



HENRY McMASTER
ATTORNEY GENERAL

May 18, 2010

Jeff Allen, Fire Marshal
Irmo Fire District
6017 St. Andrews Road
Columbia, South Carolina 29212

Dear Fire Marshal Allen:

In a letter to this office you questioned whether in circumstances where a member of the fire department is also a commissioned law enforcement officer, and is instructed to perform a regularly scheduled fire inspection, does the fact that they are a law enforcement officer require that the individual obtain a search warrant prior to making the inspection.

Prior to responding to your precise question, a review must be had of any dual office holding considerations. 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, a member of a lawfully and regularly organized fire department, a constable, or a notary public. For this provision to be contravened, a person concurrently must hold two 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 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).

As noted above, there is an exception in Article XVII, Section 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.” Therefore, this office has concluded in numerous opinions 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. As a result, 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.

In your letter, you cited to your municipal ordinance which you indicate has been adopted in your jurisdiction and is taken from the most recent edition of the International Fire Code. Such ordinance states:

[w]henver it is necessary to make an inspection to enforce the provisions of this code, or whenever the fire code official has reasonable cause to believe that there exists in a building or upon any premises any conditions or violations of this code which make the building or premises unsafe, dangerous or hazardous, the fire code official shall have the authority to enter the building or premises at all reasonable times to inspect or to perform the duties imposed upon the fire code official by this code. If such building or premises is occupied, the fire code official shall present credentials to the occupant and request entry. If such building or premises is unoccupied, the fire code official shall first make a reasonable effort to locate the owner or other person having charge or control of the building or premises and request entry. If entry is refused, the fire code official has recourse to every remedy provided by law to secure entry.¹

that ¹Such ordinance provision is consistent with S.C. Code Ann. § 6-11-1420 which 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 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).

The term “fire authority” for purposes of such provision is defined by S. Code Ann. § 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.” A prior opinion of this office dated October 19, 1990 indicated that the Irmo Fire District qualified as a special purpose district consistent with S.C. Code Ann. §§ 61-11-1410 et seq., which includes Section 6-11-1420. Another prior opinion of this office dated March 2, 2009 indicated that consistent with Section 6-11-1420, an “authorized representative of the Fire Authority”

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As indicated, such provision states in part that “whenever the fire code official has reasonable cause to believe that there exists in a building or upon any premises any conditions or violations of this code which make the building or premises unsafe, dangerous or hazardous, the fire code official shall have the authority to enter the building or premises at all reasonable times to inspect or to perform the duties imposed upon the fire code official by this code.” For purposes of this opinion, we are assuming that such ordinance is in place in your municipality. Of course, this exception for premises considered “unsafe, dangerous or hazardous” should be distinguished from those situations which require compliance with warrant procedures governing searches. See, e.g., Michigan v. Clifford, 464 U.S. 287 (1984) (“[c]ircumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once the cause has been determined.” *Id.* at 294; Michigan v. Tyler, 436 U.S. 499 (1978) “...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.” *Id.* at 511. The Ohio Attorney General in an opinion dated December 28, 1987, while citing both Michigan cases referenced above, stated that “[o]nly in precisely defined situations, such as certain types of life-threatening emergencies, may...an entry be effected absent a warrant or the property owner’s consent.” See, e.g., Herwins v. City of Revere, et al. 163 F.3d 15 at 19 (1st Cir. Ct. App. 1998) (“[n]o one can seriously doubt that emergency conditions may exist (e.g. a severe fire hazard) that would warrant a peremptory shutdown of a residential building.”). Therefore, nothing in this opinion should be construed inconsistently with those circumstances where in association with a fire investigation it has been determined that a warrant is necessary, whether it involves a regular law enforcement officer or a fire official. I am enclosing and incorporating by reference a prior opinion of this office dated January 14, 2010 which deals with the need for and the applicability of search warrant procedures generally in a fire investigation.

As to your specific question, in the opinion of this office, in circumstances where a member of the fire department is also a commissioned law enforcement officer and is a recognized fire code official, and is instructed to perform a regularly scheduled fire inspection, the fact alone that the individual is also a law enforcement officer would not require that the individual obtain a search warrant prior to making the inspection. Instead, the search warrant requirement would arise as in any other situation where the courts have indicated that a search warrant would be necessary.

¹(...continued)

would include a member of the Irmo Fire District, even though that individual is also a commissioned law enforcement officer.

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With kind regards, I am,

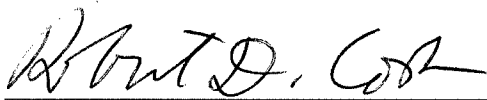
Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General