HENRY MCMASTER
ATTORNEY GENERAL

February 6, 2009

The Honorable Kenneth A. Bingham
Majority Leader
South Carolina House of Representatives
518 Blatt Building
Columbia, South Carolina 29211

Dear Representative Bingham:

You seek an opinion as to "whether, pursuant to S.C. Code Ann. § 1-3-240, the Governor has the authority to remove Employment Security Commissioners (Commissioners) from office for failure to comply with state law or failure to fulfill their duties or responsibilities in supervising the Employment Security Commission and managing the Unemployment Compensation Fund." Specifically, you request our advice with respect to the following questions:

> (1) Can the Governor remove Commissioners for failure to provide full and complete unemployment data he requests within a specific period of time under the Governor's authority to receive information pursuant to S.C. Const. Art. IV, Sec. 17 and S.C. Code Ann. § 1-3-10?
>
> (2) Can the Governor remove Commissioners for failure to promptly inform him of the need to make changes to contribute or benefit rates to protect the solvency of the Unemployment Compensation Fund as required by S.C. Code Ann. § 41-29-290?
>
> (3) Can the Governor remove the Executive Director of the Employment Security Commission for failure to perform as described in each of the above questions?

Law / Analysis

Pursuant to Art. IV, § 17 of the South Carolina Constitution, it is provided that

> [a]ll State officers, agencies and institutions within the Executive Branch shall, when required by the Governor, give him information in writing upon any subject relating

> to the duties and functions of their respective offices, agencies, and institutions, including itemized accounts of receipts and disbursements.

In furtherance of this constitutional requirement, S.C. Code Ann. Section 1-3-10 provides as follows:

> [t]he departments, bureaus, divisions, officers, boards, commissions, institutions and other agencies or undertakings of the State, upon request, shall immediately furnish to the Governor, in such form as he may require, any information desired by him in relation to their respective affairs or activities.

Section 1-3-240 further states that

> Removal of officers by Governor.
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> (A) Any officer of the county or State, except:
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> (1) an officer whose removal is provided for in Section 3 of Article XV of the State Constitution; or
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> (2) an officer guilty of the offense named in Section 8 of Article VI of the Constitution; or
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> (3) pursuant to subsection (B) of this section, an officer of the State appointed by a Governor, either with or without the advice and consent of the Senate;
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> who is guilty of malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity shall be subject to removal by the Governor upon any of the foregoing causes being made to appear to the satisfaction of the Governor. But before removing any such officer, the Governor shall inform him in writing of the specific charges brought against him and give him an opportunity on reasonable notice to be heard.
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> (B) Any person appointed to a state office by a Governor, either with or without the advice and consent of the Senate, other than those officers enumerated in subsection (C), may be removed from office by the Governor at his discretion by an Executive Order removing the officer.
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> (C)(1) Persons appointed to the following offices of the State may be removed by the Governor for malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty in office, or incapacity:

(a) Workers' Compensation Commission;

(b) Department of Transportation Commission;

(c) Ethics Commission;

(d) Election Commission;

(e) Professional and Occupational Licensing Boards;

(f) Juvenile Parole Board;

(g) Probation, Parole and Pardon Board;

(h) Director of the Department of Public Safety;

(i) Board of the Department of Health and Environmental Control, excepting the chairman;

(j) Chief of State Law Enforcement Division;

(k) South Carolina Lottery Commission;

(l) Executive Director of the Office of Regulatory Staff; and

(m) Directors of the South Carolina Public Service Authority appointed pursuant to Section 58-31-20. A director of the South Carolina Public Service Authority also may be removed for his breach of any duty arising under Section 58-31-55 or 58-31-56. The Governor must not request a director of the South Carolina Public Service Authority to resign unless cause for removal, as established by this subsection, exists. Removal of a director of the South Carolina Public Service Authority, except as is provided by this section or by Section 58-31-20(A), must be considered to be an irreparable injury for which no adequate remedy at law exists.

(2) Upon the expiration of an officeholder's term, the individual may continue to serve until a successor is appointed and qualifies.

These provisions have been interpreted by our Supreme Court. The seminal case applying Sections 1-3-10 and 1-3-240 is *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997). In *Rose*, the Supreme Court dealt with the suspension and removal of B. Boykin Rose, Director of the Department of Public Safety. The background of the *Rose* case was as follows:

> [t]he facts leading to Rose's suspension and removal involve the administration of federal grant programs by DPS. The DPS Office of Safety and Grants receives grant applications which are initially reviewed by the DPS staff and approved by the Director of DPS. The Director then forwards these recommendations to a contact person at the Governor's Office. The contact person gives approval for DPS to forward its recommendations to the Public Safety Coordinating Council which approves or disapproves funding.
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> Sometime in the spring of 1996, Rose began to suspect that grant recommendations had been illegally altered and that his Chief-of-Staff, Otis Rawl, was forging his (Rose's) signature on grant recommendations in complicity with members of the Governor's staff. Rose reported his suspicions to the United States Department of Justice, the South Carolina Attorney General, and the Governor's Chief Counsel, Henry Deneen. Rose also fired Otis Rawl who had originally been hired at the Governor's request.
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> On June 17, Rose met with the Governor along with former United States Attorney Bart Daniel and Chief Counsel Deneen. The Governor told Rose he had hired Daniel to investigate the alleged wrongdoing by the Governor's staff. Daniel and Deneen requested documents from Rose regarding the grant process and the allegedly altered grant recommendations which Rose agreed to supply. After this meeting, Rose privately asked Daniel for a letter of representation to clarify Daniel's role which Daniel agreed to provide. On June 18, Rose again met with Daniel and Deneen and they again asked for the documents which Rose said he had not had time to gather. Rose promised he would forward the documents later that day but failed to do so.
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> On June 22, Rose read in the newspaper that Daniel had been hired to investigate the DPS staff and not the Governor's staff. Rose called Daniel and Daniel reassured Rose that he was in fact investigating the Governor's staff and not DPS. On June 24, Rose again met with Deneen and Daniel and was again asked but did not provide the requested documents.
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> On June 26, Rose received a letter from Daniel requesting the documents. Rose responded by letter dated June 28 questioning Daniel's role in the investigation and stating that he would not provide the requested documents until Daniel provided him with a representation letter.
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> In response to Rose's refusal to comply with the request for documents, the Governor suspended him from office on July 1. Rose subsequently received a Notice of Intent to Remove from Office to which he was permitted a written response. On September 3, the Governor ordered Rose removed from office pursuant to S.C.Code Ann.

> § 1-3-240 (Supp.1996). ... Rose appealed to the circuit court as provided under S.C.Code Ann. § 1-3-250 (Supp.1996). The circuit court ruled Rose's suspension was void for lack of authority but affirmed his removal from office. Both Rose and the Governor appeal.

Director Rose raised various arguments to the Supreme Court that his removal violated both state law, as well as the federal Constitution. He also contended that he did not violate § 1-3-10 because he did not *refuse* the Governor's request for information altogether, but only sought to *delay* the providing of the information. The Court, however, rejected the latter argument, concluding that

> Section 1-3-10 imposes a duty to "immediately" furnish information requested by the Governor. This statute allows a public officer no discretion to delay compliance with the Governor's request. It is not for this Court to second-guess the wisdom of the legislature in imposing a duty on public officers. *A public officer's failure to comply with a statutory duty constitutes misfeasance in office.* ... Misfeasance is a ground for removal under § 1-3-240(C). Accordingly, Rose's failure to immediately furnish the requested documents supports his removal.

327 S.C. at 203. Likewise, the Supreme Court rejected Rose's contention that the hearing on appeal to the circuit court "should have been a *de novo* hearing on the merits rather than a determination that his removal was supported by clear and convincing evidence." Such a *de novo* hearing of an order from an executive body or officer acting in a quasi-judicial capacity would, in the view of the Supreme Court, "violate the separation of powers provision of our State constitution because judicial discretion cannot be substituted for that of an executive body." *Id.* at 204.

Rose also argued that he was entitled to a pre-removal hearing as a matter of due process. The Court rejected this contention, holding that a post-removal hearing was constitutionally sufficient. According to the Supreme Court,

> [a]t the hearing before the circuit court, he was represented by counsel and had the opportunity to introduce evidence, cross-examine adverse witnesses, and argue his case to the court. This post-removal procedure, which satisfied due process, sufficiently compensated for the lack of an oral pre-removal hearing ... . Accordingly, we find no error.

327 S.C. at 205-206.

In *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000), the Supreme Court again addressed the applicability of § 1-3-240, this time in the context of existing specific statutes relating to removal. There, the Governor removed members of the Board of Directors of the Public Service Authority (Santee Cooper) pursuant to his authority under § 1-3-240(B). This portion of § 1-3-240

allows the Governor within his discretion to remove those appointed by him, subject only to the exceptions for certain offices contained in Subsection (C). In this instance, members of the Public Service Authority's Board of Directors were appointed by the Governor and these offices were not enumerated as exceptions in § 1-3-240(C). Thus, Governor Hodges removed members of the Santee Cooper Board without cause.

The issue before the Supreme Court in *Hodges* was whether § 1-3-240 controlled or, instead, the specific statute governing removal of members of Santee Cooper was applicable. A pre-existing statute, Section 58-31-20, provides for removal of members of Santee Cooper *for cause*. Thus, presented were two conflicting provisions, one requiring cause for removal of Santee Cooper Board members, and the other the more general provision (§ 1-3-240(B)), permitting removal of appointees of the Governor without cause.

As to the issue of which statute prevailed, the Court ruled that § 1-3-240 was applicable. The Court's reasoning was as follows:

> In the instant case, we find that the 1934 Santee Cooper enabling legislation and the 1993 Restructuring Act are not in conflict. On the contrary, section 1-3-240(B) and (C) of the Restructuring Act can be reconciled with section 58-31-20 of the Santee Cooper legislation because both statutes provide alternative and complimentary means of removal. ... In fact, it is very logical to have both statutes in effect because the provision in the Santee Cooper Act (section 58-31-20) acts as an important safety net. Pursuant to section 58-31-20 of the Santee Cooper Act, the advisory board can remove a board member for cause, which allows the advisory board to remove a member who is not properly performing in the event the Governor fails to do so. For example, if the Governor decides to appoint a political ally to the board who commits some type of malfeasance, section 58-31-20 acts as the ultimate safety net by permitting the advisory board to remove the Governor's appointee.
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> Section 1-3-240(B) of the Restructuring Act does not affect the advisory board's removal power, it merely allows the Governor to remove a director at his or her discretion. As a matter of public policy, the Governor's discretionary removal power is important because it allows the Governor to remove a director with whom he or she cannot work. Moreover, the Restructuring Act states that the Governor's removal power is not in conflict with other removal provisions because it is merely additional to any removal powers conferred by other statutes. S.C.Code Ann. § 1-3-260 (1976) ("The power and procedure of removal conferred and provided for in §§ 1-3-240 and 1-3-250 are *additional* to any other removal powers or procedure authorized by statute.") (emphasis added).

341 S.C. at 90.

In addition, the Court addressed the question of whether Santee Cooper is a state agency for purposes of § 1-3-240. Rejecting the argument that Santee Cooper "is a state agency for some purposes and not for others," the Court concluded that "[b]ecause current case law and statutory law classify Santee Cooper a state agency, Santee Cooper's Board of Directors should be considered state officers for purposes of section 1-3-240(B)." *Id.*

We turn now to your questions relating to the Employment Security Commission. The Commission is established pursuant to § 41-29-10 *et seq*. Section 41-29-10 provides as follows:

> Membership, term, vacancies and salaries.
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> Chapters 27 through 41 of this Title shall be administered by the South Carolina Employment Security Commission. The Commission shall consist of three members to be elected by the General Assembly, in joint session, for terms of four years and until their successors have been elected and qualified, commencing on the first day of July in each presidential election year. Any vacancy occurring shall be filled by appointment by the Governor for the temporary period until the next session of the General Assembly, whereupon the General Assembly shall elect a commissioner to fill the unexpired term. Each commissioner shall receive an annual salary payable in monthly installments.

Section 41-29-110 empowers the Commission to "administer Chapters 27 through 41 of this Title and it may adopt, amend or rescind such rules and regulations, employ such persons, make such expenditures, require such reports as are not otherwise provided for, in such chapters, make such investigations and take such other action as it deems necessary or suitable to that end." One authority has succinctly summarized the Commission's duties by noting that [t]he Employment Security Commission determines eligibility, as prescribed by statute, for unemployment benefits." 14 S.C.Jur. *Labor Relations*, § 24.

In addition, Section 41-29-40 further states that

> [t]here are created under the Commission two coordinate divisions, the South Carolina State Employment Service Division created pursuant to Section 41-5-10, and a division to be known as the Unemployment Compensation Division. Each division shall be administered by a full-time salaried director, who shall be subject to the supervision and direction of the Commission. The Commission may appoint, fix the compensation of and prescribe the duties of the directors of said divisions. Such appointments shall be made on a nonpartisan merit basis in accordance with the provisions of Section 41-29-90. The director of each division shall be responsible to

> the Commission for the administration of his particular division and shall have such powers and authority as may be vested in him by the Commission.
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> Further, § 41-29-30 empowers the Commission to
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> ... appoint in accordance with § 41-29-70 an administrator who shall act as secretary and chief executive officer of the Commission and who shall, when the Commission is not in session, exercise the powers and authority of the Commission, subject to the approval or disapproval of the Commission at its next meeting.

As we noted in an opinion, dated October 13, 1977, by virtue of § 41-29-30, "the Commission is authorized to appoint an administrator to act as the chief executive officer of the Commission, which officer is vested with the exercise of the powers and authority of the Commission subject to its discretion." This opinion also recognized that "[u]nder the provisions of Section 41-29-70 and 41-29-100, the Commission may further delegate the authority of the Executive Director to other persons ...."

Moreover, in an opinion, dated May 16, 1984, we recognized that the Employment Security Commission is a "state agency." Thus, the arguments that, were raised in *Hodges v. Rainey, supra* regarding Santee Cooper – i.e. that Santee Cooper is not a state agency – are not present in this instance. We have little doubt that members of the Employment Security Commission would be state officers for purposes of the applicability of § 1-3-240.

We note also that § 41-29-90 provides that "no *employee* of the [Employment Security] Commission shall be dismissed except for good cause ...." There is a clear distinction under the law between and "officer" and an "employee." See, *Sanders v. Belue*, 78 S.C. 171, 58 S.E. 762 (1907) [officer exercises some portion of sovereign power]. In our opinion, members of the Commission are not "employees" of the Commission for purposes of § 41-29-90, but constitute the Commission itself, clearly exercising a portion of the sovereign power of the State. Likewise, the Executive Director of the Commission, who often acts in the stead of the Commission pursuant to § 41-29-30, is in our view, a "state officer" rather than an "employee." In any event, *Hodges v. Rainey* makes it clear that § 1-3-240 is also applicable here, notwithstanding other provisions of law which may be applicable.

Conclusion

Accordingly, it is our opinion that § 1-3-240(A) is applicable and is controlling with respect to any removal by the Governor of members of the Employment Security Commission. As to your specific questions, we advise as follows:

(1) Can the Governor remove Commissioners for failure to provide full and complete unemployment data he requests within a specific period of time under the Governor's authority to receive information pursuant to S.C. Const. Art. IV, Sec. 17 and S.C. Code Ann. § 1-3-10?

Here, the applicable portion of § 1-3-240 is subsection (A) because it is the General Assembly, not the Governor, which appoints Employment Security Commissioners. See, § 41-29-10. Subsection (A) of § 1-3-240 expressly requires that if the Governor is to remove a state officer (such as an Employment Security Commissioner) pursuant to this Subsection, he must conclude that one of the specific grounds for removal enumerated in this provision is present.

The Supreme Court held in *Rose v. Beasley, supra*, that it constitutes "misfeasance" – a ground for removal under § 1-3-240(A) – for a state officer to fail to produce the information requested by the Governor pursuant to § 1-3-10. In *Rose*, the Court further concluded that a court will not "second-guess the wisdom of the legislature in imposing such a duty on public officers." Moreover, the Court emphasized that § 1-3-240 "allows a public officer no discretion to delay compliance with the Governor's request." *Id.*

It is, of course, a matter for the Governor, acting within his discretion, to determine if misfeasance has occurred for failure to comply with § 1-3-10. Section 1-3-240(A) expressly states that one or more of the causes enumerated must "be made to appear to the satisfaction of the Governor." Moreover, if such removal occurs, "the Governor shall inform him [the state officer being removed] of the specific charges brought against him and give him an opportunity to be heard." *Rose* also concluded that a post-removal hearing comports with due process." Again, we emphasize that any removal for one of the enumerated grounds in § 1-3-240(A) is a matter for the Governor to determine, acting within his discretion. Of course, any removal is subject to challenge in the courts. *Rose, Id.*

(2) Can the Governor remove Commissioners for failure to promptly inform him of the need to make changes to contribute or benefit rates to protect the solvency of the Unemployment Compensation Fund as required by S.C. Code Ann. § 41-29-290?

Section 41-29-290 provides as follows:

> [w]henever the Commission believes that a change in contribution or benefit rates will become necessary to protect the solvency of the fund it shall promptly so inform the Governor and the General Assembly and make recommendations with respect thereto.

The analysis articulated in our response to Question 1 is also applicable here. The Court made it clear in *Rose v. Beasley, supra* that "[a] public officer's failure to comply with a statutory duty

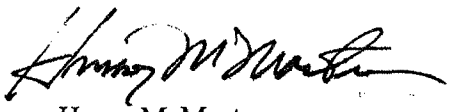
constitutes misfeasance in office." Misfeasance is a ground for removal by the Governor pursuant to § 1-3-240(A). As we emphasized with respect to Question 1, above, it is a matter for the Governor to determine whether misfeasance has occurred for failure to comply with § 41-29-290. If such removal occurs, the officer or officers removed are entitled to notice and an opportunity to be heard. Again, we emphasize that any removal is subject to challenge in the courts.

(3) Can the Governor remove the Executive Director of the Employment Security Commission for failure to perform as described in each of the above questions?

As noted above, the Executive Director of the Employment Security Commission is, in our opinion, a state officer. The Executive Director, as we understand it, often acts on behalf of the Commission itself. Like Director Rose, who was Director of the Department of Public Safety, we are of the opinion that § 1-3-240(A) is applicable. Thus, the same response set forth in our answers to Questions 1 and 2 apply here as well: the matter is for the Governor to determine, acting within his discretion.

Finally, we also emphasize here what was said by our Supreme Court in *Walker v. Grice*, 162 S.C. 29, 159 S.E. 914 (1931). There, the Court noted that "... [a] removal for cause operates as a limitation upon the power to remove, and ... 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." Section 1-3-240(A) is clear that any removal by the Governor thereunder entitles the person being removed to notice and an opportunity to be heard. Removal is subject to challenge in the courts.

Yours very truly,



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