



ALAN WILSON  
ATTORNEY GENERAL

November 3, 2022

Chief Stephen A. Watkins  
Gaston Police Department  
186 North Carlisle Street  
Gaston, SC 29053

Dear Chief Watkins:

You have requested an opinion from this Office regarding whether secondary and off-duty employment of Gaston police officers would constitute a dual commission or violate any other South Carolina laws. You explain that the officers are employed at a car auction/salvage lot in unincorporated Lexington County. They receive a 1099-Misc Income form for their tax records each year. They monitor trail cameras (mostly from their homes and while off-duty) for possible trespassers and complete perimeter checks, looking for any damage to fencing that would allow individuals to enter the property. They are dressed in “plain clothes” and not in any police attire that would give the impression they are law enforcement. They are not conducting enforcement action (ex. arrest, detain, etc.) but are in an “observe and report” status. If a trespasser or an issue arises where law enforcement is needed, the local jurisdiction, the Lexington County Sheriff’s Department, is notified to respond. You inform us that the officers, while working at this secondary employer, serve only as private citizens, dressed in “plain clothes,” employed by a private company on private property.

#### LAW/ANALYSIS

Your first question involves dual office holding. The South Carolina Constitution 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 § 1A.

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)).

In Sanders, the State Supreme Court explained that “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 [employee].” Sanders v. Belue, 78 S.C. at 172, 58 S.E. at 763.

We have concluded on numerous occasions that a municipal police officer holds an office for dual office holding purposes. See Op. S.C. Atty. Gen., 2003 WL 21790892 (July 28, 2003). Therefore, the issue is whether the position at the car auction/salvage lot entails a public office. State law does not provide for the position or its qualifications for appointment, duties, salary, or term. A bond or oath is not required. It does not appear from your description of the duties that the employees of the car auction/salvage lot are exercising the sovereign power of the State. You also inform us that while working at this secondary employer, Gaston officers serve only as private citizens, dressed in plain clothes, employed by a private company on private property.

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In our opinion, the position at the car auction/salvage lot is that of an employee or an independent contractor rather than an office holder. Accordingly, it would not be dual office holding for an individual to serve as both a police officer with the Town of Gaston's Police Department and as an employee or independent contractor of the car auction/salvage lot.

You are also inquiring as to whether the Gaston police officers' secondary and off-duty employment with the car auction/salvage lot would violate any other state laws. Because your question is extremely broad and involves a factual determination,<sup>1</sup> we will generally discuss the law regarding the off-duty employment of law enforcement officers.

Law enforcement officers are specifically authorized to engage in off-duty work or "moonlighting" pursuant to the Off-Duty Private Jobs of Law Enforcement Officers Act ("Act"), S.C. Code Ann. § 23-24-10 *et seq* (1976 Code, as amended). Section 23-24-10 provides:

Uniformed 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.

S.C. Code Ann. § 23-24-10. The State Ethics Commission further determined that "police officers may utilize uniforms, weapons, and like equipment in off-duty security work in accordance with Section 23-24-10 when properly approved by the law enforcement agency and governing body and when no additional public expense is involved." Op. S.C. Ethics Comm., AO92-154 (May 27, 1992) (emphasis added).

Meanwhile, this Office has "repeatedly advised that officers 'moonlighting' . . . retain full law enforcement authority and the right to utilize their agency issued uniforms, weapons, and other equipment when performing such off-duty work within their jurisdiction." Op. S.C. Atty. Gen., 2014 WL 1362648 (March 17, 2014). We opined that "officers moonlighting outside their jurisdiction would be acting as private citizens and have only the law enforcement authority granted to other private citizens." Id (quoting Op. S.C. Atty. Gen., 1994 WL 738179 (Dec. 7, 1994)).

Pursuant to the Act, a uniformed police officer is required to provide notice to the appropriate law enforcement agency of the off-duty work, including the "place of employment, the hours to be worked and the type of employment." S.C. Code Ann. § 23-24-50 (1976 Code, as amended). The head of the agency employing the officer must determine that the off-duty employment meets a certain criteria before approving it:

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<sup>1</sup> See Op. S.C. Atty. Gen., 1989 WL 406130 (April 3, 1989) ("[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions.")

Each agency head shall determine before such off-duty work is approved that the proposed employment is not of such nature as is likely to bring disrepute on the agency, the officer, or the law enforcement profession, and that the performance of such duties and the use of such agency equipment is in the public interest.

S.C. Code Ann. § 23-24-20 (1976 Code, as amended).

Other provisions of the South Carolina Code must also be complied with for off-duty employment. Pursuant to the Private Security and Investigation Agencies Act,<sup>2</sup> a contract security business license is required for “[a]ny person engaged in the contract security business in an individual, self-employed capacity, or as an officer or principal of a corporation, or who furnishes security officers for a fee . . .” S.C. Code Ann. § 40-18-50(A) (1976 Code, as amended). A “contract security business” is defined as “engaging in the security business<sup>3</sup> by providing private patrol, watchman, guard, security, or bodyguard service for a fee.” S.C. Code Ann. § 40-18-20(B)(1) (1976 Code, as amended).

However, section 40-18-50(H) provides an exemption to the licensing requirement for law enforcement officers:

(H) A person is exempt from the provisions of this section if he receives compensation for private employment on an individual, independent contractor basis as a patrolman, guard, or watchman and if he has full-time employment as a law enforcement officer with a state, county, or municipal law enforcement agency. For this exemption to be valid, the person must not be employed by another law enforcement officer.

S.C. Code Ann. § 40-18-50(H) (1976 Code, as amended).

We have stated regarding this exemption:

As we have repeatedly cautioned when discussing the prior, similar version of § 40-18-50(H) this exemption neither authorizes

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<sup>2</sup> S.C. Code Ann. § 40-18-20 et seq (1976 Code, as amended).

<sup>3</sup> A “‘security business’ means the provision of personnel whose duties include watching over, protecting, or defending people or property against intrusion, damage, injury, or loss, and specifically includes, but is not limited to, the following authorities or responsibilities: to allow or refuse access to property or certain areas of property; detect, prevent, or report entry by unauthorized persons; observe for and react to hazards or hazardous situations; observe for and react to violations of law or policy; observe for and react to emergencies; observe for and react to thefts or other incidents; apprehend or report intruders or trespassers; and maintain order or discipline.” S.C. Code Ann. § 40-18-20(B) (1976 Code, as amended).

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a law enforcement officer to own a private security business, nor to contract with or be employed by one. See e.g., Ops. S.C. Att'y Gen., 1990 WL 599221 (Mar. 6, 1990); 1989 WL 406098 (Feb. 3, 1989). Rather, this exemption simply acknowledges that, consistent with the “moonlighting” provisions of §§ 23-24-10 et seq., law enforcement officer may provide private security without a license so long as he is compensated “on an individual, independent contractor basis” and is not employed by another law enforcement officer.

Op. S.C. Atty. Gen., 2014 WL 1362648 (March 17, 2014).

### CONCLUSION

In our opinion, it would not be dual office holding for an individual to serve as both a police officer with the Town of Gaston’s Police Department and as an employee or independent contractor of the car auction/salvage lot you describe in your letter.


Law enforcement officers are specifically authorized to engage in off-duty work or “moonlighting” pursuant to the Off-Duty Private Jobs of Law Enforcement Officers Act, S.C. Code Ann. § 23-24-10 et seq (1976 Code, as amended). However, they must also comply with the requirements of the Private Security and Investigation Agencies Act in order to provide private security without a license. See S.C. Code Ann. § 40-18-50(H) (1976 Code, as amended).

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:

  
Robert D. Cook  
Solicitor General