



ALAN WILSON  
ATTORNEY GENERAL

September 9, 2013

Mr. Taylor A. Graham  
117 Coalmont Court  
Simpsonville, S.C. 29681

Dear Mr. Graham,

You seek an opinion of this Office as to whether State law prohibits you from continuing to serve as a firefighter for a municipal fire department, while also holding certification from the State Fire Marshal, if you are elected to city council in a separate municipality. By way of background, you inform us that you are registered as a candidate for the Simpsonville City Council. You are currently employed as a firefighter by the City of Greer Fire Department and are also certified by the State Fire Marshal. You obtained this certification years ago when you held the position of a district fire marshal. The position you currently hold is that of Senior Engineer/Firefighter. You indicate you are not required to maintain this certification as part of your current position, and you are not authorized by your current employer to carry out any of the powers or duties of a State Fire Marshal, e.g., conducting fire/arson investigations, conducting building inspections, code enforcement, signing search warrants, or issuing or approving certificates of occupancy. You indicate the purpose of your request is to address concerns raised by others that your election to City Council would constitute a dual office holding violation and/or a violation of S.C. Code § 5-7-180 if you continue to serve as a firefighter and/or continue to hold your certification from the State Fire Marshal. The view has also been expressed that you would have to forfeit your position on City Council if any such violations occurred.

#### Law/Analysis

Article XVII, § 1A of the South Carolina Constitution 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.” For a violation of this provision to occur, an individual must concurrently hold two public offices which have duties “involving an exercise of some part of the sovereign power” of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E.2d 762, 763 (1907). A public officer is “[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either great or small, in the performance of which the public is concerned, and which are continuing, and not occasional intermittent, is a public officer.” Id., 58 S.E.2d at 762-63. Other relevant considerations include: “whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.” State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

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This Office has advised on numerous occasions that a member of a town or city council holds an office for purposes of the constitutional prohibition against dual office holding. See, e.g., Ops. S.C. Att'y Gen., 2012 WL 1036294 (March 20, 2012); 2011 WL 380163 (Jan. 14, 2011). However, we have repeatedly concluded that a firefighter is expressly exempt from Article XVII, §1A, and thus does not hold an office for such purposes. See Op. S.C. Att'y Gen., 2012 WL 3142775 (July 19, 2012) (stating Article XVII, §1A "effectively exempts members of a fire department, in their capacity as fire chief, assistant fire chief, or firefighters, from the dual office holding prohibition"); see also Op. S.C. Att'y Gen., 2012 WL 1036294 (March 20, 2012) (service as volunteer firefighter does not constitute an office for dual office holding purposes). Thus, no violation of constitutional prohibition against dual office holding would occur if you continue to serve as a firefighter upon being elected to City Council.

With that being said, the issue remains whether you hold an office by virtue of being certified by the State Fire Marshal. We have repeatedly advised that an individual who is certified by *and* exercises the powers and duties of the State Fire Marshal holds an office for purposes of dual office holding. See Ops. S.C. Att'y Gen., 2012 WL 3142775 (July 19, 2012) ("any member of a fire department who is also certified by *and exercise[s] the powers and duties* of the State Fire Marshal within that district would be deemed to hold an office") (emphasis added); 1992 WL 682784 (Feb. 25, 1992) ("it is the opinion of this Office that ... if you are certified by *and exercise the powers and duties* of State Fire Marshal within your fire district then ... you would most probably be deemed to hold an office") (emphasis added). The July 19, 2012 opinion also referenced S.C. Code § 23-9-30(b) which states:

(b) 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 Marshal.

§ 23-9-30 (emphasis added). The language of this provision likewise suggests that only a person who is certified by the State Fire Marshal *and* holds a position for which he is responsible for the inspection and enforcement of fire safety codes and standards is authorized to exercise the powers and duties of the State Fire Marshal.

Also instructive here is a 2004 opinion discussing prior opinions of this Office addressing whether certain investigators employed by state agencies are officeholders. Op. S.C. Att'y Gen., 2004 WL 1297823 (June 7, 2004). We stated we previously concluded that "arson investigators certified by the State Fire Marshal clearly are office holders in that the certification of their positions is established by statute, and their investigations involve an exercise of the state's sovereign power, namely the police power." Id. On the other hand, we noted we also previously concluded a Special Investigator IV for the Child Support Unit of the South Carolina Department of Social Services likely did not hold an office because "in addition to the fact that there was no statute which established the position or prescribed its duties, the job description did not technically involve active participation in the investigations ...." Id.

In consideration of the above prior opinions and the language of § 23-9-30, we do not believe a person is considered to hold an office solely by virtue of being certified by the State Fire Marshal; one must also hold a position for which he is charged with exercising the powers and duties of the State Fire Marshal, or with some investigatory power involving the exercise of the State's sovereign power. Here,

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you indicate that in your position as a firefighter you are given no such duties or powers. Accordingly, it is our opinion that, under the circumstances presented, no violation of the dual office holding prohibition results if you are elected to City Council and continue to be certified by the State Fire Marshal, but you are employed only as a firefighter, i.e., you do not exercise the powers and duties of the State Fire Marshal or of an arson investigator.

We note that even if the circumstances were such that your election to City Council would constitute a violation of the dual office holding prohibition, you would not be required to forfeit that office. As we stated in a previous opinion:

[T]his office has consistently been of the opinion that when a dual office holding situation occurs, the law operates to automatically "cure" the problem. Thus, if an individual holds one office on the date he assumes a second office, assuming both offices fall within the purview of Article XVII, § 1A (or one of the other applicable constitutional prohibitions against dual office holding), that person is deemed by law to have vacated the first office.

Op. S.C. Att'y Gen., 2012 WL 3142775 (July 19, 2012).

You indicate concerns have also been raised that you would be in violation of S.C. Code § 5-7-180 if you are elected to city council and continue to serve as a firefighter. That section provides that "[e]xcept 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." § 5-7-180. Pursuant to § 5-7-200(a),<sup>1</sup> a violation of § 5-7-180 constitutes grounds for forfeiture of the office of a mayor or councilman.

As we stated in a prior opinion, § 5-7-180 "is, in part, designed to address the common law principle that one cannot be both master and servant at the same time." Op. S.C. Att'y Gen., 2004 WL 1182071 (May 21, 2004). Thus, we concluded § 5-7-180, as well as the common law master-servant principles upon which the statute is based, would be violated if an employee of the Town of Olar continued such employment after being elected to the Olar Town Council. Id.; see also Op. S.C. Att'y Gen., 1996 WL 82889 (Jan. 8, 1996) (concluding § 5-7-180 prohibits town mayor or councilman from serving as volunteer fireman for same town). Along the same lines, we have consistently advised that § 5-7-180 only serves to prohibit a mayor or councilman from also being employed by the same city or town they were elected to serve while in office. See Op. S.C. Att'y Gen., 2012 WL 889084 (March 5, 2012) ("Numerous prior opinions of this office point out that [§ 5-7-180] prevents mayors and members of town councils from being employed in other positions by their towns while in office") (citations omitted). Since the city you are employed by is separate and distinct from the city in which you are running for council, neither § 5-7-180 nor common law master-servant principles would be violated if you continued to serve as a firefighter for the City of Greer Fire Department upon being elected to the Simpsonville City Council.

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<sup>1</sup> That provision states that "[a] mayor or councilman shall forfeit his office if he (1) lacks at any time during his term of office any qualification for the office prescribed by the general law and the Constitution; (2) violates any express prohibition of Chapters 1 to 17; or (3) is convicted of a crime involving moral turpitude." § 5-7-200(a).

**Conclusion**

It is the opinion of this Office that, under the facts and circumstances presented, neither Article XVII, § 1A of the S.C. Constitution nor S.C. Code § 5-7-180 would be violated if you are elected to the Simpsonville City Council and continue to serve as a firefighter for the City of Greer Fire Department and maintain your certification from the State Fire Marshal. While we have consistently advised that a member of a city council holds an office for purposes of Article XVII, § 1A's prohibition against dual office holding, that provision expressly exempts firefighters from dual office holding considerations. Although we have repeatedly advised that a person who is certified by *and* exercises the powers and duties of a State Fire Marshal is an officeholder, the information you provided indicates you have no such duties or powers in your position as a firefighter. Thus, we believe no dual office holding violation would result under the facts presented.

As for § 5-7-180, we have repeatedly advised that this section prohibits a mayor or councilman from being employed by the same city or town they were elected to serve while in office. Thus, no violation of this section occurs if you are elected to the Simpsonville City Council and continue to be employed by the City of Greer as a firefighter.

Sincerely,



Harrison D. Brant  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General