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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

July 25, 2005

The Honorable J. Allen
Fire Marshal, Irmo Fire District
6017 St. Andrews Road
Columbia, South Carolina 29212

Dear Fire Marshal Allen:

By letter, you requested an opinion of this Office regarding dual office holding. Specifically, you requested that we advise as whether members of fire departments including Fire Marshals are exempted from the dual office holding prohibition.

In your letter, you noted that the Irmo Fire District Fire Chief and Fire Marshal both have been issued Group 1 Constable Commissions pursuant to a provision in the Irmo Fire District charter providing that Fire/Arson Investigators can be commissioned as Group 1 Constables through the South Carolina State Law Enforcement Division (SLED). You explained that following your commission, the South Carolina Criminal Justice Academy (the "Academy") denied your request for constable training. In its letter, the Academy stated that a 1986 Attorney General's Opinion indicates that concurrent service as a Fire Marshal and Constable may constitute a dual office holding violation. However, the Academy noted that the South Carolina Constitution regarding dual office holding had since been amended and encouraged you to seek the assistance of this Office in determining whether service as a Fire Marshal constituted an office holding.

Law/Analysis

Article XVII, Section 1A of the South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, member of a lawfully and regularly organized fire department, constable, or notary public. For this provision to be contravened, a person concurrently must hold two offices which have duties involving an exercise of some portion of the sovereign power of the State. *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe

Fire Marshal Allen

Page 2

July 25, 2005

its duties or salary, or require qualifications or an oath for the position. *State v. Crenshaw*, 274 S.C. 475, 266 S.E.2d 61 (1980). Furthermore, "[O]ne who merely performs the duties required of him under an express contract or otherwise, though such persons themselves be public officers, and though the employment be in or about a public work or business, is a mere employee." *Sanders, supra*, 78 S.C. at 174.

Effective February 8, 1989, 1989 Act No. 9, § 2, ratified the South Carolina Constitution to include members of regularly organized fire departments and constables as those officers exempt from the dual office holding provision. Prior to the 1988 vote of the people and the 1989 ratification, we had advised on several occasions that members of regularly organized fire departments were officers and thus subject to the dual office holding prohibition. *See, Ops. S.C. Atty. Gen.*, February 9, 1981; December 17, 1969. *See also, Ops. S.C. Atty. Gen.*, June 28, 1985; October 26, 1984; June 15, 1984; March 28, 1984 (volunteer firemen, chiefs or otherwise office holders for purposes of dual office holding). *See also, Op. S.C. Atty. Gen.*, October 24, 1986 (assistant county fire marshal officer for purposes of dual office holding). However, following adoption of the Constitutional amendment, we recognized a change in the law, and thus modified our opinion to find that those persons who were members of a lawfully and regularly organized fire department, including a fire chief, were not considered office holders for purposes of dual office holding. *See, Ops. S.C. Atty. Gen.*, January 23, 2001; June 13, 1996; January 19, 1994. *See also, Op. S.C. Atty. Gen.*, December 6, 1995 (volunteer firemen who are members of lawfully and regularly organized fire department no longer hold office for purposes of dual office holding). Accordingly, in our view, the Constitutional amendment effectively exempt members of a fire department, in their capacity as firefighters, from the dual office holding prohibition. The question becomes whether a Fire Marshal is included in the category of those officers exempt from the dual office holding provision.

As noted above, the October 24, 1986 opinion concludes that a Fire Marshal is an office holder for purposes of dual office holding. However, this opinion was rendered prior to the 1989 amendment, which added firemen to the list of those officers exempt from the dual office holding provision.

During a conversation with this Office, you revealed that your duties as Fire Marshal included, but were not limited to the inspection of buildings and the enforcement of the fire code within the jurisdiction of the Irmo Fire District. Similarly, in the aforementioned October 24, 1986 opinion, we advised that "investigating origins of fires, inspecting buildings or premises, requiring conformance with fire codes, subpoenaing witnesses..." all

Fire Marshal Allen

Page 3

July 25, 2005

constituted evidence of an exercise of sovereign power. *Id.* Accordingly, we concluded that an Assistant County Fire Marshal exercising such duties would hold an office for purposes of dual office holding. *Id.* Historically, we have advised that opinions of this Office are not overruled unless clearly erroneous or unless applicable law has changed. *Ops. S.C. Atty. Gen.*, October 3, 1986. Following review of this matter, we advise that a Fire Marshal does not fall within the category of offices exempt from the dual office holding prohibition as a result of the 1989 Constitutional amendment.

A previous opinion, dated May 24, 1995, indicates that the 1989 amendment regarding the exemption of members of lawfully and regularly organized fire departments from the dual office holding provision does not to extend beyond those individuals' capacity as firemen. While we recognize that a Fire Marshal might also be a member of such a fire department, the 1995 opinion indicated that a person would be exempt from the dual office holding provision only in his capacity as a fireman.

There, we stated:

[t]here was a push in the General Assembly, by the state's firemen, to become exempted from the dual office holding prohibitions. The first step was to have the General Assembly in 1987 enact what is now codified at S.C. Code Ann. §8-1-130 (1994 Cum. Supp.):

Any member of a lawfully and regularly organized fire department, county veterans affairs officer, constable, or municipal judge serving as attorney for another city is not considered to be a dual officeholder, by virtue of serving in that capacity, for the purposes of the Constitution of this State.

This statute began as an attempt, while the Constitution was being amended, to exempt firemen from dual office holding. Constables tried to jump on the bandwagon, as did the county veterans affairs officer in a particular locality, as well as a municipal judge serving as a city attorney in another city. Then the Constitution was amended, as indicated above, by a successful referendum in November 1988, with legislative ratification following in 1989.

Fire Marshal Allen

Page 4

July 25, 2005

Clearly, the foregoing strongly suggests that the amendment was intended to exempt only firemen from the dual office holding provision. Although we have extended this reasoning to include a fire chief, we note here that a fire chief serves as the chief fireman of a lawfully and regularly organized fire department. However a fire marshal's duties are somewhat different, encompassing powers more in the way of an inspection and administrative citation capacity. See, McNitt v. City of Phil., 325 Pa. 73, 189 A.300 (1937) [fire marshal is distinguished from fireman].

The distinction is confirmed by a description of the duties of the Irmo Fire Marshall which has been submitted to us for review. Such duties include the following: planning and coordination of the commercial building inspection program; establish and maintain contact with contractors in order to ensure all new and renovated commercial buildings in the fire district are constructed within the parameters of the legally adopted fire code; initiate an origin and cause investigation and perform all follow up activities as necessary in order to determine if possible the origin and cause of the fire; public education; fire code enforcement and "any other duties as requested from time to time" by the Chief. It is also anticipated that the Irmo Fire Chief may be on occasion called upon to perform law enforcement functions and thus has been issued a constable's commission.

The position of fire marshal is established by S. C. Code Ann. Sec. 23-9-30 (b) which states that "[a]ll powers and duties vested in the State Fire Marshal may be exercised by [the] ... resident fire marshal within the area of his service, or any state or local government employee certified by the State Fire Marshal whose duties include inspection and enforcement of state or local fire safety codes and standards, acting under the authority of the State Fire Marshal."

Clearly, the Irmo Fire Marshal exercises the sovereign powers of the State. Thus, it is our opinion that the 1986 opinion concluding that a fire marshal is an office for dual office holding purposes is still valid, notwithstanding the 1989 Constitutional amendment exempting firemen. Even so, no dual office holding situation arises in this instance. As noted above, with the passage of the 1989 Constitutional amendment, the office of constable was added to the list of officers exempt from the dual office holding provision. Following the 1989 amendment, we have consistently advised that a commissioned constable is exempt from the dual office holding provision. *See, Ops. S.C. Atty. Gen.*, February 26, 2001; January 25, 1999; June 3, 1998. *See also, Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 566 S.E.2d 523 (2002). As you noted, you are a Group I Constable, which means that your commission was signed and authorized by the Governor and the Chief of SLED.

Fire Marshal Allen

Page 5

July 25, 2005

Conclusion

Accordingly, it is our opinion that a Group I Constable is exempt from the dual office holding provision. Thus, we advise that concurrent service as a Fire Marshal and a Group I Constable would not violate the dual office holding prohibition. While the position of Fire Marshal of the Irmo Fire District is an office for purposes of dual office holding, the position of constable is expressly exempt from the dual office holding prohibition by virtue of Art. XVII, Section 1A of the State Constitution.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. D. Cook', written over a horizontal line.

Robert D. Cook

Assistant Deputy Attorney General