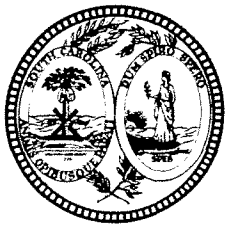

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

September 14, 1995

The Honorable Harold Gene Worley
Member, House of Representatives
P. O. Box 296
North Myrtle Beach, South Carolina 29582

Dear Representative Worley:

You have asked whether a county school superintendent can continue to serve upon indictment for common law misconduct in office. As I understand the situation, the underlying facts of the indictment allege that the superintendent unlawfully "rigged" or "fixed" bids in contravention of state law. The Indictment specifically charges the following facts:

> [t]hat Gary Smith and Richard Heath, while public officers and public officials holding positions of public trust and having a duty of accountability to the people of Horry County and the State of South Carolina imposed by the common law and statutory laws upon public officers and assumed by them as a matter of law upon their entering public office, did in Horry County between September, 1993 and January, 1995 breach that duty in that Gary Smith and Richard Heath did knowingly, willfully, dishonestly and corruptly violate the procurement laws of the State of South Carolina and of the Horry County School District by "fixing bids" in the purchase of computers, thereby, damaging the integrity of the School District and the bidding process. Further, Gary Smith and Richard Heath did receive and accept gratuities of travel and lodging from favored vendors in violation of Section 8-13-720 of the State Ethics Act, all being against the peace and dignity

> of the State of South Carolina and the Common Law in such cases made and provided.

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

> [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)

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. It makes no difference whether the superintendent is appointed or elected; he is still an officer. Thus, the question is whether the indictment charges a crime of moral turpitude. It is my conclusion that it does.

Here, the Indictment alleges the dishonest and corrupt "fixing of bids" in the purchase of computers for the school district. Moreover, the Indictment contends that there occurred a violation of S.C. Code Ann. Sec. 8-13-720, as part of the alleged misconduct in office. Section 8-13-720 proscribes any public official, public member or public employee from soliciting or receiving "money in addition to that received by the public official, public member or public employee in his official capacity for advice or assistance given in the course of his employment as a public official, public member or public employee." In this instance, the Indictment charges that the superintendent received and accepted certain gratuities from favored computer vendors.

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. It does not appear that this Office has ever considered the issue of whether offenses involving the fixing of bids are crimes of moral turpitude.

However, in O'Halloran v. DeCarlo, 162 N.J.Super. 174, 392 A.2d 615 (1978), the Court held that a count in an indictment for "willfully and knowingly" conspiring "to pervert the due administration of the laws of the State of New Jersey pertaining to the requirements for public advertisement for bids and public bidding in public contracts" and "to violate the criminal laws of the State of New Jersey pertaining to the misconduct in office of public officials" constituted moral turpitude. The lower court, which the referenced decision affirmed, stated the public policy considerations underlying this conclusion as follows:

> [t]his "partnership in criminal purposes" to violate the public bidding laws is in itself a fraud upon the State. The public's right to the benefits of public advertising and bidding were defeated, other contractors were cheated of their right to equal bidding opportunity, and the public was cheated of its right to have public officials conduct its affairs with propriety and in accordance with law.

156 N.J.Super. 249, 383 A.2d 769, 771 (1978). While the actual charge in these cases was a conspiracy to commit the offense, the result would undoubtedly be the same as to the substantive crime.

Moreover, the Indictment alleges a violation of the State Ethics Act wherein it is contended that the Superintendent accepted certain gratuities from vendors. Violation of a statute which proscribes the retention of fees or compensation in addition to those allowed by law has been held to constitute a crime of moral turpitude. In State ex rel. Griffin v. Anderson, 230 P. 315, 317 (Kan. 1924), for example, the Supreme Court of Kansas stated:

> [w]e hold that the law forbidding a public officer to retain any reward other than that allowed by law for doing anything appertaining to his duties as such, both in its general scope and as applied to the situation here presented, involves turpitude, within the meaning of the phrase as used in the statute quoted.

In view of the foregoing, it is my opinion that the Indictment charges a crime of moral turpitude and thus the Governor is empowered to suspend the individual in question pursuant to his constitutional authority.

You have also asked whether the school board is authorized to retain an attorney to represent the superintendent in the foregoing prosecution, or to pay the costs of the superintendent's legal defense in those criminal proceedings. I am enclosing a copy of an opinion of this Office, dated February 15, 1985 which discusses at length the authority of a political subdivision to employ independent counsel to represent a particular member of the body. There, we specifically noted that a public body may not employ counsel or pay counsel with public funds as to matters in which the body is not directly interested or which involved a private purpose. Op. at p. 4. Express statutory authority is necessary for expenditure of public funds in criminal proceedings (e.g. public defender).

By analogy, S.C. Code Ann. Sec. 1-7-50 only permits the State to pay for the defense of government employees in criminal actions if they acted in "good faith". Where, however, a grand jury has returned an indictment against a public official, this Office has concluded that Section 1-7-50 does not apply. We have previously stated:

> ... our Office has often taken the position that no defense will be provided where a judicial forum has made a finding of probable cause [which an indictment is] since this runs counter to the "good faith" finding specified in the statute. Under those circumstances, the employee is primarily responsible for selecting an attorney to provide a defense and for payment of any attorney fees and costs.

Letter from Nathan Kaminski, Executive Assistant for Administration, to Sally M. Walker, dated September 2, 1993. While Section 59-17-110 permits school districts to employ counsel in criminal proceedings for acts done in good faith in the course of employment, the grand jury here has found probable cause of "fixing bids", which would be clearly beyond the scope of a superintendent's duties. People v. Mehilic, 504 N.E.2d 1310.

Moreover, case law supports the idea that the payment of public funds for the defense of a public official in a criminal action is not an expenditure for a public purpose, but a private one. Holtzendorff v. Housing Authority of Los Angeles, 250 Cal.App.2d 596, 58 Cal.Reptr. 886 (1967); Bowling v. Brown, 57 Md.App. 248, 469 A.2d 896 (1984). See also, Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975) [legislative findings of public purpose usually necessary]. In Bowling v. Brown, supra, the Court found that

reimbursement of the town manager and town engineer for attorney expenses in defense against charges of official misconduct was not for a public purpose. The Court cited numerous authorities in support of this position:

> [i]t is generally agreed that a municipality has no power to reimburse a town official for his expenses incurred in defending himself from charges of official misconduct. Board of Chosen Freeholders v. Conda, 164 N.J.Super. 386, 396 A.2d 613 (1978); see 3 McQuillen, Municipal Corporations (3d ed. 1973 rev.), § 12.137. The rationale behind the rule is that such an indebtedness against a city would constitute the application of money to an individual and not to a city purpose. See, e.g., Chapman v. New York, 168 N.Y. 80, 61 N.E. 108 (1901). The general rule in Maryland is that public funds of municipalities cannot properly be devoted to private uses, even when expressly authorized by the legislature. City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957); Wilson v. Board of County Commissioners, 273 Md. 30, 327 A.2d 488 (1974).

Continuing, the Court in Bowling recognized:

> [a] New Jersey case presented a fact situation similar to that in the instant case. See Township of Manalapan v. Loeb, 126 N.J.Super. 277, 314 A.2d 81, aff'd per curiam 131 N.J.Super. 469, 330 A.2d 593 (1974). The case involved a complaint by a township for a declaratory judgment as to whether it was authorized to pay for legal expenses incurred by certain of its officers defending against an indictment handed down by a grand jury. A town committeeman had been charged with using a telephone credit card for personal calls and incurring expenses in excess of $200.00 which was paid from township funds. The town mayor and town business administrator were charged with having knowledge of the improper use of the credit card and failing to take the necessary steps to see that the township was reimbursed for the amount of the calls. The indictment was dismissed against the mayor and administrator, and a jury found the committeeman not guilty. In spite of the favorable

> termination of the legal proceedings, the court in the declaratory judgment action held that the township was not authorized by statute or otherwise to indemnify its municipal officers for the cost of defending against a criminal indictment charging them with what amounted to official misconduct. 314 A.2d at 83 citing 56 Am.Jur.2d, Municipal Corporations, Etc., § 208, at 266, and 64 C.J.S., Municipal Corporations, § 183, at 341. In reference to Defendants' 'public purpose' argument in the present case, this Court adopts the words of the Manalapan court: 'Here, under no circumstances can it be said that the acts charged against ... [the town employees] in the indictment were for the benefit of the municipality." 314 A.2d at 82.

469 A.2d at 902.

In conclusion, it is our opinion that the Indictment charges an officer with a crime of moral turpitude and, thus the Governor may suspend in this instance. Secondly, it is also our opinion that a political subdivision, such as a school district, is without authority to pay an employee's expenses of representation in a criminal proceeding. The foregoing authorities clearly hold that such expenditures are not for a public purpose. It is for the protection of the public that our Constitution requires that public funds be spent for public purposes. Just as the Court recognized in the Manalapan case, referenced above, "under no circumstances can it be said that the acts charged ... in the indictment were for the benefit of" the public. Accordingly, there may not be an expenditure of public funds for the legal expenses or costs in the referenced criminal proceedings.

Sincerely,

Charles Molony Condon
Attorney General

CMC/an
Enclosure