1984 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 27, 2005

Paula H. Hite, Board Chairperson
School District 5 of Lexington and Richland Counties
P. O. Box 938
Ballentine, South Carolina 29002

Dear Chairperson Hite:

You have requested an opinion regarding the voting capacity of certain members of the Board of Trustees of School District Five of Lexington and Richland Counties. By way of background, you state the following:

> [a]s you are aware, one of the Trustees of our Board, Mrs. Carol Sloop, has recently been charged with simple assault and battery. It is my understanding that Mrs. Sloop intends to contest these charges. There are several important matters currently before the Board which require its immediate attention and possible action. However, a question has arisen concerning Mrs. Sloop's ability to lawfully carry out the duties and functions of her office and to participate in Board decision- making, pending the resolution of these charges.
>
> I am hereby requesting that your office provide immediate advice and guidance concerning Mrs. Sloop's legal status as an elected Board member. Specifically, do the pending charges require and/or allow for Mrs. Sloop's removal from office or prevent her from performing her official duties?
>
> In addition, a question has been raised by a Board member concerning whether the Board may act in light of a letter received from a citizen, Ms. Nancy Scherberger, that asserts general and vague allegations of improper conduct by the Board or the majority of Board members. I am enclosing a copy of Ms. Scherberger's June 14 letter for your review. The Board intends to investigate the allegations in due course. Please advise us as to whether the mere submission of this letter containing such allegations precludes the Board from acting as a conflict of interest or any other grounds.

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, S.C. 29211-1549 • TELEPHONE: 803-734-3970 • FACSIMILE: 803-253-6283

Law / Analysis

Certain governing principles guide our response to your questions. As our Supreme Court long ago stated, ""[t]he power of removal from office ... is not an incident of the executive office, and it exists only where it is conferred by the Constitution or by the statute law, or is implied from the conferring of the power of appointment." *State ex rel. Lyon v. Rhame*, 92 S.C. 455, 75 S.E. 881, 882 (1912). If an officer holds office for a fixed term, summary removal is not authorized. *State v. Wannamaker*, 213 S.C. 1, 48 S.E.2d 601 (1948). The right to hold an office during a fixed term unless removed for cause may be overcome only by an unequivocal grant of power from the Legislature to remove at pleasure. *Id.*

Moreover, the Governor possesses no inherent power to remove or suspend from office. The Chief Executive may not remove or suspend a public officer unless the power to do so is conferred by the Constitution or statute. *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997). The power to suspend from office stands separate and apart from the power to remove, and must itself be found in statutory or constitutional authority. *Id.*

School board members are public officers. *See, S.C. Atty. Gen.*, May 27, 2004. Board members of Lexington Richland District Five are elected by the people for fixed terms. As a general matter, all school board members, including those serving on the Lexington-Richland Five board, "are clothed with a presumption of honesty and integrity in the discharge of their decision-making responsibilities." *Felder v. Charleston County School District*, 327 S.C. 21, 25, 489 S.E.2d 191, 193-194 (1997).

Against that background, we now turn to the various provisions contained in state law authorizing the removal or suspension of members of a school board. Article VI, § 8 of the South Carolina Constitution provides in pertinent part as follows:

> [a]ny officer of the State or its political subdivisions, except members and officers of the Legislative and Judicial Branches, *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).

Thus, the Constitution requires that for the Governor to suspend a public officer, such officer must have been indicted for a crime involving "moral turpitude." We have previously concluded that this Constitutional provision does not authorize the Governor to suspend or remove officers "merely upon their arrest." *Op. S.C. Atty. Gen.*, March 3, 1997. Thus, inasmuch as the District Five member referenced in your letter has not been indicted for any crime, but has been only arrested for assault and battery, Article VI, § 8 authorizing the Governor to suspend and remove public officers is inapplicable.

In addition, Article VI, § 8 authorizes the Governor to suspend and remove only for crimes involving "moral turpitude." A crime of moral turpitude has been defined by our Supreme Court as "... an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or society in general, contrary to the accepted and customary right and duty between man and man ..." *State v. LaBarge*, 275 S.C. 168, 268 S.E.2d 278 (1980). As the Court noted in *LaBarge*, "[w]hile all crimes involve some degree of social irresponsibility, all crimes do not involve moral turpitude." 275 S.C. at 172. Most offenses involving moral turpitude "... seem to include some sort of dishonest behavior." McAninch and Fairey, *The Criminal Law of South Carolina*, 49 (2d ed. 1989).

Certain forms of assault or assault and battery have been held by our Supreme Court to constitute a crime of moral turpitude. For example, the offense of assault of a high and aggravated nature may be such a crime, "... depending upon the facts." *Matter of J. Archie Lee*, 313 S.C. 142, 143, 437 S.E.2d 85, 86 (1993). A prior opinion of this Office dated December 29, 1980 determined that the offense of assault with intent to kill is a crime of moral turpitude.

However, our Supreme Court has never held that simple assault or a simple assault and battery is a crime involving moral turpitude. Moreover, in *Op. S.C. Atty. Gen.*, Op. No. 4202 (November 26, 1975) we concluded that the offense of assault and battery is not a crime of moral turpitude. There, we noted that while there was no South Carolina decision on point, certain authorities in other jurisdictions had concluded that assault and battery is not a moral turpitude crime. *See*, *Gillman v. State*, 165 Ala. 135, 51 So. 722 (1910); *Burford v. Commonwealth*, 179 Va. 752, 20 S.E.2d 509 (1942).

Since our 1975 opinion was written, a number of courts have concluded that simple assault is not a crime of moral turpitude. *See, e.g., People v. Rivera*, 107 Cal.App.4th 1374, 133 Cal.Reptr.2d 176 (2003); *Barge v. State,* 256 Ga.App. 560, 568 S.E.2d 841 (2002); *Bazzanella v. Tuscon City Court*, 195 Ariz. 372, 988 P.2d 157 (1999). Neither is a simple battery a crime of moral turpitude, *People v. Thomas*, 206 Cal.App.3d 689, 694, 254 Cal.Reptr. 15, 18 (1988), nor is a simple assault and battery. *State v. Baumert*, 127 Ariz. 152, 618 P.2d 1078 (1980). Thus, because the offense of simple assault or simple assault and battery is not a crime of moral turpitude, we deem Art. VI, § 8 inapplicable for that reason also.

We note also that Section 1-3-240 also authorizes the Governor to remove county or State officers for "malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty, or incapacity" after notice and an opportunity to be heard. We have raised serious doubts as to whether this provision has any applicability as to a school board member because a school board is a separate political subdivision. *See, Op. S.C. Atty. Gen.*, March 30, 1983. In any event, such provision is inapplicable here because no such procedure has been invoked or is ongoing.

With respect to other statutory provisions authorizing the removal or suspension of school board members, reference must also be made to S.C. Code Ann. Section 59-19-60 which provides in pertinent part as follows:

> [s]chool district trustees shall be subject to removal from office for cause by the county boards of education, upon notice and after being given an opportunity to be heard by the county board of education. Any such order of removal shall state the grounds thereof, the manner of notice and the hearing accorded the trustee, and the trustee shall have the right to appeal to the court of common pleas, as provided in § 59-19-560.

As we understand it, the county board of education in Lexington County has been abolished. All powers previously residing in such board have been devolved upon the various school district boards of trustees for that county. See Act No. 601, 1994 S.C. Acts 6068. Thus, the board of trustees of Lexington-Richland District Five would now most probably possess the authority to remove a board member pursuant to the procedures specified in § 59-19-60.

However, as noted above, such removal of a board member may only be "for cause" and only pursuant to notice and an opportunity to be heard. As your letter indicates, no such proceeding has occurred or has been commenced. Thus far, there have been only the issuance of the arrest warrant for assault and battery and mere allegations made against Board members in the form of a letter or letters received by the Board.

It is well recognized that "[s]chool officers whose terms of office are fixed and definite generally are not removable without cause, unless there is constitutional or statutory authority therefor." 78 C.J.S., *Schools and School Districts*, § 135. The statutory procedure for removal of school officers is mandatory and must be followed. *Id.* An official may be removed only for the grounds prescribed in the statute. *Id.* at § 188.

In *Op. S.C. Atty. Gen.*, July 1, 1999, we recognized that the term "cause" is a phrase "found in many removal statutes throughout the country and has developed a common and ordinary meaning over the years." Quoting 63C Am.Jur.2d, *Public Officers and Employees*, § 183 (1997) we stated:

> [c]ause is a flexible concept that relates to an employee's qualifications and implicates the public interest; cause for discharge has been defined as some substantial shortcoming that renders the person's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public policy recognizes as good cause for no longer holding the position; or, as sometimes stated, dismissal for cause is appropriate when an employee's conduct affects his or her ability and fitness to perform his or her duties. The phrase for-cause in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause

> which the appointing power in the exercise of discretion may deem sufficient. Relatively minor acts of misconduct are insufficient to warrant removal or discharge for cause. The cause must relate to and affect qualifications appropriate to the office, or employment, or its administration, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. Neglect of duty, inefficiency, and the good faith abolition of a position for valid reasons are all legally sufficient causes for removal. (Footnotes omitted).

Obviously, by requiring notice and an opportunity to be heard before a school board member may be removed, § 59-19-60 requires far more than a mere allegation for removal of a school board member. As we stated in *Op. S.C. Atty. Gen.*, Op. No. 89-101 (1989), an officer who possesses the right to a hearing for alleged misconduct or improprieties

> ... also has the constitutional due process guarantee of confronting, rebutting and defending all of the interrelated charges against him at the same time and at the same hearing before an impartial hearing officer.

Section 59-19-60 authorizes only removal, not suspension of a school board member. Thus, it is clear that the issuance of an arrest warrant or mere allegations made in the form of a letter could not in themselves constitute "cause" for removal of a board member or members pursuant to § 59-19-60. The procedures of the statute – including notice, opportunity to be heard and a finding of "cause" are mandatory and must be met prior to any removal thereunder.

We have also been provided with two letters recently written and submitted by Ms. Nancy Scherberger, Consultant to School District 5, in which she sought to "file formal grievances" against certain Board members. In these letters, Ms. Scherberger makes a number of allegations, noting in one letter that "[r]egardless of whether these Board Members' actions were legal or otherwise they certainly were not ethical and have broken with the Code of Ethics and Board policy on countless levels." Ms. Scherberger states that the allegations rise to the level of "malfeasance," to use her words, in that the Board should investigate these allegations fully, and the named members should be "removed from office." Among her allegations against these members are:

1) representation of "special interest groups" rather than the "interest of the entire district...."
2) making threats or intimidating voters and other threats;
3) allowing records to be taken from office;
4) neglect of duty;
5) misconduct;
6) various forms of attacks upon and campaigns to remove Superintendent McMahon, including the circulation of a publication regarding the Superintendent's job performance in Michigan;
7) working to discredit Superintendent McMahon;

> 8) sharing of executive sessions discussions, including expulsion cases and land selections for a new school.

Of course, at this point in time, these assertions are allegations only. We assume that the Board will look into them fully, but our question here is not whether the allegations are true or false, but whether, standing alone, the making of unproven allegations legally disqualifies Board members from voting, absent suspension or removal from office or a disqualification by law. In our opinion, they do not.

We have already discussed above the removal authority governing school board members, and have concluded such procedures are inapplicable at this point in time. We note also that the Ethics Reform Act of 1991 provides that public official may not use his "official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he associated." Section 8-13-700 (A). Such provision further sets forth the procedure for the public official to excuse himself from any vote wherein such economic interest affected. See, Section 8-13-700 (B).

Of course, Section 8-13-700 does not prevent a public official from voting generally, but only requires his or her non-participation where an economic interest of the official or his immediate family would be affected by the official's action. Of course, such a recusal decision must be made on a case-by-case basis, depending upon the particular facts and is thus beyond the scope of an opinion of this Office. *See, Op. S.C. Atty. Gen.*, July 21, 1982. Suffice it to say here, however, that the allegations made against Board members do not appear to concern actions taken by the members to further their "economic interest." Thus, based upon the material submitted to us, we assume that the State Ethics Act does not come into play in terms of the vote of any member.

What instead appears to be the gist of the complaints against the Board members named is that of a predisposition or preexisting bias against Superintendent McMahon. However, case law rejects any argument that such disqualifies a member from voting. Courts have held that the fact that a school board or members thereof have taken a preexisting position regarding the continued employment of an employee does not disqualify the board or board members as a decision maker. *See, Grissom v. Bd. Ed.*, 388, NE.2d 398, 399 (Ill. 1979) ["nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute..."]. As the United States Supreme Court has stated,

> [a] showing that the board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power.

Hortonville Joint School District v. Hortonville Ed. Assn., 426 U.S. 482, 496 (1976).

In other words, the fact that Board members may have previously been "involved" in or taken a position concerning the employment of Superintendent McMahon is not sufficient to disqualify them from voting

Public officers possess the right to possess and exercise the emoluments and privileges of public office absent a valid removal or suspension from office or a legal disqualification therefrom. *Hearon v. Calus*, 178 S.C. 381, 183 S.E. 13 (1935); *cf.*, 67 C.J.S. *Officers*, § 99. Such powers would include the right to vote as a validly elected member of the school board. Accordingly, absent a valid suspension or removal as a member or members of the Board of Trustees of Lexington-Richland District Five, Mrs. Sloop and other members of the Board would possess the right to attend meetings of the Board and vote. No such removal or suspension has here occurred and the issuance of an arrest warrant or the making of allegations do not themselves "trigger" such a removal, suspension or disqualification.

In *Op. S.C. Atty. Gen.*, Op. No. 84-11 (September 6, 1984), we concluded that a public body, such as a board or commission is required to meet collectively in a "meeting" in which all members are given notice and each member has the opportunity to attend and participate. There, we noted that the South Carolina Supreme Court had concluded in *Gaskins v. Jones*, 1985 S.C. 508, 18 S.E.2d 454 (1942) and *McMahon v. Jones*, 94 S.C. 362, 77 S.E. 1022 (1913) that the public is entitled to the benefit and judgment collectively and individually of the members of a board or commission. The judgment by the board should, in other words, be "'the composite judgment of the body as a whole,'" (Quoting *Webster v. Texas Pacific Motor Co.*, 166 S.W.2d 75 (Tex. 1942)). Thus, public policy requires that a public officer who has not been removed or suspended or who is not otherwise disqualified by law, be allowed to attend, participate in, and vote at meetings of the body to which he or she is a member.

Conclusion

Thus, in response to your specific questions, we would respond as follows:

1. The pending charges do not require or allow for Mrs. Sloop's removal from office or prevent her from performing her official duties. Art. VI, § 8 of the South Carolina Constitution, authorizing the Governor to suspend upon indictment for crimes of moral turpitude, and to remove upon conviction for such offense is inapplicable here. There has been no indictment, but only an arrest for simple assault and battery. The crime of simple assault and battery is not a crime of moral turpitude.

2. Moreover, other removal provisions, such as § 1-3-240 (removal by the Governor) and § 59-19-60 (removal by the Board) are inapplicable as well. These statutes allow for removal only for certain acts or for cause and only upon notice and an opportunity to be heard. The issuance of an arrest warrant is at this point only a charge. Such warrant could not at this juncture be grounds for removal under these provisions

because no proceeding requiring notice and an opportunity to be heard has been had or a determination of "cause" has been made. Furthermore, the allegations presented to the Board by letter are at this point only allegations. Mere allegations, without more, cannot result in removal for "cause."

In short, we are aware of no legal reason why Ms. Sloop or any Board member may not attend meetings of the Board and fully participate and vote therein. A school board member cannot be precluded from voting base upon allegations alone. Absent removal or suspension or disqualification, a public officer is entitled to all the rights and privileges of office and is required to carry out the duties of that office, including voting at meetings. In this instance, there has been no removal or suspension, nor could there be based upon an arrest warrant or allegations made in a letter without the required hearing and necessary proof. Moreover, case law is clear in recognizing the fact that Board members may have taken a public position previously regarding the Superintendent's continued employment does not disqualify these members from later voting upon such issue.

The law requires a "meeting" of a public body in order to insure that the collective and individual participation, input and judgment of each member may be had. Particularly is this so with respect to school board members who are elected by the people and who represent the citizens of his or her district. The General Assembly and the Constitution have set forth certain exceptions, such as removal and suspension provisions, where voting by a member is prohibited. Otherwise, a member of a school board is entitled to fully participate at Board meetings. That is the case here.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General