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OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

March 16, 2004

The Honorable William E. Sandifer, III
Member, House of Representatives
518-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Sandifer:

Your recent letter notes that the current Oconee County Supervisor "was indicted on May 20, 2003 with three felony counts of embezzlement of public funds and one misdemeanor charge of misconduct in office." By way of background, you reference therein Article VI, Section 8 of the South Carolina Constitution as well as S.C. Code Ann. Section 1-3-240. Further, you note that "[t]here does not appear to be a difference between a county official charged with a felony or a misdemeanor" and that "there is no procedure to reinstate a county official who has been acquitted of criminal charges."

Your questions are as follows:

1, Would the county supervisor be allowed to remain in office if acquitted of the felony charges but convicted of the misdemeanor or is a guilty verdict on the misdemeanor sufficient to constitute a violation subject to removal?

2. If the county supervisor is acquitted of all charges would she be immediately reinstated or would it require an additional action of reinstatement by the Governor?

Law / Analysis

Of course, we must emphasize that any comment we make regarding the questions you have presented is confined entirely to a hypothetical discussion. The individual in question is presumed innocent until proven guilty and we make no comment regarding this particular pending criminal case.

Article VI, § 8 of the South Carolina Constitution provides that upon indictment for embezzlement of public funds, "[t]he Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted. In case of conviction, the position shall be declared vacant

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and the vacancy filled as may be provided by law." Article VI, § 8 also specifies that the Governor may suspend the officer upon indictment for "a crime involving moral turpitude." As with the case of embezzlement, if the officer is convicted of a crime of moral turpitude, "... the office shall be declared vacant and the vacancy filled as may be provided by law."

Section 1-3-240 further provides that "any officer of the county or State ... who is guilty of malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistence, misconduct, persistent neglect of duty in office, or incapacity shall be subject to removal by the Governor upon any of the foregoing causes being made to appear to the satisfaction of the Governor." Pursuant to § 8-1-100, "[e]xcept as provided in Section 8-1-110, any state or county officer who is indicted in any court for any crime may, in the discretion of the Governor, be suspended by the Governor, who in event of suspension shall appoint another in his stead until he shall be acquitted. In case of conviction, the office shall be declared vacant by the Governor and the vacancy filled as provided by law." Section 8-1-110 provides as follows:

> [w]henever it shall be brought to the notice of the Governor by affidavit that any officer who has the custody of public or trust funds, is probably guilty of embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer and, upon true bill found, the Governor shall suspend such officer and appoint one in his stead until he shall have been acquitted by a jury. In case of conviction the office shall be declared vacant and the vacancy filled as provided by law.

In an earlier opinion, former Attorney General McLeod concluded that § 8-1-100 "must be read in conjunction with Article VI, Section 8, of the Constitution, which contains the same general language but restricts the power of the Governor to remove an indicted officer only for crimes involving moral turpitude." Op. S.C. Atty. Gen., Op. No. 79-74 (June 6, 1979).

Your first question assumes that an individual is acquitted of the charges of embezzlement, but is convicted of the common law crime of misconduct in office. Thus, the issue here is whether misconduct in office is "a crime involving moral turpitude" within the meaning of Article VI, § 8 of the South Carolina Constitution. If so, an officer convicted of this offense, would immediately vacate his or her office.

South Carolina recognizes the common law offense of misconduct in office. This crime occurs "when duties imposed by law have not been properly and faithfully discharged." State v. Hess, 279 S.C. 14, 20, 301 S.E.2d 547 (1983). Such conduct must be done willfully and dishonestly. This is a question of fact for the jury. Id.

There is little doubt that the position of county supervisor would constitute an office for purposes of the offense of misconduct in office. See, State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994). Moreover, we have consistently concluded in previous opinions that the offense of

misconduct in office constitutes a crime of moral turpitude. See, Op. S.C. Atty. Gen., October 13, 1995; Op. S.C. Atty. Gen., September 14, 1995; Op. S.C. Atty. Gen., November 1, 1979.

A crime involving moral turpitude has been defined by our Supreme Court in State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978). There, the Court noted that "moral turpitude" is defined as

> [a]n act of baseness, vileness, or depravity in the private and social duties accepted and customary rule of right and duty between man and man .... Moral turpitude implies something immoral in itself, regardless of whether it is punishable by law as a crime.

Our Supreme Court, In The Matter of Chiles, 327 S.C. 105, 490 S.E.2d 259 (1997), concluded that a conviction of a judge for official misconduct in office is a conviction for a crime of moral turpitude or a serious crime under Paragraph 1(b)(2) of the Rule on Judicial Discipline and Standards contained in Rule 502, SCACR. However, the Court stated In the Matter of Archie Lee,313 S.C. 142, 437 S.E.2d 85 (1993) that "while the crimes of misconduct in office ... are not always crimes of moral turpitude, they may be depending on the facts as particularized in the indictment." Id. at 143-144.

In this instance, the Indictment, which is a matter of public record, charges that the acts of Misconduct In Office involve the misuse of public funds. Specifically, the Indictment states that the Supervisor "did willfully and dishonestly by act or omission, on numerous occasions while in her capacity as the Oconee County Supervisor an elected public official make use of government funds, equipment and/or personnel for her own personal gain, benefit and/or enjoyment." Courts have generally held that such misuse of public funds involve moral turpitude. See, Ky. State Bar Assn. v. Howard, 437 S.W.2d 171 (Ky. 1969); In re Battin, 617 P.2d 1109 (Cal. 1980); Scheidman v. Shawnee Co. Bd. of Co. Commrs., 1996 WL 89367 (D. Kan. 1996). Presuming, therefore, that an officer were convicted of misconduct in office, involving the specific acts alleged in the Indictment against the Oconee County Supervisor, such would, in our opinion, be a crime "involving moral turpitude" pursuant to Article VI, § 8 of the South Carolina Constitution. Accordingly, such conviction would result in the office being "declared vacant" thereby.

Your second question is the result if the County Supervisor is acquitted on all charges. You inquire whether "she [would] be immediately reinstated or would it require an additional action of reinstatement by the Governor?" Previous opinions of this Office reflect that, upon acquittal, "the order of suspension [by the Governor] will terminate." Op. S.C. Atty. Gen., May 27, 1983; Op. S.C. Atty. Gen., Op. No. 3538 (June 6, 1973). Thus, if the jury returns a verdict of acquittal as to all charges, Article VI, § 8 mandates that the suspension order of the Governor is automatically dissolved.

You have also inquired as to the applicability of § 1-3-240. It should be noted that this provision does not require a criminal conviction or even a criminal charge to be utilized by the Governor. The seminal case involving use of § 1-3-240 is Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997). There, Governor Beasley removed the Director of the Department of Public Safety for violation of § 1-3-10 which requires a public officer to "immediately furnish to the Governor, in such form as he may require, any information desired by him in relation to [the officer's] affairs or activities." The Director appealed his removal to the Circuit Court which affirmed the Governor's actions. Upholding the Circuit Court's decision, our Supreme Court noted that "[a] public officer's failure to comply with a statutory duty constitutes misfeasance in office ...," a ground for removal under § 1-3-240. In addition, the Court held that the DPS Director "failed to show any prejudice form the lack of a pre-removal hearing" and that a post-removal hearing provided adequate procedural due process. 327 S.C. at 205-206.

Thus, use of § 1-3-240 would be available for the Governor notwithstanding complete acquittal on all charges. As we have indicated in earlier opinions, the Governor's removal pursuant to § 1-3-240 is completely discretionary with the Governor. Op. S.C. Atty. Gen., Op. No. 90-51 (August 31, 1990). In an opinion dated May 23, 1990, we noted that whether the situation involved is appropriate for the Governor's use of § 1-3-240 is "a matter to be exclusively decided by the Governor." Section 1-3-240 authorizes removal only if the Governor should be satisfied as to the misconduct or neglect of duty. Hearon v. Calus, 178 S.C. 381, 183 S.E. 13 (1936). Of course, § 1-3-240 requires that the individual "be informed in writing of the specific charges against him and given an opportunity, upon reasonable notice, to be heard."

Moreover, from a legal standpoint, acquittal does not impose a legal barrier to the Governor's use of § 1-3-240. As we have stated, "[t]he failure to convict an officer or employee on criminal charges brought against him does not necessarily preclude his suspension [or removal] for the conduct forming the basis of the charge or render the prior suspension [or removal] improper." Op. S.C. Atty. Gen., Op. No. 89-101 (September 27, 1989), referencing 67 C.J.S., Officers, § 110. Accordingly, even should an officer be found "not guilty" of pending charges, the Governor would possess the discretion to remove the individual (following a hearing) pursuant to § 1-3-240. The standards for conviction in a criminal case ("beyond a reasonable doubt") and removal pursuant to § 1-3-240 are entirely different. See, Application of Baker, 386 N.Y.S.2d 313 (1976). An acquittal in a criminal case does not operate as an estoppel in a subsequent civil or administrative action based upon the same facts. See, Neanderland v. Comm. of Internal Revenue, 424 F.2d 639 (2d Cir. 1970). (finding of "not guilty" in criminal action for tax fraud does not bar subsequent civil action.).

Conclusion

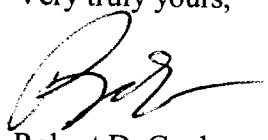
1. If a County Supervisor were acquitted of charges of embezzlement of public funds, but convicted of common law Misconduct in Office, the office of County Supervisor would be subject to being declared vacant as a "crime involving moral turpitude"

pursuant to Article VI, § 8 of the South Carolina Constitution. You are correct that the fact that this crime is a misdemeanor is irrelevant.

2. If the Supervisor were acquitted of all charges, the suspension by the Governor would terminate automatically without reinstatement by the Governor.

3. Use of the removal procedure by the Governor pursuant to § 1-3-240 is not barred by a verdict of "not guilty" on all charges against the Supervisor. Section 1-3-240 is unrelated to criminal charges and provides an independent basis for removal. The Governor, after a hearing, could find that removal was warranted for the reasons enumerated in § 1-3-240.

Very truly yours,



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