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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

November 3, 2003

The Honorable Inez M. Tenenbaum
State Superintendent of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Superintendent Tenenbaum:

You have requested an opinion "on whether the State Board of Education (State Board) has the authority to suspend or revoke a South Carolina Educator's certificate for violations of test security laws and regulations when no criminal conviction occurs."

By way of background, you state the following:

> The question is whether the language of the test security statute that a certificate may be suspended or revoked upon conviction prohibits the board from suspending or revoking the certificate of an educator when the educator is not convicted of violating § 59-1-445? Can the breach of test security constitute unprofessional conduct or one of the other reasons set forth in § 59-25-160 or State Board Regulation 43-58 and therefore be considered by the State Board as just cause for suspension or revocation of an educator's certificate?

Law / Analysis

S.C. Code Ann. Sec. 59-25-150 provides that "[t]he State Board of Education may, for just cause, either revoke or suspend the certificate of any person." Section 59-25-160 defines "just cause" for suspension or revocation of an educator's certificate as follows:

"Just cause" may consist of any one or more of the following:

(1) Incompetence;
(2) Wilful neglect of duty;
(3) Wilful violation of the rules and regulations of the State Board of Education;
(4) Unprofessional conduct;
(5) Drunkenness;
(6) Cruelty;

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Request Letter

(7) Crime against the law of this State or the United States;
(8) Immorality;
(9) Any conduct involving moral turpitude;
(10) Dishonesty;
(11) Evident unfitness for position for which employed; or
(12) Sale or possession of narcotics

Other grounds for suspension or revocation are specified in State Board Regulation 43-58.

Subsequent to the enactment of § 59-25-150 and -160 in 1974, the General Assembly in 1985 enacted Act No. 201, Part II of 1985, now codified as § 59-1-445. This Code provision relates to violations of mandatory test security and provides penalties therefor. Such Section states as follows:

> (1) It is unlawful for anyone knowingly and wilfully to violate security procedures regulations promulgated by the State Board of Education for mandatory tests administered by or through the State Board of Education to students or educators, or knowingly and wilfully to:
>
> (a) Give examinees access to test questions prior to testing;
>
> (b) Copy, reproduce, or use in any manner inconsistent with test security regulations all or any portion of any security test booklet;
>
> (c) Coach examinees during testing or alter or interfere with examinees' responses in any way;
>
> (d) Make answer keys available to examinees;
>
> (e) Fail to follow security regulations for distribution and return of secure test as directed, or fail to account for all secure test materials before, during, and after testing;
>
> (f) Participate in, direct, aid, counsel, assist in, encourage, or fail to report any of the acts prohibited in this section.
>
> Any person violating the provisions of this section or regulations issued hereunder is guilty of a misdemeanor and upon conviction must be fined not more than one thousand dollars or be imprisoned for not more than ninety days, or both. Upon conviction, the State Board of Education may suspend or revoke the administrative or teaching credentials, or both, of the person convicted.

> (2) The South Carolina Law Enforcement Division shall investigate allegations of violations of mandatory test security, either on its own initiative following receipt of allegations, or at the request of a school district or the State Department of Education.
>
> The South Carolina Law Enforcement Division shall furnish to the State Superintendent of Education a report of the findings of any investigation conducted pursuant to this section.
>
> (3) Nothing in this section may be construed to prohibit or interfere with the responsibilities of the State Board of Education or the State Department of Education in test development or selection, test-form construction, standard setting, test scoring, and reporting, or any other related activities which in the judgment of the State Superintendent of Education are necessary and appropriate. (emphasis added).

The State Board of Education has promulgated Regulation 43-100 which describes in greater detail the types of conduct involving tests which would violate the law.

There is little question that prior to the enactment of § 59-1-445, a criminal conviction (of any kind) was unnecessary to revoke a certificate for "just cause" pursuant to § 59-25-150. See, Op. S.C. Atty. Gen., January 18, 1982. [The "Board may deny a teaching certificate to a person who exhibits immoral or unprofessional conduct or evident unfitness for teaching, including the commission of a crime."] The question here, however, is whether the subsequent enactment of § 59-1-445, which deals specifically with breach of test security and provides criminal penalties therefor, now makes a criminal conviction under that statute necessary before a certificate may be administratively revoked for a breach of test security by a educator? In other words, does the language contained in § 59-1-445, i.e. "upon conviction, the State Board of Education may suspend or revoke the administrative or teaching credentials, or both, of the person convicted" make conviction under § 59-1-445 the only means for suspension or revocation with respect to breach of test security? It is our opinion that § 59-25-150 (which provides for suspension and revocation for "just cause" as defined by § 59-25-160 and the Regulations of the State Board) authorizes the State Board to suspend or revoke an educator's certificate in situations involving breaches of test security where no criminal conviction pursuant to § 59-1-445 has occurred.

Several principles of statutory construction are pertinent to these questions. First and foremost, in interpreting a statute, the primary purpose is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). An enactment should be given a reasonable and practical construction, consistent with the purpose and policy expressed in the statute. Hay v. S.C. Tax Comm., 273 S.C. 158, 390 S.E.2d 486 (Ct. App. 1990).

Moreover, full effect must be given to each part of a statute and, in the absence of ambiguity, words must not be added or taken therefrom. Home Bldg. and Loan Assn. v. City of Sptg., 185 S.C.

313, 194 S.E.139 (1939). Statutes in apparent conflict with each other must first be read together and reconciled if possible so as to give meaning to each and to avoid an absurd result. Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984). Implied repeals of a statute are not favored and will not be indulged if any other reasonable construction exists. Strickland v. State, 276 S.C. 17, 274 S.E.2d 430 (1981). As the Court stated in State v. Alexander, 48 S.C.L. 247 (1867), "[i]n order to ... repeal ... a former statute by implication from the terms of a later, the matter of the latter must be so clearly repugnant to, that it necessarily implies a negation of the former."

On the other hand, where two statutes are in fact in irreconcilable conflict, the latest statute enacted is deemed to prevail. Yahnis Coastal, Inc. v. Stroh Brewery Co., 295 S.C. 243, 368 S.E.2d 64 (1988); Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994). However, the following caveat to this general rule of construction was stated in Op. S.C. Atty. Gen., August 5, 1986:

> ... when courts are confronted with an apparent conflict between a specific statute on a subject and a more general one on the same subject, the court is obligated to examine the statutes carefully and harmonize any apparent conflicts. Criterion Insurance Company v. Hoffman, [258 S.C. 282, 188 S.E.2d 459 (1972)] .... The reason for this requirement is that repeals by implication are not favored, and where two statutes can be construed together and thus preserve the objects to be obtained by each, they should be so construed, where no contradiction or unreasonableness will result. State v. New Mexico State Authority, 411 P.2d 984, 1004 (New Mexico 1966). There must indeed be a true conflict between the two statutes, State v. O'Brien, 123 Ariz. 578, 601 P.2d 341 (1979), and even so, the duty remains to reconcile such conflicts if at all possible. Banana River Properties v. City of Cocoa Beach, 287 So.2d 377 (Fla. Ct. App. 1974).
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> Even where conflicts may not be reconciled, courts have noted two particular exceptions to the generally recognized principle that later specific statutes will prevail over earlier general ones. In Association of General Contractors of California v. Secretary of Commerce of U.S. Department of Commerce, 441 F.Supp. 955 (C.D. Cal. 1977) vacated on other grounds, 438 U.S. 909 (1978), it was noted that this general rule of construction is not to be applied when the results are extraordinary or where the results do not reflect the true presumed intention of the legislature. These exceptions are also recognized in cases such as Shelton v. U.S., 165 F.2d 241 (D.C. Cir. 1947) and U.S. v. Windle, 158 F.2d 196 (8th Cir. 1946).

The North Carolina case of Person v. Garrett, 280 N.C. 163, 184 S.E.2d 873 (1971) illustrates the foregoing rules. In that decision, the North Carolina Supreme Court held that a statute authorizing the department of motor vehicles to suspend a driver's license of any operator who has within twelve months been convicted of two or more charges of speeding or one or more charges of reckless driving did not repeal an earlier statute requiring mandatory revocation for conviction of two

offenses of reckless driving in a twelve month period. The Court reasoned as follows in reaching this conclusion:

> [a] statute is not deemed to be repealed merely by the enactment of another statute on the same subject. The later statute on the same subject does not repeal the earlier if both can stand, or where they are cumulative, and the court will give effect to statutes covering the same subject matter where they are absolutely irreconcilable and when no purpose of repeal is clearly indicated .... The language of the statute will be interpreted to avoid absurd consequences.

184 S.E.2d at 874. The Court noted that the earlier statute had been on the books since 1935 and that "[i]t would be more than passing strange for the legislature to allow this section to remain in the General Statutes for a period of twenty-four years if the legislature had intended to repeal it." Moreover, the Court added that

> ... reckless driving is one of the more serious motor vehicle violations, and it would strain one's credulity to conclude that the legislature, by implication, intended to repeal [the earlier statute] requiring mandatory revocation for conviction of two offenses of reckless driving within a period of twelve months .... Such interpretation produces an absurd result.

Id.

For many of these same reasons, we conclude that a conviction under § 59-1-445 is not the exclusive means for revocation or suspension of an educator's certificate for misconduct involving test security. Such action by the State Board remains authorized if "just cause" is found pursuant to § 59-25-440. It is well established that "[w]here the conduct of a public employee that forms the basis of disciplinary proceedings resulting in the employee's suspension may also constitute a violation of criminal law, the absence of a conviction bars neither prosecution nor findings of guilt for misconduct in office in the disciplinary proceeding." Op. S.C. Atty. Gen., Op. No. 90-51 (August 31, 1990).

Here, there is no indication that the General Assembly in any way intended to limit § 59-25-150 or to narrow its applicability through the passage of § 59-1-445. Admittedly, § 59-1-445 is later in time to § 59-25-150. Moreover, the two statutes do overlap somewhat, inasmuch as § 59-25-150 authorizes a criminal conviction to serve as one basis (among many others) for revocation "for just cause." However, discern no intent on the part of the Legislature to make conviction under § 59-1-445 the sole basis for revocation or suspension for conduct involving a breach of test security. No express repeal or limitation is contained in the Test Security statute. And, as referenced above, implied repeals are strongly disfavored under the law. Moreover, § 59-25-150, allowing for revocation or suspension for "just cause," has been on the books since 1974. The General Assembly has made no effort to remove this statute or any part thereof from the Code. As the Court held in

Person v. Garrett, supra, the two statutes, § 59-25-150 and 59-1-445 can be read as cumulative. Absent an indication that the Legislature intended an implied repeal or narrowing of § 59-25-150, we decline to infer such a limitation.

Moreover, maintenance of test security lies at the very heart of maintaining the integrity of the educational system. It defies common sense to conclude that the only way the State Board could now revoke the credentials of teachers or administrators who commit misconduct involving test security would be by way of a criminal conviction. Such a conclusion would mean that unless there were proof beyond a reasonable doubt of a violation of § 59-1-445 itself, the Board could take no disciplinary action against educators who breach test security. While all other teacher conduct rising to the level of "just cause" for removal would remain intact, misconduct involving test security could not result in revocation of a certificate without a conviction under § 59-1-445. We decline to read the law in such a constrained, illogical fashion. We do not believe the Legislature intended such a result. See, City of Myrtle Beach v. Richardson, 280 S.C. 167, 311 S.E.2d 922 , 925 (1984) [in cases of alleged repeals by implication, "'the consequences of such repeal may be taken into consideration.'"]

In our view, there is nothing remarkable about the Legislature's insertion of the "upon conviction" language in § 59-1-445. This statute created the crime of violation of mandatory test security and imposed penalties therefor. A natural adjunct of passage would have been to make proof of conviction of the offense an additional basis for suspension or revocation "of the administrative or teaching credentials, or both, of the person convicted." We, therefore, read § 59-1-445 as cumulative to § 59-21-150 rather than as effectuating a repeal or limitation thereupon. Thus, in our view, a determination by the State Board of misconduct involving test security could constitute "just cause" for revocation or suspension of a certificate.

Accordingly, in our opinion, §§ 59-1-445 and 59-25-150 may be fully reconciled with each other. The latter statute deals with wrongful conduct, including all criminal conduct. On the other hand, § 59-1-445 deals solely with a suspension or revocation for proof of conviction pursuant to that specific statute. All wrongful conduct other than a conviction for violation of § 59-1-445 - including misconduct involving mandatory test breaches of security which do not result in a conviction under § 59-1-445 remain unaffected by passage of the Test Security Act. In our opinion, therefore, the State Board of Education possesses the authority to suspend or revoke a South Carolina Educator's certificate for violations of test security laws and regulations when no criminal conviction occurs

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an