ALAN WILSON
ATTORNEY GENERAL

March 18, 2014

Mark A. Keel, Chief
South Carolina Law Enforcement Division
P. O. Box 21398
Columbia, South Carolina 29221-1398

Dear Chief Keel:

You seek an opinion in your "capacity as Chairman of the South Carolina Law Officers Training Council which is statutorily responsible for certification of police officers in this State." By way of background, you provide the following:

> As the problem with the crime of arson has become prevalent and more complex, the requirements for successfully investigating and prosecuting these offenses have necessitated that members of the fire service and law enforcement undertake joint efforts to combat this illegal activity. Lack of sufficient manpower has also hindered a higher level of resources. There are varying ways in which this initiative between police and the fire service structure their efforts across the state. Basic law enforcement training is offered at the Criminal Justice Academy and arson training is located at the Fire Academy and elsewhere. Credits for this arson training are awarded by the Criminal Justice Academy.
>
> A situation has arisen, however, in which the South Carolina Criminal Justice Academy has stopped providing Basic Training in certain cases due to a longstanding Attorney General's opinion which is interpreted as prohibiting members of organized fire departments who have duties as fire marshals from also being commissioned law enforcement officers in that it may be dual office holding. Departments which structure under the public safety concept seem to have no issue since the fire and police functions are merged using the same personnel and receive training and certification in both disciplines. Police Departments and Sheriff's Offices in several areas desire to commission a very limited number of full time firefighters as law enforcement officers in order to

have their expertise and the additional manpower to better address arson cases. Instances occur where they are prohibited from doing so because some of these certified firefighters have been promoted through the ranks to fire marshal. These personnel still respond to active fire scenes and assist the incident commander as required and to determine the cause and origin of the fire.

In 1989 the State Constitution was amended to make "any member of a lawfully and regularly organized fire department" not be considered dual office holding with another public office. However the Attorney General's opinion states that persons certified by the State Fire Marshal, a statutorily created position and acting under his authority could not also hold a commission as a police officer without a dual office holding situation arising. This we understand.

The question then arises can a member of an organized fire department who has risen to the point that his duties may include those of a local fire marshal, but who is not certified by the State Fire Marshal and not acting under that state authority, be commissioned by a Police Chief or Sheriff as a law enforcement officer then be considered not to hold two public offices in violation of the State Constitution. The staff of the Criminal Justice Academy, representatives of the law enforcement community and the fire service and I have met on two occasions to resolve the training, certification, and organizational issues regarding this effort. We have resolved our concerns and created a plan that will allow enhanced joint operations coordinated by law enforcement in an effort to combat arson and safe lives and property. Our only remaining unresolved issue is described above. I would ask you to please review this situation and advise what may possible be done for us to move forward. Any guidance would be greatly appreciated.

Law / Analysis

Art. XVII, Section 1A provides in pertinent part as follows:

[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 ....

(emphasis added). The question you pose is whether a person who holds a law enforcement commission and who also holds a position as a fire marshal or arson investigator in a "lawfully and regularly organized fire department" is violating the dual office holding provision contained

in Art. XVII, Section 1A of the State Constitution. It is our opinion that such individual is not in violation of the dual office holding provision of the Constitution.

As we have often recognized, Art. XVII, § 1A was amended in 1988 by the voters and ratified by the General Assembly in 1989. See e.g. *Op. S.C. Atty. Gen.*, May 24, 1995 (1995 WL 803664). Our Supreme Court recognized the adoption of the 1988 Amendment in *Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 293, 566 S.E.2d 523, 524-525 (2002), stating as follows:

> [t]he 1895 Constitution extended the dual office holding proscription to all persons holding positions of "honor or profit," exempting from the prohibition only notaries public and militia officers. Art. II, § 2. An exemption for delegates to constitutional conventions was added, but the provisions remained otherwise changed until 1988, when the Constitution was amended to except from prohibition the offices of "constable" and "member of a lawfully and regularly organized fire department." The record does not suggest any persuasive reason why these two offices were added in 1988.

The Supreme Court, in *Richardson,* interpreted the meaning and extent of the exemption from dual office holding for a "constable," noting as follows:

> [i]n this case, we are asked to determine the meaning of the term "constable" as used in the state constitution's dual office holding provisions. When this Court is called upon to interpret our Constitution, we are guided by the "ordinary and popular meaning of the words used ... ." *Abbeville County School Dist. v. State*, 335 S.C. 58, 67, 515 S.E.2d 535, 539-40 (1999) (internal citation omitted). A word used in the Constitution should be given its "plain and ordinary "meaning. *Johnson v. Collins Entertainment,* 333 S.C. 96, 508 S.E.2d 575 (1998). In *Johnson,* this Court noted that the term "lottery" as used in our statutes and Constitution had no "technical, legal meaning," and should therefore be construed in the "popular sense."

Richardson, 350 S.C. at 294, 566 S.E.2d at 525.

In our previous opinions, in applying the exemption from dual office holding for a "member of a lawfully and regularly organized fire department," unfortunately, we have not fully employed the guidance expressed by the Court in *Richardson* as it applies to this phrase. Our guiding principle has been that the exemption applies to "firemen." Thus, according to our

previous opinions, an "arson investigator" or "fire marshal," which did not typically fall in the category of a "fireman" was not entitled to the exemption.

For example, in the May 24, 1995 opinion, we noted that "[y]ou can see that the 1989 constitutional amendment basically exempted firemen and constables." And, in *Op. S.C. Atty. Gen.*, July 25, 2005 (2005 WL 1983348) we observed that the 1989 amendment "added firemen to the list of those officers exempted from the dual office holding provision." In *Op. S.C. Atty. Gen.*, July 19, 2012 (WL 3143775), we summarized our opinions over the years in this area as follows:

> In an opinion of this Office dated July 25, 2005, in which we addressed whether members of fire departments are office holders, we commented on the changes made to Article XVII as a result of a 1989 constitutional amendment. Effective February 8, 1989, 1989 S.C. Acts No. 9, § 2 ratified the South Carolina Constitution to include members of regularly organized fire departments and constables as those officers exempt from the dual office holding provision. Prior to the 1988 vote of the people and the 1989 ratification, we had advised on several occasions that members of regularly organized fire departments were officers and thus subject to the dual office holding prohibition. See Ops. S.C. Atty. Gen., June 28, 1985; October 26, 1984; June 15, 1984; March 28, 1984; February 9, 1981; December 17, 1969. However, following adoption of the Constitutional amendment, we recognized a change in the law and thus modified our opinion to find that those persons who were members of a lawfully and regularly organized fire department, including a fire chief, were not considered office holders for purposes of dual office holding. See Ops. S.C. Atty. Gen., December 29, 2006; January 23, 2001; June 13, 1996; January 19, 1994; see also Op. S.C. Atty. Gen., December 6, 1995 [volunteer firemen who are members of lawfully and regularly organized fire department no longer hold office for purposes of dual office holding]. Accordingly, we have concluded that the Constitutional amendment 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 Ops. S.C. Atty. Gen., March 3, 2011 [advising that a member of a fire authority, who is also holding law enforcement credentials, would be authorized to sign, as an affiant, a criminal search warrant]; May 18, 2010 [advising that, because of the exception provided in Article VII, § 1A, "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"].

Significantly, this Office in a prior opinion dated June 15, 1984, concluded that one who is an arson investigator for a fire department would also hold an office for dual office holding purposes, because arson investigators exercise a portion of the sovereign power of the State, namely police power. In a subsequent opinion dated October 24, 1986, we advised that a fire marshal is an office holder for purposes of dual office holding. These opinions, however, were rendered prior to the 1989 amendment to Article XVII, which added firemen to the list of those officers exempt from the dual office holding provision.

Subsequently, in an opinion of this Office dated July 25, 2005, we addressed whether a fire marshal is included in the category of those officers exempt from the dual office holding provision. The requester stated that his duties as Fire Marshal included, but were not limited to, the inspection of buildings and the enforcement of the fire code within the jurisdiction of the Irmo Fire District. Referencing the 1986 opinion, we emphasized that "investigating origins of fires, inspecting buildings or premises, requiring conformance with fire codes, subpoenaing witnesses" all constituted evidence of an exercise of sovereign power. Id. Accordingly, we concluded that an Assistant County Fire Marshal exercising such duties would hold an office for purposes of dual office holding. Id. Following review of the authority in this regard, we advised that a fire marshal does not fall within the category of offices exempt from the dual office holding prohibition as a result of the 1989 Constitutional amendment.

In addition, an opinion of this Office dated May 24, 1995, concluded that the 1989 amendment regarding the exemption of members of lawfully and regularly organized fire departments from the dual office holding provision does not to extend beyond those individuals' capacity as firemen. While we recognized that a fire marshal might also be a member of a fire department, the opinion indicated that a person would be exempt from the dual office holding provision only in his capacity as a fireman. We explained as follows:

> [t]here 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.

Clearly, the foregoing strongly suggests that the amendment was intended to exempt only firemen from the dual office holding provision. Although we have extended this reasoning to include a fire chief, we note here that a fire chief serves as the chief fireman of a lawfully and regularly organized fire department. However a fire marshal's duties are somewhat different, encompassing powers more in the way of an inspection and administrative citation capacity. See, McNitt v. City of Phil., 325 Pa. 73, 189 A. 300 (1937) [fire marshal is distinguished from fireman].

The distinction is confirmed by a description of the duties of the Irmo Fire Marshall which has been submitted to us for review. Such duties include the following: planning and coordination of the commercial building inspection program; establish and maintain contact with contractors in order to ensure all news and renovated commercial buildings in the fire district are constructed within the parameters of the legally adopted fire code; initiate an origin and cause investigation and perform all follow up activities as necessary in order to determine if possible the origin and cause of the fire; public education; fire code enforcement and "any other duties as requested from time to time" by the Chief. It is also anticipated that the Irmo Fire Chief may be on occasion called upon to perform law enforcement functions and thus has been issued a constable's commission.

> The position of fire marshal is established by S.C. Code Ann. Sec. 23-9-30(b) which states that "[a]ll powers and duties vested in the State Fire Marshal may be exercised by [the] ... resident fire marshal within the area of his service, or any state or local government 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."
>
> Clearly, the Irmo Fire Marshal exercises the sovereign powers of the State. Thus, it is our opinion that the 1986 opinion concluding that a fire marshal is an office for dual office holding purposes is still valid, notwithstanding the 1989 Constitutional amendment exempting firemen. Even so, no dual office holding situation arises in this instance ....

We reached similar conclusions in opinions of this Office dated June 13, 1996; and February 25, 1992, advising that any member of a fire department who is also certified by and exercising the powers and duties of the State Fire Marshal within that district would be deemed to hold an office for dual office holding purposes.

Thus, as can be seen, our opinions have never squarely addressed the meaning of the exemption contained in Art. XVII, § 1A – "member of a lawfully and regularly organized fire department" – in the popular sense of those words, as is required by *Richardson* and other decisions referenced therein. In short, we have not yet interpreted the word "member" as used in that phrase according to its broad and popular meaning. Instead, in limiting the exemption to firemen or firefighters, it appears that we have interpreted this exemption only in its technical sense, or at least in the narrower sense of the word.

However, our previous interpretations appear too limited. We reference here an opinion of the Texas Attorney General, Opinion No. GA-0041, dated March 17, 2003 (2003 WL 1384468), which discussed a similar issue in another context. The Texas Attorney General's opinion in instructive. There, the Attorney General of Texas reasoned:

> [w]hile the City correctly suggests that the 2001 amendments to the definition of the term "fire fighter" changed little aside from expressly including fire arson investigators within the ambit of the civil service system, the City incorrectly assumes that, before 2001, the definition did not encompass various

> members of a fire department, without regard to whether the member actively "fought fires" in a narrow sense. See id. Even before the 2001 amendments, section 143.004, defined the term "fire fighter" in its first sentence to mean "a member of the fire department." .... The term "member" encompasses positions other than those that actively engage in fire fighting, as it is commonly understood. See *City of Wichita Falls v. Cox*, 300 S.W.2d 317, 321 (Tex. Civ. App. – Fort Worth 1957, writ refused n.r.e.) (stating that municipal police department's "members" included all "whose services though diversified, were for the sole purpose of accomplishing a distinct governmental function" and who were paid); *City of San Antonio v. Hahn*, 274 S.W.2d 162, 164 (Tex. Civ. App. – Austin 1955 writ ref'd n.r.e. (including switchboard operators, lineman, clerks, and mechanics within "members" of police departments for purposes of civil service act); *see also Firemen's & Policemen's Civil Service Comm'n v. Wells*, 306 S.W.2d 895, 897 (Tex. 1957) (stating that by refusing to grant writ on *Cox, Hahn*, and analogous cases defining member of civil service system, court approved holdings) ... . Thus, even before the 2001 amendments became effective, section 143.003(4) defined the term "fire fighter" to include a fire department member who was not a fire fighter in the narrow since of the word.

Further, in its usual context, the word "member" simply means a person belonging to some association, community, party, etc. *In re Freshour's Estate,* 345 P.2d 689, 696 (Kan. 1959). The word is synonymous with "employee." *McKeag, v. Bd. of Com'rs of City of Los Angeles,* 132 P.2d 198, 199 (Cal. 1943). A police physician thus was held to be a "member" of the police department. *Gerendasy v. Police and Fire Departments Pensions Commission of City of Elizabeth*, 32 A.2d 447, 448 (N.J. 1943). In that case, the Court concluded that

> [t]he fact that one appointed to the permanent force as a member thereof is not delegated to duties in the police department as a policeman or in the fire department as a fireman does not exclude him from the benefits of this pension act." *Id.*

We find the reasoning employed in these authorities persuasive. Thus a "member of a regularly and organized fire department" would, in our view, include an arson investigator or fire marshal who is part of such department for purposes of the dual office holding exemption. We believe the people voted to amend the Constitution to exempt a "member of a lawfully and regularly organized fire department" and not just firemen or firefighters. The fact that such persons may

not primarily engage in fire fighting duties is not controlling but instead whether the person is a member of a lawfully and regularly organized fire department

Conclusion

Notwithstanding our earlier opinions, it is our opinion today that a fire marshal or arson investigator who is a member of a lawfully and regularly organized fire department and who also holds a law enforcement commission, does not violate the dual office holding provision of the South Carolina Constitution. The amendment to the Constitution in 1988 exempted all "members" of a lawfully and regularly organized fire department, not just firemen or firefighters as we have previously opined. In our view, it is not controlling whether a person is primarily engaged in fire fighting duties, but whether the person is a member of a lawfully and regularly organized fire department.

Our reading of the provision of the Constitution in the past has been unduly narrow and is corrected today, consistent with the analysis herein. Our analysis now focuses upon the language "member" of a lawfully and regularly organized fire department, so that fire marshals or arson investigators who are "members" of such departments are exempt for purposes of dual office holding. Thus, these individuals, who also hold law enforcement commissions, do not violate the constitutional prohibition against dual office holding.

Sincerely,

Robert D. Cook
Solicitor General

RDC/an