ALAN WILSON
ATTORNEY GENERAL

July 17, 2012

Swati S. Patel, Esquire
Chief Legal Counsel
Office of the Governor
1205 Pendleton Street
Columbia, SC 29201

Dear Ms. Patel:

We received your letter requesting an opinion of this Office regarding whether the Governor has the authority to suspend a public official who was indicted for a violation of the State Ethics Act (the "Ethics Act"). See S.C. Code Ann. §§8-13-100 *et seq*.

By way of background, you note that Christy Bartley Coleman was indicted by the Grand Jury for the Court of General Sessions of Aiken County for a violation of §8-13-735(B)(2)(a). The Indictment states that she:

> . . . did in Aiken County, South Carolina, on or about November 10, 2010, unlawfully serve as a Part-time Clerk to the Clearwater Water and Sewer District Commission while concurrently serving as a Board Member to the Commission. . . .

Specifically, §8-13-735(B) provides, in pertinent part, that:

> No person shall serve at the same time as:
>
> (1) a nonappointed member of the governing body of the board or commission for a water or sewer district or a nonprofit water or sewer corporation or company organized pursuant to the provisions of state law; and
>
> (2)(a) an employee of the same board, commission, corporation, or company; or
>
> (b) in a position subject to the control of that board, commission, corporation, or company; or
>
> (c) in a decision-making position concerning the operation and functions of that board, commission, corporation, or company.

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Pursuant to §8-13-1520(A), ". . . a person who violates any provision of this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned for not more than one year, or both."

The clear intent of the Ethics Act is to prohibit public officials from operating under a conflict of interest. For example, a conflict of interest exists when one individual is both master and servant. The master-servant relationship is based on common law and may be summarized as follows:

> [A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.

Ops. S.C. Atty. Gen., March 5, 2012; February 19, 2003; January 19, 1994. The 2003 opinion further states that "[t]raditionally, a master-servant role arises when an individual serves as an employee for the same body to which he or she serves as an officer." In an opinion of this Office dated April 4, 2006, we added:

> [i]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions. ... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality. ...

Moreover in McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), the South Carolina Supreme Court considered the propriety of a public commission charged with the management of a Confederate veterans' infirmary hiring two commission members as employees of the infirmary. In holding that the employment of the two commission members by the commission was illegal, the Court stated:

> [n]o man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.

Id., 77 S.E. at 1022. We have thus recognized that when such a master-servant conflict exists, a public official is prohibited from serving in both roles. See Ops. S.C. Atty. Gen., March 5, 2012; July 19, 2006; February 19, 2003.

However, we must emphasize that the individual in question here is presumed innocent until proven guilty, and we thus make no comment regarding this particular pending criminal case.

With this caveat in mind, we note that pursuant to Article VI, §8 of the South Carolina Constitution:

> [a]ny officer of the State or its political subdivisions . . . who has been indicted by a grand jury for a crime involving moral turpitude or who has waived such indictment if permitted by law may be suspended by the Governor until he shall have been acquitted. In case of conviction the office shall be declared vacant and the vacancy filled as may be provided by law. [Emphasis added].

This constitutional provision requires that at the crime named in the indictment be a crime of moral turpitude for the Governor's power of suspension to be invoked.

The Supreme Court of South Carolina defines "a crime of moral turpitude" as:

> . . . an act of baseness, vileness, or depravity in the private and social duties that a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man . . .

State v. Drakeford, 290 S.C. 338, 350 S.E.2d 391, 392 (1986); State v. Horton, 271 S.C. 413, 238 S.E.2d 263, 263 (1978); see Ops. S.C. Atty. Gen., January 27, 1998; March 20, 1991, January 23, 1991, March 6, 1990, June 13, 1989; March 11, 1988. The Court has explained that a crime of moral turpitude is usually *mala in se* (prohibited in and of themselves, regardless of whether or not there is a statutory prohibition), as opposed to one which is *mala prohibitum* (prohibited by statute). Horton, 248 S.E.2d at 263; see Ops. S.C. Atty. Gen., June 25, 1991; August 13, 1984. Thus, while all crimes involve some degree of social irresponsibility, at the same time all crimes would not involve moral turpitude. State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278, 280 (1980); see McAninch and Fairey, The Criminal Law of South Carolina, 45 (3rd ed. 1996) ("Most offenses found to involve moral turpitude ... seem to include some type of dishonest behavior....").

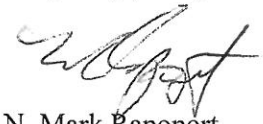
By way of illustration, in In re Sims, 861 A.2d 1 (D.C. App. 2004), the D.C. Court of Appeals upheld the disbarment of an attorney who was convicted in federal court for conflict of interest. The court held that the attorney's conduct, in which he engaged in the manipulation of records for his own gain, *i.e.*, "fixing" multiple parking tickets, clearly involved moral turpitude which warranted his disbarment. Id., 861 A.2d at 4.

However, after careful review of the facts as particularized in the above-referenced Indictment, we find it unlikely a court will conclude that the conduct alleged therein constitutes a crime of moral turpitude, as has been defined by law. See Matter of Lee, 313 S.C. 142. 437 S.E.2d 85, 86 (1993) ["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"]; Ops. S.C. Atty. Gen., June 27, 2005; March 16, 2004.

Accordingly, it is the opinion of this Office that the Governor would not be authorized to suspend this individual and declare the office vacant pursuant to Article VI, §8 of the South Carolina Constitution.[1]

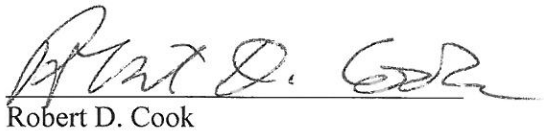
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General

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[1]We have previously noted that the Clearwater Water and Sewer District is a special purpose district. Ops. S.C. Atty. Gen., August 1, 2000; January 28, 1982. Therefore, the removal provisions found in §8-1-100 [". . . 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"] are inapplicable, since members of a special purpose district are not State or county officers. See Op. S.C. Atty. Gen., August 1, 2000 [advising that the removal provisions found in §1-3-240 addressing persistent neglect of duty do not apply to members of the Clearwater Water and Sewer District, because such members are not State or county officers].