



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

December 6, 1995

Jonathan R. Hendrix, Esquire  
Attorney for Batesburg-Leesville  
Post Office Box 1263  
Lexington, South Carolina 29072

RE: Informal Opinion

Dear Mr. Hendrix:

By your letter of November 13, 1995, to Attorney General Condon, you have sought an opinion as to whether, under a council-manager form of municipal government, a mayor or member of council may be a member of the volunteer fire department for the same municipality which the individual serves as mayor or a member of council. In addition, if the first question is answered affirmatively, you have asked whether the mayor or member of council may be an officer, such as chief or assistant chief, in the volunteer fire department.

You advised that in the Town of Batesburg-Leesville, the council-manager form of government is operative. The Town has a "volunteer" fire department in which the equipment, etc., is paid for by the Town. The firemen are covered by the Town's blanket Workers' Compensation coverage and Insurance Reserve Fund liability coverage. I understand from other sources that the firemen receive a minor amount of compensation and that they will soon be covered under a \$5,000.00 life insurance policy. You have further advised that, to your knowledge, none of the firemen work the required thirty hours per week which would qualify them for other Town benefits such as the Town's group health plan, and so forth.

### Dual Office Holding

One aspect of this inquiry is consideration of dual office holding. Article XVII, Section 1A of the South Carolina Constitution, among other sections, provides that "[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." [Emphasis added.] It is beyond argument that a mayor or a member of a municipal council would hold an office; however, the state constitution exempts from dual office holding considerations one who would serve as a "member of a lawfully and regularly organized fire department." I assume that the volunteer fire department is such a department and therefore that its members would not be office holders for constitutional purposes. Thus, dual office holding is not a problem in this instance.

### Statutory Considerations

At least two statutes require consideration to resolve your inquiry. The first, applicable to all forms of municipal government, is S.C. Code Ann. §5-7-180, which provides:

Except where authorized by law, no mayor or councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected.<sup>1</sup>

This Code section has been construed previously in several opinions of this Office. In particular, one opinion dated August 8, 1979, appears to be directly on point. The issue therein was whether "volunteer" firemen were to be considered municipal employees within the prohibition against municipal employment of city council members contained in §5-7-180. The opinion of the Honorable Karen LeCraft Henderson (then a Senior Assistant Attorney General, now a federal judge on the United States Court of Appeals for the District of Columbia) was that "the employment of city councilmen as volunteer firemen is most probably municipal employment prohibited by Section 5-7-180." Citing to Miller v. Town of Batesburg, 273 S.C. 434, 257 S.E.2d 159 (1979), the opinion observed that the Supreme Court therein held that a volunteer fireman was a municipal employee subject to the mayor's power to suspend or discharge employees in the mayor-

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<sup>1</sup>The language "except as otherwise provided by law" has been interpreted to mean that statutory law, rather than an ordinance, is necessary to invoke this exception. See Op. Att'y Gen. dated February 2, 1978.

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council form of municipal government. The firemen therein were paid a nominal fee, provided with life insurance and workers' compensation coverage, and allowed to use equipment owned by the town. Judge Henderson also found that

city councils are given control over municipal fire departments pursuant to Section 5-25-20 of the Code. It is arguable, then, that a conflict of interest might arise if a city council containing active volunteer firemen among its membership were called upon to decide issues of fire department policy, employment, pay, benefits, etc. For this additional reason, it would seem that city councilmen should not act as volunteer firemen during their terms of office.

A copy of the entire opinion is enclosed herewith.

This Office also concluded in an opinion dated September 7, 1982, that a volunteer fireman of the Town of Cheraw would be considered an employee, such that a member of the town council of Cheraw would be prohibited by §5-7-180 from service as a volunteer fireman of the Town. In addition, by an opinion dated February 2, 1978, this Office concluded that volunteer firemen of the Town of Batesburg would be considered municipal employees for purposes of S.C. Code Ann. §5-9-30 (issue: whether the mayor of Batesburg had the authority to dismiss a member of the Batesburg volunteer fire department). Copies of these two opinions are enclosed herewith, as well.

A second statute to be considered is similar to §5-7-180 and is specific to the council-manager form of municipal government: §5-13-40. Subsection (a) of that Code section provides:

Except where authorized by law, no councilman shall hold any other municipal office or municipal employment while serving the term for which he was elected to the council.<sup>2</sup>

Section 5-13-30 makes it clear that the mayor in a council-manager form of government is a member of the council. See also §5-13-20 (municipal council is to be comprised of the mayor and the specified number of councilmen). Due to the virtually identical language of §§5-7-180 and 5-13-40, the same reasoning is applicable to each. There is no apparent reason to depart from the interpretations of this Office previously placed on

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<sup>2</sup>See footnote 1 for an interpretation of the phrase "except as otherwise provided by law."

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§5-7-180. Thus, I am of the opinion that a mayor or member of the municipal council of the Town of Batesburg-Leesville would be prohibited from serving as volunteer firemen during the term for which they were elected to serve, by operation of §§5-7-180 and 5-13-40(a).

One additional statutory concern is found in S.C. Code Ann. §5-7-200, which provides in subsection (a):

A mayor or councilman shall forfeit his office if he ... (2) violates any express prohibition of Chapters 1 to 17 [of Title 5 of the South Carolina Code of Laws]; ... .

In my opinion, §5-7-200(a) might be invoked if the provisions of §§5-7-180 or 5-13-40(a) were to be violated.

Because your first question has been answered negatively, it is not necessary to address your second question.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion. I trust that it has satisfactorily responded to your inquiry and that you will advise if clarification or additional assistance should be necessary.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Senior Assistant Attorney General

Enclosures