

Reg. 5083



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

CHARLES MOLONY CONDON  
ATTORNEY GENERAL

October 13, 1995

Angelia S. Tutko, Legal Counsel  
Office of the Governor  
Post Office Box 11369  
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Ms. Tutko:

You have asked for this Office's opinion regarding the Governor's authority to suspend the Georgetown County Superintendent of Education and the Georgetown County Assistant Superintendent of Education who were both recently indicted for Failure to Report to Law Enforcement and common law misconduct. As I understand the situation, the underlying facts of the situation allege that the Superintendent and Assistant Superintendent unlawfully failed to contact law enforcement authorities immediately upon notice that a person had engaged in activities on school property which resulted or could have resulted in injury or serious threat of injury to another person. The Indictment specifically charges the following facts:

**COUNT ONE - FAILURE TO REPORT TO LAW ENFORCEMENT**

That D. P. McGann and Tommy Burbage did in Georgetown County on or about March 8, 1995, while holding the offices of Georgetown County Superintendent of Education and Georgetown County Assistant Superintendent of Education, respectively, after having been advised by [REDACTED] that their 16-year-old minor son, a student of Waccamaw High School, had been sexually fondled by Tom Hoffmeyer, a teacher of Waccamaw High School, which information resulted in the Defendants having reason

to believe that a child's physical or mental health or welfare had been or may be adversely affected, fail to report same or cause a report to be made of same to law enforcement, in violation of Section 20-7-510, Code of Laws of South Carolina, 1976, as amended.

AND THE GRAND JURORS FURTHER PRESENT UPON THEIR OATH:

COUNT TWO - MISCONDUCT IN OFFICE

That D. P. McGann and Tommy Burbage, while in office as the Georgetown County Superintendent of Education and Georgeown County Assistant Superintendent of Education, respectively, and having a duty of accountability to the people of Georgetown County and the State of South Carolina imposed by the common law on public officers and assumed by them as a matter of law upon their entering a public office, did in Georgetown County on or about March 8, 1995, breach that duty in that they did knowingly, willingly and corruptly engage in official misconduct by failing to contact law enforcement authorities immediately upon notice that a person had engaged in activities on school property which resulted or could have resulted in injury or serious threat of injury to another person, as required by Section 59-24-60, Code of Laws of South Carolina, 1976, as amended; and that such wilful and corrupt official misconduct is a breach of duties imposed by law and owed to the people of Georgetown County and the State of South Carolina, and such being the Defendants' duty not to compromise himself, his public office or the judicial process and to be willing to properly and fairly discharge his duties; which acts or ommissions on the part of the Defendants constituted the common law crime of misconduct in office.

Against the peace and dignity of the State and contrary to the statutes in such cases made and provided.

Article VI, Section 8 of the South Carolina Constitution (1895 as amended) provides in pertinent part:

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[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)

In addition, S.C. Code Ann. § 8-1-100 (1994 Supp.) provides as follows:

Except as provided in Section 8-1-110, any state or county officer who is indicted in any court for any crime may, in the discretion of the Governor, be suspended by the Governor, who in event of suspension shall appoint another in his stead until he shall be acquitted. In case of conviction, the office shall be declared vacant by the Governor and the vacancy filled as provided by law.

This Office has often concluded that a county school superintendent is an officer. Op. Atty. Gen. August 9, 1991, affirming Op. Atty. Gen. April 5, 1991; Op. Atty. Gen. February 27, 1991; and Op. Atty. Gen. September 14, 1995. It makes no difference whether the superintendent is appointed or elected; he is still an officer. Thus, the question remains whether the position of assistant school superintendent is also considered an office for the purposes of the constitutional and statutory provisions referenced above. It is my conclusion that it is.

Although at least two prior opinions of this Office (Op. Atty. Gen. October 23, 1968 and Op. Atty. Gen. September 7, 1979) concluded that the position of assistant school superintendent is not an office within the meaning of the constitutional provision relating to dual officeholding, it must be noted these opinions, which concentrated on the fact that the position was not created by statute, were rendered prior to the South Carolina Supreme Court's decision in State v. Thrift, \_\_\_\_\_ S.C. \_\_\_\_\_, 440 S.E.2d 341 (1994). In Thrift, one of the questions before the Court was how South Carolina defines a public official for the purposes of common law criminal prosecutions. The trial judge had earlier dismissed the indictments for common law misconduct in office against various Highway Department officials, holding that they were public employees and not public officials. The Supreme Court, however, traced some of the various definitions applied to South Carolina misconduct in office cases dating as far back as 1907 and concluded that the "common thread ..." is not whether an individual is appointed or

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elected to office by the public or a specific arm of government, but "... lies in the exercise of the powers of or representation of the sovereign .... A reading of the common law definitions of public official shows the greater the duty to the public at large, the more likely it is that the individual will be a public official." Thrift, 440 S.E.2d at 356. Therefore, recognizing that the duties of the indicted Highway Department officials were of great concern to the public at large, the Court ruled that the trial judge erred in finding that the individuals were not public officials subject to prosecution for common law misconduct in office. It is important to note that one or more of the Highway positions at issue in Thrift were not created by statute. There is no question that county assistant superintendents perform duties exercising a portion of the sovereign power of the State. See, e.g. Ludlam v. Sch. Dist. of Grville, 455 S.E.2d 177 (S.C. 1995) [assistant superintendent participated in decision to terminate teacher]; Snipes v. McAndrew, 280 S.C. 320, 313 S.E.2d 294 (1984) [2 assistant superintendents of District testified that approximately one-third of principals were being evaluated under certain plan]. See also, Reynolds v. Bd. of Ed. of Lexington, 311 Ky. 458, 224 S.W.2d 442 (finding assistant superintendent of education an officer, based largely on duties performed); Cf. Act No. 393 of 1912 (creating office of assistant superintendent in certain counties to function in superintendent's absence).

Thus, based on the Court's reasoning in Thrift that for the purposes of misconduct in office prosecutions, one should look more closely at the individual's powers and duties rather than the means by which he occupies his position, it is my opinion that an assistant school superintendent is an officer within the meaning of Article VI, Section 8 of the South Carolina Constitution and Code Section 8-1-100.

You have also asked whether the Indictment charges a crime of moral turpitude. It is my conclusion that it does.

As our Supreme Court has previously held, "moral turpitude" is defined as

an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man ... . Moral turpitude implies something immoral in itself, regardless of whether it is punishable by law as a crime. ...

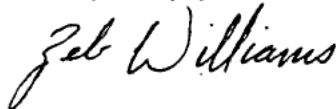
State v. Horton, 271 S.C. 413, 414, 248 S.E.2d 263 (1978); Op. Atty. Gen. February 9, 1995.

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Here, the grand jury has found probable cause that the Superintendent and Assistant Superintendent "knowingly, willingly and corruptly engaged in official misconduct by failing to contact law enforcement authorities immediately upon notice that a person had engaged in activities on school property which resulted or could have resulted in injury or serious threat of injury to another person ... and that such willful and corrupt official misconduct is a breach of duties imposed by law and owed to the people of Georgetown County and the State of South Carolina ...." (Emphasis added.) Specifically, the Indictment alleges a violation of S.C. Code Ann. 59-24-60 (1994 Supp.) which imposes a requirement on school administrators to contact law enforcement authorities when criminal conduct occurs. Therefore, consistent with this Office's long-standing policy of not attempting to second-guess grand jury determinations, it appears that the Indictment charges a crime of moral turpitude. Accordingly, it is my opinion that the Governor has the authority to suspend the individuals in question for an offense involving moral turpitude and also the authority to appoint officers to serve in the place of the suspended officials pending their trial. Article VI, Section 8 South Carolina Constitution, S.C. Code Ann. 8-1-100 (1994 Supp.).

This letter is an informal opinion only. It has been written by a designated 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.

Very truly yours,



Zeb C. Williams, III  
Deputy Attorney General

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