ALAN WILSON
ATTORNEY GENERAL

September 11, 2014

The Honorable James E. Smith, Jr.
Richland County Judiciary Committee
335C Blatt Bldg.
Columbia, 29201

The Honorable Todd Rutherford
House Minority Leader
335B Blatt Bldg.
Columbia, 29201

Dear Representatives Smith and Rutherford:

You seek an opinion regarding the legal status of Mr. Robert W. Harrell, both as Speaker of the House and as a member of the House, following the recent indictment of Mr. Harrell. Specifically, you ask the following:

1) Speaker Harrell's elected position as member of the South Carolina House of Representatives;
2) Speaker Harrell's position as Speaker of the South Carolina House of Representatives;
3) Whether or not South Carolina law or House Rules would allow Speaker Harrell to continue to serve as Speaker after the issuance of the indictment on September 10, 2014;
4) Would South Carolina law operate to effectuate the above – impacts without the House convening; and
5) Under the circumstances which occurred today, at what time or event would the Speaker Pro Tem assume the responsibilities of the Office of Speaker?

In addressing your various questions, we note that the Speaker was indicted on nine counts in the Court of General Sessions for Richland County. Among the charges were common law misconduct in office, statutory misconduct in office (§ 8-1-80) and violations of the Ethics Act for use of campaign funds for personal use (§ 8-13-1348). We will first analyze the statutory procedures for suspension and removal of members of the General Assembly and then resolve your specific questions.

Law/Analysis

S.C. Code Ann. Section 8-13-560, a part of the State Ethics Act, provides as follows:

> Unless otherwise currently or hereafter provided for by House or Senate rule, as is appropriate:
>
> (1) A member of the General Assembly who is indicted in a state court, or a federal court for a crime that is a felony, a crime that involves moral turpitude, a crime that has a sentence of two or more years, or a crime that violates election laws must be suspended immediately without pay

> by the presiding officer of the House or Senate, as appropriate. The suspension remains in effect until the public official is acquitted, convicted, pleads guilty, or pleads nolo contendere. In the case of conviction, the office must be declared vacant. In the event of an acquittal or dismissal of charges against the public official, he is entitled to reinstatement and back pay.
>
> (2) If the public official is involved in an election between the time of suspension and final conclusion of the indictment, the presiding opinion of the House or Senate, or the Governor, as appropriate, shall again suspend him at the beginning of his next term. The suspended public official may not participate in the business of his public office.

(emphasis added). It is our understanding that at least one of the indictments in question concerns common law misconduct in office, a misdemeanor, but an offense which carries a penalty of up to ten years. See State v. Follin, 352 S.C. 235, 249, 573 S.E. 812, 819 (Ct. App. 2002) ["Lewis was sentenced to ten years imprisonment on the official misconduct charge."] In addition, the allegation of using campaign funds for personal use would most probably constitute a crime of moral turpitude, as certainly would any alleged false claims. Thus, while the offenses for which Speaker Harrell was indicted are misdemeanors, such fact is irrelevant to the question of suspension. Section 8-13-560 would be applicable here and would be controlling.

Section 8-13-560(1) uses the term "must be suspended immediately". We have, in the past, construed similar language as constituting a mandatory, ministerial duty to suspend immediately, thus affording the suspending authority no discretion whatsoever. See Op. S.C. Atty. Gen., No 4358, May 27, 1976 (1976 WL 22977) [Governor is mandated "to suspend such officer upon indictment by a grand jury."]; Op. S.C. Atty. Gen., No. 93, July 23, 1981 (1981 WL 96596) [upon indictment for embezzlement, "the Governor has the mandatory duty imposed upon him of suspending Mr. Avant from office."]; Op. S.C. Atty. Gen., May 27, 1983 (1983 WL 181898) ["the Governor has the mandatory duty to suspend the mayor"].

The question then becomes who is the suspending authority in this instance. Section 8-13-560 references the "presiding officer of the House. . . ." Of course, the Speaker of the House normally presides over the House and typically carries out the suspension process; but in this instance, the Speaker himself is the subject of indictment. House Rule 1.8 states that the "Speaker Pro Tempore shall preside in the absence of the speaker." (emphasis added). Rule 1.6 of the House provides that '[t]he Speaker may vote in all cases (except when he may be personally or pecuniarily interested)." Thus the issue is whether the Speaker is "absent" for purposes of the House Rule, so that the Speaker Pro Tem may act in his stead, or whether the Speaker is personally or pecuniarily interested, so that he is disqualified. We conclude that, by operation of law, the Speaker Pro Tem is legally required to act in this case instead of the Speaker because the Speaker is "absent" and is disqualified because he is "personally or pecuniarily interested."

In Northcutt v. Howard, 130 S.W.2d 70 (Ky. 1939), the Kentucky Court construed a statute providing for the appointment of a commonwealth's attorney by the circuit judge "in the absence of the commonwealth's attorney." The Court concluded as follows:

> [i]t is argued for appellant that the commonwealth attorney is absent in legal effect when he is either disqualified or, for some reason, disabled from performing the functions of his office, and that when his own actions are being investigated by the grand jury in any investigations pending before it. This argument is unquestionably sound. There can be no doubt that if the commonwealth attorney was under indictment he would be disqualified from prosecuting the case against himself, and the circuit court in such case has the right to appoint a commonwealth attorney pro tem to conduct the trial of the felony charge against the commonwealth attorney. This being true, it follows as a matter of course, that when the grand jury is actually investigating such a charge against the commonwealth attorney, he is thereby automatically disqualified from assisting the grand jury in such investigation. 130 S.W.2d at 71-72.

See also, Raper v. State, 317 So.2d 709 (Miss. 1975) [term "absent" includes disqualification].

Likewise, it is our opinion that, in this instance, the Speaker of the House is "absent" for purposes of Rule 1.8, and that the Speaker Pro Tem is required to suspend the Speaker pursuant to § 8-13-560. The purpose of § 8-13-560 is the protection of the public interest. In this regard, it has been stated that "an official indicted for [misconduct in office] should be separated from the office pending trial. . . ." Bessette v. Comm. Of Public Works, 204 N.E.2d 909, 912 (Mass. 1965). As stated above, the duty to suspend is mandatory and ministerial. See, Sumpter v. State, 98 S.W. 719, 720 (Ark. 1906) [statute "requires the court to suspend a county officer indicted for malfeasance in office."]

For purposes of § 8-13-560, it is thus the indictment itself which mandates as a matter of law the suspension of an individual. See, Gov. v. McConigle, 637 N.E.2d 863, 865 (Mass. 1994) ["the indictment itself provided sufficient cause for a suspension."]; Sumpter v. State, supra ["as a matter of public policy, he (the officer) is prevented from exercising the duties of the office while an indictment is pending against him."]; Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956) [suspension pending trial serves to "tie (the officer's) . . . hands for the time being."]; Tisdale v. Sheheen, 777 F.Supp. 1270 (D.S.C. 1991), vacated as moot, 502 U.S. 932 (1991) [House Rule 3.12 "requiring suspension of a member (of the Legislature) upon his indictment"]; Leedy v. Brown, 113 P. 177, 179 (Okl. 1910) ["when the grand jury returned the finding into court, and it was ordered to be filed, the order of suspension was made."]; Cf. Parker v. State Hwy. Dept., 224 S.C. 263, 78 S.E.2d 382, 385 (1953) ["Upon receipt of such report, it is mandatory upon the Department to suspend the license of the person so convicted. No discretion is allowed in the matter. . . . The suspension follows as a consequence and effect of committing the offense."]

In short, the indictment renders the Speaker "absent" as a matter of law. He may not "participate in the business of his public office" pursuant to the express terms of § 8-13-560; in

the words of the Northcutt Court, he is absolutely disqualified from acting. Moreover, it is an inherent conflict of interest to make a decision regarding one's self. As our Supreme Court emphasized in Lide v. Fidelity and Deposit Co. of Md., 179 S.C. 161, 183, S.E. 771, 774 (1936) "it would be a monstrosity to permit a judge to sit in judgment in one's own case, or in one in which he is interested in the outcome." Likewise, as our Court stated in Singletary v. Carter, 1 Bail. 467, 1830 WL 1348 (1830), "there is no proposition, which would be more universally concurred in, than that no officer should be permitted to act in his own case." Further, § 8-13-560 requires that a member, upon the requisite indictment, must be suspended immediately "without pay." Clearly, this would give the Speaker a "pecuniar[y] interest," which would disqualify him pursuant to Rule 1.6. Thus, we construe House Rules 1.6 and 1.8 as disqualifying the Speaker from acting in this instance and that the Speaker Pro Tem would be the "presiding officer" for purposes of § 8-13-560. See Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) [Speaker Pro Tem is "presiding officer" for purposes of ratification of a Bill].

Courts have also concluded that such statutory requirements of mandatory suspension, based upon indictment, are constitutional. For example, in Eaves v. Harris, 364 S.E.2d 854 (Ga. 1988), the Supreme Court of Georgia stated that "[b]alancing the public good against the indicted public official's right to hold office results in the conclusion that this law does not offend traditional notions of fair play and justice." 364 S.E.2d at 857. The Eaves Court quoted Brown v. Dept. of Justice, 715 F.2d 662, 667 (5th Cir. 1983), noting as follows:

> [a]n indictment is a public record, and public knowledge of an individual formally accused of job-related crimes is still on duty would undoubtedly erode public confidence. . . . [suspension] pending disposition of the criminal charges thus safeguards the public interest. . . . In suspending an [officer] solely on the basis of his or her indictment, the agency is making no assertion about . . . guilt or innocence; rather, the suspension is merely a means of safeguarding the legitimate interests of the agency.

364 S.E.2d at 857, quoting Brown.

Rejecting any argument that a statute requiring removal under certain circumstances infringes upon the power of each house to punish its members, the Court in Erichetti v. Merling, 457 A.2d 309, 321 (N.J. 1982) concluded that '[t]here is no express statement that the removal clause is the sole means by which a legislator may lose his seat." See Art. III, § 12 of the South Carolina Constitution [each house may punish its members]. See also, Smith v. Arizona Citizens Clean Election Comm., 132 P.3d 1187 (Ariz. 2006). And, in Thompson v. Seigler, supra, our Supreme Court concluded that an Act providing for suspension and removal of an officer did not deprive the officer [Sheriff] of property without due process. According to the Thompson Court,

> ". . . suspension without such notice does not deprive the officer of property without due process of law. Nor is a suspension wanting in due process or as a denial of 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."

230 S.C. at 124, 94 S.E.2d at 235. See also, Ex Parte Wiley, supra ["We cannot pronounce the enactment, so far as it authorizes the suspension of a county solicitor under indictment violative of the Constitution."].

In summary, § 8-13-560 must be followed immediately by the Speaker Pro Tem. Such provision is a part of the State Ethics Act, an enactment which is generally applicable to all public officials, including members of the General Assembly. As the New Jersey Court concluded in State v. Gregorio, 451 A.2d 980 (N.J. 1982), the ethics "statutory scheme is 'as much a general law as the criminal law of the State, for violation of which any person including a legislator, may be subject to a prescribed penalty.'" 451 A.2d 989, quoting Comm. On Ethical Standards v. Perkins, 432 A.2d 116 (1981). Moreover, as our Supreme Court stressed in State v. Thrift, 312 S.C. 282, 306, 440 S.E.2d 341, 354 (1994), the purpose of the Ethics Act is the "fostering of public trust and confidence in government, and the promotion of the integrity of government through openness."

As to your question regarding any distinction between the status of Mr. Harrell as a member of the House and as Speaker of the House, it is our opinion that suspension of Mr. Harrell as a member, pursuant to § 8-13-560, has the legal effect of also suspending him as Speaker of the House. As we read the House Rules, a person cannot be Speaker unless he is a member of the House. Rule 1.6 provides that,

> [t]he Speaker may vote in all cases (except when he may be personally or pecuniarily interested). . . . The presiding officer . . . may speak on points of order in preference to other members. . . .

(emphasis added). The fact that the Speaker may vote certainly implies that he be a member because non-members, such as officers of the House, are not allowed to vote. Moreover, reference to "other members" clearly indicates that the Speaker himself must be a member.

This conclusion is supported by the treatise, Jefferson's Manual and Rules of the House of Representatives. Section 26 thereof states:

> [t]he officers of the House are the Speaker, who has always been one of its members and whose term as Speaker must expire with his term as a Member; and the Clerk, Sergeant-At-Arms, Doorkeeper, Postmaster and Chaplain . . . no one of whom has ever been chosen from the sitting membership of the House and who continue in office until their successors are chosen and qualified.

Further, South Carolinas' Constitution, pursuant to Art. III, § 3 mandates that the "House of Representatives shall consist of one hundred and twenty four members. . . ." If the Speaker were not selected from the membership of the House, there would be one "member" who was "missing" from the House at any time the House elected a non-member as Speaker. Thus, the Constitution manifestly contemplates that the Speaker be elected from the membership.

Conclusion

1. The obvious purpose of § 8-13-560, which is a part of the Ethics Act, is to protect the public interest in preventing "the inappropriate situation of having an official under indictment engaged in the duties of his office." Reynolds v. Comm'r of Commerce and Development, 214 N.E. 2d 69, 71 (Mass. 1966). Our own Supreme Court, in State v. Thrift, supra, emphasized that the overarching purpose of the Ethics Act is the "fostering of public trust and confidence in government." Section 8-13-560, which requires the immediate suspension of a House member under indictment for an offense carrying a sentence of more than two years, thus makes mandatory the immediate suspension of Mr. Harrell upon indictment for common law misconduct in office, which punishes by a sentence of up to ten years. Further, § 8-13-560 is also applicable because one or more of the charges for using campaign funds for personal use, as well as alleged false claims, would constitute a crime of moral turpitude.

2. Rule 1.8 of the House provides that the Speaker Pro Tem "shall preside" in the "absence" of the Speaker. We conclude that the Speaker is rendered "absent" by the indictment for common law misconduct in office, as well as the other charges. Here, the suspension order is the ministerial act of implementing the mandate of § 8-13-560, based upon the aforesaid indictments. In other words, the indictments themselves necessitate suspension, and Mr. Harrell is rendered disqualified from participation "in the business of his public office" as a matter of law upon indictment, pursuant to the express terms of § 8-13-560.

3. Further, Mr. Harrell is disqualified as a matter of law upon his indictment by the universal and long-held common law rule that no officer may be permitted to act in his own case. Section 8-13-560 requires that the suspension be "without pay." Thus, pursuant to the express terms of Rule 1.6 of the House, Mr. Harrell would be both "personally and pecuniarily interested." Accordingly, Mr. Harrell is disqualified from acting on his own suspension and the Speaker Pro Tem, as the "presiding officer" of the House, must carry out the immediate suspension required by § 8-13-560.

4. The indictments are public information and thus § 8-13-560 requires the Speaker Pro Tem to act "immediately" to suspend Mr. Harrell. While the crimes charged in the indictment, such as common law misconduct in office, are misdemeanors, such is irrelevant. It is the offenses referenced in § 8-13-560, such as those carrying sentences of more than two years and crimes of moral turpitude, which result in immediate mandatory suspension here.

5. Section 8-13-560, as part of the Ethics Act, is binding upon the House. Such provision is constitutional and does not infringe upon Art. III, § 12 of the Constitution (concerning the power of each house to punish its members), nor any other provision of the State or federal Constitution.

6. As to your specific questions regarding any distinction between the status of Mr. Harrell as a member of the House and as Speaker of the House, as noted above, § 8-13-560 suspends a member automatically, based upon the referenced indictments. Suspension of Mr. Harrell as a member of the House by virtue of § 8-13-560 thus also serves to suspend him as Speaker of the House. Only members of the House may serve as Speaker. See, e.g. Rule 1.6 of the House Rules (allowing the Speaker to vote on all matters unless personally and pecuniarily interested and

referencing that the Speaker "may speak on points of order in preference to other members.") (emphasis added). Thus, clearly Rule 1.6 contemplates that the Speaker must be a member of the House. Further, Art. III, § 3 of the Constitution, mandating that the House consist of 124 members, reinforces that the Speaker be elected from House membership. Otherwise, a non-member who is elected Speaker would deprive the House of its full constitutional membership.

7. Section 8-13-560 requires immediate suspension by the "presiding officer" upon the types of indictments referenced in the statute. In this case, as stated, the "presiding officer" is the Speaker Pro Tem. Thus, reconvening the House in order to carry out the mandate of suspension is not required by § 8-13-560. The act of suspension is ministerial in nature and is delegated expressly to the "presiding officer" rather than to the House as a whole.

Sincerely,

Robert D. Cook
Solicitor General