



ALAN WILSON
ATTORNEY GENERAL

March 3, 2011

Chief R. Dale Horne
Anderson Fire Department
400 South McDuffie Street
Anderson, SC 29624

Dear Chief Horne:

In a letter to this office you indicated there have been several recent fires in Anderson and that arson is suspected. You have asked whether members of the Anderson Fire Department are "able to obtain search warrants, collect evidence, question witnesses (take statements), receive tips through Crime stoppers and run background checks" relating to fire investigations.

In a prior opinion of this office, we stated that S.C. Code Ann. §6-11-1410 (2004) defines a "Fire Authority" as "any lawfully and regularly organized fire department, fire protection district, or fire company regularly charged with the responsibility of providing fire protection and other emergency services incident thereto." Op. Atty. Gen., April 21, 1998. We stated that §6-11-1420 further provides:

[n]otwithstanding any other provisions of law, authorized representatives of the Fire Authority having jurisdiction, as may be in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, have the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous areas, investigate the existence of suspected or reported fires, gas leaks or other hazardous conditions or situations and of taking any other action necessary in the reasonable performance of their duty. In the exercise of such power, the Fire Authority having jurisdiction may prohibit any person, vehicle, vessel, or object which may impede or interfere with the operations of the Fire Authority having jurisdiction.

In Op. Atty. Gen., November 15, 1991, we construed §§6-11-1410 et seq. (2004 & Supp. 2010) in the context of whether the Act "automatically makes the fire chief in charge of a scene even though other public safety officials may be present and whether a fire chief would have authority over

such other emergency services.”¹ In responding to this question, we quoted from Op. Atty. Gen., April 5, 1984, which stated:

[i]t would be inappropriate for us to comment on applicability of the section [Section 6-11-1450, which provides a criminal offense for “any person” who obstructs the operations of a fire authority] to a law enforcement officer who may be present at an accident scene in his official capacity, leaving such factual interpretation or application to the courts of this State. It should be noted that, depending on the nature of the emergency and the locality, there may be a number of officials who would have jurisdiction for varying reasons; the Act does not appear to address the manner in which various officials should cooperate when such jurisdictions overlap.

In the opinion of November 15, 1991, in response to the question of whether a fire chief can deny admittance by the rescue squad to a scene if the fire department has equal rescue capability and claims authority pursuant to the Emergency Powers Act, we advised that

[a]gain, as stated in the . . . [1984] opinion referenced above, depending on the circumstances, there may be a number of officials who would have jurisdiction at a particular scene depending on the circumstances and the Emergency Powers Act does not specifically detail the manner in which officials should cooperate in instances of overlapping authority. As stated in that opinion, legislative clarification would be advantageous in clarifying questions such as these regarding conflicting authority.

Op. Atty. Gen., November 15, 1991. These opinions remain in effect and continue to represent the opinion of this Office.

In Op. Atty. Gen., October 24, 1986, this office responded to a question concerning a county fire marshal who wished to employ a deputy fire marshal due to the large number of arson-type fires which required investigation. We cited §23-9-30 (2007), which states:

(a) The chief of any organized fire department or county fire marshal is ex officio resident fire marshal; however, this chapter does not repeal, amend, or otherwise affect Chapter 25 of Title 5.

(b) All powers and duties vested in the State Fire Marshal may be exercised or discharged by any deputy state fire marshal, county fire marshal, or

¹Sections 6-11-1430, -1440 also provide for evacuation by the Fire Authority. Pursuant to §6-11-1450, “[a]ny person who obstructs the operations of the Fire Authority in connection with extinguishing any fire or other emergency, or disobeys any lawful command of the fire official or officer of the Fire Authority who may be in charge at such a scene, or any part thereof, or any police officer assisting the Fire Authority, is guilty of a misdemeanor and, upon conviction, may be fined not more than two hundred dollars or imprisoned for more than thirty days.”

resident fire marshal within the area of his service, or any state or local governmental employee certified by the State Fire Marshal whose duties include inspection and enforcement of state or local fire safety codes and standards, acting under the authority of the State Fire Marshal.

Section 23-9-40 further provides:

It shall be the duty of the State Fire Marshal to enforce all laws and ordinances of the State, and the several counties, cities, and political subdivisions thereof, with reference to the following:

... (f) Investigation of the cause, origin and circumstances of fire.

The duties to be exercised under this authority are specified pursuant to §23-9-90, as follows:

[i]n the conduct of any investigation into the cause, origin, or loss resulting from any fire, the State Fire Marshal shall have the same power and rights relative to securing the attendance of witnesses and the taking of testimony under oath as is conferred upon the Director of the Insurance Department or his designee under Section 38-3-180. . . .

It is the opinion of this office that any investigator, if certified by the State Fire Marshal, may lawfully exercise the powers and duties vested in the State Fire Marshal. Thus, if an individual, as a county employee, should be certified by the State Fire Marshal, the individual would then have all powers and duties vested in the State Fire Marshal. These duties inhere in the Anderson Fire Marshal, and include §23-9-40 et seq. Op. Atty. Gen., October 24, 1986.

Your letter concerns the use of the police reserve program or constables, because the "local police department does not have the manpower to assign two investigators to arson cases in our area." Section 54-16 of the Anderson City Code provides that "city council may appoint or elect as many special police officers as may be necessary for the proper government of the city and . . . [s]uch special police shall be sworn in and vested with the powers now conferred by law upon constables, in addition to the special duties imposed upon them by the council." Section 54-17 states: "[t]he chief may, in his discretion, appoint such number of reserve police officers as may be needed . . . Each period of time reserves shall serve shall be determined and specified by the chief in writing. The powers and duties of reserves shall be prescribed by the chief and they shall be subject to removal by him at any time

Section 23-28-10 et seq. (Supp. 2010) defines "Reserves" as "persons given part-time police powers without being assigned regularly to full-time law enforcement duties." We have stated that reserve officers are given very limited police authority under §§23-28-20, -70. Section 23-28-20 limits their powers and duties to those specifically described by the chief of their parent law enforcement agency. Section 23-28-70(A) states that "[r]eserves shall serve and function as law enforcement

officers only on specific orders and directions of the chief or sheriff.” Subsections (C) & (D) state that “a person appointed as an auxiliary or reserve police officer . . . shall perform his duties while accompanied by a full-time, certified South Carolina police officer or deputy sheriff . . . Reserves shall in no case assume full-time duties of law enforcement officers without complying with all requirements for full-time officers.” Enclosed, for illustration, please find prior opinions of this office dated December 13, 2007, and August 23, 1978, characterizing the powers of reserve officers as limited by the sections above, and February 21, 1979, concerning the powers of arrest of a reserve police officer. Thus, it can be seen that reserve officers do not have the same powers and duties of full-time law enforcement officers; rather, they instead serve in a more limited part-time capacity defined by the chief of their law enforcement agency.² The question of whether individuals are actually serving in a particular situation is, however, a factual matter beyond the scope of an opinion of this office. Therefore, the applicability of these provisions to a particular situation as to whether an individual is authorized to act must be examined on a case-by-case basis.

Additionally, State statutes create constable’s offices, which are generally filled by the governor’s appointment or commission. Pursuant to §23-1-60 (Supp. 2010), the governor “may ... appoint such additional deputies, constables, security guards, and detectives as he may deem necessary to assist in the detection of crime and the enforcement of any criminal laws. . . .” See also §1-3-220 (4) (2005) [providing for the governor’s appointment of a “chief constable”]. State constables appointed by the governor have state-wide jurisdiction, unless otherwise restricted. See Richardson v. Town of Mount Pleasant, 350 S.C. 291, 566 S.E.2d 523 (2002); Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970). We also reviewed our prior opinions that cited case law dealing with the law enforcement authority of State constables.

A prior opinion of this office dated January 29, 1996 determined that “[a] constable is empowered to enforce any state statute.” In an opinion dated January 25, 1996, this office, citing the decision of the State Supreme Court in State v. Luster, 178 S.C. 199, 182 S.E. 427 (1935) determined that “. . . state constables possess the authority of regularly commissioned peace officers, including the power of arrest.” That opinion, citing the decision in State v. Franklin, 80 S.C. 332, 338, 60 S.E. 953, 955 (1908), noted that “[o]ur Supreme Court has stated that constables perform all the duties of law enforcement officers and in particular ‘a constable stands on the same footing as a sheriff.’”

Ops. Atty. Gen., January 12, 2009; September 1, 2009.

The South Carolina Supreme Court has held that the “several types of constable’s officers” are in marked contrast to municipal police officers who “need not obtain commissions from the governor

²We noted in the opinion of December 13, 2007, the limitations and distinctions as to reserve police officers as to their certification and training.

to execute the power and duties of a state constable.”³ Richardson, 566 S.E.2d at 526-27. The Court noted:

The legislature has also enacted a statute providing for the employment by municipalities of police officers. South Carolina Code Ann. §5-7-110 [2004] provides:

Any municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipality and fix their salaries and prescribe their duties.

Police officers shall be vested with all the powers and duties conferred by law upon constables, in addition to the special duties imposed upon them by the municipality. . . . [Emphasis in original].

Thus, unlike campus police officers, DNR officers, and PRT officials, the Court stated municipal police officers need not obtain commissions from the governor to exercise the power and duties of a state constable. Despite this delegation of state constable authority, however, the Court recognized that municipal police officers generally have no jurisdiction beyond the municipality’s territorial limits. Richardson, 566 S.E.2d at 527 [citing State v. Harris, 299 S.C. 157, 382 S.E.2d 925 (1989)]. We came to a similar conclusion in Op. Atty. Gen., May 12, 2006, where we addressed the law enforcement

³In the Supreme Court’s words, these positions are enumerated specifically as follows:

[s]ome law enforcement officers are required or authorized to obtain state constable commissions. Generally, the jurisdiction of these law enforcement officers is circumscribed by statute. See, e.g., §59-116-20 [2004][college and university police officers must obtain state constable commissions but their jurisdiction pursuant to such appointment “is limited to the campus grounds and streets and roads through and contiguous to them”]; compare, e.g., §§ 50-3-310 and -340 [2008] [commissioned Dep’t of Natural Resources (DNR) officers “when acting in their official capacity, have statewide authority for the enforcement of all laws relating to wildlife, marine, and natural resources”]; see also §51-3-147 [1992][commissioned Parks, Recreation and Tourism officials have enforcement powers of any state constable]. The governor is also empowered to appoint special state constables whose jurisdiction is “limited to the lands and premises acquired by the United States government . . . in Aiken, Allendale, and Barnwell counties.” §23-7-40 [2007]. These “Savannah River” constables possess “all of the rights and powers prescribed by law for magistrates’ constables and deputy sheriffs and powers usually exercised by marshals and policemen of towns and cities.” §23-7-50); see also §58-13-910 [Supp. 2010][governor authorized to “certify” special officers or constables for the protection of common carriers].

authority and the authority to carry handguns by various university and college law enforcement officers in this State. We stated: [i]f they are municipal police officers without a separate constable's commission, they would have law enforcement authority similar to other municipal police officers in this State ' . . . on all private and public property within the corporate limits of the municipality and on all the property owned or controlled by the municipality wheresoever situated.'" Again, we are without facts to determine whether individuals are acting as constables or as municipal police officers in these circumstances. A determination whether individuals are authorized to act must be examined on a case-by-case basis pursuant to the authority above.

We turn now to the constitutional rules governing search and seizure concerning the situation set forth in your letter. As referenced in prior opinions of this office dated April 21, 1998, and January 14, 2010, two cases decided by the United States Supreme Court ("USSC"), Michigan v. Tyler, 436 U.S. 499 (1978), and Michigan v. Clifford, 464 U.S. 287 (1984), are controlling on your investigation.

In Tyler, the local fire department responded to a call to the defendants' furniture store. As the fire was extinguished, containers of flammable liquid were discovered at the scene and reported to the chief. The fire chief summoned a police detective for investigation of possible arson, but he had to cease the investigation because of smoke and steam. Subsequently, the fire chief and detective removed the containers and left. An hour later the assistant and the detective in the course of another examination removed pieces of evidence. At later dates, a member of the State Police arson division took photographs and made an inspection, which was then followed by several other visits where additional evidence and information were obtained. The defendants were subsequently charged and the evidence seized was used to convict them notwithstanding their objections that no warrants were obtained before conducting the search. Tyler, 436 U.S. at 501-04.

The USSC agreed that the defendants' objections were valid. The State argued that in light of an arson investigation, the defendants' privacy interests were negligible. The USSC rejected this argument, stating:

[t]his argument is not persuasive. . . . People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. . . . Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the . . . (State's) . . . argument unravels. For it is, of course, impossible to justify a warrantless search on the ground of abandonment by arson when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction.

Id. at 505-06. Thus, in the USSC's view,

. . . there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a

policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately.

Id. at 506. In short, “[a]s a general matter, then, official entries to investigate the cause of a fire must adhere to the warrant procedures of the Fourth Amendment.” Id.

The USSC, however, rejected any argument that the fighting of a fire does not create exigent circumstances for purposes of the Fourth Amendment. As to this point, the USSC explained as follows:

[f]ire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished. . . . And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

Id. at 510. In applying these rules, the USSC found that “the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.” Id. at 511. However, the “entries occurring after January 22 . . . were clearly detached from the initial exigency and warrantless entry. . . .” The USSC ultimately determined the entries were invalid because they were made without warrant or consent. The USSC concluded, stating:

. . . we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. . . . [Citations omitted] . . . Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime.

Id. at 511-12.

In Clifford, the defendants' private residence caught fire and was damaged while they were out of town. Upon extinguishing the fire, all the firefighters and police left the premises. However, hours later a team of arson investigators arrived to investigate. A work crew was at the scene boarding up the house and pumping water out of the basement. The investigators learned that the defendants had been notified and instructed their insurance agent to send the work crew to secure the house. Knowing this, the investigators entered the residence and searched the premises without either consent or a warrant. The investigators found evidence the fire had been deliberately set. At the defendants' trial for arson, the defendants moved to suppress on this basis. Clifford, 464 U.S. at 289-91.

The USSC first addressed the issue of what type of warrant is necessary once the Tyler parameters of fighting the fire and remaining for a reasonable time to investigate the cause of the blaze had been fulfilled. Reasoning that where a warrant is necessary, "the object of the search determines the type of warrant required. . . ." The USSC stated:

[i]f the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice. . . . To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time. If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. Coolidge v. New Hampshire,[403 U.S. 443 (1971)]. This evidence then may be used to establish probable cause to obtain a criminal search warrant. Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer. The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, the scope of the search may be no broader than reasonably necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause. . . .

Id. at 494-95.

The USSC then applied the foregoing rule in responding to the State's argument that Tyler should be modified to justify the warrantless search in that instance. Distinguishing the facts presented in Tyler, the USSC noted:

[a]s the State conceded at oral argument, this case is distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Between the times the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived about 1:00 p.m. to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion. These efforts separate the entry made to extinguish the blaze from that made later by different officers to investigate its origin. Second, the privacy interests in the residence-- particularly after the Cliffords had acted--were significantly greater than those in the fire- damaged furniture store, making the delay between the fire and the mid-day search unreasonable absent a warrant, consent, or exigent circumstances. We frequently have noted that privacy interests are especially strong in a private residence. . . . These facts--the interim efforts to secure the burned-out premises and the heightened privacy interests in the home-- distinguish this case from Tyler. At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene, we hold that a subsequent post-fire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency. . . . So long as the primary purpose is to ascertain the cause of the fire, an administrative warrant will suffice.

Id. at 296-97. The USSC, therefore, determined that since no exigent circumstances justified the upstairs search, that search was unreasonable under the Fourth Amendment. It held that a criminal search warrant was required to search the upstairs and, because a warrant was not obtained, the search was invalid.

These two decisions control as to the need for a warrant in the circumstances of a fire investigation. For purposes of the Fourth Amendment, the USSC clearly distinguished between fighting the fire (*i.e.*, ascertaining the origins and cause of the fire), and a criminal investigation for arson.

As set forth in the referenced 1998 opinion of this office, the following principles appear to be applicable from Tyler and Clifford to your question concerning search warrants:

1. No warrant is necessary for officials who enter a building or premises to put out a fire.
2. Officials need no warrant to remain for "a reasonable time to investigate the cause of the blaze after it has been extinguished." Evidence found in "plain view" or uncovered during the removal process may be seized.

3. Where reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished, and fire and police officials have left the scene, must generally be made pursuant to a warrant or the identification of some new exigency.
4. Where a warrant is necessary, the object of the search determines the type of warrant necessary.
 - a. an administrative warrant is sufficient if the primary object is to determine the cause and origin of a recent fire. The showing required is that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.
 - b. if the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched.

Op. Atty. Gen., April 21, 1998.

In the opinion of January 14, 2010, we cited several State statutes that authorize courts to issue administrative search warrants in particular circumstances. For instance, §41-15-260 (Supp. 2010) establishes procedures by which the Commissioner of Labor and employees of the South Carolina Department of Labor are authorized to inspect work sites for compliance with the occupational safety and health provisions contained in Title 41 of the South Carolina Code. This provision also allows the Commissioner to seek a warrant from any circuit judge if he or she is denied entry. Several other provisions of the State Code also allow for the issuance of an administrative search warrant in certain circumstances. *See, e.g.*, §39-9-90 (Supp. 2010)[allowing the Agriculture Commissioner to seek a search warrant if denied entry to commercial premises when enforcing provisions under Chapter 9 of Title 39 of the South Carolina Code and regulations thereunder]; §44-53-1390 (Supp. 2010) [allowing the Department of Health and Environmental Control to obtain an administrative warrant from a court of competent jurisdiction to enter a dwelling unit or childcare facility in order to investigate a report of lead poisoning]; §44-53-480 (2002)[controlled substance violations]; §56-29-40 (2006)[chop shop operations]; §44-53-520(b) (2002)[drug forfeitures].

We noted in the opinion, however, that:

[w]hile the above provisions authorize administrative warrants in the situations provided, [we were] unaware of any State statutory provision authorizing the issuance of an administrative warrant in association with a fire investigation. Also, [we were] informed in a telephone conversation

with an individual at the State Fire Marshal's office that they were unaware of any statutorily-authorized administrative warrants for fire investigations.

We went on to state in the above opinion that the authority of the State Fire Marshal is set forth in §23-9-50 (2007), as follows:

(a) The State Fire Marshal shall have authority at all times of the day or night, in the performance of duties imposed by this chapter, to enter upon and examine any building or premises where any fire has occurred and other buildings or premises adjoining. Provided, that the Fire Marshal may enter a private dwelling or premise only with the permission of the owner or occupant, unless there is probable cause to believe that a violation of the provisions respecting fire laws exists, that there exists imminent danger to the occupants thereof or arson.

(b) The State Fire Marshal shall have authority at any reasonable hour to enter into any public building or premises or any building or premises used for public purposes to inspect for fire hazards.

(c) Nothing in this section shall restrict the authority of the State Fire Marshal from investigating any premises which has been damaged by a fire of suspicious cause within a reasonable period of time after the occurrence of such fire. . . .

We then noted an opinion of this office dated December 15, 2006, which states:

South Carolina courts, as well as courts of other jurisdictions, require specific statutory authority for judges and magistrates to issue search warrants. In State v. Baker, 251 S.C. 108, 160 S.E.2d 556, 556-57 (1968), the South Carolina Supreme Court noted: "There is no common law right to issue search warrants. The issuing authority is subject to the constitutional prohibition against unreasonable searches and seizures as set forth in the fourth amendment to the Constitution of the United States, and subject to statutory control." . . . Other jurisdictions' courts follow the same reasoning. For instance, the Supreme Court of Washington has consistently held "municipal courts have no inherent authority to issue administrative search warrants, they must rely on an authorizing statute or court rule." City of Seattle v. McCready, 877 P.2d 686, 691 (Wash. 1994). See also, City of Seattle v. McCready, 868 P.2d 134, 141 (Wash. 1994) ("There is . . . no general common law right to issue search warrants."). The courts of Delaware, Iowa, and Kentucky also reached this conclusion. Matter of Brookview Assoc. Petition for A Writ of Prohibition, 506 A.2d 569, 570 (Del. Super. Ct. 1986) ("Justice of the Peace Court only has such jurisdiction as is expressly conferred upon it by statute."); Fisher v.

Sedgwick In and For Story County, 364 N.W.2d 183 (Iowa 1985) (finding in the absence of statutory authority a court does not have warrant authority); Stovall v. A.O. Smith Corp., 676 S.W.2d 475, 476 (Ky. Ct. App. 1984) (finding the Commissioner of Labor did not have the right of entry under common law and “the courts had no parallel authority to issue administrative search warrants.”); State v. Peterson, 194 P. 342, 351 (Wyo. 1920) (“[T]he powers of a justice of the peace are strictly limited to what is conferred upon him by statute.”).

The opinion concluded this office was unable to locate a provision in the South Carolina Code affording authority to magistrates, city judges, or the like to issue administrative search warrants for the enforcement of zoning ordinances. In finding no such authority, this office presumed the Legislature thus did not intend for such authority to exist. Similarly, in the absence of any State statutory authority for an administrative warrant for fire investigations, this office was unable to conclude that the issuance of an administrative warrant would be authorized under the law. Op. Atty. Gen., December 15, 2006. This continues to be the opinion of this office.

We noted in the opinion of January 14, 2010, that there is statutory authority pursuant to §§ 6-11-1410 et seq. for certain fire investigations for a recognized “fire authority”. As previously stated, a “fire authority” is defined by §6-11-1410 as “. . . any lawfully and regularly organized fire department, fire protection district, or fire company regularly charged with the responsibility of providing fire protection and other emergency services incident thereto.” Section 6-11-1420 states:

[n]otwithstanding any other provisions of law, authorized representatives of the Fire Authority having jurisdiction, as may be in charge at the scene of a fire or other emergency involving the protection of life or property or any part thereof, have the power and authority to direct such operation as may be necessary to extinguish or control the fire, perform any rescue operation, evacuate hazardous areas, investigate the existence of suspected or reported fires, gas leaks, or other hazardous conditions or situations, and of taking any other action necessary in the reasonable performance of their duty. In the exercise of such power, the Fire Authority having jurisdiction may prohibit any person, vehicle, vessel, or object from approaching the scene and may remove or cause to be removed or kept away from the scene any person, vehicle, vessel, or object which may impede or interfere with the operations of the Fire Authority having jurisdiction. (Emphasis added).

We suggested that, because no reference is made in Title 6 to the utilization of or authorization for an administrative warrant, and we discovered no statutory authorization for such warrants in association with fire investigations in this State, the fire authority should, therefore, “continue to use the search warrant process in situations where such is appropriate.” Op. Atty. Gen., January 14, 2010. We are enclosing a copy of the opinion for your review.

Therefore, in summary, as to your question concerning search warrants obtained pursuant to your investigation of suspicious fires, it remains the opinion of this office that, in the absence of statutory authorization for such warrants in association with fire investigations in this State, a fire authority continue to use the search warrant process in situations where such is appropriate. We are unaware of any local ordinances authorizing administrative warrants, or a situation where the Anderson City Code provides for such. You may wish to contact your city attorney as to whether there has been or should be such an adoption in your jurisdiction.

In an issue related to your question, we are further unaware of any State statute authorizing a fire inspector to complete and sign, as the affiant, a criminal search warrant. We advised in the opinion of January 14, 2010:

[t]he general statute for search warrants, S.C. Code Ann. §17-13-140 states that a search warrant “. . . shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.” Case law in this State typically refers to a law enforcement officer serving as the affiant on a search warrant. See, e.g., State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). Therefore, until a court so rules in this State, or there is specific authority for a fire inspector who is not a commissioned law enforcement officer or who does not possess any law enforcement authority generally, in the opinion of this office, a fire inspector would not be authorized to sign, as an affiant, a criminal search warrant. [Emphasis added].

See also §17-13-90 (2003)[stating “only law enforcement officers under bond shall be permitted to execute a search warrant”].

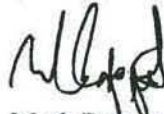
We have stated in opinions of this office that there is an exception in Article XVII, §1A of the State Constitution from consideration as an officer for dual office holding purposes of “a member of a lawfully and regularly organized fire department.”⁴ This office has concluded that a member of “a lawfully and regularly organized fire department” is not a position considered to be an office for dual office holding purposes. See: Ops. Atty. Gen. dated June 14, 2007; July 25, 2005; January 23, 2001; June 13, 1996. We recently stated, therefore, that “there would not be any dual office holding violations for an individual holding law enforcement credentials from also serving as a member of a fire department.” Op. Atty. Gen., May 18, 2010. As a result, a member of a fire authority, who is also holding law enforcement credentials, in the opinion of this office, would be authorized to sign, as an affiant, a criminal search warrant.

⁴ Article XVII, §1A states, in part: “No 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. . . .”

It is also important to note that in a recent opinion of this office regarding the issuance of search warrants pursuant to the authority of §17-13-140, we advised that "a warrant issued without proper authority violates the fourth amendment and is void as a matter of law." Additionally, we advised that a law enforcement officer's execution of an invalid search warrant may subject the officer to liability." Op. Atty. Gen., May 19, 2010 [citing Smoak v. Hall, 460 F.3d 768, 784 (6th Cir. 2006)]["Those present for an unconstitutional seizure can also be held liable for failure to protect"]; see Smith v. Heath, 691 F.2d 220, 225 (6th Cir.1982)[holding that an officer "was directly responsible for and personally participated in the deprivation of the Smiths' constitutional rights" because he "was present while the other officers unlawfully searched the apartment and thereby violated the Smiths' rights"]; see also Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894, 899 (1994)[holding a warrant to search does not absolve an officer from liability under 42 U.S.C. §1983; rather, the focus is whether the warrant was executed in a reasonable manner].

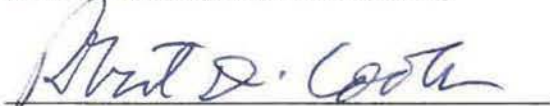
If there are any questions regarding the above conclusions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
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