HENRY MCMASTER
ATTORNEY GENERAL

October 20, 2008

Ray N. Stevens, Director
Department of Revenue
P. O. Box 125
Columbia, South Carolina 29214

Dear Mr. Stevens:

You have sought an opinion concerning an interpretation of S.C. Code Ann. Section 12-54-240. This provision prohibits the divulging of tax returns and other tax documents except upon "proper judicial order or as otherwise provided by law." By way of background, you note that "[t]his statute presents two sanctions" for violation thereof. As you correctly describe,

> [t]he first is the typical fine plus imprisonment imposed by a criminal statute. In this case, the statute is clear that a criminal violation is at issue since the "person violating the provisions of this section is guilty of a misdemeanor." And, more importantly for our question, the statute is plain that the sanction of a fine or imprisonment or both arises only "upon conviction." Thus, the sanction is in a criminal statute, requires a conviction before the sanction can be imposed, and imposes a sanction that is typical for a criminal violation. However, the second sanction authorized by this statute is more problematic.
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> The second sanction addresses the "offender's" means of deriving income from the State. For example, if "the offender is an officer or an employee of the State." the offender must be dismissed and is prohibited from "holding any public office" for five years. Obviously, the prohibition of "any public office" covers all State agencies and functions, not just the Department of Revenue. In addition, if the offender's connection to the State is via "an independent contract" for specific areas, the contract must be terminated and the company must be prohibited from contracting with the State within specific areas of activities for five years. Clearly, such a sanction (one that denies employment and that voids contracts) is unlike the typical fine plus imprisonment associated with a criminal statute. In fact, one could contend that the second sanction is so different from the first that the General Assembly must have intended the second sanction to be imposed regardless of whether the individual

> is convicted (or for that matter, even arrested or tried) for a crime. This uncertainly is the basis for our opinion request.

Thus, your question is "whether a person who makes an unlawful disclosure under S.C. Code Ann. Section 12-54-240 (Revised 2000) may be subjected to a loss of employment or the loss of contract without first having been criminally convicted of having made the unlawful disclosure."

Law / Analysis

S.C. Code Ann. Section 12-54-240 (A) provides as follows:

> [e]xcept in accordance with proper judicial order or as otherwise provided by law, it is unlawful for a person to divulge or make known in any manner any particulars set forth or disclosed in any report or return required under Chapters 6, 8, 11, 13, 16, 20, or 36 or Article 17 of Chapter 21 of this title. A person violating the provision of this section is guilty of a misdemeanor and, upon conviction, must be punished by a fine of not more than one thousand dollars or by imprisonment of not more than one year, or both. *If the offender is an officer or employee of the State, he must be dismissed from office and disqualified from holding any public office in this State for a period of five years thereafter.* If the offender is an officer or employee of a company retained by the state on an independent contract basis under subsection (B)(3) of this section or Section 12-4-350, the contract is immediately terminated and the company is not eligible to contract with the State for this purpose for a period of five years thereafter.

(emphasis added). Section 12-54-240(B) identifies numerous exceptions. *See,* § 12-54-240 (B)(1) through (28).

We have advised that § 12-54-240 (previously § 12-7-1680 "is explicit in its mandate that ... returns and the information contained therein, shall not be disclosed by [Department of Revenue] employees." *Op. S.C. Atty. Gen.*, No. 86-11 (January 23, 1986). Moreover, we have noted that this statute "further provides for criminal and civil sanctions for the unlawful production or disclosure of income tax records." *Id.* Such is to enforce the "strong public policy against disclosure of income tax records filed with the [Department of Revenue]" because such policy "serves the public good by encouraging voluntary and truthful reporting by the taxpayer, since the taxpayer is assured that disclosures in his return will remain confidential." *Id.* In the 1986 Opinion, we noted also that the language of § 12-54-240 "is similar to that found in other states' provisions," (citing *New York State Dept. of Taxation v. N.Y. State Dept. of Law*, 378 N.E.2d 110 (N.Y. 1978) and *Garrett v. State*, 253 S.E. 2d 741 (Ga. 1979)).

Your question is whether a conviction for the unauthorized dissemination of tax records is necessary or required prior to any "dismissal" from office and "disqualification" from holding office as is mandated by Section 12-54-240. Put another way, is the requirement that the "offender" be "dismissed" from office and is "disqualified from holding office "for five years dependent upon a conviction for violation of § 12-54-240? We conclude that the better reading is that a conviction for violation of § 12-54-240 is required for such mandatory dismissal.

Several principles of statutory construction are applicable here. First and foremost, is the "cardinal rule of statutory construction ... to ascertain and effectuate the intent of the legislature." *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Moreover, as our Supreme Court has recognized, "[w]hen construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." *Foothills Brewing Concern, Inc. v. City of Greenville*, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000). In construing statutes, the words must be given their plain and ordinary meaning without resort to a subtle or forced construction for the purpose of limiting or expanding their operation. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984). A statute must be read as whole and provisions thereof not in isolation. All sections and provisions must be construed together. *Higgins v. State*, 307 S.C. 446, 415 S.E.2d 799 (1992).

We have located no court decisions or opinions of this Office which directly address your question. However, several general principles are relevant here. It has generally been stated that

> [t]he right to hold public office is a valuable one and its exercise should not be declared prohibited or curtailed except by plain provisions of law. *In re Ray*, 26 N.J. Misc. 56, 59, 56 A.2d 761 (Circ. Ct. 1947), cited in *Strothers v. Martini*, ... 79 A.2d 857.

State v. Musto, 187 N.J. Super. 264, 454 A.2d 449, 459 (1982). Thus, as we stated in an opinion, dated February 16, 2007, referencing an earlier opinion of July 1, 1999,

> ... prior to the removal of a public officer or employee for cause, such officer or employee must be afforded notice and an opportunity to be heard. As stated in that opinion,
>
> [w]here an officer ... can be removed only for cause either for the reason that he holds for a term fixed by law, or during good behavior, or that a constitution or statute so provides, it is generally held that the power granted is not arbitrary to be exercised at pleasure, and the power can be exercised only after notice and opportunity to be heard.

The 2007 opinion noted that the earlier opinion cited the decision in *Walker v. Grice*, 162 S.C. 29, 159 S.E. 914 (1931), where the Court concluded that

> ... [a] removal for cause operate as a limitation upon the power to remove, and, in our opinion, the party to be removed, or attempted to be removed, is entitled to a hearing as to the charge that he has failed to perform his duty.

Moreover, we also noted in the 2007 opinion that

> [f]urther support for this proposition is found in *Williamson v. Wannamaker*, 213 S.C. 1, 48 S.E.2d 601 (1948). See also: Op. Atty. Gen., dated April 1, 1999 ("... where a term of office is fixed by law, due process rights of notice and an opportunity to be heard attach to any decision to remove.").

Cases in other jurisdictions concerning similar statutory provisions have reached varying conclusions. Certain authorities construe analogous statutes as not requiring a criminal prosecution or conviction prior to disqualification of the officer or employee. For example, in *State ex rel. Smith v. Bohannan*, 101 Ariz. 520, 421 P.2d 877, 880 (1967), the Arizona Supreme Court, sitting *en banc*, stated the following:

> [r]espondent's principal argument in resisting *suo warranto* is predicated on the theory that there must be a previous criminal conviction for the offense prohibited by the statute before he is subject to the disqualification set forth in the last clause of s 38-447 ....
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> From this premise, respondent presses upon this Court a statement from an annotation in 119 A.L.R., at page 741. Since it embodies his theory of defense, we quote directly therefrom:
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> > 'Misconduct upon the part of a public officer is not of itself ground for forfeiting his office upon proceedings in quo warranto unless such misconduct has already been judicially established or unless the acts of misconduct charged are declared *ipso facto* to work a forfeiture of his office.'
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> Respondent's argument stems from the fact that his misconduct has not yet been judicially established. We think, however, that the correct rule is stated in *State ex inf. McKittrick v. Wymore*, 343 Mo. 98, 119 S.W.2d 941, 119 A.L.R. 710. There the Court held:

'The rule is stated by standard tests as follows:

> "Quo warranto will also lie for the purpose of ousting an incumbent whose title to the office has been forfeited by misconduct or other cause. And in such a case it is not necessary that the question of forfeiture should ever have been presented to any court for judicial determination, but the court having jurisdiction of the quo warranto proceeding, may determine the question of forfeiture for itself. The question must however be judicially determined before he can be ousted ... Mecham, *Public Officers*, Sec. 478, p. 308.'

Id. at 880-881. The Court also noted that in the case before it, "respondent has admitted the acts which the legislature has prohibited." *Id.* at 881. *See also In re Moskowitz*, 329 Pa. 183, 196 A. 498 (1938), 67 C.J.S. *Officers*, § 28; S.C. Code Ann. § 1-3-240 [removal from office following hearing by Governor of any county or state officer who is "guilty of misconduct or persistent neglect of duty in office].

On the other hand, in *Johnson v. Johnson*, 427 P.2d 414 (Okla. 1967), the Oklahoma Supreme Court found it unnecessary to determine whether the statute in question required a conviction prior to disqualification because "in any event the statute requires at least a formal adjudication of the officer's guilt in some regular proceeding with formal allegations of his misdeeds, due process thereof and full opportunity to defend." 424 P.2d at 419. In *dicta*, the Court concluded that the statute could be read either way, and that "it may well also be ... that none of the penalties prescribed by the statute occur or may be imposed until a conviction in a criminal proceeding may be had." *Id.*

Conclusion

We deem § 12-54-240 to be ambiguous and capable of various interpretations. However, it is our opinion that the better reading of the statute is that the General Assembly requires a criminal conviction for violation of § 12-54-240 prior to the harsh measures of disqualification from holding any public office in the State for five years. Moreover, in support of our interpretation, we note that § 12-54-240 makes no provision for the governing procedures applicable for dismissal and disqualification. Thus, the pertinent sentence contained in the statute in question must, we believe, be read in conjunction with the preceding sentence regarding conviction for the crime of unauthorized release of tax records. Otherwise, standing alone, the dismissal and disqualification provision enunciates no requirement of formal adjudication or due process concerning the determination of the officer's misconduct. Finally, we do not believe the General Assembly intended

to impose a five year period of disqualification from holding any public office based solely upon and administrative determination by the Department of Revenue (subject to judicial review) that the individual has violated § 12-54-240. Such a determination by one administrative agency would govern all public offices in the State, a result we do not believe the Legislature intended. Instead, we believe the better interpretation is that such discharge and dismissal may occur only after conviction for violation of § 12-54-240. This reading is consistent with the generally applicable rule of removal from Office by the Governor upon conviction for certain crimes as set forth in Art. VI, § 8 of the Constitution.

Very truly yours,

Robert D. Cook
Deputy Attorney General

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