



HENRY McMASTER
ATTORNEY GENERAL

December 28, 2006

Michael W. Kellems
908 Fairway Drive
New Ellenton, South Carolina 29809

Dear Mr. Kellems:

In a recent letter addressed to this Office, you informed us that you currently serve as councilmember for the City of New Ellenton and are considering running for Fire Chief of the New Ellenton Volunteer Fire Department. Thus, you request an opinion as to whether "holding these two positions [is] considered holding dual offices." Additionally, you ask whether holding the Assistant Chief position would be considered dual office holding.

Law/Analysis

Article XVII, section 1A of the South Carolina Constitution (Supp. 2005) prohibits a person from holding "two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." In order to contravene this provision, a person concurrently must hold two offices having duties that involve the exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 174, S.E. 762, 763 (1907). Furthermore, our courts recognize other relevant considerations in determining whether an individual holds an office, such as, whether a statute, or other such authority, establishes the position, proscribes the position's duties or salary, or requires qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 477, 266 S.E.2d 61, 62 (1980).

Numerous opinions of this Office find positions on city or town councils constitute offices for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., May 9, 2006; May 21, 2004; June 27, 1997. Thus, we must consider whether the position the Fire Chief and the Assistant Fire Chief for the New Ellenton Volunteer Fire Department are also offices for purposes of dual office holding.

In a July 2005 opinion addressing whether members of fire departments are office holders, we commented on the changes made to article XVII, section 1A as a result of a 1989 constitutional amendment. Op. S.C. Atty. Gen., July 25, 2005.

Request Letter
REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11540 • COLUMBIA, SC 29211

In a July 2005 opinion addressing whether members of fire departments are office holders, we commented on the changes made to article XVII, section 1A as a result of a 1989 constitutional amendment. Op. S.C. Atty. Gen., July 25, 2005.

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.

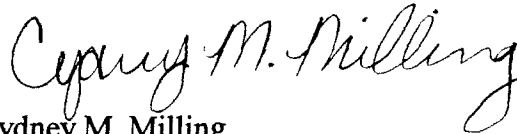
Id. (emphasis added). Thus, because article XVII, section 1A specifically exempts members of “regularly organized fire department[s]” from the dual office holding prohibition, your holding the positions of Fire Chief or Assistant Fire Chief for the New Ellenton Volunteer Fire Department would not constitute an office for purposes of dual office holding.

Michael W. Kellems
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Conclusion

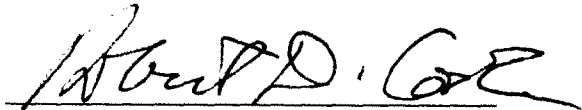
Although your position on the New Ellenton City Council is an office for purposes of dual office holding, the position of Fire Chief and Assistant Fire Chief are specifically exempt from the dual office prohibition. Thus, in our opinion, if selected, you may continue in your position as a member of the New Ellenton City Council while serving as the Fire Chief or Assistant Fire Chief for the New Ellenton Volunteer Fire Department without running afoul of the constitutional prohibition on dual office holding.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General