

1984 WL 249904 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 15, 1984

*1 Captain Lynn S. Sumner
Support Services Division
Tigerville Fire Department
Post Office Drawer F
Slater, South Carolina 29683-0246

Dear Captain Sumner:

By your letter of April 23, 1984, you have asked whether a fire chief or arson investigator of the Tigerville Fire Department would be considered officers for the purposes of dual office holding so as to preclude their being commissioned as state constables, which position is considered an office. For the reasons stated herein, this Office concludes that volunteer firemen of the Tigerville Fire Department, which presumably includes the chief and arson investigator, would be considered officers.

[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, 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). On numerous occasions this Office has concluded that the holding of a state constable's commission constitutes the holding of an office, whether the holder is compensated or not. See [Ops. Atty. Gen.](#) dated March 14, 1983 and May 18, 1983.

In your letter of April 23 you referred to a letter written to Roy W. Hudson in which it was stated that a volunteer fireman has not been considered an office by this Office. That paragraph also noted that the manner in which the fire department was created and the precise duties of the firemen must be examined before a determination can be made. In examining all prior opinions of this Office concerning volunteer firemen or chiefs, only the opinion dated March 28, 1983 (captain of Lee County Rural Fire Department would be an officer), a copy of which is enclosed and was cited in the letter to Mr. Hudson, considered the issue in-depth. We would advise that a determination must be made on a case-by-case basis, examining in-depth all criteria specified in [Sanders](#) and [Crenshaw supra](#). Moreover, it must be noted that since the most recent official opinion of this Office was issued on March 28, 1983, the General Assembly adopted Act No. 65, 1983 Acts and Joint Resolutions, granting certain emergency powers to regularly and lawfully organized fire departments, which would include volunteer fire departments; this Act must be considered with the indicia described [supra](#).

The Tigerville Fire Department was created by Ordinance No. 638, adopted on September 5, 1978, by the Greenville County Council. This Office must assume that volunteer firemen, including the chief and arson investigator, would be acting pursuant to the ordinance, though those positions are not specifically provided for nor are the duties detailed. As you pointed out, no bond, oath, or commission are required of the volunteer firemen. Neither tenure nor qualifications are specified, and the firemen are not paid. Presence or absence of these indicia is not conclusive in the determination of whether the position is an office, however. Cf., [State ex rel. Gibson v. Fernandez](#), 40 N.M. 288, 58 P. 2d 1197 (1936); 67 C.J.S. [Officers](#), § 8(c); 63 Am.Jur.2d [Public Officers and Employees](#), § 6.

*2 The final indicia to be considered is whether one occupying the position of volunteer fireman, chief, or arson investigator would exercise a portion of the sovereign power of the state. Section 5 of Ordinance No. 638 of Greenville County provides as follows:

All members of the truck company of the [Tigerville Fire] District may direct and control traffic at the scene of any fire in the area of the county and enforce the laws of this state relating to the following fire apparatus, the crossing of fire hose and the interfering with firemen in the discharge of their duties in connection with a fire in a like manner as provided for the enforcement of such laws by peace officers. [Emphasis added.]

Moreover, by Act No. 65 of 1983, codified as [Section 6-11-1410 et seq., Code of Laws of South Carolina \(1983 Cum. Supp.\)](#), certain emergency powers would be available to the volunteer firemen.¹ Section 6-11-1420 provides the following: Notwithstanding 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.

Additionally, Section 6-11-1430 permits a Fire Authority to evacuate, or cause to be evacuated, 'all persons within and adjacent to burning structures, open fires, dangerous gas leaks, flammable liquid spills, and transportation incidents.' (Certain exemptions from the Act are specified.) In addition, provisions are made in Section 6-11-1450 for those who would violate the Act: Any person who obstructs the operation 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 not more than thirty days.

Based on the foregoing, it is concluded that members of the Tigerville Fire Department to exercise a portion of one of the traditional sovereign powers of the State: police power. That such powers may be exercised infrequently makes no difference; the nature of the powers and not the extent to which such powers are exercised would be the consideration, [Wiley v. City of Sparta, 154 Ga. 1, 114 S.E. 45 \(1922\)](#); 63 Am.Jur.2d [Public Officers and Employees](#), § 3; [Op. Atty. Gen.](#) dated December 16, 1983; thus compelling the conclusion that members of the Tigerville Fire Department would be officers for dual office holding purposes.

***3** This conclusion is consistent with the most recent Opinion of the Attorney General issued prior to the enactment of Act No. 65 of 1983. Although that opinion addressed the position of captain of the Lee County Rural Fire Department, that opinion contained the following:

Since these firemen are given certain law enforcement powers when attending fires, they would most probably be considered office-holders for dual office holding purposes. . . . Although this Office has concluded in the past that a volunteer fireman does not hold an office, there is no indication in that opinion that the fireman under consideration was given any authority such as that quoted above.

The quotation referred to contains language virtually identical to Section 5 of Ordinance No. 638.

In conclusion, this Office would consider the members of the Tigerville Fire Department, chief and arson investigator included, to be office-holders for dual office holding purposes. If these members were to be commissioned as state constables, a dual office holding situation would exist.

Please advise this Office if additional information or clarification is needed.

Sincerely

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 The term 'Fire Authority' is defined by [Section 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.
The Tigerville Fire Department appears to fit within the definition of a Fire Authority.
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