



ALAN WILSON
ATTORNEY GENERAL

May 27, 2015

Roger LeDuc
Town of Edgefield Administrator
400 Main Street
Edgefield, SC 29824-1302

Dear Mr. LeDuc:

This Office received your request for an opinion. You inform us that the Town of Edgefield has a volunteer fire department with 30 members and a part-time Chief who is paid \$5,000.00 per year. The Mayor is currently a volunteer and the Assistant Chief of the fire department. You ask if the Mayor can serve as Chief of the fire department while remaining as Mayor if the current Chief retires.

LAW/ANALYSIS:

We will consider whether this would be dual office holding. The South Carolina Constitution provides that "[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." S.C. Const. art. XVII, § 1A.

The South Carolina Supreme Court explains that an "office" for dual office holding purposes is:

"[o]ne 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." Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). "In considering whether a particular position is an office in the constitutional sense, it must be demonstrated that "[t]he power of appointment comes from the state, the authority is derived from the law, and the duties are exercised for the benefit of the public." Willis v. Aiken County, 203 S.C. 96, 103 26 S.E.2d 313, 316 (1943). "The powers conferred and the duties to be discharged with regard to a public office must be defined, directly or impliedly, by the legislature or through legislative authority..." 63C Am Jur.2d Public Officers and Employees § 5 (2009).

Segars-Andrews v. Judicial Merit Selection Commission, 387 S.C. 109, 691 S.E.2d 453 (2010). "Other relevant considerations [as to whether a position is a public office] include: 'whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a

representative of the sovereign; among others.” See Op. S.C. Att’y. Gen., June 17, 2013 (2013 WL 3243063) (quoting State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980)).

A mayor is a public officer. “In previous opinions from this Office, we have advised that a mayor holds an office for purposes of Article XVII, Section 1A’s prohibition on dual-office holding.” Op. S.C. Att’y. Gen., May 2, 2014 (2014 WL 2120885).

The question is whether a chief of a volunteer fire department would be an officer. As we stated above, Article XVII, section 1A of the South Carolina Constitution provides that a “member of a lawfully and regularly organized fire department” is excluded from holding an office. We have determined in prior opinions that as a result of Article XVII, section 1A, “service as a volunteer firefighter does not constitute an office” (Op. S.C. Att’y. Gen., March 20, 2012 (2012 WL 1036294)) and that “members of a fire department, in their capacity as fire chief, assistant fire chief, or firefighters” are exempted “from the dual office holding prohibition” (Op. S.C. Att’y. Gen., July 19, 2012 (2012 WL 3142775)). Based upon the State Constitution, we do not believe that service as a fire chief of a volunteer fire department would constitute an office.

Accordingly, it is our opinion that service as a mayor and as a fire chief of a volunteer fire department would not be a violation of the Constitutional prohibition against dual office holding. However, statutory law must also be considered. Section 5-7-180 provides that “[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.” In a prior opinion, we determined that section 5-7-180 “is, in part, designed to address the common law principle that one cannot be both master and servant at the same time.” Op. S.C. Att’y. Gen., September 9, 2013 (2013 WL 5921571) (quoting Op. S.C. Att’y. Gen., May 21, 2004 (2004 WL 1182071)). In our March 5, 2012 opinion, we stated:

A conflict of interest exists when one individual is both master and servant. The master-servant relationship is based on common law and may be summarized as follows:

[A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.

Op. S.C. Att’y. Gen., March 5, 2012 (2012 WL 889084) (quoting Op. S.C. Att’y. Gen., February 19, 2003)).

The Town of Edgefield has adopted the mayor-council form of government. See Town of Edgefield Code of Ordinances § 2-1. “Under the mayor-council form of government the powers, duties, functions, and responsibilities of municipal government are exercised by a council and a mayor.” Miller v. Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979). Pursuant to section 5-9-30, the mayor is the “chief

administrative officer of the municipality.” S.C. Code Ann. § 5-9-30 (1976 Code, as amended). He has the power “to appoint and, when he deems it necessary for the good of the municipality, suspend or remove all municipal employees and appointive administrative officers provided for by or under Chapters 1 through 17, except as otherwise provided by law, or personnel rules adopted pursuant to Chapters 1 through 17.” Id. Specifically, he appoints the fire chief. Town of Edgefield Code of Ordinances § 18-27. He also has the power “to direct and supervise the administration of all departments, offices and agencies of the municipality except as otherwise provided by Chapters 1 through 17.” S.C. Code Ann. § 5-9-30, supra.

Since the fire chief serves at the pleasure of the mayor and the administration of the fire department is directed and supervised by the mayor, we believe that a court may find that the mayor’s service as fire chief creates a master-servant conflict of interest and violates section 5-7-180.

A concern is section 5-7-200(a), which provides that “[a] mayor or councilman shall forfeit his office if he . . . (2) violates any express prohibition of Chapters 1 to 17. . . .” S.C. Code Ann. § 5-7-200(a) (1976 Code, as amended). Pursuant to section 5-7-200(a), “a violation of section 5-7-180 constitutes grounds for forfeiture of the office of mayor or councilman of a municipality.” See Op. S.C. Atty. Gen., March 20, 2012, supra.

Public policy must also be considered. We stated in a prior opinion:

in Bradley v. City Council of City of Greenville, 212 S.C. 389, 46 S.E.2d 291, 295 (1948), the South Carolina Supreme Court held that, “[i]n the absence of constitutional or statutory provision it is, as said in 42 Am.Jur. 955, Public Officers, Sec. 97, ‘contrary to public policy to permit an officer having an appointment power to use such power as a means of conferring an office upon himself, or to permit an appointing body to appoint one of its own members.’”

Op. S.C. Atty. Gen., March 5, 2012, supra. In our opinion, it would be contrary to public policy for the Mayor to appoint himself as fire chief.

Although you did not ask this Office to address whether the Mayor can serve as a volunteer fireman and we have not been provided with sufficient information to make a determination, we find this service troubling. As stated above, the administration of the fire department is directed and supervised by the Mayor, which appears to be a conflict of interest. Furthermore, a volunteer fireman may be an employee of the Town of Edgefield, which would be a violation of Section 5-7-180. The Town of Edgefield Code of Ordinances provides:

There is hereby created and established a fire department for the town that shall consist of a fire chief and other firefighters. The fire department is a volunteer department, and no fire department personnel are town employees. The fire department and every member thereof shall be authorized within the town to extinguish accidental or destructive fires and to prevent the occurrence or spread of such fires.

Town of Edgefield Code of Ordinances § 18-26 (emphasis added).

However, the court in Miller v. Town of Batesburg, supra, held that a volunteer fireman was an employee of the Town of Batesburg subject to dismissal by the mayor in a mayor-council form of government because he was paid a nominal sum for his services, provided with a small life insurance policy and workers' compensation insurance, and allowed to use equipment owned by the town. The court explained:

The Batesburg Fire Department is an agency of the Town of Batesburg. The buildings, equipment, supplies, and all expenses of the fire department are paid for by the Town of Batesburg. The law would be remiss indeed if the Town of Batesburg was without the authority to determine the manner in which this equipment is used and in whose hands the safety of the citizens of Batesburg is placed. It follows by force of reason that the Town of Batesburg possesses the necessary authority to determine who may serve as a member of the municipal fire department, and under the mayor-council form of municipal government this authority is exercised by the mayor. The designation of a municipal fireman as a "volunteer" does not insulate him from the authority of the mayor under Section 5-9-30(1).

Id (emphasis added).

In other words, labeling a fireman as a "volunteer" does not prevent him from being an employee of the town. If the Edgefield fire department and its firemen receive similar benefits to those provided in the Miller case, a court will find that the Mayor, in his capacity as a volunteer fireman, is an employee of the Town of Edgefield. A violation of section 5-7-180 will have occurred and the forfeiture of office provision of section 5-7-200(a) could be triggered.

CONCLUSION:

This Office concludes:

1. Our opinion is that service as a mayor and as a fire chief of a volunteer fire department would not be a violation of the Constitutional prohibition against dual office holding.
2. Since the fire chief serves at the pleasure of the mayor and the administration of the fire department is directed and supervised by the mayor, we believe that a court may find that the mayor's service as fire chief creates a master-servant conflict of interest and violates section 5-7-180.
3. In our opinion, it would be contrary to public policy for the Mayor to appoint himself as fire chief.

Roger LeDuc
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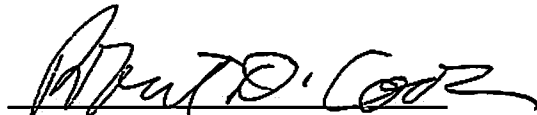
Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Elinor V. Lister".

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in cursive script, appearing to read "Robert D. Cook".

Robert D. Cook
Solicitor General