



ALAN WILSON
ATTORNEY GENERAL

January 28, 2022

Colonel A. Chisolm Frampton
Deputy Director for Law Enforcement
S.C. Department of Natural Resources
P.O. Box 167
Columbia, SC 29202

Dear Colonel Frampton:

Attorney General Alan Wilson has referred your letter to the Opinions section. The letter states the following:

The question has recently been raised as to whether holding a commission as a SC Department of Natural Resources Deputy Law Enforcement Officer (hereinafter DLEO) while a sitting member of the General Assembly, an agency's board member, an agency's advisory committee member, or other public office holder is permissible considering the statutory language in S.C. Code § 50-3-315(A) stating "No person may be appointed as an officer who holds another public office."

As background, there are two types of training for DLEOs per S.C. Code § 50-3-315(G)(1). DLEOs can be certified as Class 3 Law Enforcement Officers by the Criminal Justice Academy, or "must successfully complete the 'Basic State Constable Course.'" S.C. Code § 50-3-315(G)(1).

In a previous September 17th, 2003, AG's Opinion your office found that DLEO's were exempt from the dual office holding prohibition under the SC State Constitution stating, "... 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." In review of this opinion, it does not appear that the statutory prohibition from S.C. Code § 50-3-315(A) was discussed and may not have been taken into consideration. As further background, agency board members are appointed by the Governor with the advice and consent of the Senate. S.C. Code § 48-4-30(A). The agency has eight advisory committees, some are statutorily created (for example the Heritage Trust Advisory Board, Saltwater Recreational Fisheries Advisory Committee) and some are created by the DNR Board (for example the

Law Enforcement Advisory Committee, Marine Advisory Committee), which means some committee members are appointed by the Governor or legislative delegations, and some are appointed by the DNR Board members.

Considering this statutory language, we would respectfully seek an updated clarification on the following questions:

- 1) Whether a sitting member of the General Assembly would be able to hold a DLEO commission?
- 2) Whether a sitting member of the DNR Board would be able to hold a DLEO commission?
- 3) Whether a sitting member of a DNR Advisory Committee would be able to hold a DLEO commission?
- 4) What other “public office” holders would be prohibited from holding a DLEO commission?

Law/Analysis

It is this Office’s opinion that a court would interpret the term “public office” in S.C. Code § 50-3-315(A) in the same manner the South Carolina Supreme Court interpreted “public officer” in State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). As stated in your letter, section 50-3-315(A) grants the director the authority to appoint deputy enforcement officers (“DLEOs”) who serve at his pleasure. In relevant part, section 50-3-315(A) states, “No person may be appointed as an officer who holds another public office.” While the statute does not define public office, our state courts and this office are often asked a similar question of whether certain positions constitute “an office of honor or profit” which is commonly referred to as a public office. S.C. Const. art. XVII, § 1A. In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the South Carolina Supreme Court stated that relevant considerations for determining whether a position would be classified a public office include whether statutes, or other such authority, establish the position, the qualifications for appointment, duties, tenure, require an oath for the position, or otherwise authorizes the position to exercise a sovereign power of the state. Traditionally, the three principal attributes of sovereignty include the power to tax, the power of eminent domain and the police power. Op. S.C. Att’y Gen., 1996 WL 599391 (September 6, 1996) (citing Philadelphia Nat. Bank v. United States, 666 F.2d 834 (3d Cir. 1981)). No single criterion is dispositive and it is not necessary that a position exhibits all the criteria to find that a position is considered a public office. Id. With this framework in mind, this opinion will next examine whether a court would find the listed positions constitute a public office and would bar appointment as a DLEO.

First, this Office’s opinions have repeatedly found that members of the General Assembly are public officers. See Op. S.C. Att’y Gen., 1997 WL 419947 (June 27, 1997) (citing several

opinions finding General Assembly members are considered “office holders for dual office holding purposes.”). The positions and terms of General Assembly members are established by law, an oath is required, and the two bodies collectively wield “plenary legislative power.” Pinckney v. Peeler, 434 S.C. 272, 286, 862 S.E.2d 906, 913 (2021) (“[T]here can be no limit on the General Assembly's power to enact, amend, or repeal legislation unless the limit is set forth in the state or federal constitution.”). Certainly, members of the General Assembly hold public office and, as a result, section 50-3-315(A) prohibits their appointment as DLEOs.

Second, a court would likely hold that DNR Board members are public officers. South Carolina Code section 48-4-30 establishes the governing board for the Department. Subsection (B) states that board members are appointed by the Governor with the advice and consent of the Senate. Subsection (F) clarifies that board members serve a term of four years and until their successors are appointed and qualify. Subsection (G) requires that board members take and file the oath of office with the Secretary of State. The Board exercises sovereign power in that it is vested with the duty to set the policies for DNR. S.C. Code § 48-4-50; see also S.C. Code § 48-4-70 (listing the general duties of the Board). These characteristics meet most, if not all, of the Crenshaw considerations. Therefore, it is this Office’s opinion that a court would find DNR Board members hold public office and section 50-3-315(A) prohibits their appointment as DLEOs.

Third, this Office cannot categorically state whether or not a member of a DNR Advisory Committee holds a public office. Our state courts would likely look to the Crenshaw considerations to determine if membership on a particular board constitutes a public office. This Office’s prior opinions have come to opposite conclusions when analyzing different DNR advisory boards according to these considerations with the result often turning on whether the board “exercise[s] a portion of the sovereign power of the State.” Op. S.C. Att’y Gen., 2004 WL 113635, at 2 (January 7, 2004) (“This Office has twice advised in prior opinions that an appointed, but not ex officio, member of the Migratory Waterfowl Committee would be an office holder ...”); see also Op. S.C. Att’y Gen., 2001 WL 265251 (February 27, 2001) (opining that membership on a legal advisory board for DNR was not a public office because the position did not contain many attributes of an office, “most notably the exercise of sovereign power.”). As your letter notes that the Department has eight advisory committees with different sources of enabling authority and appointment authority, we advise analyzing the enabling legislation for each committee for the factors identified in Crenshaw to determine whether a specific board’s members hold “public office” according to S.C. Code § 50-3-315(A).

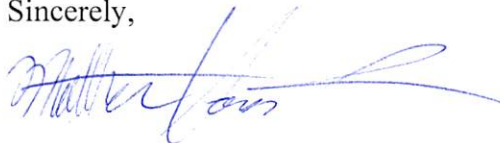
Fourth, the letter asks what other “public office” holders are prohibited from holding a DLEO commission. Some clarification may be necessary as your letter notes a prior opinion of this Office concluded DNR enforcement officers are constables and fall within an exception to the constitutional prohibition on dual-office holding. See Op. S.C. Att’y Gen., 2003 WL 22378702, at 2 (September 17, 2003). The opinion explained the State 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. S.C. Const. art. XVII, § 1A. While the opinion concluded that DNR officers are included within the “constable” exception from the dual-office holding prohibition in the constitution, it did not address the separate statutory prohibition for DLEOs in S.C. Code § 50-3-315(A). Unlike the constitutional prohibition, this statutory prohibition does not contain caveats or exceptions to its application. Therefore, broadly, if not universally, any person who holds a public office would be prohibited from holding a commission under section 50-3-315.

Conclusion

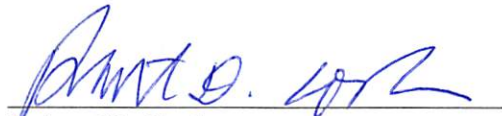
As discussed above, it is this Office’s opinion that a court would interpret the term “public office” in S.C. Code § 50-3-315(A) in the same manner the South Carolina Supreme Court interpreted “public officer” in State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980). Unlike the constitutional prohibition on holding dual-offices, section 50-3-315(A) does not contain caveats or exceptions to its probation on DLEOs holding other public offices. (“No person may be appointed as an officer who holds another public office.”). As a result, any person who holds a public office would be prohibited from holding a commission as a DLEO under section 50-3-315.

Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General