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The State of South Carolina

Office of the Attorney General

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September 27, 1989

The Honorable James E. Bryan, Jr.
Senator, District No. 9
P. O. Box 756
Laurens, South Carolina 29360

Dear Senator Bryan:

As you know, Attorney General Medlock has referred to me for response your letter dated August 10, 1989. By that letter, you have requested an opinion concerning the legality and constitutionality of a policy adopted by a state agency which provides that, if an employee is served with a warrant for a felony or indicted for a felony, the employee is suspended from employment pending the outcome. You specifically questioned such a policy when the criminal charge is not job-related as well as the employee's entitlement to back pay under such a policy.

Of course, when the validity of a legislative act is questioned, the court will presume the legislative act to be constitutionally valid and every intendment will be indulged in favor of the act's validity by the court. Richland County v. Campbell, 294 S.C. 346, 364 S.E. 2d 470 (1988). This presumption also inures to the acts of an administrative agency which are legislative in character. See, e.g., 2 Am. Jur. 2d Administrative Law §298; Sutherland Stat. Constr. §31.02 (4th ed. 1985).

Although this Office may comment upon potential constitutional problems, the courts of this State have the sole province to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative act unconstitutional. S.C. Att'y Gen. Op., May 26, 1989. See 7 Am. Jur. 2d Attorney General §11 (discussing the advisory and ministerial, rather than judicial, function of the office of attorney general).

According to one legal encyclopedia:

> "Suspension from office" has been defined as the temporary withdrawal of the power to exercise the duties of an office. The gist of a suspension is that the employee still has a chance to return to work and is not foreclosed from doing so. . . .
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> While the power of the legislature to confer authority to suspend an officer is subject to limitations imposed by the constitution, the power to suspend an office pending charges may be given by statute in the absence of a constitutional inhibition, and its exercise by the competent authority under the statute does not violate any constitutional right of the officer. A statute authorizing the governor to suspend an officer on an indictment for any crime is not invalid on the ground of a deprivation of the constitutional guaranty of due process of law, or that it constitutionally delegates the legislative power to the federal government or to the government of a sister state.
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> Where no express power to suspend has been granted, the courts do not generally recognize that the power is included within a arbitrary power to remove; but, where the power of removal is limited to cause, the power to suspend, made use of as a disciplinary power pending charges, has been regarded as included within the power of removal, and it has been stated that the power to suspend is an incident to the power to remove for cause, and, according to some authorities, the power to remove necessarily includes the minor power to suspend. Where the term or tenure of a public officer is not fixed by law, it has been announced that the power of suspension, unless controlled by statute, is an incident to the power of appointment. [Footnotes omitted.]

67 C.J.S. Officers §108(a). In addition,

> [t]he grounds on which an officer may be suspended may be fixed by constitutional provision, or, within constitutional restrictions, may be designated by the legislature. Where a statute provides for a definite term of office, an officer may be suspended only for cause.
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> While the general rule has been announced that, unless the matter is controlled by statute, an officer whose term or tenure is not fixed by law may be suspended without charges, a provision prescribing the grounds on which an officer may be suspended will be strictly construed, and may not be extended to include other grounds. . . .
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> Various particular grounds have been held to authorize the suspension of an officer or employee, including the commission of a felony, conflicts of interest, drunkenness, incompetency, and malfeasance. Other grounds for suspension include misconduct or insubordination, misfeasance, neglect of duty, being under the influence of intoxicating liquor, and unfitness to render effective service. A suspension on the ground of a violation of public policy, or on the ground that certain transactions might lead to a conflict of interest, may be improper.
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> It has been stated that a constitutional or statutory provision authorizing the suspension of an officer for specified causes or on the ground of his indictment for a specified offense authorizes suspension based only on causes arising or offenses committed during his current term of office and not on those arising or committed prior to such term. However, it has also been held that such rule refers to completed acts and offenses known and condoned by election or appointment, and that it does not apply to

> matters arising from neglect of a continuing duty with which an officer is obligated to comply during his current term of office. The failure to convict an officer or employee on criminal charges brought against him does not necessarily preclude his suspension for the conduct forming the basis of the charge or render the prior suspension improper. [Footnotes omitted.]

67 C.J.S. Officers §110. Similarly, 63A Am. Jur. 2d Public Officers and Employees §291, states, in part: "Where the conduct of a public employee that forms the basis of disciplinary proceedings resulting in the employee's suspension may also constitute a violation of criminal law, the absence of a conviction bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceeding. [Footnote omitted.]"

The State Employee Grievance Procedure Act of 1982, S.C. Code Ann. §§8-17-310 through -380 (1976 & 1988 Cum. Supp.), contains this definition: "'Suspension' means an enforced leave of absence without pay pending investigation of charges against an employee or for disciplinary purposes." S.C. Code Ann. §8-17-320 (13) (1976 & 1988 Cum. Supp.). The regulations of the South Carolina State Budget and Control Board contain the identical definition. S.C. Code Ann. R 19-700(III) (1976 & 1988 Cum. Supp.). Other regulations of the South Carolina State Budget and Control Board authorize the use of a suspension without pay as a disciplinary sanction. S.C. Code Ann. R 19-705.02(B) ("All suspensions shall be without pay."); R 19-705.03(C) ("Each agency's program for handling disciplinary problems should provide for the following type of disciplinary actions. . . (6)Suspension. . . ."); R 19-707.09(C)(1) ("A suspension is defined as an action taken by an agency head against an employee to temporarily relieve the employee of duties and place the employee on leave without pay."); R 19-707.09(C)(2) ("An agency head may suspend an employee as a disciplinary measure for just cause.") (vol. 23A 1976 & 1988 Cum. Supp.).

A potential constitutional challenge to the policy you describe might be made based upon due process grounds. See U.S. Const. amend. V & XIV. Cf. S.C. Const. art. I, §3 ("Privileges and immunities; due process; equal protection of laws."). Both substantive due process and procedural due process requirements are recognized within the protection of the fifth and fourteenth amendments of the United States Constitution. See, e.g.,

Hamilton v. Bd. of Trustees of Oconee County School Dist., 282 S.C. 519, 319 S.E. 2d 717 (Ct. App. 1984)(Upon analysis of the fifth and fourteenth amendments of the United States Constitution, substantive due process means state action which deprives a person of life, liberty, or property must have a rational basis; the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary.); Beckman v. Harris, 756 F.2d 1032 (4th Cir.), cert. denied, 474 U.S. 903 (1985)(To be entitled to the procedural safeguards, i.e., notice and opportunity to be heard, encompassed by the due process clause of the fourteenth amendment, the complaining party must suffer from the deprivation of a liberty or property interest.). One legal encyclopedia states:

> As a general rule the power to suspend may, in the absence of a constitutional or statutory provision to the contrary, be exercised without prior notice to the person suspended, at least where the term or tenure of the officer suspended is not fixed by law; but the view has been taken that, where the power to suspend an officer pending a proceeding to remove for cause is incident to the power to remove, the power to suspend should not be exercised without notice to the accused officer. [Footnotes omitted.]

And,

> [t]he general rule has been announced that, unless the matter is controlled by statute, an officer whose term or tenure is not fixed by law may be suspended without a hearing, and that an officer may be suspended without a hearing pending an investigation of charges of misfeasance or malfeasance against him, but the view has been taken that, where the power of a judge to suspend an officer pending a proceeding to remove such officer for cause is incident to the power to remove, the power to suspend should not be exercised without giving to the officer an opportunity to be heard. [Footnotes omitted.]

67 C.J.S. Officers §111. Another legal encyclopedia has, however, stated:

> Due process principles are violated by a state statute that authorizes a public

> employer to peremptorily suspend any merit system public employee without pay and without right of hearing as a punishment for improper behavior. A suspended officer who has the right to a hearing on disciplinary charges also has the constitutional due process guarantee of confronting, rebutting and defending all of the interrelated charges against him at the same time and at the same hearing before an impartial hearing officer. An officer can demonstrate a property interest in continued employment sufficient to invoke minimum due process protection by showing governing regulations specifically providing that suspension, listed along with dismissal as type of discipline to which the employee may be subjected, may occur only "for cause." [Footnotes omitted.]

63A Am. Jur. 2d Public Officers and Employees §293. Whether or not due process attaches and is violated would necessarily depend on the facts of each specific situation. Your letter does not contain facts sufficient to analyze a constitutional challenge based upon due process grounds.

Because several, but not all, state agencies apparently have the policy you describe, another potential constitutional challenge might be based upon equal protection grounds. Of course, both the United States Constitution and the South Carolina Constitution contain equal protection clauses. U.S. Const. Amend. 14; S.C. Const. art. 1, §3. The requirements of equal protection are satisfied if the classification bears a reasonable relation to the purpose sought to be effected, members of the class are treated alike under similar circumstances and conditions, and the classification rests on some reasonable basis. GTE Sprint Communications Corp. v. Pub. Serv. Comm'n of South Carolina, 288 S.C. 174, 341 S.E.2d 126 (1986)(analyzing U.S. Const. Amend. 14 and S.C. Const. art. 1, §3). In Smith v. Smith, 291 S.C. 420, 424, 354 S.E.2d 36, 39 (1987)(citing Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985)), the South Carolina Supreme Court stated:

> In determining whether a statute violates the equal protection clauses of state and federal constitutions, we must give great deference to the classification passed by the legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is "any reasonable hypothesis" to support it.

Obviously, the specific facts and circumstances involved would impact on a judicial analysis of an equal protection challenge based on such an employment policy.

In addition to such constitutional challenges, an employee disciplined according to such a policy might argue that the policy is unreasonable where the felony in question was not directly related to that employee's job. The employee may also protest the nonpayment of wages during the period of suspension, particularly if the employee is subsequently acquitted of the charges or the charges are dropped. This Office has previously opined concerning an inquiry as to

> whether the Department of Mental Health has the discretion to deny back pay to an employee of the Department for the period of time he was suspended from his position pursuant to Department Policy [Memorandum No. 17-84 (8-1-84)] after being charged with committing a crime arising out of or in the course of employment with the Department of Mental Health for which conviction would adversely reflect on the individual's suitability for patient care and/or employment.

<u>S.C. Att'y Gen. Op</u>. #85-101 (Sep. 18, 1985). Citing <u>S.C. Att'y Gen. Op</u>. #3281 (1972) and <u>S.C. Att'y Gen. Op</u>. (Dec. 16, 1981), that Opinion observed that "this Office has previously concluded that if a public employee is lawfully suspended after being charged with a crime and the suspension is thereafter terminated because of acquittal of the employee, the employee is not entitled to compensation for the period of time he [ ] was suspended." This Office concluded, in that Opinion:

> [W]e believe that the Department of Mental Health policy [Memorandum No. 17-84] is valid insofar as it authorizes the suspension without pay of an employee charged with committing a misdemeanor arising out of or in the course of employment with the Department and for which conviction would adversely reflect on the employee's suitability for patient care and/or continued employment. In addition, although the suspension of the employee may be terminated by ultimate acquittal or dismissal of the charges brought against him, this fact does

> not entitle the employee to compensation during the period of suspension unless the suspension was illegal or unlawfully made.

Id. That Opinion, however, did not address the application of such a policy where the criminal charges were not directly related to the employee's job.

At least one jurisdiction has, however, addressed that issue. In Salvati v. Berks County Bd. of Assistance, 81 Pa. Cmwlth. 629, 474 A.2d 399 (1984) ["Salvati II"] the Commonwealth Court of Pennsylvania granted reargument concerning the order of a panel of that court in Salvati v. Dep't of Public Welfare, 76 Pa. Cmwlth. 248, 463 A.2d 1224 (1983) ["Salvati I"]. In Salvati I, an income maintenance worker petitioned for review of an order of the State Civil Service Commission ["Commission"] upholding her suspension from her position with a county board of assistance. The panel in Salvati I affirmed the Commission's Order. After reargument in Salvati II, the court reaffirmed the panel's order. Salvati was suspended as a result of her arrest and arraignment on criminal charges relating to the possession and sale of controlled substances. According to Salvati II:

> The Commission found that the petitioner's arrest and arraignment on criminal charges constituted "good cause" of the type specified in 4 Pa.Code §101.21(a)(5), "scandalous or disgraceful conduct while on or off duty which may bring the service of the Commonwealth into disrepute."
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> The petitioner argues, however, that a mere arrest without conviction or independent investigation of the charges by the appointing authority is not good cause and that judicial precedent has limited the definition of good cause to require that it be job related and touch upon competency and ability, a requirement which petitioner asserts has not been met in this case. [Citation omitted.] She also points to the Commission's holding that "the sole basis for the suspension [of the petitioner] [sic] was the fact that on April 2, 1981, [she] [sic] was arraigned on criminal charges," and argues that the decision of the Commission amounts to a presumption of criminal guilt applicable to civil service employees.

> As to the petitioner's first point - that a "mere arrest" cannot constitute good cause - we held just the contrary in Pennsylvania Department of Justice v. Grant. 22 Pa. Commonwealth Ct. 582, 350 A.2d 878 (1976) and in Brown v. Commonwealth Department of Transportation, 34 Pa. Commonwealth Ct. 461, 383 A.2d 978 (1978). We were clear on this point in Grant:
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> > For appellant to be dismissed, it was not necessary for him to be convicted of the crimes with which he was charged.
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> Id. at 586, 350 A.2d at 880. The Commission expressly relies on these cases and the petitioner we believe offers neither reason nor argument why they should not be controlling. [Footnote omitted.]

Salvati II, 81 Pa. Cmwlth. at ___, 474 A.2d at 401. The court further concluded in Salvati II that evidence that publicity followed the employee's arrest on criminal charges relating to the possession and sale of controlled substances and the county board received a number of anonymous letters and phone calls supported a finding that the employee's arrest tended to bring public service into disrepute, thereby establishing "good cause" for the suspension. Id. at ____, 474 A.2d at 401-2.

Other jurisdictions have considered the validity of other forms of discipline based upon the arrest of an employee. In Dep't of Transp. v. Nobles, 187 Ga. App. 244, 370 S.E.2d 11 (Ga. App. 1988), the Court of Appeals of Georgia considered the dismissal of a Department of Transportation employee who was arrested for selling drugs. The court held that the fact that the State Personnel Board ["Board"] which upheld the dismissal, did not have a stated policy concerning the consequences of an employee's drug-related activity did not preclude dismissal of the employee, where the Board had a rule providing that an employee can be dismissed because of misconduct or conduct reflecting discredit upon the Department of Transportation and where the Board determined that the employee's conduct constituted misconduct and conduct reflecting discredit on the Department of Transportation. Id. In Reece v. Tennessee Civil Serv. Comm'n, 699 S.W. 2d 808 (Tenn. App. 1985), cert. denied, 106 S.Ct. 1207 (1986), the Court of Appeals of Tennessee considered an appeal involving an employee who was dismissed by the State Civil Service Commission. The employee's notice of termination stated:

> You were placed on indefinite suspension on August 12, 1982 due to your arrest and charge of "Manufacturing Marijuana". We were informed today by Attorney General William Pope that you were tried in Bledsoe County General Sessions Court and the court failed to exonerate you of the allegations. I feel that the nature and awareness of these charges would greatly affect your ability to perform the duties of a Correctional Sergeant. Because of this, I feel that I must terminate your employment.

699 S.W.2d at 809. The court observed:

> The gravamen of the grounds for dismissal was _not_ that plaintiff was guilty of unlawful involvement with marijuana but that a prosecution had been duly initiated by police officers involving arrest of plaintiff on some charge involving marijuana, that this arrest received intensive publicity in the area of plaintiff's employment, and that the prosecution was terminated without exoneration of plaintiff, resulting in such impairment of his usefulness as required his discharge "for the good of the service". [Emphasis in original.]

699 S.W.2d at 809. Analyzing the employee's assertion that the State insists that his failure to exonerate himself is evidence of guilt, the court stated:

> This is not the theory of the State. The premise of the State, which is supported by the evidence and by common sense, is that whenever a public official is accused of wrongdoing, especially that which closely affects his public duties, his public image is marred because of a suspicion of guilt which is not allayed or removed without a conclusive determination of the fact of guilt or innocence. This is the position in which plaintiff, or any other public official finds himself once he has been charged, falsely or otherwise, and the charges have received the usual venomous publicity. For the superiors of such public employee, the issue is not guilt or innocence, but usefulness or uselessness.

699 S.W.2d at 811. See also Anderson v. State Personnel Bd., 194 Cal. App. 3d 761, 239 Cal. Rptr. 824 (1987)("[A] determination of whether there has been a failure of good conduct under Government Code Section 19572, subdivision (t) [failure of good behavior causing discredit to an agency as grounds for discipline] does not require 'that the employee be convicted of a crime [or] [sic] that it appear that [his] [sic] actions . . . [were] [sic] illegal.' [Citation omitted.]").

Apparently, no appellate court in South Carolina has decided the precise issue that you raise here. Nevertheless, the logic and analysis from the Commonwealth Court of Pennsylvania as well as the other courts cited above may be persuasive to a South Carolina Court. Obviously, the specific language of the questioned policy as well as the specific facts and circumstances involved would be critical in comparing their similarity to the cases from these other jurisdictions.

In summary, a court would most probably presume the constitutionality of such a policy as you describe. Courts in other jurisdictions have upheld provisions requiring discipline of an employee upon arrest where those employees have raised constitutional challenges against such provisions. Of course, any constitutional challenge would ultimately depend upon the specific facts and circumstances involved.

I hope this information will be of assistance to you. Please advise me if you have additional questions concerning this matter.

Sincerely,

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

REVIEWED AND APPROVED BY

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