

1987 WL 342737 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 10, 1987

\*1 John A. O'Leary  
Executive Director  
South Carolina Criminal Justice Academy  
5400 Broad River Road  
(J.P. Strom Boulevard)  
Columbia, South Carolina 29210-4088

Dear John:

In a letter to this Office you questioned whether an individual who is not a citizen of the United States can serve as a police officer in this State.

Pursuant to [Section 5-7-110 of the Code](#) “(a)ny municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality....” [Article XVII, Section 1 of the State Constitution](#) provides

(n)o person shall be elected or appointed to any office in this State unless he possesses the qualifications of an elector ...

Generally, police officers have been construed to be holding an office in other contexts. In construing the dual office provisions of the [State Constitution, Article XVII, Section 1A](#), this Office has determined that the position of police officer is an office. See: Ops.Atty.Gen. dated March 13, 1984, February 10, 1984, October 20, 1984, and August 3, 1964. In [Edge v. Town of Cayce, 187 S.C. 171, 197 S.E. 216 \(1938\)](#), the South Carolina Supreme Court referenced the following definition in determining that the police chief of a municipality is a public officer:

“[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...”

The Court noted that a municipal corporation is a part of the sovereign power of the State and its chief of police is charged with preserving the peace and order of the town and with enforcing the laws of the municipal corporation. See also: 16 McQuillin Municipal Corporations (3rd Ed.), Section 45.11, pp. 562-563. The determination could similarly be made that a municipal police officer is an officer for purposes of [Article XVII, Section 1](#).

In [State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 \(1980\)](#), the State Supreme Court was concerned with the question of whether city police officers were “officers” for purposes of [Section 16-9-220, Code of Laws of South Carolina](#), 1976, which prohibits the acceptance of bribes by officers. The Court stated that in distinguishing between an “officer” and an “employee” criteria to be considered 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....” [274 S.C. 475 at 478](#).

Noting such criteria, the Court concluded that a police officer was an officer for purposes of [Section 16-9-220](#). See also: [McClain v. Arnold](#), 275 S.C. 282, 270 S.E.2d 124 (1980). Referencing the above, it appears that a police officer may be considered to hold an office for purposes of [Article XVII, Section 1](#).

\*2 In [McLure v. McElroy, et al.](#), 211 S.C. 106 at 120, 44 S.E.2d 101 (1947) the State Supreme Court interpreted [Article XVII, Section 1](#) as meaning

... all officers, constitutional and statutory, and whether elected or appointed, must be qualified electors....

See also: [Blalock v. Johnston](#), 180 S.C. 40, 185 S.E. 51 (1936); [State ex rel. Harrelson v. Williams](#), 157 S.C. 290, 154 S.E. 164 (1930). In [Mew v. Charleston and Savannah Railway Co.](#), 55 S.C. 90, 32 S.E. 828 (1899) the State Supreme Court determined that the phrase “qualified elector” means “registered elector.” To be a registered elector in this State an individual must be a citizen of this State and of the United States. See: [Section 7-5-120 of the Code](#).

Additionally, in [Foley v. Connelie](#), 435 U.S. 291 (1978) the United States Supreme Court held that a state must require that law enforcement officers be citizens of the United States. In [Cabell v. Chavez-Salido](#), 454 U.S. 432 (1982) the Court similarly held that states may bar aliens from a position such as a probation officer. Both of these cases were exceptions to the general rule that for purposes of the equal protection clause of the Fourteenth Amendment, discrimination against aliens is inherently suspect and subject to strict scrutiny. The exception cited in the two referenced cases has been termed the “political function exception”. As stated by the Supreme Court in [Bernal v. Fainter](#), 467 U.S. 216 (1984), such exception has been applied to laws that discriminate against aliens in situations “intimately related to the process of democratic self-government”. [467 U.S. at 220](#). In [Bernal](#), the Court explained the rationale behind the “political function exception” by stating that

... within broad boundaries a State may establish its own form of government and limit the right to govern to those who are full-fledged members of the political community. Some public positions are so closely bound up with the formulation and implementation of self-government that the State is permitted to exclude from those positions persons outside the political community, hence persons who have not become part of the process of democratic self-determination.

[467 U.S. at 221](#).

Referencing the above, in the opinion of this Office, an individual who is not an American citizen is not eligible to serve as a police officer in this State. Furthermore, as noted, such State prohibitions would not be violative of protections of the Fourteenth Amendment.

If there is anything further, please advise.

Sincerely,

Charles H. Richardson  
Assistant Attorney General

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