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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 24, 1995

Broadus E. Albertson, Chief
Walhalla Police Department
Post Office Box 1099
Walhalla, South Carolina 29691

RE: Informal Opinion

Dear Chief Albertson:

Henry L. Deneen, Chief Legal Counsel for Governor Beasley, has forwarded your letter of May 8, 1995, to Attorney General Condon with the request that we respond to you about the matter. I can appreciate your continued concern with the matter and will attempt to explain the problem and offer some resolution.

At the heart of the problem is the South Carolina Constitution, which in several places prohibits what is commonly called dual office holding. The provision we most often cite is Article XVII, Section 1A, which provides in relevant part:

> Every qualified elector is eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution. 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. ...

Prior to the Constitution being amended in 1989, as the result of the successful vote of the electorate in November 1988, the same provision read:

> Every qualified elector shall be eligible to any office to be voted for, unless disqualified by age, as prescribed in this Constitution. But no person

> shall hold two offices of honor or profit at the same time: Provided, That any person holding another office may at the same time be an officer in the Militia or a Notary Public. ...

You can see that the 1989 constitutional amendment basically exempted firemen and constables[1] from the dual office holding prohibitions, along with members of the militia and notaries public.

In examining a potential dual office holding situation, this Office commonly advises in any opinion:

> Article XVII, Section 1A of the South Carolina 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 a notary public. For this provision to be contravened, a person concurrently must hold two public offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). Other relevant considerations are whether statutes, or other such authority, establish the position, prescribe its tenure, duties, or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61 (1980).

Such is sometimes modified to cite the appropriate constitutional provision when a member of the legislature or the judiciary is involved in the potential dual office holding situation.

Using those specified criteria, and sometimes other criteria (such as the incumbent being required to post a bond, or the like), this Office has advised on numerous occasions that individuals who exercise a portion of the sovereign power of the state (and who meet other criteria) would be considered office holders. As examples, there are opinions on sheriffs, deputy sheriffs, highway patrolmen, police officers, probation and parole agents, assistant attorneys general, solicitors and assistant solicitors, jailers, corrections officers, coroners, deputy coroners, and many other similar positions which one might ordinarily

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[1]This constitutional amendment notwithstanding, the South Carolina Law Enforcement Division determines eligibility of those who apply for constables' commissions. For additional information about such eligibility, interested persons should contact SLED.

consider employment, which arise to the level of an office due to the nature of the power involved.

Firemen found themselves in a similar position until 1987. Due to the powers a fireman may exercise at the scene of a fire and later when a fire investigation is underway, particularly by arson investigators, this Office concluded on numerous occasions that a fireman would be considered an office holder. There was a push in the General Assembly, by the state's firemen, to become exempted from the dual office holding prohibitions. The first step was to have the General Assembly in 1987 enact what is now codified at S.C. Code Ann. §8-1-130 (1994 Cum. Supp.):

> Any member of a lawfully and regularly organized fire department, county veterans affairs officer, constable, or municipal judge serving as attorney for another city is not considered to be a dual officeholder, by virtue of serving in that capacity, for the purposes of the Constitution of this State.

This statute began as an attempt, while the Constitution was being amended, to exempt firemen from dual office holding. Constables tried to jump on the bandwagon, as did the county veterans affairs officer in a particular locality, as well as a municipal judge serving as a city attorney in another city. Then the Constitution was amended, as indicated above, by a successful referendum in November 1988, with legislative ratification following in 1989.

In looking at a potential dual office holding situation, this Office examines both positions which are sought to be held at the same time. There are literally hundreds of opinions on such positions (offices) as school boards, city councils, county councils, state boards and commissions, and the like. While it is not always possible to generalize about dual office holding, it is safe to say that service as a police officer and on a school board, city council, county council, or the like would create a dual office holding problem.

Occasionally there are other statutes and common law doctrines to be considered. One statute is particularly applicable to municipalities; §5-7-180 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.

This statute is very broad in scope and would prohibit a police officer in one municipality from holding office as a mayor or member of a municipal council in that or any other

municipality. Op. Att'y Gen. dated September 18, 1979. In part, this statute is designed to prevent the common law master-servant problem.

One way to resolve the problem would be to take the approach taken by the firemen several years ago. You might discuss with your legislative delegation the possibility of having legislation enacted, perhaps by way of an amendment to §8-1-130, to have police officers excepted from dual office holding considerations.[2] The safest course would be to have the Constitution amended in a manner similar to that as voted on in 1988, to have police officers excepted from dual office holding constraints as firemen and constables were able to have done in 1988-1989. There may still be some other concerns, such as master-servant problems which could arise on an individual basis, or difficulties such as §5-7-180 would present. Legislation or constitutional amendment would go a long way toward resolving most of the present difficulties, however.

Your letter indicates that the situation is not equitable. I hope you can see from the above discussion that not only police officers are affected; indeed, a newly-employed assistant attorney general recently gave up serving on a city council to assume the position with this Office, to prosecute insurance fraud. There are other capacities in which police officers can serve, positions which do not involve an exercise of a portion of the sovereign power of the state; you and fellow officers who wish to serve the state and its citizens can certainly put your time and talents into those types of positions without risk of dual office holding.

I hope that the above discussion is helpful and explains the dual office holding issues clearly; I also hope that the suggestions will prove to be helpful. The only way to ultimately remedy the problem is legislative, by way of a constitutional amendment. Until that is accomplished, the problem will continue.

This letter is an informal opinion only. It has been written by a designated 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.

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[2]The constitutional issues of such a statute are not discussed herein. Presumption of the constitutionality of such a statute would attach, unless and until a court should declare otherwise, I would advise generally.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General