ALAN WILSON
ATTORNEY GENERAL

December 4, 2012

John P. Covington, Chief of Police
Seneca Police Department
P.O. Box 4773
Seneca, SC 29679

Dear Chief Covington:

We received your letter requesting an opinion of this Office regarding a proposed Christmas bonus program for reserve police officers appointed by the Seneca Police Department (the "Department"). You indicate to us that the bonuses "are in no way compensation or pay for hours worked, but rather a gratuity and token of appreciation. Only the years of service with the [D]epartment would dictate the amount of the bonus." You ask us whether the Department may implement the Christmas bonus program.

Law/Analysis

The position of reserve police officer is established pursuant to S.C. Code Ann. §23-28-10 *et seq.* Pursuant to §23-28-20(A), "[t]he chief with the approval of the governing body or its chief operating officer or sheriff may appoint the number of reserve police officers as may be needed but not exceeding the number of regular full-time officers of his department." Furthermore, §23-28-10 defines "reserves" as ". . . persons given part-time police powers without being assigned regularly to full-time law enforcement duties." As to the powers and duties of reserves, §23-28-20(A) states, in part, that "[t]he powers and duties of reserves must be prescribed by the chief . . . ." Section 23-28-70 states further that reserves shall serve and function as law enforcement officers only on specific orders and directions of the chief. Also, it is specifically stated in §23-28-70 that reserves "may not assume full-time duties of law enforcement officers without complying with all requirements for full-time officers." Requirements for becoming a reserve police officer are provided in §23-28-20(C). In addition, §§23-28-30 and -40 provide for the training of reserve police officers.

We addressed the issue of compensation for reserve police officers in an opinion of this Office dated February 24, 1984 (1984 WL 159829). Therein, we noted that:

> Act No. 481, 1978 Acts and Joint Resolutions, provided for the appointment of reserve police officers, defined in Section 1 as 'persons given part-time police powers without being regularly assigned to full-time law enforcement duties.' That Act provided comprehensive treatment on the subject of reserve police officers and, as now codified in Chapter 28 of Title 23, Code of Laws of South

> Carolina (1983 Cum. Supp.), provided the only statutes on the subject. A careful reading of Section 23-28-10 *et seq.* of the Code reveals no provision for compensation of reserve police officers. Arguably, within its comprehensive treatment of the subject, the General Assembly could easily have authorized such compensation, but the General Assembly failed to do so. Thus, it may be implied that the General Assembly intended that reserve police officers not be compensated. [Emphasis added].

We explained that, although §5-7-110 authorized a municipality to "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 as prescribe their duties," because such provision failed to expressly include reserve police officers among those officers who are to be compensated that "it may be inferred that this omission is to be understood as an exclusion . . . and thus, municipalities would not be authorized to fix salaries or otherwise compensate reserve police officers." We further stated:

> [t]he conclusion that reserve police officers, as public officers, are not to be compensated absent specific statutory authorization, is consistent with the general rule stated by the South Carolina Supreme Court in Ridgill v. Clarendon County, 188 S.C. 460, 199 S.E. 683 (1938):
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> > There also can be no doubt that where compensation is claimed for the performance of official duties the officer must be able to support his claim by pointing to some provision of law authorizing it, and the absence of any provision for compensation carries with it the implication that the services of the incumbent are to be rendered gratuitously.
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> 188 S.C. at 466, 199 S.E. at 686. See also 67 C.J.S. Officers §219 and 63 Am.Jur.2d Public Officers and Employees §361.

We thus concluded in the opinion that "no statute authorizes the compensation, by salary or otherwise, of reserve police officers for services rendered." Our conclusion was reaffirmed in later opinions of this Office dated November 30, 1984 (1984 WL 159942), and February 16, 1995 (1995 WL 803325).

In the above-referenced 1995 opinion, we also discussed whether reserve police officers could be paid while performing working activities which are beyond the regular duties of reserves, *i.e.*, duties similar to those of regular law enforcement officers who "moonlight." We then advised that, although such activities of regular officers were permitted by §23-24-10 *et seq.*, the "moonlight" provisions were inapplicable to reserve police officers.

However, 1994 S.C. Acts No. 411, §1 amended §23-24-10 so as to extend the "moonlight" authorization to reserve police officers. The statute now provides that:

> [u]niformed law enforcement officers, as defined in Section 23-23-10, and reserve police officers, as defined in Section 23-28-10(A), may wear their uniforms and use their weapons and like equipment while performing private jobs in their off duty hours with the permission of the law enforcement agency and governing body by which they are employed. [Emphasis added].

Notwithstanding this amended provision, we stated in an opinion of this Office dated October 14, 1994, that compensation for reserve police officers by their police departments is not specified within §23-24-10. We noted that even prior to the 1994 amendment, there was no provision regarding compensation, and that neither the Title to Act 411 nor any of the committee reports or amendments to the bill contained references to compensation by police departments. We observed:

> [t]he literal language of the act permits reserve police officers to wear their uniforms and use their weapons and like equipment while performing private jobs in their off-duty hours with the permission as required therein. Compensation for service as a reserve police officer simply is not addressed within the statute; to conclude otherwise would require adding to the statute and drastically changing its obvious meaning. Such would be a legislative matter, in our view, since such a meaning would remake the statute rather than construe it.

We thus concluded that §23-24-10, as amended, did not authorize reserve police officers to be compensated by their police departments for services rendered as reserve police officers. This opinion, however, failed to address the issue of compensating reserve police officers who "moonlight."

That question was finally addressed in the opinion dated February 16, 1995. We noted that police officers who "moonlighted" are typically paid by the third party employer either directly or by payment to the law enforcement agency which then pays the police officer. In light of the amendment to §23-24-10, we advised that since reserve police officers are placed in the same status as other law enforcement officers with respect to "moonlighting" or employment at private, off-duty jobs, compensation for reserve police officers for "moonlighting" appeared to be part of the legislative intent. We observed, however, that:

> [i]n reaching this conclusion, it is observed that an anomalous result is reached, in that service as a reserve police officer is not compensated, while performing "moonlighting" services may be compensated. The absence of legislative amendment as to the issue of compensation of reserve police officers *per se*, subsequent to the opinion of this Office dated February 24, 1984, strongly suggests that the views expressed therein were consistent with legislative intent. Scheff v Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977). Such determination as to compensation of these officers is a matter of policy to be decided by the General Assembly, however.

See Ops. S.C. Atty. Gen., December 17, 2004 (2004 WL 3058233); March 12, 1997 (1997 WL 208013).

Subsequent to the 1995 opinion, the Legislature amended §23-28-20. See 1995 S.C. Acts No. 85, §1. The statute now specifically provides for compensation for reserve police officers who "moonlight" at private, off-duty jobs in accordance with §23-24-10.[1] The statute provides, in part, that:

> (B) The chief or sheriff, with the approval of the governing body, also shall allow for the compensation of reserve police officers for work done pursuant to Section 23-24-10 when compensation for approved public activities would be paid by a party other than the municipality or county. Reserve officers must be paid for approved public activities the same as off-duty police officers. Work performed for compensation must be in excess of the minimum logged service time required of Section 23-28-70. No additional training, beyond what is required for reserve police officers is required for reserve police officers who receive compensation. [Emphasis added].

Clearly, the Legislature intended to address the compensation of reserve police officers who "moonlight." We note that, because the Legislature failed to address the issue of compensation of reserve police officers *per se*, this again strongly suggests to us that the views expressed in our previous opinions regarding compensation for reserve officers *per se* are consistent with legislative intent in this regard. It therefore remains the opinion of this Office that reserve police officers are not authorized to be compensated by their police departments for services rendered as reserve police officers.

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[1]Prior to the 1995 amendment, §23-28-20 provided that:

> [t]he chief may, in his discretion, appoint such number of reserve police officers as may be needed but not exceeding the number of regular full-time officers of his department. The number of full-time officers shall not be decreased because of the institution or expansion of a reserve force. Each period of time reserves shall serve shall be determined and specified by the chief in writing. The powers and duties of reserves shall be prescribed by the chief and they shall be subject to removal by him at any time. Before assuming their duties reserves shall:
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> (A) Take the oath of office required by law.
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> (B) Be bonded in an amount determined by the governing body of the county, municipality or other political entity which shall be not less than one thousand, five hundred dollars.
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> (C) Successfully complete a course of training specified by the South Carolina Law Enforcement Council and endorsed by the chief who appoints them.

Additionally, we note that Article III, §30 of the South Carolina Constitution provides:

> [t]he General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law ... .

As used in Article III, §30, "extra compensation" has been defined as "any compensation over and above that fixed by law or contract at the time the service was rendered." State *ex rel.* McLeod v. McLeod, 270 S.C. 557, 243 S.E.2d 446, 447-48 (1978). Use of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public employees is unconstitutional if it is greater than that which the State has a contractual or legal obligation to provide. Ops. S.C. Atty. Gen., February 3, 1997 (1997 WL 205801); April 3, 1989 (1989 WL 406130). Further, it is a general rule that a municipal corporation cannot legally bestow a gratuity on an officer or an employee. Ops. S.C. Atty. Gen., February 17, 1999 (1999 WL 397927) [citing 64 C.J.S. Municipal Corp. §1837 (1950)]; February 3, 1997 [same]; see also Op. S.C. Atty. Gen., October 2, 1969 (1969 WL 15317) [advising this Office has consistently expressed the view that the payment of gratuities is not authorized by any public entity of this State]. This Office has opined repeatedly, based on Article III, §30, that bonus pay (or such pay that amounts to bonus payments) is prohibited as being made after services have been rendered or a contract fulfilled. See, *e.g.*, Ops. S.C. Atty. Gen., December 11, 2003 (2003 WL 22970989) [Christmas gifts to sheriff employees]; February 3, 1997 [Christmas gifts to mayor and city council members]; July 19, 1979 (1979 WL 29101) [bonus payments to retiring employees]. Even though Article III, §30 by its terms prohibits only action by the Legislature, this Office has previously concluded that this constitutional provision also serves to limit political subdivisions, such as municipalities, at least in the powers delegated to them by the Legislature. Id.

Moreover, it is well recognized that every expenditure of public funds must be for a public purpose. A public purpose has,

> for its objective the promotion of public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43, 47 (1975). A payment to any individual with no assurance of more than a negligible advantage to the general public does not serve a public purpose within the meaning of the South Carolina Constitution. Id. In the situation described in your letter, it would appear that no one other than the reserve police officer will benefit from this planned expenditure of public funds. Because there is no provision authorizing compensation for reserve police officers, no further services to the municipality are to be rendered and it would appear that the public purpose test would not be met by the proposed expenditure of public funds. Accordingly, if the Department is under

no legal or contractual obligation to pay reserve police officers, the payment of these bonuses would thus be prohibited.

We discussed circumstances similar to the situation presented in your letter in an opinion of this Office dated February 11, 2002 (2002 WL 399635). There, we addressed a proposed payment of a Christmas bonus to volunteer firemen based upon the number of fire calls (about $3.00 per call) they responded to during the year. The bonus program would not be applied to salaried employees. We concluded, however, that since nothing in the enabling legislation for the fire district authorized compensation for volunteer firemen, the Legislature clearly intended for them to be volunteers serving without compensation. We therefore advised that the award of bonus money to the volunteer firemen would be inappropriate. Significantly, we observed that:

> [a] "volunteer" is "a person who performs service without promise of remuneration, either express or implied, and therefore not entitled thereto." [Citation omitted]. Put another way, a "volunteer" is "a person who gives his services without any express or implied promise of remuneration in return" so that he "is entitled to no remuneration whatever for his service." [Citation omitted]. If one is paid for his services, he is not considered a volunteer fireman. [Citations omitted].

See Op. S.C. Atty. Gen., May 5, 1995 (1995 WL 803550) [in the absence of enabling legislation by the Legislature providing for compensation in fire districts, volunteer firemen in those fire districts may not be compensated].

Conclusion

The Legislature provided for the appointment of reserve police officers in §23-28-10 *et seq.* Reserve police officers provide an extremely valuable service to communities in this State. Their service is strictly voluntary, however. No statute authorizes the compensation, by salary or otherwise, of reserve police officers by their police departments for services rendered. The Legislature could easily have authorized such compensation, but its failure to do so implies to us that the Legislature intended reserve police officers not be compensated. Under these circumstances, we advise that payment of any compensation to reserve police officers of the Department, including the proposed bonus or gratuity, would be inappropriate. The only exception for compensation is provided for reserve police officers with respect to "moonlighting" or employment at private, off-duty jobs pursuant to §23-24-10. In such cases, compensation for reserve police officers for approved public activities would need to be paid by a party other than the municipality or county which appointed them.

In addition, this Office has consistently expressed the view that that bonus payments (or such pay that amounts to bonus payments) for public employees are prohibited, pursuant to Article III, §30 of the South Carolina Constitution, as being made after services have been rendered or a contract fulfilled, unless there is a legal or contractual obligation to pay employee bonuses. However, any determination of whether there is a legal or contractual obligation to pay bonuses is a factual one, and this Office will not make such a determination in a legal opinion. See Op. S.C. Atty. Gen., February 17, 1999. Further, it

would appear that the public purpose test for the expenditure of public funds would not be met by such an expenditure by the Department.

If you have any further questions, please advise.

Very truly yours,

N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:

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