HENRY MCMASTER
ATTORNEY GENERAL

December 6, 2010

Mr. Hubert F. Harrell
Director, South Carolina Criminal Justice Academy
5400 Broad River Road
Columbia, South Carolina 29212-3540

Dear Director Harrell:

We received your letter requesting an opinion of this Office concerning the definition of the "unlawful use of a controlled substance" within the context of the regulations promulgated by the Department of Public Safety pertaining to the certification of law enforcement officers. Specifically, you asked:

> First, in determining whether a substance is a "controlled substance," is the Academy limited to only those substances as defined in S.C. Code § 44-53-110 or can/should the Academy also consider substances to be "controlled substances" as defined in 21 C.F.R. § 1308.11 through 21 C.F.R. § 1308.15? Second, what is the definition of "unlawful use" in regard to controlled substances? Lastly, would an individual engaged in the use of a controlled substance for the purpose of committing suicide be considered an "unlawful use" of that controlled substance?

This opinion will address prior opinions, relevant statutes and case law, and statutory construction.

Law/Analysis

Title 23, Chapter 6 of the South Carolina Code of Laws of 1976 governs the Department of Public Safety. Further, S.C. CODE ANN. § 23-47-20(C)(15) (1976) requires the Department of Public Safety to promulgate regulations providing for the training of "911" telecommunication operators or dispatchers. It is the interpretation of the term "unlawful use of a controlled substance" found in §§ 38-004 and 38-016 of said regulations which is the subject of this opinion. S.C. CODE ANN. REGS. § 38-004 (West Supp. 2009) provides in part:

> A. The Department may deny certification based on evidence satisfactory to the Department that the candidate has engaged in misconduct. For purposes of this section, misconduct means: . . .
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> 2. Unlawful use of a controlled substance; . . .
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> B. In considering whether to deny certification based on misconduct, the Department may consider the seriousness, the remoteness in time and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct.

Similarly, S.C. CODE ANN. REGS. § 38-016 (West Supp. 2009) provides in part:

> A. A law enforcement officer, certified pursuant to the provisions of R.38-007 and R.38-008, shall have his or her certification as a law enforcement officer withdrawn by the Department upon the occurrence of any one or more of the following events: . . .
>
> 4. Evidence satisfactory to the Department that the officer has engaged in misconduct. For purposes of this section, misconduct means: . . .
>
> b. Unlawful use of a controlled substance; . . .
>
> Provided however that in considering whether to withdraw certification based on misconduct, the Department may consider the seriousness, frequency and any mitigating circumstances surrounding the act or omission constituting or alleged to constitute misconduct.

With regard to your question as to whether the Criminal Justice Academy is limited to the definition of "controlled substance" found in S.C. CODE ANN. § 44-53-110 (1976 & West. Supp. 2009) or can or should also consider the definition of "controlled substance" found in 21 C.F.R. §§ 1308.11-15 in determining the definition of the term "unlawful use of a controlled substance" in its regulations, we turn to the familiar rules of statutory construction. The regulations promulgated by the Department of Public Safely fail to define the term "unlawful use of a controlled substance" or the separate terms "unlawful use" or "controlled substance." "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). As this Office has consistently noted,

> One of the primary rules in the construction of a statute is that the words used therein should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation. Brewer v. Brewer, 242 S.C. 9, 129 S.E.2d 736 (1963). It is a well-settled principle of law that "[c]onstruction of a

> statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons." Logan & Associates v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986).

Op. S.C. Att'y Gen. (March 25, 1985). Accordingly, ordinarily in this instance the term "controlled substance" would be construed by its "plain meaning" and the Department of Public Safety's interpretation of the term would be given great deference. However, the "plain and ordinary meaning" rule does not apply to"statutory words [that] have acquired some technical meaning . . . ." State v .Morgan, 352 S.C. 359, 370, 574 S.E.2d 203, 208 (Ct. App. 2002).

The American Heritage College Dictionary defines "controlled substance" as "[a] drug or chemical substance whose possession and use are regulated under the Controlled Substances Act." The South Carolina Code of Laws provides a definition as well as specific, detailed "schedules" and tests for inclusion in said "schedules" of controlled substances in the "Poisons, Drugs, and Other Controlled Substances" chapter of Title 44. S.C. CODE ANN. §§ 44-53-110, 44-53-180 - 44-53-270 (1976 & West Supp. 2009). Additionally, the Code of Federal Regulations also provides five specific, detailed "schedules" of controlled substances. 21 C.F.R. §§ 1308.11-15. Accordingly, because the term "controlled substance" is extensively, precisely and technically defined, it is the opinion of this Office that the term "controlled substance" has taken on a "technical meaning." Therefore, the "plain and ordinary meaning" rule of statutory construction does not apply.

Ideally, the regulations promulgated by the Department of Public Safety would provide a definition of "controlled substance" or, like various other statutory provisions, specify which statutory definition applies to the term. See, e.g., S.C. CODE ANN. §§ 12-21-5020, 44-23-1080 (1976); S.C. CODE ANN. § 40-37-290 (West Supp. 2009) (code sections specifically adopting the definition of "controlled substance" provided by S.C. CODE ANN. § 44-53-110). "[I]t is well-recognized that courts give great deference to an agency's interpretation of its own regulations even in circumstances where there may be more than one interpretation and even if such interpretation is not the one that the court would adopt in the first instance." Op. S.C. Att'y Gen.(August 12, 1986) "Construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons." Logan & Associates v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). "As a matter of policy, this Office typically defers to the administrative interpretation by the agency charged with enforcement of the statute in question." Op. S.C. Att'y Gen. (January 5, 2001) Accordingly, under these circumstances, this Office will not attempt to legislate or interpret the definition of "controlled substance" intended by the Department of Public Safety in its regulations.[1]

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[1] This Office notes that, in the specific factual scenario described in your letter, the substance described is obviously a "controlled substance," as it cannot be obtained without a prescription.

With regard to the definition of "unlawful use," once again the regulations do not provide a definition. As noted above, "[w]hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). "There is no safer nor better rule of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly says." Jones v. South Carolina Highway Dep't, 247 S.C. 132, 136, 146 S.E.2d 166, 168 (1966). American Heritage College Dictionary defines "unlawful" as "[n]ot lawful; illegal." Accordingly, "unlawful use" in the context of controlled substances simply means an illegal use of a controlled substance.

In the opinion of this Office, the use of a controlled substance by an individual "for the stated purpose of attempting suicide," as indicated in your letter, is an "unlawful use of a controlled substance." It appears that suicide remains an unlawful act in South Carolina. State v. Reese, 370 S.C. 31, 633 S.E.2d 898 (2006), *overruled on other grounds by* State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009) (malice may not be inferred from use of a deadly weapon in certain circumstances); State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); Op. S.C. Att'y Gen., November 1, 1967) (suicide is a common law felony); Op. S.C. Att'y Gen., August 21, 1963[2] . Moreover, attempted suicide also appears to be illegal in South Carolina. Op. S.C. Att'y Gen., August 21, 1963 (suicide is a felony and an attempt to commit a felony is illegal); Op. S.C. Att'y Gen., October 12, 1959. Accordingly, as the individual in this case used a controlled substance "for the stated purpose of attempting suicide," an illegal act in South Carolina, such conduct qualifies as an "unlawful use of a controlled substance."[3]

Conclusion

In determining the definition of "controlled substance" in the regulations promulgated by the Department of Public Safety, this Office will defer, as would the courts, to the Department of Public Safety's interpretation of its own regulations. As noted above, " [c]onstruction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be

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[2] This opinion relied on State v. Levelle, 34 S.C. 120, 13 S.E. 319 (1891), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) as well as Section 16-51 (S.C. Code of Laws (1962)) (defining "murder" as "the killing of any person with malice aforethought, either express or implied.). Although this statute is no longer in place, the current definition of murder remains the same. "'Murder' is the killing of any person with malice aforethought, either express or implied." S.C. CODE ANN. §16-3-10 (1976).

[3] This Office notes that, although the specific facts described in your letter, in our opinion, constitute an "unlawful use of a controlled substance," this opinion does not address other legal issues which may arise as a result of said scenario pursuant to the Americans with Disabilities Act (ADA), workers' compensation laws, civil rights laws, etc.

overruled without cogent reasons." Logan & Associates v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). "As a matter of policy, this Office typically defers to the administrative interpretation by the agency charged with enforcement of the statute in question." Op. S.C. Att'y Gen. (January 5, 2001) Therefore, in this instance, this Office defers to the Department of Public Safety as to the definition of the term "controlled substance," which, in our opinion, has taken on a "technical meaning." The definition of "unlawful use," which is also undefined in the regulations, takes on its "plain and ordinary" meaning, which, according to the American Heritage College Dictionary, is "[n]ot lawful; illegal." Furthermore, in the specific hypothetical scenario described in your letter, it is the opinion of this Office that the intentional overdose of a prescription medication for the stated purpose of committing suicide is an "unlawful use of a controlled substance." Of course, herein we do not comment upon any specific factual circumstance in which the Criminal Justice Academy might take action regarding any particular individual's certification. This Office, in an opinion, cannot determine facts. See Op. S.C. Att'y Gen. (December 12, 1983). Moreover, it would remain entirely within the discretion of the Academy as to what course of action that agency would take in a particular case concerning an officer's certification.

Sincerely,

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By: ElizabethAnn L. Felder
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REVIEWED AND APPROVED BY:

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