



ALAN WILSON
ATTORNEY GENERAL

September 6, 2017

The Honorable Kent M. Williams, Member
South Carolina Senate
PO Box 142
Columbia, SC 29202

Dear Senator Williams:

We received your opinion request dated August 28, 2017 seeking an opinion on the legal consequence of a pardon on a conviction for arson in the context of an application to work as a firefighter. The following opinion sets out our understanding of your question and our response.

Issue (as quoted from your letter, edited slightly):

A local fire chief has been contacted concerning the status of an individual who was convicted of an arson crime. The individual in question had served his sentence and also received a pardon from the State of South Carolina. [I request] a legal opinion on whether an individual who has received a pardon for a crime of arson is allowed to work for the local fire department.

Law/Analysis:

It is the opinion of this Office that a court would conclude that the prohibition, found in S.C. Code Ann. § 40-80-20 (2011), of a person convicted of arson from ever being employed as a firefighter does not extend to persons who have been pardoned for such offenses. If the General Assembly had intended that an arson offense continue to result in a lifetime ban on employment as a firefighter even after the conviction was pardoned, we believe that the legislature would have stated that intent explicitly in light of the decisions of the South Carolina Supreme Court in *State v. Baucom* and *Edwards v. SLED* (discussed *infra*). This opinion should not be viewed as an endorsement of any application including a record of a pardoned arson offense, and we strongly encourage any hiring authority to weigh any such application with great caution. We simply opine that a pardon removes the legal prohibition on the convicted person becoming a firefighter, and confine our answer to that legal conclusion.

S.C. Code Ann. § 24-21-940 (2007) defines a pardon to mean "that an individual is fully pardoned from all the legal consequences of his crime and of his conviction, direct and collateral, including the punishment, whether of imprisonment, pecuniary penalty or whatever else the law has provided." As this Office has previously opined:

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S., E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005).

As you note in your request letter, S.C. Code Ann. § 40-80-20 (2011) bans a person convicted of arson from firefighting in South Carolina for life: "no person may volunteer as a firefighter, be employed as a firefighter, or perform firefighting duties if he has been convicted of, pled guilty to, or pled nolo contendere to arson." This code section, however, does not reference pardoned convictions as included or excluded for any purpose. Section 40-80-20 simply is silent regarding the impact of a pardon. In the absence of any such language, we look to South Carolina precedent, which provides definitive guidance regarding pardons in this area.¹ As discussed below, our courts interpret the legal consequences of a pardon defined by Section 24-21-940 according to the decision of the South Carolina Supreme Court in *State v. Baucom* and its progeny. *See infra*.

In *State v. Baucom*, a driver was convicted of DUI, second offense and given an enhanced sentence based on a prior DUI conviction. *State v. Baucom*, 340 S.C. 339, 344, 531 S.E.2d 922, 924 (2008) (citing S.C. Code Ann. § 56-5-2940). The offender challenged the sentence on the grounds that although he had been convicted of a prior DUI offense, he had received a pardon for that prior offense before being convicted of the latest one. *Id.* Our state's Supreme Court agreed, and held that the prior, pardoned offense could not be considered in sentencing. *Id.* The Court framed the issue as "whether enhancement of a subsequent sentence is a collateral legal consequence of the pardoned conviction." *Id.* In so doing, our Supreme Court rejected the reasoning of the Court of Appeals that "a pardon forgives the punishment for a crime, but does not forget or obliterate the commission of the crime." *Id.* at 344, 531 S.E.2d at 924. Our Supreme Court concluded that in adding the language "all the legal consequences" to Section 24-21-940, the General Assembly intended to abrogate a prior ruling, *Bay v. S.C. Highway Dep't*, 266 S.C. 9, 221 S.E.2d 106 (1975), which had held that a pardon did not operate to preclude a civil legal consequence of a conviction (i.e. suspension of a driver's license). *Id.* The Court in *Baucom* also discussed the relevance of statutes where the General Assembly has made exceptions to the general absolution of a pardon:

¹ We are not aware of any reported South Carolina cases interpreting S.C. Code Ann. § 40-80-20 (2011).

Under [S.C. Code Ann.] §§ 24–21–990 and 16–13–210, despite a pardon, a person convicted of embezzling public funds may not hold a public office unless the General Assembly removes the disability by a two-thirds vote. S.C.Code Ann. § 24–21–990 (1989) and § 16–13–210 (1985). Under Rule 609(c), SCRE, a conviction pardoned based on a finding of the rehabilitation (as opposed to innocence) of the person convicted, can be used to impeach a witness if the person has been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year. These exceptions are noteworthy because they demonstrate the General Assembly's readiness to expressly address pardons in situations where the legislature does not wish them to have full effect.

Id. at 345, 531 S.E.2d at 924. Our Supreme Court expressed some displeasure with the result of the law as applied to the facts in *Baucom* but concluded that the intent of the General Assembly in Section 24-21-940 was clear. *Id.* at 346, 531 S.E.2d at 925. ("Although we share the reluctance of the State, the trial court, and the Court of Appeals to sentence petitioner as if the present offense were his first DUI, rather than his fourth, our holding is compelled by the plain and unambiguous language of the pardon statute.").

One year after the decision in *Baucom*, the South Carolina Court of Appeals relied upon the decision to hold that a pardon restored the civil right to possess a pistol in South Carolina in the case of *Brunson v. Stewart*, 345 S.C. 283, 547 S.E.2d 504 (2001). We note that possession of a pistol is not one of the rights specifically enumerated in S.C. Code Ann. § 24-21-990 (2007) which are restored by a pardon², and this holding points to our courts' broad interpretation and application of the pardon statute removing "collateral legal consequences." *See Brunson*.

In 2002, this Office relied on the decisions in *Baucom* and *Brunson* to predict that a sex offender who received a pardon was relieved of his statutory duty under then-applicable law to register annually, because registration was a collateral legal consequence of his conviction. *Op. S.C. Att'y Gen.*, 2002 WL 1340410 (April 22, 2002). This prediction was confirmed by the decision of the South Carolina Supreme Court in *Edwards v. SLED*, 395 S.C. 571, 720 S.E.2d 462 (2011), which concluded that the offender's 2004 pardon relieved him of the duty to register under the law as of that date. *Id.* at 464-65, 720 S.E. at 576-77. Notably, the General Assembly had amended the sex offender registration statute in 2005 and 2008 to include mandatory registration for pardoned offenses where the statutes had been silent before, but the Court held that the amendments could not apply retroactively. *Id.* at 467, 720 S.E. 2d at 582.

² This Office has reiterated in numerous opinions that it strongly supports the Second Amendment and the right of citizens to keep and bear arms. That right is subject, however, to the constitutionally-limited power of the state and the federal governments to regulate and prohibit the purchase and possession of firearms in certain instances. *See D.C. v. Heller*, 554 U.S. 570 (2008); *see also McDonald v. Chicago*, 561 U.S. 742 (2010).

We believe that the decision of the South Carolina Supreme Court in *Baucom* is dispositive of the question presented in your letter. On its face, Section 40-80-20 unequivocally demonstrates a legislative intent that a person convicted of arson be legally barred from being employed as a firefighter for life. The text of the statute is silent, however, regarding pardoned offenses. *See* S.C. Code Ann. § 40-80-20 (2011). Conversely, Section 24-21-940 operates such that a pardon absolves a person all legal consequences of a conviction unless the General Assembly specifically includes pardoned offense for the purposes of a particular code section. *See Baucom*, 340 S.C. at 345, 531 S.E.2d at 924. Accordingly, consistent with *Baucom*, a court faced with the question presented in your letter likely would frame the issue as whether the legal prohibition on becoming a firefighter is a collateral legal consequence of the arson conviction. Because an arson conviction legally bars an otherwise qualified candidate from firefighting, no matter how exemplary their credentials, we have no doubt that a court would conclude that the prohibition is a collateral legal consequence of the conviction. *See* S.C. Code Ann. § 40-80-20 (2011). The court most likely would then apply *Baucom* to hold that a pardon removes that collateral legal consequence. The conviction could still be considered by the hiring authority, but the legal bar to employment is removed by the pardon.

While this result might seem incongruous with the intent of Section 40-80-20 specifically, we believe that it is consistent with the broad power of the pardon established by the General Assembly and the absence of a specific reference to pardoned offenses in Section 40-80-20. We note that the General Assembly added the lifetime prohibition on persons convicted of arson by statutory amendment in 2008, and it remains silent as to pardons even after that amendment. *Cf.* S.C. Code Ann. § 40-80-20 (2011) & Act No. 309, 2008 S.C. Acts 2480. By contrast, the General Assembly amended the sex offender registry statute to resolve its silence on the question and to include pardoned offenses in 2005. *Edwards v. SLED*, 395 S.C. 571, 576-77, 720 S.E.2d 462, 465. While we are cautious not to imply too much intent in the absence of legislative action, the most reasonable conclusion from comparing the histories of these statutes is to presume that if the General Assembly intended for pardoned arson offenses to retain some legal consequence, it would have included some text in Section 40-80-20 to indicate that in light of *Baucom* and its progeny. *See Baucom*, 340 S.C. at 345, 531 S.E.2d at 924 ("[T]he legislature is charged with knowledge that a pardon relieves the convict of all the consequences of his conviction.").

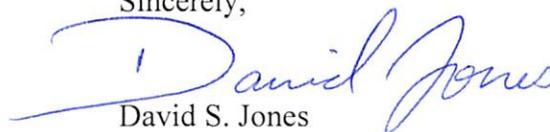
This opinion should not be construed to require a hiring authority to ignore an arson conviction on an applicant's record. We simply opine that a pardon removes the legal prohibition on such a person becoming a firefighter found in S.C. Code Ann. § 40-80-20.

Conclusion:

In conclusion, for the reasons set out above, it is the opinion of this Office that a pardon removes the legal prohibition found in Section 40-80-20 on a person convicted of arson from becoming a firefighter and permits the hiring authority to consider the application on its merits. This Office routinely states that our opinions are not attempts to establish or comment upon public policy, and that caveat is particularly appropriate here. Nothing in this opinion should be seen as a comment on the wisdom or propriety of any particular hiring decision. Our duty is to set out the law as clearly as we are able, and we believe that *Baucom* and its progeny are dispositive of this question. If this law does not reflect sound public policy, then it is for the General Assembly, not this Office, to amend the law. *See Hampton v. Haley*, 403 S.C. 395, 403, 743 S.E.2d 258, 262 (2013) ("In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision.").

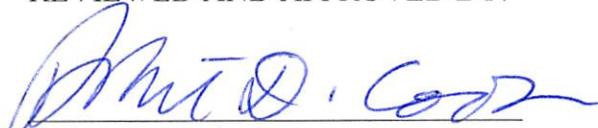
We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt to comment on any pending application, pending litigation, or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. *See S.C. Code Ann. § 15-53-20* (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,



David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General