



ALAN WILSON
ATTORNEY GENERAL

December 31, 2012

The Honorable Todd Rutherford
Representative, District No. 74
2321 Lincoln Street
Columbia, South Carolina 29201

Dear Representative Rutherford,

We received your letter requesting an opinion of this Office as to whether an individual employed by the South Carolina Department of Mental Health (the "SCDMH") Division of Public Safety as a cadet pending certification as a law enforcement officer is a "public officer" as defined in S.C. Code § 8-1-10 and as used in S.C. Code § 8-1-80 concerning official misconduct. By way of background, you explain that an individual was offered a position as a "Law Enforcement Officer I, Band 4," an entry-level position with the SCDMH Division of Public Safety, Sexually Violent Predator Program. Among other things, the offer was conditional upon certification as a law enforcement officer through the successful completion of training with the South Carolina Criminal Justice Academy (the "SCCJA"). At the time of the alleged misconduct, the individual in question had not yet completed such training nor taken the oath prescribed by the Constitution, but was in fact still working as a cadet and receiving cadet pay. The individual did not have the power of arrest and did not have a badge.

Law/Analysis

The statutory offense for official misconduct is provided for in S.C. Code § 8-1-80 (1976, as amended). That section states:

Any *public officer* whose authority is limited to a single election or judicial district who is guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud, or oppression shall be liable to indictment and, upon conviction thereof, shall be fined not more than one thousand dollars and imprisoned not more than one year.

The presiding judge before whom any public officer convicted under this section is tried shall order a certified copy of the indictment to be immediately transmitted to the Governor who must, upon receipt of the indictment, by executive order declare the office to be vacant. The office must be filled as in the case of the death or resignation of the officer.

§ 8-1-80 (emphasis added). As used in § 8-1-80, "[t]he term '*public officers*' shall be construed to mean all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law." § 8-1-10.

In Sanders v. Belue, 78 S.C. 171, 58 S.E. 762, 763 (1907), the South Carolina Supreme Court provided the following common law definition of a “public officer”:

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 employé....

Our appellate courts have since held that various types of law enforcement officers are “public officers” within the common law meaning or that provided by statute. See, e.g., Edge v. Town of Cayce, 187 S.C. 171, 197 S.E. 216 (1938) (the chief of police of a municipal corporation is a “public officer”); Willis v. Aiken County, 203 S.C. 96, 26 S.E.2d 313, 316 (1943) (stating a deputy sheriff is “a public officer within any definition given by the Courts or text writers”); State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196, (1997) (Highway Patrol officers are “public officials” as defined in § 16-3-1040 concerning threats against a public official and within common law definition); State v. Carter, 324 S.C. 383, 478 S.E.2d 86 (Ct. App. 1996) (municipal police officers are “public officials” for purposes of § 16-3-1040 concerning threats against a public official).

Relying on the common law definition of “public officer” as stated in Sanders, prior opinions of this Office have concluded that an individual holding any certification as a law enforcement officer – i.e., as a Class 1, 2, or 3 law enforcement officer¹ – holds an office for purposes of the dual office holding prohibition found in Article XVII, § 1A of the South Carolina Constitution. See, e.g., Ops. S.C. Att’y Gen., 2012 WL 4836949 (Oct. 2, 2012) (concluding SCCJA instructor certified as a Class 3 law enforcement officer holds an office); 2012 WL 989298 (March 16, 2012) (concluding Class 1 municipal police officer holds an office). Such a conclusion is generally based on our belief that any class of law enforcement certification entails some duties and powers which involve the exercise of some portion of the sovereign power of the State, particularly the power of arrest. See Op. S.C. Att’y Gen., 2012 WL 4836949 (Oct. 2, 2012) (concluding Class 3 officers hold an office even though they do not have same powers and duties of regular police officers as they nonetheless possess some, albeit limited, powers of arrest). Furthermore, we have specifically opined that a Security Officer for the Department of Mental Health holds an office for purposes of dual office holding. See Op. S.C. Att’y Gen., 1980 WL 121203 (May 1, 1980). Therefore, we would have no problem concluding that a Public Safety Officer for the Department of Mental Health who has been certified as a law enforcement officer by the SCCJA is a “public officer” within the meaning of § 8-1-80 or the common law definition.

However, we have never had the occasion to determine whether a cadet who has yet to be certified as a law enforcement officer is a “public officer” in any sense. One statute that is particularly instructive on the matter is § 23-23-40 which provides, part:

No law enforcement officer employed or appointed on or after July 1, 1989, by any public law enforcement agency in this State is authorized to enforce the laws

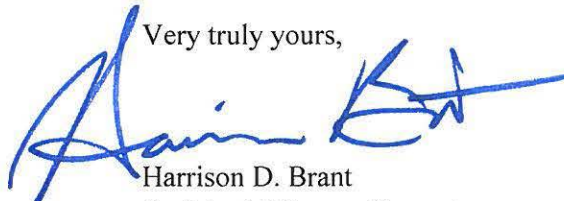
¹ See S.C. Code Regs. 38-007 (setting forth training requirements, powers, and duties associated with different classes of law enforcement certification).

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**

§ 23-23-40 (emphasis added).

The language of § 23-23-40 clearly indicates that a cadet who is not yet certified is prohibited from performing “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” unless and until he has completed the referenced firearms qualification program. Assuming the individual in question had not completed the requisite firearms qualification program and thus was prohibited from performing the duties of a law enforcement officer or exercising the power of arrest, we fail to see how such individual could be considered to have had any duties or powers involving the exercise of some portion of the sovereign power of the State. Therefore, it is our opinion that a cadet who has yet to obtain certification as a law enforcement officer and has not completed the firearms qualification program otherwise required by § 23-23-40 is not a “public officer” within the meaning of § 8-1-80 or the common law definition. We note, however, that a cadet who has completed the firearms qualification program referenced in § 8-1-80 and is thus permitted to perform certain duties and powers of a law enforcement officer including the power of arrest would likely be considered a “public officer.”

Very truly yours,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General