



ALAN WILSON
ATTORNEY GENERAL

March 16, 2012

Hubert F. Harrell, Director
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212-3540

Dear Director Harrell:

We received your letter requesting an opinion of this office on behalf of the South Carolina Criminal Justice Academy (the "Academy") regarding the Honorable James A. Preacher, Jr., mayor of the Town of Norway ("Mayor").

The information you provided to us indicates the Town of Norway disbanded its Police Department (the "Department") on August 8, 2011, "due to the lack of funding . . ." On January 12, 2012, the Academy received a "Personnel Change in Status - Hire Form" indicating that Mayor was hired by the Department on January 11, 2012, as a Class 1 law enforcement officer. The Academy also received a "Personnel Change in Status - Hire Form" reporting that another Class 1 law enforcement officer was hired by the Department on January 30, 2012. However, because the Town of Norway Police Department has not been reestablished as a law enforcement agency through the South Carolina Law Enforcement Division ("SLED"), the Academy informed Mayor on January 31, 2012, that the Academy was unable to issue Class 1 law enforcement officer certification to either Mayor or the other individual hired.

Upon information and belief, Mayor appointed himself as "Chief Constable" of the Town of Norway pursuant to the Norway Town Code.¹ You inform us Mayor asserted that he had law enforcement jurisdiction as a "town constable" within the corporate boundary of the Town of Norway. However, we note that in a letter to the Orangeburg County Sheriff's Department dated February 7, 2012, Mayor indicated the Town of Norway "has no active Law Enforcement Department . . . due to lack of funds" and a pending SLED investigation into the Department. Mayor further requested the Orangeburg County Sheriff's Department to provide law enforcement protection for the Town of Norway "until this matter is resolved."

Given this background information, you specifically ask us whether the Town of Norway may employ "town constables" without certification by the Law Enforcement Training Council ["Training Council"]. If so,

¹Upon information and belief, Norway Town Code 13.101 states: "[t]he Law Enforcement Dept. shall consist of a Chief Constable, to be appointed by the Mayor, and such constables and employees as may be appointed by the Town Council, upon recommendation of the chief." Further, Norway Town Code 13.102 provides that "[t]he Chief Constable shall supervise the Law Enforcement Dept. and shall be responsible for security of business establishments and any other matters of public safety and law enforcement as directed by the Council. . . ."

you ask us from where would these “town constables” receive their law enforcement commission and training, and what are the duties and responsibilities of “town constables.” In addition, you ask us whether Mayor may simultaneously serve as mayor of the Town of Norway and a Class 1 law enforcement officer employed by the Town of Norway.

Law/Analysis

A. Lawful authority of the Town of Norway “town constables”

S.C. Code Ann. §5-7-30 relates to the powers conferred upon municipalities and provides, in pertinent part, as follows:

[e]ach municipality of the State, in addition to the powers conferred to its specific form of government, may enact regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State, including the exercise of powers in relation to roads, streets, markets, law enforcement, health, and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order, and good government in it . . .

This provision authorizes the governing body of a municipality to provide police protection for an area located within its city limits. However, a municipality is not required to establish a police force if it does not choose to do so. See Ops. S.C. Atty. Gen., April 20, 2011; April 2, 1996

The Legislature has further enacted a statute providing for the employment by municipalities of police officers. It is provided in §5-7-110 that:

[a]ny municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties.

Police officers shall be vested with all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality. . . .

With respect to this statute, we have previously noted that §5-7-110 gives municipalities “broad authority” regarding a municipal police department. See Ops. S.C. Atty. Gen., April 28, 1998; April 2, 1996. Moreover, as the South Carolina Supreme Court stated Williams v. Town of Hilton Head Island, 311 S.C. 417, 429 S.E.2d 802, 805 (1993), “. . . [S.C. Const. art. VIII] and Section 5-7-30 [taken together] . . . bestow upon municipalities the authority to enact regulations for government services deemed necessary and proper for the security, general welfare and convenience of the municipality or for preserving health, peace, order and good government, obviating the requirement for further specific statutory authorization so long [as] . . . such regulations are not inconsistent with the Constitution and general law of the state.”

Thus, while a municipality is granted broad authority to provide for proper law enforcement in such municipality, we note that these police officers must be certified by the Training Council in order to carry out their law enforcement duties. Section 23-23-40 provides that:

[n]o law enforcement officer employed or appointed . . . by any public law enforcement agency in this State is authorized to enforce the laws or ordinances of this State or any political subdivision thereof unless he has been certified as qualified by the Law Enforcement Training Council, except that any public law enforcement agency in this State may appoint or employ as a law enforcement officer, a person who is not certified if, within one year after the date of employment or appointment, the person secures certification from the council; provided, that if any public law enforcement agency employs or appoints as a law enforcement officer a person who is not certified, the person shall not perform any of the duties of a law enforcement officer involving the control or direction of members of the public or exercising the power of arrest until he has successfully completed a firearms qualification program approved by the council; and provided, further, that within three working days of employment the department must be notified by a public law enforcement agency that a person has been employed by that agency as a law enforcement officer, and within three working days of the notice the firearms qualification program as approved by the director must be provided to the newly hired personnel. If the firearms qualification program approved by the director is not available within three working days after receipt of the notice, then the public law enforcement agency making the request for the firearms qualification program may employ the person to perform any of the duties of a law enforcement officer, including those involving the control and direction of members of the public and exercising the powers of arrest. Should any such person fail to secure certification within one year from his date of employment, he may not perform any of the duties of a law enforcement officer involving control or direction of members of the public or exercising the power of arrest until he has been certified. He is not eligible for employment or appointment by any other agency in South Carolina as a law enforcement officer, nor is he eligible for any compensation by any law enforcement agency for services performed as an officer.

See also S.C. Code Ann. Regs. 38-007 ["Training requirements for Basic Law Enforcement Certification"]. Section 23-23-60 states that the Training Council is ". . . authorized to issue certificates and other appropriate indicia of compliance and qualification to law enforcement officers or other persons trained under the provisions of this chapter."

Pursuant to §23-23-10(D), a "law enforcement officer" is defined as

. . . an appointed officer or employee hired by and regularly on the payroll of the State or any of its political subdivisions, who is granted statutory authority to enforce all or some of the criminal, traffic, and penal laws of the State and who

possesses, with respect to those laws, the power to effect arrests for offenses committed or alleged to have been committed.

The cardinal rule of statutory interpretation is to ascertain the legislative intent whenever possible. Bankers Trust of S.C. v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). A statute as a whole must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). Full effect must be given to each section of a statute, words therein must be given their plain meaning, and phrases must not be added or taken away in the absence of ambiguity. Hartford Acc. & Indemnity Co. v. Lindsay, 273 S.C. 79, 254 S.E.2d 301 (1979).

The obvious intent of §23-23-10 *et seq.* is to ensure that individuals controlling or directing members of the public or exercising the power of arrest have the proper training and maturity.² The standard of training is the basic training course offered by the Academy. If the officer fails to meet the requirements of the Training Council, he or she would be prohibited from performing “any of the duties of a law enforcement officer involving control or direction of members of the public or exercising the power of arrest. . .” Neither Mayor nor any other individual hired by the Department (now disbanded) are certified by the Training Council as Class 1 law enforcement officers. Clearly, under State law, they are included in the category of law enforcement officers subject to the training requirements set forth in §23-23-10 *et seq.* Absent certification by the Training Council as such, they are prohibited from, among other things, exercising the power of arrest or carrying out their law enforcement duties. This office in prior opinions has consistently recognized the mandatory training required by these provisions in order for any law enforcement officer to be empowered with the authority to make an arrest. See Ops. S.C. Atty. Gen., September 6, 1990; May 15, 1986; March 24, 1983; February 1, 1979; May 11, 1978.

²Section 23-23-10 states, in pertinent part:

(A) In order to insure the public safety and general welfare of the people of this State, and to promote equity for all segments of society, a program of training for law enforcement officers and other persons employed in the criminal justice system in this State is hereby proclaimed and this chapter must be interpreted to achieve these purposes principally through the establishment of minimum and advance standards in law enforcement selection and training.

(B) It is the intent of this chapter to encourage all law enforcement officers, departments, and agencies within this State to adopt standards which are higher than the minimum standards implemented pursuant to this chapter, and these minimum standards may not be considered sufficient or adequate in cases where higher standards have been adopted or proposed. Nothing in this chapter may be construed to preclude an employing agency from establishing qualifications and standards for hiring or training law enforcement officers which exceed the minimum standards set by the council, hereinafter created, nor, unless specifically stated, may anything in this chapter be construed to affect any sheriff, or other law enforcement officer elected under the provisions of the Constitution of this State.

We also advised in the February 1, 1979, opinion that, while there are no statutory penalties applicable to a department head who willfully neglects the referenced training requirement:

. . . if a situation develops where there is failure to meet the training requirement, allowing a non-qualified individual to perform the duties of a law enforcement officer may result in possible civil suits or questions regarding the propriety and legality of any actions taken by such individual as a law enforcement officer.

We refer to an opinion of this office dated February 28, 1980, where we addressed whether a city could authorize, by ordinance, police cadets to detain motorists and issue traffic tickets for minor traffic violations. The cadets were not delegated the power to arrest, but could detain motorists for the purpose of issuing traffic summonses for violations committed in their presence. The cadets would be trained in a program operated by the city and directly supervised by an experienced law enforcement officer. Although we recognized that a summons did not rise to the level of an arrest, we advised that the intent of §23-23-10 would nevertheless be thwarted by allowing cadets to detain, *i.e.*, control and direct members of the public, without meeting the basic training requirements specified by state law. Further, we determined that “it is unclear whether the [Legislature] in enacting §23-23-40 meant to include only those individuals empowered to make arrests.” We stated that §23-23-10(D), which defines the term “law enforcement officer,” “specifically allows the term to acquire a meaning as the context of the statute dictates. Since the power to arrest is distinguished from the ability to detain by the use of the word or in §23-23-40 it is the opinion of this office that cadets are to be included within the meaning of that term.” We concluded the city ordinance would conflict with state law regarding training requirements. See also Op. S.C. Atty. Gen., November 26, 1973 [there is no authority permitting the creation of an auxiliary police force with police power under the auspices of a city police department].

However, it is also worth noting that this office has distinguished State constables from other public law enforcement agencies. With respect to State constables, it is the Governor who is the appointing authority. See §23-1-60(A). We have previously advised that SLED has regulatory authority over all commissioned State constables and that those holding State constable commissions must comply with SLED’s training requirements, standards of conduct, and limits on the use of their authority. See Ops. S.C. Atty. Gen., January 6, 2012; September 6, 1990. In fact, we understand that SLED has interpreted the relevant laws to require a constable commissioned by the Governor to undergo the requisite law enforcement training at the Academy if the individual is to have arrest powers. Ops. S.C. Atty. Gen., January 6, 2012; June 5, 1987; cf. State v. Luster, 178 S.C. 199, 182 S.E. 427, 429 (1935) [“. . . state constables possess the authority of regularly commissioned peace officers, including the power of arrest”]. .

Also illustrative is the decision of the South Carolina Supreme Court in Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002), a case discussing whether or not a police officer serving the Town was a constable for purposes of the dual office holding exemption in S.C. Const. art. XVII, §1A. In Richardson, the Court construed this provision in the specific context of the meaning of the term “constable.” Specifically, the Court addressed the issue of whether a municipal police officer was a “constable” for purposes of the exception. The officer argued that because §5-7-110 specifies that “police officers shall be vested with all the powers and duties conferred upon constables,” the exception applied for purposes of dual office holding. The Court rejected this argument, holding that “[r]espondent, in his capacity as a municipal

police officer, is not a constable exempt from the constitutional provisions forbidding dual office holding.” Id., 566 S.E.2d at 527. In the Court’s view, the Legislature “has distinguished between the office of constable and that of municipal police officer.” Id. Relevant to your inquiry, we further note the Richardson Court reasoned that if municipal police officers were “constables” under existing state law, then no express delegation by the Legislature of certain powers of a constable would have been necessary. For purposes of Article XVII, §1A, therefore, the Court concluded that “[a] constable is a person who holds a state commission, is employed in such capacity by a magistrate, or otherwise meets one of the statutory definitions.” Id.

The Richardson Court further articulated which officers were entitled under state law to the ‘constable’ exemption pursuant to Article XVII, §1A. The Court concluded that Governor’s constables appointed pursuant to §23-1-60 were obviously included within the exception. Moreover, the majority decision deemed magistrate’s constables, created by Title 22, Chapter 9 of the Code as “most nearly” meeting the common and ordinary definition of “constable.” Finally, in the view of the majority, certain other law enforcement officers “are required or authorized to obtain state constable’s commissions.” Id. The Court noted that these “several different types of constable’s offices” stand in marked contrast to municipal police officers, who “need not obtain commissions from the governor to exercise the power and duties of a state constable.” Id., 566 S.E.2d at 526. In the Court’s words, these positions are enumerated specifically as follows:

[s]ome law enforcement officers are required or authorized to obtain state constable commissions. Generally, the jurisdiction of these law enforcement officers is circumscribed by statute. See, e.g., S.C. Code Ann. §59-116-20 (1990) (college and university police officers must obtain state constable commissions but their jurisdictions pursuant to such appointment “is limited to the campus grounds and streets and roads through and contiguous to them”); compare, e.g. S.C. Code Ann. §§50-3-310 and -340 (Supp. 2001) (commissioned Department of Natural Resources (DNR) officers “when acting in their official capacity, have statewide authority for the enforcement of all laws relating to wildlife, marine, and natural resources”); see also S.C. Code Ann. §51-3-147 (1976) (commissioned Parks, Recreation and Tourism (PRT) officials have enforcement powers of any state constable.)

The governor is also empowered to appoint special state constables whose jurisdiction “is limited to the lands and premises acquired by the United States government in Aiken, Allendale, and Barnwell counties.” S.C. Code Ann. §23-7-4 (Supp. 2001). These “Savannah River” constables possess “all of the rights and powers prescribed by law for magistrate’s constables and deputy sheriffs and powers usually exercised by marshals and policemen of towns and cities.” S.C. Code Ann. §23-7-50 (Supp. 2001); see also S.C. Code Ann. §58-13-910 (Supp. 2001) (governor authorized to “certify” special offices or constables for the protection of common carriers).

Id., 566 S.E.2d at 526.³ Again, the key distinction which the Richardson Court made with respect to the applicability of the “constable” exemption contained in Article XVII, §1A is whether a particular law enforcement officer must obtain a commission from the Governor “to exercise the powers and duties of a state constable.”

In light of the above authority, it is the opinion of this office that police officers appointed by the Town of Norway would be included within the definition of a “law enforcement officer” for purposes of §23-23-10 *et seq.* Consequently, they are required to comply with the training requirements under State law and must be certified by the Training Council. These individuals may not perform law enforcement duties, including “the control or direction of members of the public or exercising the power of arrest,” until they have successfully completed the requisite training or unless they are otherwise exempted. We advise that to otherwise allow a non-qualified individual to perform duties of a law enforcement officer under the circumstances described may subject the Town of Norway to possible civil liability or questions regarding the legality of any actions taken by such an individual as a law enforcement officer. We are further unaware of any separate statutory authority for the Town of Norway to commission individuals with law enforcement authority. These individuals neither constitute nor are they part of a law enforcement agency within the meaning of §5-7-110.

B. Dual office holding

S.C. Const. art. XVII, §1A 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 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).

In numerous opinions of this office, we have concluded that a mayor holds an office for purposes of dual office holding. See, e.g., Ops. S.C. Atty. Gen., August 30, 2010; October 29, 2009; October 16, 2000; January 25, 1999. Additionally, in numerous prior opinions of this office, we have concluded that a municipal police officer would be deemed to hold an office for dual office holding purposes. See, e.g., Ops. S.C. Atty. Gen., July 28, 2003; July 31, 2000; June 12, 1995; February 4, 1994; November 2, 1994; see also Richardson, 566 S.E.2d at 526 [holding that a municipal police officer is an office holder for purposes of the prohibition against dual office holding, and is not a constable so as to be exempt from the constitutional provision forbidding an individual from holding two offices of honor or profit at same time]. Based on the foregoing authority, we advise that Mayor simultaneously serving as both mayor of the Town of Norway and a commissioned law enforcement officer creates a dual office holding situation.

In fact, we addressed this situation in an opinion of this office dated August 13, 2009. At the time, Mayor was the Ehrhardt Chief of Police and indicated his intent to run for the office of mayor of the Town of

³See also §23-6-21 [commissioning of special constables by the Department of Public Safety]; §58-13-910 [special constables for the protection of common carriers].

Norway. Although we determined there was no specific prohibition to a chief of police running for the office of mayor, we advised that if Mayor “was to be successfully elected as mayor, it would be a violation of the dual office holding provision of the State Constitution to hold both offices simultaneously.”

We further advise that this office has consistently been of the opinion that when a dual office holding situation occurs, the law operates to automatically “cure” the problem. Thus, if an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, §1A (or one of the other applicable constitutional prohibitions against dual office holding), that person is deemed by law to have vacated the first office.⁴ See *Ops. S.C. Atty. Gen.*, July 28, 2003; July 31, 2000; July 13, 1995. For example, in an opinion of this office dated April 28, 1999, we advised that a mayor assuming a position as a correctional officer violated the dual office holding prohibitions, and is further presumed by law to have vacated his position as mayor on the date he assumed the second office. In an opinion dated January 10, 1975, we advised a mayor that his appointment as a conservation officer, an office within the meaning of the dual office holding provisions, while remaining as mayor would operate to vacate his office as mayor.

Applying this concept to the situation presented to us, it appears the law would deem that Mayor vacated his position as mayor of the Town of Norway if he assumes a position as a law enforcement officer.

Moreover, in a recent opinion of this office dated March 5, 2012, we advised that §5-7-180 provides: “[e]xcept where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected.” Thus, §5-7-180 proscribes Mayor from simultaneously holding a position as a law enforcement officer for the Town of Norway. Pursuant to §5-7-210,⁵ Mayor could be required to forfeit his office for violating §5-7-180.

Conclusion

To summarize the above, we would advise that:

1. Pursuant to §5-7-110, the Town of Norway may appoint or elect as many police officers as may be necessary for proper law enforcement of the municipality. However, inasmuch as these individuals are granted law enforcement powers under State law, including the authority to make arrests, they are subject to the training requirements set forth in §23-23-10 *et seq.* Absent law enforcement certification

⁴We have noted, however, that the individual may continue to perform the duties of the previously held office as a *de facto* officer until a successor is duly selected to assume the duties or complete the term of office. While the actions taken by a *de facto* officer are generally held to be valid with regard to third parties, there is no question that such officer is acting under color of law rather than with full *de jure* status which he would possess if there had been no dual office holding. Furthermore, there exists general authority that the protections afforded a *de facto* officer will not be deemed to continue indefinitely, particularly when the public is chargeable with notice that the officer’s status has been reduced to one of *de facto* rather than *de jure*. See *Ops. S.C. Atty. Gen.*, July 28, 2003; July 31, 2000; July 25, 2000; May 7, 1998.

⁵Section 5-7-200(a) provides that “[a] mayor or councilman shall forfeit his office if he . . . (2) violates any express prohibition of Chapters 1 to 17 [of Title 5]; . . .” [Emphasis added].

pursuant to State law, these individuals may not exercise the power of arrest or carry out their law enforcement duties. To otherwise allow a non-qualified individual to perform duties of a law enforcement officer may subject the Town of Norway to possible civil liability or questions regarding the legality of any actions taken by such an individual as a law enforcement officer.

2. Simultaneously serving as mayor of the Town of Norway and a law enforcement officer would constitute dual office holding in contravention of Article XVII, §1A of the South Carolina Constitution. In addition, if Mayor assumes a second office as a law enforcement officer, he is deemed by law to have vacated his first office as mayor of the Town of Norway.
3. For Mayor to serve concurrently as mayor and a police officer of the Town of Norway is prohibited by §5-7-180, which proscribes Mayor from holding any other municipal office or municipal employment (whether or not he is compensated for such position) while in office. Pursuant to §5-7-210, Mayor could be required to forfeit his office for violating §5-7-180.

If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General