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The State of South Carolina



Office of the Attorney General

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September 18, 1985

Dr. Jaime E. Condom
Interim State Commissioner
S.C. Department of Mental Health
Post Office Box 485
Columbia, South Carolina 29202

RE: Suspension of an Employee of the Department
of Mental Health

Dear Dr. Condom:

Thank you for your recent inquiry relative to the above. You have inquired whether the Department of Mental Health has the discretion to deny back pay to an employee of the Department for the period of time he was suspended from his position pursuant to Department Policy [Memorandum No. 17-84 (8/1/84)] after being charged with committing a crime arising out of or in the course of employment with the Department of Mental Health for which conviction would adversely reflect on the individual's suitability for patient care and/or employment. According to the facts you have provided, the employee was subsequently reinstated to employment after being acquitted of the criminal charges. Memorandum No. 17-84 expressly provides that reinstatement of the employee, if acquitted, is without back pay. Since the Department policy is clear in its intent that the employee not be provided compensation during the period of suspension, I address your inquiry as questioning the validity of the Department policy.

Section 8-11-230(6), Code of Laws of South Carolina, 1976, as amended, authorizes the State Personnel Division (Division) of the State Budget and Control Board to develop policies and programs concerning disciplinary actions and separations involving state employees. In accordance with this mandate and others, the State Personnel Division has promulgated several rules and regulations that authorize the use of a suspension to discipline an employee. R. 19-707.09C, Rules of the Division, provides guidelines for agency use of

Dr. Jaime E. Condom
September 18, 1985
Page 2

employee suspension. Suspension is defined therein "as an action taken by an agency head against an employee to temporarily relieve the employee of duties and place the employee on leave without pay." The regulation further provides that "[a]n agency head may suspend an employee as a disciplinary measure for just cause." This provision, as well as several other regulatory provisions of the Division, authorize and even mandate the appropriateness of an employee suspension without pay as a disciplinary sanction. See, e.g., R. 19-705.03C(6); R. 19-705.02B; R. 19-700(III). Moreover, there is little doubt that the Department's suspension policy is consistent with the requirement that "just cause" exist pursuant to R. 19-707.9C(2). Indictment or arrest for a crime involves a finding of probable cause by an independent forum [ordinarily, either a grand jury or magistrate, respectively] that the person charged committed the criminal act, and further, the policy is limited to crimes that arise out of or in the course of employment and that adversely reflect on the individual employee's suitability for patient care and/or continued employment. Thus, the suspension of an employee in accordance with Memorandum No. 17-84 is consistent with the State law governing the discipline of employees.^{1/}

The law is uniform that "a public officer or employee lawfully suspended is generally not entitled to compensation during the period of his suspension, whether or not he is finally removed..." 67 C.J.S. Officers, § 221, at 712; 63A Am.Jur.2d Public Officers and Employees, § 473. Following the general authority, this Office has previously concluded that if a public employee is lawfully suspended after being charged with a crime and the suspension is thereafter terminated because of acquittal of the employee, the employee is not entitled to compensation for the period

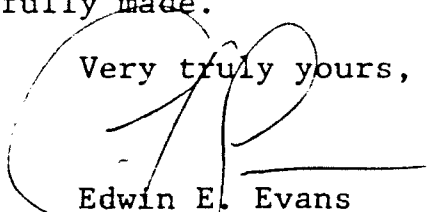
^{1/} Incidentally, pursuant to R.19-705.02, an agency's disciplinary procedures and policies are approved by the State Personnel Division. Approval by the Division would create, at the least, a strong inference that the Department's policies are consistent with the Division's requirements and regulations.

Dr. Jaime E. Condom
September 18, 1985
Page 3

of time he of time he was suspended. 1972 Op. Atty. Gen., No. 3281; Op. Atty. Gen. (December 16, 1981), [see attached].^{2/}


Thus, for the reasons herein identified, we believe that the Department of Mental Health policy [Memorandum No. 17-84] is valid insofar as it authorizes the suspension without pay of an employee charged with committing a misdemeanor arising out of or in the course of employment with the Department and for which conviction would adversely reflect on the employee's suitability for patient care and/or continued employment. In addition, although the suspension of the employee may be terminated by ultimate acquittal or dismissal of the charges brought against him, this fact does not entitle the employee to compensation during the period of suspension unless the suspension was illegal or unlawfully made.

Very truly yours,


Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:


Robert D. Cook
Executive Assistant for Opinions

^{2/} Of course, here, we assume the suspension of the employee was legally entered. Parenthetically, an employee who is suspended may challenge the validity of the suspension by appealing through the State Employee Grievance Act. [§§ 8-17-310, et seq.]; see in particular, § 8-17-330. And, if the suspension were wrongful the employee would generally be entitled to back pay and other employment rights and benefits. 63A Am.Jur.2d Public Officers and Employees, § 297; R. 19-706.02G. We have not reviewed the Department's employee grievance procedures and thus voice no opinion as to whether the grievance procedures employed by the Department comply with State and federal law.