ALAN WILSON
ATTORNEY GENERAL

9311/9861

January 14, 2015

David W. Epperson, Esq.
Clarendon County Administrator
411 Sunset Drive
Manning, SC 29102

Dear Mr. Epperson:

This Office received your request for an opinion regarding the authority of a County Board of Education to suspend or remove an appointed school board member after the member has been arrested and charged with a crime. You explain that the Clarendon County Board of Education appoints all nine (9) members to the Clarendon School District Two Board of Trustees. On or about November 13, 2014, a member of the Clarendon School District Two Board of Trustees was arrested and charged with petit larceny and impersonating a police officer.

LAW/ANALYSIS:

We addressed a similar situation in a prior opinion. In our June 27, 2005 opinion, a member of a school board was charged with simple assault and battery. We opined that the school board member could not be removed or suspended from office and she was not prevented from performing her official duties.

We considered the following when reaching our conclusion:

> As our Supreme Court long ago stated, ""[t]he power of removal from office... is not an incident of the executive office, and it exists only where it is conferred by the Constitution or by the statute law, or is implied from the conferring of the power of appointment." *State ex rel. Lyon v. Rhame*, 92 S.C. 455, 75 S.E. 881, 882 (1912). If an officer holds office for a fixed term, summary removal is not authorized. *State v. Wannamaker*, 213 S.C. 1, 48 S.E.2d 601 (1948). The right to hold an office during a fixed term unless removed for cause may be overcome only by an unequivocal grant of power from the Legislature to remove at pleasure. *Id.*
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> Moreover, the Governor possesses no inherent power to remove or suspend from office. The Chief Executive may not remove or suspend a public officer unless the power to do so is conferred by the Constitution or statute. *Rose v. Beasley*, 327 S.C. 197, 489 S.E.2d 625 (1997). The power to suspend from office stands separate and apart from the power to remove, and must itself be found in statutory or constitutional authority. *Id.*

> School board members are public officers. *See, S.C. Atty. Gen.*, May 27, 2004. . . .
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> [W]e now turn to the various provisions contained in state law authorizing the removal or suspension of members of a school board. Article VI, § 8 of the South Carolina Constitution provides in pertinent part as follows:
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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).
>
> Thus, the Constitution requires that for the Governor to suspend a public officer, such officer must have been indicted for a crime involving "moral turpitude." We have previously concluded that this Constitutional provision does not authorize the Governor to suspend or remove officers "merely upon their arrest." *Op. S.C. Atty. Gen.*, March 3, 1997.

Op. S.C. Atty. Gen., June 27, 2005 (2005 WL 1609288).

In our prior opinion, we determined that pursuant to Article VI, section 8, the Governor could not suspend the school board member because she had only been arrested; she had not been indicted. The Governor could not remove her because she had not been convicted. Our understanding from your letter is that the Clarendon School District Two trustee has been arrested for petit larceny and impersonating a police officer but he has not been indicted or convicted. Therefore, we believe that he could not be suspended or removed by the Governor.

In our prior opinion, we continued with our analysis of the Governor's right to remove public officers from office. We stated:

> We note also that Section 1-3-240 also authorizes the Governor to remove county or State officers for "malfeasance, misfeasance, incompetency, absenteeism, conflicts of interest, misconduct, persistent neglect of duty, or incapacity" after notice and an opportunity to be heard. We have raised serious doubts as to whether this provision has any applicability as to a school board member because a school board is a separate political subdivision. *See, Op. S.C. Atty. Gen.*, March 30, 1983. . . .

Id.

Our March 30, 1983 opinion cited above opines that a school board member is most likely not a state or county officer for purposes of section 1-3-240 and it provides:

> The second question, crucial to the instant case, is whether or not the particular officer involved here, a school district trustee, is a 'state or county officer' within the meaning of § 1-3-240. If he is neither, then the Governor may not remove him. Removal may then only be accomplished under the provisions of § 8-1-90, Code of Laws of South Carolina (1976), which requires as a prerequisite a criminal conviction. See, Opin. Att'y Gen. No. 1247, (December 13, 1961).
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> Although a trustee of a school board is unquestionably a public officer, see, State v. Elliott, 94 S.C. 35, 77 S.E. 728 (1913), we have found no South Carolina case or prior opinion of this office which characterizes a trustee as either a county or state officer. And school districts, which these officers serve, are themselves political subdivisions. Patrick v. Maybank, 198 S.C. 262, 17 S.E.2d 530 (1941); Brooks v. One Motor Bus, 190 S.C. 379, 3 S.E.2d 42 (1939).
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> Moreover, a school district usually comprises only a portion of the county. It is well recognized that an important consideration in determining whether or not an officer is a county officer, although not the sole factor, is whether the officer's 'territorial jurisdiction is the county . . .' 20 C.J.S., Counties, § 100, p. 888 . . .
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> Since such removal provisions must be strictly construed, and because § 1- 3-240 expressly mandates that the officer must be either a 'state' or 'county' officer, it is difficult to see how an officer who serves a political subdivision, such as a school district, clearly meets either of these statutory requisites. Moreover, in previous opinions of this office, other officers serving political subdivisions have been deemed not to come within the reach of § 1- 3-240, or similar statutes either as 'state' or 'county' officers. See, Opin. Att'y Gen. No. 1247 (December 13, 1961); Opin. Att'y Gen. No. 2878 (April 9, 1970) [a mayor of a municipality is not a state or county officer and is not removable upon indictment]. . . .

Op. S.C. Atty. Gen., March 30, 1983 (1983 WL 181821).

According to our prior opinions, the Clarendon School District Two trustee probably cannot be removed by the Governor under section 1-3-240 because he is not a county or state officer, as required pursuant to the statute.

In our June 27, 2005 opinion, we also reviewed section 59-19-60, which is included in the chapter on school trustees and is most applicable to your question. We provided as follows:

> With respect to other statutory provisions authorizing the removal or suspension of school board members, reference must also be made to S.C. Code Ann. Section 59-19-60 which provides in pertinent part as follows:
>
> > [s]chool district trustees shall be subject to removal from office for cause by the county boards of education, upon notice and after being given an opportunity to be heard by the county board of education. Any such order of removal shall state the grounds thereof, the manner of notice and the hearing accorded the trustee, and the trustee shall have the right to appeal to the court of common pleas, as provided in § 59-19-560. . .
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> In *Op. S.C. Atty. Gen.*, July 1, 1999, we recognized that the term "cause" is a phrase "found in many removal statutes throughout the country and has developed a common and ordinary meaning over the years." Quoting 63C Am.Jur.2d, *Public Officers and Employees*, § 183 (1997) we stated:
>
> > [c]ause is a flexible concept that relates to an employee's qualifications and implicates the public interest; cause for discharge has been defined as some substantial shortcoming that renders the person's continuance in office in some way detrimental to the discipline and efficiency of the service and which the law and sound public policy recognizes as good cause for no longer holding the position; or, as sometimes stated, dismissal for cause is appropriate when an employee's conduct affects his or her ability and fitness to perform his or her duties. The phrase for cause in this connection means for reasons which the law and sound public policy recognize as sufficient warrant for removal, that is, legal cause, and not merely cause which the appointing power in the exercise of discretion may deem sufficient. Relatively minor acts of misconduct are insufficient to warrant removal or discharge for cause. The cause must relate to and affect qualifications appropriate to the office, or employment, or its administration, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. Neglect of duty, inefficiency, and the good faith abolition of a position for valid reasons are all legally sufficient causes for removal. (Footnotes omitted).

> Obviously, by requiring notice and an opportunity to be heard before a school board member may be removed, § 59-19-60 requires far more than a mere allegation for removal of a school board member. As we stated in *Op. S.C. Atty. Gen.*, Op. No. 89-101 (1989), an officer who possesses the right to a hearing for alleged misconduct or improprieties... 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.
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> Section 59-19-60 authorizes only removal, not suspension of a school board member. Thus, it is clear that the issuance of an arrest warrant or mere allegations made in the form of a letter could not in themselves constitute "cause" for removal of a board member or members pursuant to § 59-19-60. The procedures of the statute - including notice, opportunity to be heard and a finding of "cause" are mandatory and must be met prior to any removal thereunder. . . .

Op. S.C. Atty. Gen., June 27, 2005, supra.

The Clarendon School District Two trustee can only be removed for cause after notice and a hearing. It does not appear from your letter that a hearing with notice thereof has occurred. Furthermore, cause does not exist because there has been an arrest charge without a conviction. The school board trustee cannot be suspended by the Clarendon County Board of Education because the law does not permit it.

CONCLUSION

In conclusion, this Office believes that the Clarendon School District Two trustee cannot be removed or suspended from office at this time. The Governor can ot suspend or remove the school board member under Article VI, section 8 of the South Carolina Constitution because he has not been indicted or convicted for a crime of moral turpitude. The Governor can ot remove the school board member pursuant to section 1-3-240 because a school board trustee is not a county or state officer.

The Clarendon County Board of Education cannot suspend the school board member because the Legislature has not provided for it. The Clarendon County Board of Education cannot remove the Clarendon School District Two trustee from office because it does not appear from your letter that there has been a hearing with notice. Furthermore, there is not cause to remove the school board member since he has been charged with but not convicted of petit larceny and impersonating a police officer.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

Sincerely,

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General