



ALAN WILSON
ATTORNEY GENERAL

March 19, 2019

The Honorable Stephen L. Goldfinch, Member
South Carolina Senate
PO Box 142
Columbia, SC 29202

Dear Senator Goldfinch:

You have requested an opinion from this Office regarding dual office holding. Specifically, you state the following questions:

1. Is service in the South Carolina State Guard exempt from the Dual Office Holding prohibition?
2. Can a public office holder, such as a city or county prosecutor, serve in the South Carolina State Guard and also become a South Carolina Certified Law Enforcement Officer with the State Guard without violating the Dual Office Holding Prohibition?

LAW/ANALYSIS:

We will begin with a general discussion of dual office holding. Dual office holding is prohibited by the South Carolina Constitution, which provides:

[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 ... The limitation above set forth does not prohibit any officeholder from being a delegate to a constitutional convention.

S.C. Const, art. XVII § 1 A.

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

“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.” 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 for an office are:

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.

Op. S.C. Atty. Gen., 2013 WL 3243063 (June 17, 2013) (quoting State v. Crenshaw, 274 S.C. 475, 478; 266 S.E.2d 61, 62 (1980)).

We will now answer each of the questions presented:

1. Is service in the South Carolina State Guard exempt from the Dual Office Holding prohibition?

Our Office has previously concluded that service as a volunteer commissioned officer in the South Carolina State Guard (“State Guard”) was not a public office. Op. S.C. Atty. Gen., 1994 WL 16852007, No. 28-1994 (Oct. 31, 1994). Under the South Carolina Constitution, an exception was provided for “an officer in the militia.” S.C. Const, art. XVII § 1 A, supra. Since the State Guard was a branch of the militia, we determined that the position of commissioned officer was exempt under the State Constitution. Op. S.C. Atty. Gen., 1994 WL 16852007, supra at *2.

2. Can a public office holder, such as a city or county prosecutor, serve in the South Carolina State Guard and also become a South Carolina Certified Law Enforcement Officer with the State Guard without violating the Dual Office Holding Prohibition?

You are asking if service as a South Carolina Law Enforcement Officer with the State Guard would violate the dual office holding prohibition. We believe that you are referring to the Provost Marshal Detachment (“PMD”) of the State Guard. “The mission of the PMD is to provide highly trained personnel, capable of performing limited Military Police and Specialized Security missions in support of the Governor . . . In order to meet the mission requirements . . . all members of the unit (PMD) must undergo highly specialized and mission oriented training at the direction of the Commander, and certification from South Carolina Criminal Justice Academy and/or South Carolina Law Enforcement Division (SLED).” See South Carolina State Guard website at <http://sg.sc.gov/index.php/professional/>

In a prior opinion, this Office considered whether a fire marshal or arson investigator qualified as a “member of a lawfully and regularly organized fire department” under the State Constitution.¹ Op. S.C. Atty. Gen., 2014 WL 1398590 (March 18, 2014). Relying upon the guidance provided by our State Supreme Court in Richardson v. Town of Mt. Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002),² we considered the broad and popular meaning of the word “member.” Id. at *5, 6. We determined that a “member” encompassed all members of a fire department, not just those who were firefighters. Id. at * 6. In spite of our prior opinions finding the opposite, we concluded that fire marshals and fire investigators who were members of a fire department were exempt for purposes of dual office holding. Id. at *6.

As discussed above, the State Constitution provides an exception for “an officer in the militia.” S.C. Const, art. XVII § 1 A, supra. Under the plain and ordinary meaning of the word “officer,” the exception applies to all officers in the military, without singling any out. In our October 31, 1994 opinion, we determined that a commissioned officer in the State Guard did not hold a public office, although a commanding officer and his subordinates in the State Guard were statutorily invested with the authority of sheriffs and deputy sheriffs to enforce South Carolina law when on active duty. See Op. S.C. Atty. Gen., 1994 WL 16852007, supra; S.C. Code Ann. § 25-3-130 (1976 Code, as amended). Based upon our prior opinions, it is our opinion that it would not be dual office holding for a city or county prosecutor³ to serve as an officer in the Provost Marshal Detachment of the State Guard, where law enforcement certification is required for performance.

CONCLUSION:

As a result of the South Carolina Constitution providing an exemption for “an officer in the militia,” it is our opinion that it would not be dual office holding for a city or county prosecutor to serve as an officer in the Provost Marshal Detachment of the South Carolina State Guard, where law enforcement certification is required for performance.

Sincerely,



Elinor V. Lister
Assistant Attorney General

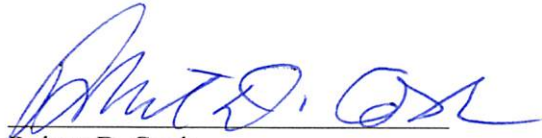
¹ S.C. Const, art. XVII § 1 A, supra.

² In Richardson, our State Supreme Court instructed that it was guided by the ordinary, popular, and plain meaning of the words used when interpreting the South Carolina Constitution.

³ See Op. S.C. Atty. Gen., 2009 WL 2844870 (Aug. 10, 2009) (“an individual simultaneously serving as an assistant solicitor and a part-time city prosecutor would most probably hold dual offices in conflict with the referenced provisions of the State Constitution.”)

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REVIEWED AND APPROVED BY:

A handwritten signature in blue ink, appearing to read "Robert D. Cook", is written over a horizontal line.

Robert D. Cook
Solicitor General