

March 7, 2008

Mr. Charles H. Smith
South Carolina Forestry Commission
P.O. Box 391
Pickens, South Carolina 29671

Dear Mr. Smith:

We received your letter requesting an opinion of this Office concerning dual office holding. You posed the following question: “Can a state employee whose job responsibilities include supervising forest firefighters and performing law enforcement activities also fulfill responsibilities as a county councilman?” You also inquired, “If it is determined to be a dual office situation, will you clarify if the employee can run for office without violating the dual office holding [prohibition]?”

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, 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.” For this provision to be contravened, a person concurrently must hold two public 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). “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.” Id., 58 S.E. 762, 763. Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, 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).

In numerous prior opinions, this Office has advised that a member of county council holds an office for dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen., January 18, 2006; November 2, 2005; March 18, 2004. We must now determine whether the position of Forestry Technician III, which we understand includes the law enforcement duties of a Basic Officer/ Type III Investigator

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is an office for dual office holding purposes. To make that determination, we will examine the criteria from Sanders v. Belue and the factors from State v. Crenshaw as described above.

The position of Forestry Commission law enforcement officer is established by statute. S.C. Code Ann. Section 48-23-96 (Supp. 2006) provides as follows:

The State Forestry Commission shall appoint law enforcement officers whose terms of office must be permanent unless revoked by the commission. Officers may be removed by the commission on proof satisfactory to it that they are not fit persons for these commissions. These officers shall carry out the law enforcement responsibilities of the commission.

The above section establishes the position of Forestry Commission law enforcement officer, and prescribes the tenure and duties of the position. These factors weigh in favor of finding that a Forestry Commission law enforcement officer holds an office for dual office holding purposes.

Although we have not previously addressed the issue of whether a Forestry Commission law enforcement officer holds an office for dual office holding purposes, we have previously opined that a Commissioner on the Forestry Commission holds an office for dual office holding purposes. In that opinion, we examined the powers and duties of the Forestry Commission, and found that the duties of the Commission “include significant law enforcement authority and oversight.” Although the position of Commissioner is separate and distinct from that of a Forestry Commission law enforcement officer, a portion of that opinion is pertinent to our discussion:

Section 48-23-70 of the South Carolina Code (Supp. 2005) sets forth certain unlawful acts with regard [to] State Forestry Commission land and the criminal penalties associated with these acts. Section 48-23-96 of the South Carolina Code (Supp. 2005) permits the Forestry Commission to appoint law enforcement officers to carry out enforcement of the acts described in section 48-23-70. Moreover, section 48-23-95 of the South Carolina Code (Supp. 2005) allows the Forestry Commission to prescribe and prepare a special official summons form to be used by these law enforcement officers in making arrests.
Op. S.C. Atty. Gen., January 29, 2007

In your letter, you described the position held by the individual in question as that of “a state employee whose job responsibilities include supervising forest firefighters and performing law enforcement activities.” You also stated as follows:

The law enforcement responsibilities are based on the general forestry laws. The individual holding this position is considered a Basic Officer (Type III) and is

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qualified to issue summons and to conduct minor/ routine investigations. This investigator is expected to prepare documentation adequate to support cases. The typical duties are as follows:

1. Make and record pertinent observations en route to and upon arrival at the scene of a forest fire.
2. Identify, protect, and document the point or area of origin.
3. Identify witnesses and secure statements and/or identification.
4. Locate, document, protect, and/or collect physical evidence at the scene.
5. Identify the ignition source, cause, and responsible party.
6. Issue summons for violations of outdoor burning laws and related violations.
7. Issue summons for violations of laws dealing with violations on State Forests.
8. Handle routine smoke complaint and incident investigations.
9. May handle minor timber trespass violations under the guidance of Type I and II Officers.
10. Assist Type I and II with investigations as needed.

The above description you provided includes duties--particularly the power to issue summons--which involve an exercise of the sovereign power of the State. The investigatory duties, such as collecting evidence and securing witness statements, are analogous to the duties of other law enforcement officers, such as police officers or sheriff's deputies. This office has previously advised that a law enforcement officer such as a police officer would be considered an officeholder for dual office holding purposes. Op. S.C. Atty. Gen., September 8, 1992. See also, Crenshaw, supra. The law enforcement duties you described weigh in favor of finding that the position in question is an office for dual office holding purposes.

In our telephone conversation, you referred us to the Director of Human Resources of the S.C. Forestry Commission for further information. Based on the information she provided, it is our understanding that the specific position in question is that of a Forestry Technician III, a position which includes not only supervisory duties (supervision of a forest fire suppression team) and technical duties, but also law enforcement activities. The description she provided lists the following among the job functions of the Forestry Technician III: "As a Type III Investigator, investigates fires to determine causes and damages, conducts forest fire law enforcement activities as described on the attachment titled BASIC OFFICER." The description states that the percentage of time spent on this function is 10 percent.

Even though the principal duties of the Forestry Technician III do not appear to involve the exercise of sovereign power, it does appear that the individual has some continuing law enforcement responsibilities (those of a Basic Officer/Type III Investigator), and thus exercises some portion of the sovereign power of the State on a continuing basis. Under the rule set forth in Sanders v. Belue,

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for a position to be considered an “office,” the duties involving an exercise of some part of the sovereign power of the State may be either “small or great,” but must be “continuing, and not occasional or intermittent.” Sanders v. Belue, *supra*, at 763. Based on the job descriptions provided to us, it appears that the law enforcement duties of a Forestry Technician III are continuing duties.

In other words, while the position does not require the exercise of law enforcement duties even a majority of the time on the job, such law enforcement duties are performed on a regular, as needed basis as part of the position’s responsibilities. Therefore, it is our opinion that the position of Forestry Technician III, which also performs the law enforcement duties of a Basic Officer/ Type III Investigator, is an office for purposes of dual office holding. Moreover, it is our understanding that a constable’s commission is not issued for the position in question; thus, the exception for constables would not apply here.

As we understand the second question posed in your letter, you inquire whether the individual holding the position in question may run for county council without violating the dual office holding prohibition. The prohibition on dual office holding is only contravened when a individual who holds an office assumes a second office. Merely running for an office does not violate the dual office holding prohibition. The problem would arise if the individual holding the first office were elected, took the oath, and began to exercise the duties of the second office. See Op. S.C. Atty. Gen. September 8, 1992. However, we caution that some agencies have other restrictions on the political activity of their employees. Also, consideration of the federal Hatch Act may be necessary if federal funding is involved in the position. Since this Office cannot provide advice on questions of federal law, inquiries concerning the Hatch Act should be directed to the Office of the Special Counsel, United States Merit Systems Protection Board, at 1-800-85-HATCH (42824). Questions regarding the ethical rules on campaign practices (not using public time or resources for campaigning, etc.) may be directed to the State Ethics Commission.

Conclusion

The position of Forestry Commission law enforcement officer, along with the tenure and duties of the position, are established by statute. As we understand from the information provided to us, the individual holding the position of Forestry Technician III also performs the law enforcement duties of a Basic Officer/ Type III Investigator. Although the position of Forestry Technician III does not require the exercise of law enforcement duties even a majority of the time on the job, such law enforcement duties appear to be performed on a regular, as needed basis as part of the position’s responsibilities. Thus, the position has continuing duties involving an exercise of some portion of the sovereign power of the State. Therefore, it is our opinion that the position is an office for purposes of dual office holding.

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The dual office holding prohibition is only contravened when a individual who holds an office assumes a second office. Merely running for an office does not violate the dual office holding prohibition. We caution, however, that persons considering running for office should familiarize themselves with any applicable agency rules, federal restrictions, or ethical considerations.

Sincerely,

Henry McMaster
Attorney General

By: Elizabeth H. Smith
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Assistant Deputy Attorney General

cc: Ms. Lisa McCloud
SC Forestry Commission