



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

September 17, 2003

Paul S. League, Deputy Chief Counsel  
SC Department of Natural Resources  
Post Office Box 167  
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Dear Mr. League:

You have requested an opinion "regarding the possible application of a recent amendment to the South Carolina Constitution to commissioned law enforcement officers of the South Carolina Department of Natural Resources." By way of background, you have provided the following information:

The relatively recently case of Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002), suggests that the opinions of your office cited above should be reviewed in light of a 1988 Amendment to the Constitution. That amendment added an exemption for one holding the office of Constable from the prohibition of dual office holding. The issue presented in the Richardson case was whether or not a police officer serving the Town of Mt. Pleasant was a Constable for purposes of the dual office holding exemption just referenced. The Supreme Court held that the municipal police officer could not be classified as a Constable. The Court based its opinion, in part, by comparing and contrasting the duties and authority of the municipal police officer with several state authorized enforcement officers, including college and university police officers, commissioned Parks, Recreation & Tourism officials, and Department of Natural Resources officers.

The Supreme Court's opinion did not actually hold that officers such as DNR enforcement officers are Constables for purposes of the exemption from dual office holding. The Court did not fully review all statutes granting authority to DNR enforcement officers. For example, see Wyndham v. United States, 197 F.Supp. 856 (D.C. E.D. South Carolina 1961), citing S.C. Code of Laws § 28-140 (1952) (currently S.C. Code Ann. § 50-3-400), wherein the court stated that "Wardens have powers of constables." However, the manner in which the State Law Enforcement Officers were characterized, in an effort to distinguish them from the Town of Mt. Pleasant police officer, suggests that officers such as DNR enforcement officers may fall under the umbrella of "Constable."

Therefore, I respectfully request your opinion on whether or not Department of Natural Resources enforcement officers (all classes) are Constables for purpose of the exemption from the prohibition against dual office holding in the State Constitution. This is a question of some significance for this agency, in that the question has arisen with some frequency.

### 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 ..." 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).

Previously, we have applied these criteria and concluded that a commissioned officer of the South Carolina Department of Natural Resources is an officer for purposes of the dual office holding provision of the State Constitution. In an opinion dated February 1, 1989, we advised that a commissioned officer with the State Wildlife and Marine Resources Department is an officer. We referenced previous opinions dated July 21, 1986, February 18, 1986 and February 11, 1986, concluding that "a commissioned officer of the State Wildlife and Marine Resources Department would exercise sovereign power and thus be an officer for dual office holding purposes." See also, Op. S.C. Atty. Gen., July 21, 1986 [Wildlife Technician is a commissioned officer with the Wildlife and Marine Resources Department, possessing arrest powers, thereby involving an exercise of sovereign powers; thus such position is an office for dual office holding purposes.] And in Op. S.C. Atty. Gen., Op. No. 2827 (February 4, 1970), we concluded that a conservation officer is a state law enforcement officer charged with enforcing the fish, game, commercial fishing and boating laws of the State and is a public officer of the State. See also, Op. S.C. Atty. Gen., March 24, 1983 [deputy wildlife conservation officer is officer for dual office holding purposes]; Op. S.C. Atty. Gen., September 27, 1982 [same]; Op. S.C. Atty. Gen., August 1, 1979 [same]. Moreover, in Wyndam v. United States, 197 F.Supp. 856 (D.C.E.D.S.C. 1961), the Court concluded that a game warden in South Carolina possesses the "powers of constables" and exercises "all of the power and authorities held and exercised by the constable at common law and under the statutes of this State," standing "on the same footing as a sheriff." Id., quoting State v. Franklin, 80 S.C. 332, 60 S.E. 953, 955.

In 1988, Art. XVII, § 1A was amended by a vote of the people and such amendment became effective by ratification by the General Assembly in 1989. As a result, the Constitution excepted from the prohibition on dual office holding the offices of "constable" and "member of a lawfully and regularly organized fire department." See, Op. S.C. Atty. Gen., February 9, 2001. Since such

amendment became effective, we have apparently not addressed directly the question of whether the position of conservation or wildlife officer of the Department of Natural Resources is included within the term "constable" for purposes of present Article XVII, § 1A.

However, in Richardson v. Town of Mt. Pleasant, supra, the State Supreme Court construed Article XVII, § 1A, as amended, in the specific context of the meaning of the term "constable." There, the Court addressed the issue of whether a municipal police officer was a "constable" for purposes of the Article XVII, § 1A 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.

Nevertheless, the Supreme 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." 566 S.E.2d at 527. In the Court's view, "the General Assembly has distinguished between the office of constable and that of municipal police officer." Id. The Court reasoned that if municipal police officers were "constables" under existing state law, no express delegation by the General Assembly of certain powers of a constable would have been necessary. For purposes of Article XVII, § 1A, 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."

The Richardson Court further articulated which officers were entitled under state law to the "constable" exemption pursuant to Article XVII, § 1A. Governor's constables appointed pursuant to 23-1-60 were obviously included within the exception, concluded the Court. 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." 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

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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).

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." The Courts specifically mentioned "DNR officers" in this context as being included within the exemption. Accordingly, based upon the Court's analysis in Richardson v. Town of Mt. Pleasant, supra, it is evident that the Court has determined (in dicta) that DNR officers are included within the exception.

### **Conclusion**

Based upon the Court's analysis in Richardson v. Town of Mt. Pleasant, supra, it appears that DNR officers who are commissioned by the Governor fall within the exemption for "constables" contained in Article XVII, § 1A. Thus, any DNR officer who is in such category and who holds another office would not be dual office holding in contravention of the Constitution. The information which you have provided indicates that generally DNR officers do receive a commission from the Governor. You have enclosed information which indicates that regular (Class 1) enforcement officers as well as deputy law enforcement officers fall into this category. Accordingly, such officers, as well as any other DNR officials who are in this category, are "constables" within the meaning of Article XVII, § 1A's exemption.

Very truly yours,



Robert D. Cook  
Assistant Deputy Attorney General