ALAN WILSON
ATTORNEY GENERAL

July 19, 2012

Brandy A. Duncan, Esquire
General Counsel
South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, SC 29212-3540

Dear Ms. Duncan:

By letter, you request an opinion of this Office on behalf of the South Carolina Criminal Justice Academy regarding dual office holding. Specifically, you request that we advise as to whether members of fire departments, including fire/arson investigators, are exempted from the dual office holding prohibition. By way of background, you indicate that several fire departments across the State have individuals certified as law enforcement officers based solely on their employment/service as firefighters for their respective fire departments.

Article XVII, §1A of the South Carolina Constitution states 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 a notary public." [Emphasis added]. As concluded by Attorney General Daniel McLeod in an opinion dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that 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). "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. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee." Id., 58 S.E. at 763. Other relevant considerations, as identified by the Court, are whether statutes or other 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).

We have consistently advised that a law enforcement officer, such as a police officer, would be considered an office holder for dual office holding purposes. See, *e.g.*, Ops. S.C. Atty. Gen., March 16, 2012; June 12, 1995; November 2, 1994; February 4, 1994; September 8, 1992; December 11, 1990; see also Ops. S.C. Atty. Gen., March 7, 2008 [Forestry Commission law enforcement officer]; December 19,

2003 [deputy sheriff]; June 21, 1999 [highway patrol officer]; June 13, 1996 [reserve police officer]; cf. Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523, 526 (2002) [holding that a municipal police officer is an office holder for purposes of the prohibition against dual office holding, and is not 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].

In an opinion of this Office dated July 25, 2005, in which we addressed whether members of fire departments are office holders, we commented on the changes made to Article XVII as a result of a 1989 constitutional amendment. Effective February 8, 1989, 1989 S.C. Acts 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., June 28, 1985; October 26, 1984; June 15, 1984; March 28, 1984; February 9, 1981; December 17, 1969. 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., December 29, 2006; 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, we have concluded that the Constitutional amendment effectively exempts members of a fire department, in their capacity as fire chief, assistant fire chief, or firefighters, from the dual office holding prohibition. See Ops. S.C. Atty. Gen., March 3, 2011 [advising that a member of a fire authority, who is also holding law enforcement credentials, would be authorized to sign, as an affiant, a criminal search warrant]; May 18, 2010 [advising that, because of the exception provided in Article VII, §1A, "there would not be any dual office holding violations for an individual holding law enforcement credentials from also serving as a member of a fire department"].

Significantly, this Office in a prior opinion dated June 15, 1984, concluded that one who is an arson investigator for a fire department would also hold an office for dual office holding purposes, because arson investigators exercise a portion of the sovereign power of the State, namely police power. In a subsequent opinion dated October 24, 1986, we advised that a fire marshal is an office holder for purposes of dual office holding. These opinions, however, were rendered prior to the 1989 amendment to Article XVII, which added firemen to the list of those officers exempt from the dual office holding provision.

Subsequently, in an opinion of this Office dated July 25, 2005, we addressed whether a fire marshal is included in the category of those officers exempt from the dual office holding provision. The requester stated that his 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. Referencing the 1986 opinion, we emphasized that "investigating origins of fires, inspecting buildings or premises, requiring conformance with fire codes, subpoenaing witnesses" all 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. Following review of

the authority in this regard, we advised 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.

In addition, an opinion of this Office dated May 24, 1995, concluded 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 recognized that a fire marshal might also be a member of a fire department, the opinion indicated that a person would be exempt from the dual office holding provision only in his capacity as a fireman. We explained as follows:

> [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.
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> 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.
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> 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].
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> 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 news 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.
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> 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."
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> 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. . . .

We reached similar conclusions in opinions of this Office dated June 13, 1996; and February 25, 1992, advising that any member of a fire department who is also certified by and exercising the powers and duties of the State Fire Marshal within that district would be deemed to hold an office for dual office holding purposes.

Based on the foregoing authority, we advise there would not be any dual office holding violations for an individual both serving as a member of a fire department and holding either law enforcement credentials or a position as a fire/arson investigator certified by the State Fire Marshal. However, it is our opinion that an individual holding law enforcement credentials who is simultaneously holding a position as a fire/arson investigator certified by the State Fire Marshal, thereby exercising the sovereign power of the State, *i.e.*, "investigating origins of fires, inspecting buildings or premises, requiring conformance with fire codes, subpoenaing witnesses, [and] taking testimony [, etc.]...", would violate the dual office holding prohibitions of the South Carolina Constitution. See Ops. S.C. Atty. Gen., June 7, 2004; May 24, 1995; February 25, 1992.

We advised in the opinion of this Office dated June 13, 1996:

> . . . you may serve as Fire Chief and as a Certified Fire Marshal without dual office holding problems. If, however, you were to serve also as a reserve police officer at the same time you hold the other two positions and certifications, you would most probably violate the dual office holding prohibitions of the South Carolina Constitution.

Finally, we 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. See Ops. S.C. Atty. Gen., March 16, 2012; July 28, 2003; July 31, 2000; July 13, 1995. However, 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. See Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1933); State v. Coleman, 54 S.C. 282, 32 S.E. 406 (1898); 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 State *ex rel.* McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); Ops. S.C. Atty. Gen., March 16, 2012; May 7, 1998. This *de facto* capacity does carry with it some risk, however. While a *de facto* officer's actions are generally held to be valid with regard to third parties, it is possible that a court might find that the actions of a *de facto* officer are invalid. In this instance, for example, an arson investigator charged with police powers in this State may be performing those duties in a *de facto*, rather than *de jure* capacity. Accordingly, we advise that the wisest course of action in this case would be for such individual to avoid a situation where his/her actions could be called into question. See Op. S.C. Atty. Gen., July 28, 2003.

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