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Office of the Attorney General

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October 24, 1986

Lt. Patricia N. Murphy
South Carolina Law Enforcement Division
Post Office Box 21398
Columbia, South Carolina 29221

Dear Lt. Murphy:

You had sent this Office a copy of a Clarendon County ordinance establishing the Clarendon County Fire Department. You advised that the County employed a Fire Marshall, who wishes to employ a Deputy Fire Marshall due to the large number of arson-type fires which require investigation. You have also advised that the individual under consideration is presently a "certified" law enforcement officer having statewide authority. You have asked:

1. Would a deputy fire marshall have the same authority as a fire marshall to investigate suspicious fires?
2. Would the individual in question, if so employed, be able to retain her present certification as a law enforcement officer (i.e., constable's commission)?

According to the ordinance enclosed with your letter, Clarendon County Council has created and established the Clarendon County Fire Protection Service Area as a special tax district, pursuant to Sections 4-9-30, 4-19-10, and 4-19-20 of the Code of Laws of South Carolina (1976, as revised). The district is to be managed by a Fire Advisory Board, which has responsibility for, among other things, providing and selecting firemen, supervising their training, promulgating rules and regulations, and so forth.

Lt. Murphy
Page 2
October 24, 1986

The County has employed a Fire Marshall, whose responsibilities would include fire and arson investigations, codes enforcement, training, record-keeping, and similar duties. The proposed Assistant County Fire Marshall, by whatever title the position may be called, would assist the Fire Marshall with these duties and responsibilities including investigation and codes enforcement. Whether the assistant to the Fire Marshall would actually have the same authority as the Fire Marshall to investigate suspicious fires is your first question.

Section 23-9-30 of the Code was amended by Act No. 347, 1986 Acts and Joint Resolutions. Subsection (b) now provides the following:

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 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 Marshall. [Emphasis added.]

If the individual, as a county employee, should be so certified by the State Fire Marshal, the individual would then have all powers and duties vested in the State Fire Marshal. These duties also inhere in the Clarendon County Fire Marshall and include Section 23-9-40 et seq. of the Code. The answer to your first question is therefore affirmative: an Assistant County Fire Marshall would have the same authority as the County Fire Marshall.

Your second question pertains to dual office holding: whether one who holds a constable's commission (or, is a certified law enforcement officer with statewide jurisdiction) would be able to retain the commission and also serve as an Assistant County Fire Marshall.

Article XVII, § 1A of the South Carolina Constitution provides that "... no person shall hold two offices of honor or profit at the same time." For this provision to be contravened,

Lt. Murphy

Page 3

October 24, 1986

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). While State v. Crenshaw dealt specifically with a police officer as an officer, we also note that this Office has opined on numerous occasions that one who holds a constable's commission is an officer for dual office holding purposes. See Ops. Atty. Gen. dated March 28, 1983; April 20, 1981; and September 23, 1980.

This Office has similarly concluded that one who is an arson investigator for a volunteer fire department would also hold an office for dual office holding purposes. See Op. Atty. Gen. dated June 15, 1984, enclosed. In that opinion, it was noted that volunteer firemen, an arson investigator included, would exercise a portion of the sovereign power of the State, namely police power. That opinion would be applicable to an Assistant County Fire Marshall as an arson investigator certified by the State Fire Marshal, particularly since the duties to be exercised are specified by statute and include further exercise of the police power (investigating origins of fires, inspecting buildings or premises, requiring conformance with fire codes, subpoenaing witnesses, taking testimony, and so forth). Thus, we would conclude that one who would hold a constable's commission and at the same time be certified by the State Fire Marshall under Section 23-9-30 of the Code as an Assistant County Fire Marshall would most probably violate the dual office holding prohibitions of the State Constitution.

Also enclosed for your information is an opinion of this Office dated February 10, 1984, describing how dual office holding is cured by operation of law; in particular, see page 2 of that opinion. In response to your second question, acceptance of the position of Assistant County Fire Marshall would most probably have the effect of vacating the office held by virtue of being a commissioned constable.

In a letter to you from Carter H. Jones, dated August 26, 1986, Mr. Jones asked how to best approach the problem so that the individual might retain the constable's commission, suggesting

Lt. Murphy
Page 4
October 24, 1986

that the county ordinance might require amendment. Please be advised that a county council would not be authorized to adopt an ordinance which would conflict with the Constitution or the statutes of this State. Cf., Law v. Spartanburg, 148 S.C. 229, 146 S.E. 12 (1928).

With kindest regards, I am

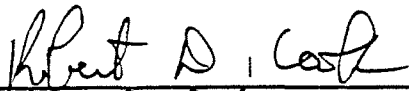
Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

Enclosures

REVIEWED AND APPROVED BY:


Robert D. Cook
Executive Assistant for Opinions

cc: Lt. James E. Gamble