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OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 3, 1997

H. Spencer King, Esquire
Spartanburg City Attorney
P. O. Drawer 3188
Spartanburg, South Carolina 29304-3188

Re: Informal Opinion

Dear Mr. King:

You note that the Spartanburg Department of Public Safety "has had a policy of suspending officers charged with domestic violence." You indicate that "[i]f the Department determines that the charge is meritorious, the officer is suspended without pay" and if "the Department determines that the charge is not meritorious, the suspension is with pay." You further state, however, that

> ... in recent months, we have seen a noticeable increase in the number of injunctions issued for protection from domestic violence. The City's policy is to make an investigation to determine if there are grounds to justify the claim of domestic violence. In those situations where there is no history of domestic violence by the officer, does the mere issuance of a restraining order require that the officer be suspended from duty and/or that his city-issued firearm be taken? We are encountering situations where the mere filing of the restraining order may require us to remove an officer from patrol whom we would not otherwise remove. (emphasis added).

Request Letter

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Law / Analysis

S.C. Code Ann. Sec. 5-7-110 provides that "[a]ny municipality may appoint or elect as many police officers, regular or special, as may be necessary for the proper law enforcement in such municipalities and fix their salaries and prescribe their duties." As I understand it, the City of Spartanburg possesses the council-manager form of government. Under the council-manager format, Section 5-13-90 authorizes the city manager to dismiss any employee "for the good of the municipality."

In Bunting v. City of Cola., 639 F.2d 1090 (4th Cir.1981), the Fourth Circuit Court of Appeals addressed the question of the rights of police officers in South Carolina under the Due Process Clause of the Fourteenth Amendment. In that case, the Fourth Circuit interpreted § 5-13-90, referenced above. The Court concluded that the statutory language employed therein created no expectancy of continuation in employment. Noting that the City of Columbia had also adopted an ordinance permitting the city manager to dismiss employees for the good of the City, the Court concluded:

> [s]uch provisions indicate that city employees do not have a property interest in their employment but rather that they hold their positions at the will and pleasure of the city. Accord, Bane v. City of Columbia, 480 F.Supp. 34 (D.S.C.1979); Gambrell v. City of Columbia, No. 77-CP-40-1312 (Court of Common Pleas of Richland County, South Carolina, December 19, 1979).
>
> No other state statute or constitutional provision mandates any other conclusion. Cf. Rhodes v. Smith, 273 S.C. 43, 254 S.E.2d 49, 50 (1979) (South Carolina statute allowing sheriff to dismiss his deputy sheriff at the sheriff's pleasure was not affected by the County and Municipal Employees Grievance Procedure Act. S.C. Code § 8-17-110 (1976)). Furthermore, nothing in the city's personnel policy manual can be read as granting a city employee a property interest in his job. Although the policy manual accords permanent employees certain procedural protections when they are dismissed by a department head rather than by the city manager, such protections do not negate the fact that a city employee holds his position at the will of the city and can be dismissed by the city manager without any procedural

> protections. See Bane v. City of Columbia, 480 F.Supp. 34 (D.S.C.1979).

The Court in Bunting went on to conclude that, while the police officers "did not have any constitutional rights implicated in their dismissal, ... they are eligible to a grievance hearing under the County and Municipal Employees Grievance Procedure Act ... S.C. Code § 8-17-110 (1976)." Subsequently, in Beckham v. Harris, 75 F.2d 1032 (4th Cir. 1984), the Fourth Circuit explained that in Bunting, "the City of Columbia's personnel manual did not conform substantially to the [County and Municipal Employees Grievance] Act, as required by S.C. Code § 8-17-120"; however said the Court, the Act does not "limit the police department's ability to discharge an at-will employee." See, Rhodes v. Smith, supra.

Likewise, in Dew v. City of Florence, 279 S.C. 155, 303 S.E.2d 664 (1983), a city employee was dismissed for publicly criticizing an employee payment plan. The employee contended she was denied procedural due process of law. Our Supreme Court upheld the dismissal without a hearing, noting that the federal and State Constitutions require notice and a hearing only if Dew "could show that she had a 'property' interest in continued employment." The Court further noted that the employee handbook specifically stated that "'Nothing in this title shall be deemed to confer any vested right in employment upon any City employee.'" Therefore, concluded the Court, because nothing in the record indicated that Dew was under contract with the City, and

> [i]n light of unambiguous language of the Employee Handbook and § 5-13-90, it is clear that Dew was an "at will" employee with no vested "property" interest in continued employment with the City.

303 S.E.2d at 667. See also, Small v. Springs Indus. Inc., 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987) [employee handbook established property interest]; Marr v. City of Cola. 307 S.C. 545, 416 S.E.2d 615 (1992) [handbook established no property interest].

Further, in Eubanks v. Smith, 292 S.C. 57, 354 S.E.2d 898 (1987), the Court addressed the issue of a public employee's "liberty" interest in a discharge. There, city employees were suspected of criminal wrongdoing and thus the City Manager for the City of Myrtle Beach commenced an administrative investigation. SLED was also called in by the City Manager to conduct a criminal inquiry. The three city employees were suspended with pay in order to facilitate the investigations. No criminal wrongdoing or administrative irregularities against the employees were found, however.

While the investigations were ongoing, the City Manager issued several press releases implying that the three employees were guilty of some criminal conduct and that disciplinary action would be taken against them. One employee resigned with severance pay and the other two were terminated.

It was conceded that the employees were at-will and thus had no protected property interest in their employment. The two employees who were terminated requested and received an employee grievance hearing pursuant to § 8-17-120. However, they subsequently contended that they were denied their "liberty" without due process through the actions of the City Manager in issuing the press releases.

The Court held that the "liberty" interest of the two employees was indeed implicated. The Court stated as follows:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential ... . A protected liberty interest is implicated when a public employer, in terminating an employee, makes charges against him that damage his standing in the community or otherwise imposes a stigma on the employee that forecloses other employment opportunities ... . [citations omitted]. When an employee's liberty interest is implicated, due process requires that the aggrieved employee be given notice of the charges and a hearing to afford him an opportunity to clear his name ... . [citations omitted]. The employee's protected liberty interest is not the right to remain employed but is merely the right to clear his name ... .

354 S.E.2d at 900. However, the Court held that the grievance hearing provided to the two employees who were terminated, as well as the fact that they were given the right to cross-examine witnesses at the State Ethics Commission hearing held to refute charges that they had violated Ethics laws, fully satisfied due process.

In your question, you reference the "restraining order" or injunction against domestic violence. I assume your reference here is to the order of protection established by the "Protection from Domestic Abuse Act", codified at Section 20-4-10 et seq. We have previously described the process for obtaining an order of protection as follows:

> [t]he Protection from Domestic Abuse Act, in addition to establishing the crime of criminal domestic violence, established a civil procedure whereby an individual who has been physically harmed, assaulted, or threatened with physical harm may petition the courts for an order of protection. Such orders are not issued ex parte but only after service of a petition on the respondent. Generally, the family court has jurisdiction over all these proceedings, except that the petition may be filed with a magistrate during non-business hours or at other times when the family court is not in session. A magistrate is limited to issuing an order temporarily enjoining the individual causing the alleged abuse from abusing, threatening to abuse, or molesting the petitioner. The Legislature specifically recognized that in certain situations an emergency hearing must be held. Pursuant to Section 20-4-50 (a), an emergency hearing may be held within twenty-four hours of service of a summons and petition upon the respondent.

Op. Atty. Gen., Op. No. 84-121 (October 10, 1984). As noted, Section 20-4-50 requires a hearing in order for an order of protection to be issued. An allegation of abuse must be proven "by a preponderance of the evidence". Even where a magistrate issues an order of protection, the magistrate is governed by Section 20-4-60 (a) (1) [temporary relief]. And, as we stated in Op. Atty. Gen., Op. No. 84-120 (October 10, 1984), "it is clear that the orders of protection are not issued ex parte but only issued after a hearing." Thus, in the latter opinion, since we were of the view that the issuance of such order involved "civil" jurisdiction, we concluded that ministerial magistrates were not authorized to issued orders of protection.

Accordingly, it is evident that the issuance of an Order of Protection must be based upon a factual showing made in an adversarial proceeding. See, State v. Johnson, 298 S.C. 496, 381 S.E.2d 732 (1989) [Order of Family Court included factual finding of physical abuse].

A number of cases have upheld the use of judicial factual findings as a basis for suspension or removal of a police officer or public employee. In District of Cola. Metropolitan Police Dept. v. Broadus, 560 A.2d 501 (D.C.Ct. of App. 1989), for example, the Court addressed the question whether a criminal indictment for offenses committed by an off-duty police officer constituted "cause" for suspension of the officer. The Court referenced a number of cases including Brown v. Dept. of Justice, 230 U.S.App.D.C. 188,

715 F.2d 662 (D.C.Cir. 1983) which had upheld the Border Patrol's use of an indictment alone to sustain a finding of cause for the indefinite suspension of two Border Patrol agents. Brown had held that "[c]ertainly, at some point along the continuum of an employee's involvement in the criminal justice system, evidence of that involvement alone gives rise to reasonable cause to believe the employee has committed a crime." Likewise, in City of Phil. v. Fraternal Order of Police Lodge, 140 Pa. Cmwlth. 235, 592 A.2d 779 (1991), the Court upheld a 30-day suspension of a police officer served with an arrest warrant for conduct arising out of an assault committed while the officer was off-duty. The Court noted that "[g]iven the City's substantial countervailing interest in protecting the public from improper police conduct, the procedure used to suspend a police officer pending further action by the Police Commissioner satisfied due process and obviates the need for a full blown pre-suspension hearing."

And in Op. Atty. Gen., Op. No. 85-101 (September 18, 1985), we concluded that a Department of Mental Health policy which suspended employees without pay upon being charged with a crime arising out of or in the course of employment, such crime being one for which convictions would adversely reflect on the individual's suitability for patient care and/or employment, was valid. Additionally, we noted that the policy provided that there would be no back pay for the time of suspension if the employee was acquitted. We stated that "[i]ndictment 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." Further, we recognized that it is the general rule that where a suspension of a public employee is lawful, the employee is not entitled to compensation for the time suspended if subsequently acquitted. Thus, we deemed the Department of Mental Health's policy of suspension to be legally supportable.

While it is true that in the foregoing authorities, the governmental authorities relied upon findings in criminal proceedings as a basis for suspension or removal of the public employee, it is clear that a criminal factual determination such as a warrant of arrest or indictment is not essential to satisfy the requirements of due process of law. Instead, what is necessary is a "reasonably reliable basis for concluding that the facts justifying the official action are as a responsible governmental official warrants them to be." Mackey v. Montrym, 433 U.S. 1, 13 (1979). There must be a reasonable degree of certainty that the employee "actually committed the conduct complained of ...." Sherman v. Alexander, 684 F.2d 464, 467 (7th Cir. 1982). Thus, statutory procedures summarily suspending drivers found with a blood alcohol content of .10 percent or more was held not to violate due process. Ruge v. Kovach, 467 N.E.2d (Ind. 1984).

Here, I am assuming that nothing in an Employee Handbook or any other documents alters the statutory provision enabling the City Manager to dismiss city employees for "the good of the municipality". As noted above, such provision has been held to bestow no property interest upon municipal employees.

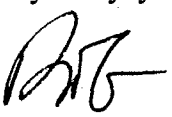
Regardless, however, it is my opinion that a policy which bases a suspension of a police officer upon the issuance of an order of protection would be legally supportable. Of course, a suspension is simply the lesser-included punishment of removal or discharge. See, State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956). As noted, the issuance of an Order of Protection is typically the result of adversarial hearing, and thus, is based upon factual findings by the Court. Thus, in my judgment, it would comport with due process to rely upon the issuance of an Order of Protection as a basis to suspend an officer for having committed some form of domestic violence. Such would indicate a judicial finding that an individual has been "physically harmed, assaulted or threatened with physical harm." Op. Atty. Gen., Op. No. 84-121. Moreover, the suspension or discharge of a police officer for commission of domestic violence would certainly be in keeping with the language of Section 5-13-90, "for the good of the municipality.' Clearly, a police officer who commits domestic violence while off-duty would demonstrate" that vital connection between the employee's complained of activities and some identifiable detriment to the efficiency of the service ..." Young v. Hampton, 568 F.2d 1253, 1261 (7th Cir. 1977).

Of course, the City of Spartanburg is not legally required to rely simply upon the issuance of an Order of Protection in deciding whether or not to discipline the officer. The City possesses the discretion to go beyond the statutory requirements of § 5-13-90, either through an Employee Handbook or otherwise if it so chooses. Moreover, the City may establish as intricate procedures for suspension and/or termination of its employees as it desires so long as the requirement of due process is met. The key concern should be to determine the best means to insure that the risk of "erroneous decisions" is minimized. Mackey v. Montrym, supra. In short, the fact that reliance solely upon an Order of Protection for suspension would be legally defensible, does not mean that the City could not, as you indicate, have a policy that "where there is no history of domestic violence by the officer", that a greater indicia of officer's wrongdoing -- such as an independent investigation -- would be required. Such would be a matter within the City's discretion, taking into consideration factors such as whether or not Spartanburg employees possess a "property interest", in their continued employment, the degree of factual detail in the Order of Protection, the employee's history of domestic violence, etc. From factors such as these, I believe the City would be able to fashion a policy which minimizes the risk of erroneous decisions while at the same time insuring that those employees who commit domestic violence are appropriately disciplined.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions 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 am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/ph