1976

Mr. Robert T. Mullally, Commissioner  
Bureau of Personnel  
State Capitol Building  
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 76-104

**Can an employee of the Executive Branch serve in the Legislature?**

Dear Mr. Mullally:

You have requested an opinion from this office based upon the following factual circumstances.

FACTS:

It has been brought to my attention that some of the employees of the Executive Branch of state government are candidates for the Legislature. It has also been brought to my attention that it may not be legal for said persons to serve in the Legislative Branch of government while being employed in the Executive Branch of same governmental jurisdiction.

Based on the above facts, you ask:

QUESTION:

Can an employee of the Executive Branch of state government serve in the Legislature as an elected Representative or Senator?

There are three variations to this broad question:

1. Could the employee serve if they resigned from the Executive Branch at the same time as

they were elected?

2. Could the employee serve if he took annual leave for the period served in their elected capacity?

3. Could the employee serve if they took "leave without pay" which means that they would still be on the payroll as a state employee but not receiving any compensation?

Article III, Section 12 of our State Constitution provides:

No member of the Legislature shall, during the term during which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased during the term for which he was elected, nor shall any member receive any civil appointment from the Governor, the Governor and Senate, or from the Legislature during the term for which he shall have been elected, and all such appointments and all votes given for any such members for any such office or appointment shall be void; nor shall any member of the Legislature during the term for which he shall have been elected, or within one year after, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

In regard to your broad general question, it is my opinion that Article III, Section 12 does not prohibit a present state employee of the Executive Branch of state government from being a member of the Legislature while continuing in such state employment. Article III, Section 12 first of all prohibits a present legislator from being elected or appointed to a civil *office* in South Dakota, which office has been created or the compensation increased by the Legislature during the elected term of such legislator.

In the case of *Palmer v. State*, 75 N.W. 818 (1889), our Supreme Court was confronted with a case where a legislator was employed by the board of railroad commissioners pursuant to a law passed by the Legislature during the legislator's term of office. The court held the auditor properly denied payment to the legislator for such services saying in part:

The language of the constitution is plain. Its meaning can not be mistaken. The purpose of the provision is apparent. It is intended to preclude the possibility of any member deriving, directly or indirectly, any pecuniary benefit from legislation enacted by the legislature of

which he is a member. It is one of the most important of many reforms attempted by the framers of our organic law. It is intended to remove any suspicion which might otherwise attach to the motives of members who advocate the creation of any offices or the expenditure of public funds. If the employment of plaintiff by the Commissioners did not create contractual relations with the state, it is impossible to comprehend how it can be liable in this action. If the Board was authorized to employ counsel at the expense of the state, and the statute cited clearly clothed it with such authority such employment created a contract with the state. It was a contract authorized by law passed during the term of legislature for which the plaintiff was elected, executed during the term for which he was elected, and in which the constitution expressly declares he shall not be directly or indirectly interested. His case is clearly within the letter and spirit of the constitutional inhibition.

Since your questions deal with *employees* rather than *officers*, it is important to note that there are differences between these two categories as to the requirements of Article III, Section 12. After a discussion of the issues in this matter, my predecessors in office held at 1925-26 AGR 258, 260, and 1957-58 AGR 18, with which I would concur, that the South Dakota Constitution does not prohibit a member of the Legislature to enter into a contract of *employment* with the state when the employment is authorized by the Legislature when the employee was not a member of that body. As to the matter of *officers* (as opposed to employees) running for and being elected to the South Dakota Legislature, Article III, Section 3 of the State Constitution prohibits persons holding "lucrative office" under state or federal law from being a member of the Legislature. In my opinion, state employees (as opposed to officers) do not, by definition, hold a "lucrative office."

In the 1957-58 Opinion cited above, the question was whether the State Livestock Sanitary Board could employ a supervising veterinarian who was running for the Legislature without jeopardizing the individual seat if elected. In reaching the conclusion that the board could so employ this veterinarian inspector, it was noted that his duties would be entirely under the control of the Livestock Sanitary Board and that although every office is an employment, it does not follow that every employment is an office. When an individual holds a position, the duties of which are undefined and which can be changed at the will of the supervisor, there is not an "office" involved, but merely an "employment." (See *Griggs v. Harding County*, 3 N.W. 2d 486 (1942) for additional criteria distinguishing officers from employees.)

Having determined that the South Dakota Constitution does not per se prohibit state *employees* from being a member of the Legislature, there are other legal

considerations that must be addressed.

Title V, USCA §§ 1501 and 1502 deal with the application of the Federal Hatch Act to certain state employees and officers. The provisions of this Act must be recognized as having possible bearing in regard to the questions you ask.

Title V, USCA §§ 1501 and 1502 prohibit a state or local officer or employee, whose principal employment by the state or local agency is in an activity financed in whole or in part by federal government loans or grants, from being a candidate for elective office. Section 1502 (a) 3, setting forth this prohibition, is limited by Section 1502 (c) so as not to apply to:

1. The Governor or Lieutenant Governor of a state or an individual authorized by law to act as Governor;
2. The Mayor of a city;
3. A duly elected head of an Executive Department of a state or municipality who is not classified under a state or municipal merit or civil-service system; or
4. An individual holding an elective office.

Title V, § 1501 (4) defines "state or local officer or employee" as an individual employed by a state or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a federal agency, but does not include: (a) an individual who exercises no functions in connection with that activity; or (b) an individual employed by an educational or research institution, establishment, agency, or system which is supported in whole or in part by a state or political subdivision thereof, or by a recognized religious, philanthropic, or cultural organization.

In addition, I believe it is important to note that Article III, Section 9 of our State Constitution says that each house of the Legislature shall be the judge of the election returns and qualifications of its own members. Decisions made by the Legislature in this regard, however, would not obviate potential problems which may exist under Title V, § 1501 through 1508.

Finally, I believe it is important to note the legislative changes made by the 1976 Legislature with respect to dual compensation (Chapter 37 of S.L. of 1976). The changes made here would relate to the propriety of a state employee also receiving compensation as a state legislator.

In summary, it is my opinion based on the above arguments and authorities that South Dakota state law does not prohibit a state employee from serving in the State Legislature as an elected representative or senator. In certain factual circumstances, however, the effect of Title V, USCA §§ 1501 through 1508, inclusive, would appear to prohibit certain state employees from being a candidate for elective office. If a problem exists on this level, it is my opinion that none of the possibilities raised in the three variations to your broad question would go beyond form to substance and avoid the legal dilemma presented.

Respectfully submitted,

WILLIAM J. JANKLOW  
ATTORNEY GENERAL

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