



ALAN WILSON
ATTORNEY GENERAL

December 13, 2016

James C. Redd
Fire Chief
355 Locust Street
Lyman, South Carolina 29365

Dear Mr. Redd,

Attorney General Alan Wilson has referred your letter dated October 24, 2016 to the Opinions section regarding whether a person who serves as the Chairman of the board of fire control for the Tyger River Fire Service Area may also serve as a reserve deputy of the Spartanburg County Sheriff's Office without violating the prohibition on holding dual offices contained in the South Carolina Constitution.

Law/Analysis

It is this Office's opinion that a person who serves on the board of fire control for the Tyger River Fire Service Area and serves as a reserve deputy of the Spartanburg County Sheriff's Office violates the prohibition on holding dual offices. Article XVII, § 1A of the South Carolina Constitution prohibits a person from holding "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." A person violates this provision if he holds two or more public offices which "involv[e] an exercise of some part of the sovereign power..." Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). In State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980), the South Carolina Supreme Court stated that relevant considerations for determining whether a position would be considered a public office include whether statutes, or other such authority, establish the position, the qualifications for appointment, duties, tenure, require an oath for the position, or otherwise authorizes the position to exercise a sovereign power of the state. No single criterion is dispositive and it is not necessary that a position exhibits all the criteria to find that an individual is a public officer. Id.

For this Office to provide an opinion on whether an individual violates the prohibition on dual office holding, we must examine the positions to determine whether they are both public offices. This Office has opined that a board member of a fire protection entity holds a public office within the meaning of Article XVII, § 1A of the South Carolina Constitution. See Ops. S.C. Atty. Gen., 1996 WL 549540 (August 14, 1996) ("A commissioner or member of the board of fire control of the Irmo Fire District would most probably be considered an office holder for dual office holding purposes."); 1986 WL 289858 (June 4, 1986) (membership on the board of the North Spartanburg Area Fire and Rescue Department would probably be considered a public office).¹ Similarly, it is this Office's opinion that a court would likely find a member of the board of fire control for the Tyger River Fire Service Area to be a public

¹ This Office recognizes a long-standing rule that it will not overrule a prior opinion unless it is clearly erroneous or a change occurred in the applicable law. Ops. S.C. Atty. Gen., 2013 WL 6516330 (Nov. 25, 2013); 2013 WL 3762706 (July 1, 2013); 2009 WL 959641 (March 4, 2009); 2006 WL 2849807 (September 29, 2006); 2005 WL 2250210 (September 8, 2005); 1986 WL 289899 (October 3, 1986); 1984 WL 249796 (April 9, 1984).

officer. In our June 26, 2007 opinion, this Office examined the authority by which Spartanburg County established fire service areas within its geographic boundaries as follows:

You mentioned in your letter that the fire service areas in question were created pursuant to section 4-19-10 et seq. of the South Carolina Code (1986 & Supp. 2006). These provisions allow counties to establish a system of fire protection services. Pursuant to these provisions, a county must enact an ordinance establishing the district. S.C. Code Ann. 4-19-20(4) (Supp. 2006).

Op. S.C. Atty. Gen., 2007 WL 1934802 (June 26, 2007). Under this authority, Spartanburg County created multiple fire protection systems which are codified in Chapter 34 of the Spartanburg County Code. Article VIII of Chapter 34 establishes the board of fire control for the Tyger River Fire Service Area, sets the composition of the board, residency requirements for board members, board members' terms of office, compensation, as well as the board's duties and responsibilities. Spartanburg County Code § 34-191 et seq. Further, Section 34-195 provides that the revenue for the maintenance and operation of the fire service area "shall be derived from ad valorem taxes upon all taxable property within the area." The board is required to submit an annual budget to the Spartanburg County Council to "serve as the basis for the ad valorem tax levy in the service area for the upcoming year." Spartanburg County Code § 34-196. These code sections speak directly to most, if not all, of the Crenshaw considerations for finding a position constitutes a public office.² Therefore, it is this Office's opinion that a court would likely conclude a board member of the Tyger River Fire Service Area is a public officer.

Further, this Office has consistently opined that the position of reserve officer, as authorized pursuant to S.C. Code. Ann. § 23-28-10 et seq., qualifies as a public office within the meaning of Article XVII, § 1A of the South Carolina Constitution. See Ops. S.C. Atty. Gen., 2011 WL 380163 (January 14, 2011); 2005 WL 774158 (March 21, 2005); 1993 WL 720101 (April 14, 1993); 1991 WL 633037 (August 12, 1991); 1988 WL 485225 (February 5, 1988).³ Thus, because it is this Office's opinion that both the positions of a member of the board of fire control for the Tyger River Fire Service Area and that of a reserve deputy of the Spartanburg County Sheriff's Office are public offices, it is also this Office's opinion that a court would likely find an individual who holds both positions simultaneously to be in violation of the South Carolina Constitution's prohibition on dual office holding.

In this Office's July 19, 2012 opinion, we explained that the law operates to "cure" the dual office holding problem as follows:

[I]f 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. See Ops. S.C. Atty. Gen., March 16, 2012; July 28, 2003; July 31, 2000; July 13, 1995. However, the individual may continue to perform the duties

² The request letter states, "We are not a special purpose district, but most simply explained as a contractor for fire service for the County, established under the Home Rule Act." This distinction does not alter our application of the Crenshaw considerations.

³ The position of a reserve sheriff's deputy is not included within the exception to dual office holding for constables. Richardson v. Town of Mount Pleasant, 350 S.C. 291, 298, 566 S.E.2d 523 (2002) ("A constable is a person who holds a state commission, is employed in such capacity by a magistrate, or otherwise meets one of the statutory definitions.").

of the previously held office as a *de facto* officer until a successor is duly selected to assume the duties or complete the term of office. See Walker v. Harris, 170 S.C. 242, 170 S.E. 270 (1933); State v. Coleman, 54 S.C. 282, 32 S.E. 406 (1898); While the actions taken by a *de facto* officer are generally held to be valid with regard to third parties, there is no question that such officer is acting under color of law rather than with full *de jure* status which he would possess if there had been no dual office holding. Furthermore, there exists general authority that the protections afforded a *de facto* officer will not be deemed to continue indefinitely, particularly when the public is chargeable with notice that the officer's status has been reduced to one of *de facto* rather than *de jure*. See State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); Ops. S.C. Atty. Gen., March 16, 2012; May 7, 1998. This *de facto* capacity does carry with it some risk, however. While a *de facto* officer's actions are generally held to be valid with regard to third parties, it is possible that a court might find that the actions of a *de facto* officer are invalid. In this instance, for example, an arson investigator charged with police powers in this State may be performing those duties in a *de facto*, rather than *de jure* capacity. Accordingly, we advise that the wisest course of action in this case would be for such individual to avoid a situation where his/her actions could be called into question. See Op. S.C. Atty. Gen., July 28, 2003.

Op. S.C. Atty. Gen., 2012 WL 3142775, at *4 (July 19, 2012). As your letter does not state the order in which the individual assumed the subject offices, we cannot give an opinion as to which he currently holds and which has been vacated by assuming the second office. However, there should be public records detailing when the individual assumed office at both of these entities which you can use to make this determination.

Conclusion

We hope that the guidance provided above will assist you and the Tyger River Fire Service Area in determining the board member's status. This Office is, however, only issuing a legal opinion based on the current law at this time and the information as provided to us. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. Additionally, you may petition the court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code § 15-53-20 (1976 Code, as amended). If it is later determined otherwise, or if you have any additional questions or issues, please let us know.

James C. Redd
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Sincerely,



Matthew Houck
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General