



The State of South Carolina  
**OFFICE OF THE ATTORNEY GENERAL**

CHARLES M. CONDON  
ATTORNEY GENERAL

March 15, 2001

Susan S. Quinn, Assistant Chief Counsel  
South Carolina Department of Natural Resources  
Post Office Box 167  
Columbia, South Carolina 29202

**RE: Informal Opinion**

Dear Ms. Quinn,

By your letter of March 8, 2001, you have requested an opinion of this Office concerning whether the Department of Natural Resources has the authority to suspend a commissioner of a local Soil, Water Conservation District. You have informed us that allegations of sexual harassment have been brought against the commissioner. Furthermore, you have written:

Given the allegations that have been made against the commissioner, DNR will likely hold a hearing to determine whether he should be removed. Obviously, we would have to give the commissioner the requisite 30 days notice prior to any hearing.

In the meantime, we think that suspension of the commissioner pending the outcome of the hearing is an appropriate measure to take in order to prevent further harassment of DNR employees. However, the statute does not specifically address whether the DNR board, which is authorized to terminate commissioners, has the authority to suspend them.

The statutes governing the appointment and election of the commissioners of a Soil, Water Conservation District are codified at South Carolina Code of Laws Section 48-9-1210 *et seq.* Section 48-9-1210 addresses the qualifications of the appointed commissioners of a District and Section 48-9-1220 provides for the election of the three additional commission members. Section 48-9-1230 states that any commissioner, either elected or appointed, "may be removed by the board upon notice and hearing for neglect of duty or malfeasance in office, but for no other reason." Because the statute grants no express authority to the DNR board to suspend the commissioner, the question turns on whether the power of suspension is incidental to the board's power of removal for neglect of duty or malfeasance in office.

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It has been the opinion of this Office in the past that the authority to suspend depends on the limitations placed on the power to remove. See OP. ATTY. GEN. Sept. 27, 1989. In particular, an arbitrary power to remove is generally not held to include the power to suspend. However, when the power to remove is limited to removal for cause, then the power to suspend is viewed as a part of the disciplinary process leading to removal, and is considered an incidental power thereto. See id. This conclusion is in accord with a 1956 case of the South Carolina Supreme Court involving the Governor's suspension of a sheriff pending the outcome of federal charges brought against the sheriff. See State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956). The Court held that the Governor could suspend the sheriff without notice, stating:

'So long as action is not arbitrary, the suspension of an officer pending his trial for misconduct, so as to tie his hands for the time being, seems to be universally accepted as fair and often necessary. The power to suspend is generally considered as included in the power of removal for cause, since a suspension is merely a less severe disciplinary measure. But where the power to remove at will or at pleasure exists, it has been observed that the power to suspend is not necessary and does not exist. Moreover, the indefinite suspension of a public officer without pay is not considered as within the general power of removal.

Notice and hearing are not pre-requisite to suspension unless required by statute, and a suspension without such notice does not deprive the officer of property without due process of law. Nor is a suspension wanting in due process of law or as a denial of the equal protection of the laws because the evidence against the officer is not produced and he is not given an opportunity to confront his accusers and cross examine the witnesses.'

See Seigler, 94 S.E.2d at 235 (citations omitted).

In the instant case, the statute authorizing the removal of commissioners limits the causes for removal to neglect of duty and malfeasance in office. Although not exactly the same as removal "for cause" the statute neither grants the DNR board power to remove the commissioners arbitrarily. Thus, because the removal power is limited, under the line of reasoning advanced in previous opinions of this Office and South Carolina case law, the power to suspend a commissioner is incidental to that power to remove.

We must caution, however, that a recent South Carolina Supreme Court case casts some doubt on this conclusion. In Rose v. Beasley, 327 S.C. 197, 489 S.E.2d 625 (1997), the Court considered whether the Governor had the authority to suspend the director of the Department of Public Safety. The Governor did not argue that any particular statute or constitutional provision expressly granted him the power to suspend the Director from office, but instead argued that his authority to suspend was incidental to his power to remove the officer. See id., 489 S.E.2d at 629. The Court rejected this argument, stating that "the power of removal or suspension from office is not an inherent function of the chief executive." Id. at 630. The Court neither overruled State ex rel.

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Thompson v. Seigler nor clearly stated the extent of its holding as it applied to other officials with the power to remove. The end result, however, was this: the Court rejected the notion that the Governor has the authority to suspend an appointee as incident to his power to remove. The Court's holding in Beasley may be indicative of the courts' changing attitudes concerning the suspension of officers. In other words, if the Governor, as the state's chief executive officer, lacks the authority to suspend officers as inherent to his power to remove, then would a cabinet agency board also lack that authority? The Beasley case seems to suggest the board would not have that authority.

As I have noted, the courts have not expressly overruled case law supporting our conclusion that generally the power to suspend is incidental to a limited power of removal. However, the Court's ruling in Beasley certainly leaves some room for doubt that this conclusion will be sustained by future case law. Accordingly, we would advise the DNR board to proceed with caution should it decide to suspend the commissioner, as we are not entirely confident that a court today would find that the board has that authority. Indeed, if the DNR board proceeds with the suspension pending the outcome of the sexual harassment allegations, we would strongly advise the board to seek the assistance of a labor law specialist to advise them during the process.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole  
Assistant Attorney General