1983 WL 181821 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
March 30, 1983

***1 RE: Clarendon County Indictment for Lottery Offenses**

The Honorable Richard W. Riley
Governor
State House
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:
You have inquired as to whether or not a public official, indicted in Clarendon County for certain lottery offenses, may be removed from office by the Governor pursuant to Article VI, § 9 of the South Carolina Constitution.

Article VI, § 9 provides as follows:
Officers shall be removed for incapacity, misconduct, or neglect of duty, in such manner as may be provided by law when no mode of trial or removal is provided in this Constitution.

The language contained in the above section is identical to language contained in Article III, § 27. These constitutional provisions are not self executing, McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912), and leave to the General Assembly the discretion to provide the manner of removal of certain public officers. The General Assembly did so, in 1924 Act No. 615 (33 Statutes 997), which today exists as §§ 1-3-240 through 1-3-270. State ex rel. Blackwood v. Pridmore, 163 S.C. 97, 161 S.E. 340 (1931). Section 1-3-240 provides:
Any officer, county or state, . . . who is guilty of misconduct or persistent neglect of duty in office or who persists in holding an office to which he has been appointed or elected the duties of which he has not the capacity properly to discharge shall be subject to removal by the Governor of the State upon any of the foregoing causes being made to appear to the satisfaction of the Governor . . .

The statute goes on to provide that the Governor must notify the officer in writing of the specific charges against him, and provide a reasonable opportunity to be heard. Id. In addition, following a hearing before the Governor, usually initiated by a rule to show cause, the officer may appeal an adverse decision to the Circuit Court, and from there to the Supreme Court as in any other appeal at law. Section 1-3-250, Code of Laws of South Carolina (1976).

It is the general rule that removal statutes are penal in nature and must be strictly construed. See, e.g. In the Matter of Boso, 231 S.E.2d 215 (W.Va. 1977). In addition, the power to remove implies the power to suspend. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956).

The first question for consideration is the meaning of the phrase ‘misconduct or persistent neglect of duty in office’ as used in § 1-3-240. The general rule is that if a statute requires for removal ‘misconduct in office’, the act of misconduct must be related to the office or the performance of the duties therein. See, Throop, Public Officers, § 368 at p. 363; 67 C.J.S., Officers, § 121. On the other hand, where the particular statutory provision states that the officer may be removed simply for ‘misconduct’

only, 'removal may be made for misconduct not connected with the office.' Stanley v. Jones, (La.), 2 So.2d 45, 51 citing, 46 C.J., Officers, § 150, p. 987.

***2** From the language contained in § 1-3-240, it is not entirely clear which approach the General Assembly here intended. However, the statute must certainly be construed in light of the plain language of Article III, § 27 (which clearly requires only 'misconduct') and in a constitutional manner. And it must also be presumed that the General Assembly, when it enacted § 1-3-240 in 1924, was aware of the earlier construction placed upon Article III, § 27 by the Supreme Court in State ex rel. Wolfe v. Sanders, 118 S.C. 498, 110 S.E. 808 (1921). There, the Court clearly refused to limit the meaning of 'misconduct' as used in Article III, § 27 to 'official misconduct'. The Court stated:

But we are not prepared to go to the extent of holding, as contended by defendant, that the cause must necessarily be official misconduct. The Constitution (Art. III, § 27) does not so qualify the word 'misconduct'. It says that officers may be removed for 'misconduct.' If it had been intended that they could be removed only for 'official' misconduct, we presume that that intention would have been so expressed. It is conceivable that the misconduct of an officer may be of such nature as to make his continuance in office a reproach to decent government, while his conduct might not necessarily affect the proper administration of his office.

118 S.C., supra, at 509.

Moreover, no case construing § 1-3-240 has definitively concluded that the statute requires the misconduct to be in the performance of official duties. State v. Ballentine, 152 S.C. 365, 150 S.E. 46 (1929), for example, clearly upholds the constitutionality of the provision and implies at least that, like Article III, § 27, Section 1-3-240 requires only 'misconduct'. 150 S.E., supra at 50. (Cothran, J. dissenting). While a subsequent case, State v. Pridmore, 163 S.C. 97, 161 S.E. 340 (1931) does make reference to the statute in terms of 'misconduct in office', the Court in Pridmore also clearly stated that there was no necessity to determine the meaning of that phrase. Indeed, the Pridmore decision went on to define only the term 'misconduct', stating that the word means:

[M]ismanagement, wrong or improper conduct, bad behavior, unlawful behavior or conduct, malfeasance, a case or instance of bad behavior or a misdeed.

161 S.E., supra at 350.

Based then upon the meaning given 'misconduct' in Article III, § 27, as expressed in the Sanders case, and the principle that the General Assembly cannot limit that meaning or the provision's mandatory language ['officers shall be removed . . .] (emphasis added) by statute, it appears that § 1-3-240 may be construed as not confined to 'official' misconduct, as that term is normally used. Instead, it would be more reasonable to construe this statutory removal provision as requiring misconduct which is 'of such nature as to make . . . [the officer's] continuance in office a reproach to decent government.' State v. Sanders, supra. Therefore, if the removing authority, in this instance the Governor, were to conclude that the conduct in question meets that definition, the officer could be removed if otherwise in accordance with the procedural requirements § 1-3-240 and the definition of misconduct contained in State v. Pridmore, supra. See above. This conclusion is not free from doubt, however, especially in view of the considerable authority in other jurisdictions which limits similar removal provisions to 'official' misconduct, in the performance of official duties. See, e.g. cases cited at 27 Words and Phrases, 'Misconduct In Office' p. 492; see also, State v. Hess, Opin. No. 21880 (March 15, 1982).

***3** 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).

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).

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.

It is true that, in this instance, the trustee is appointed by the County Board of Education and trustees are generally subject to removal by the County Board. See, § 59-19-60. And it is also true that trustees generally operate pursuant to the supervision and orders of the Board. § 59-19-10. Moreover, there is some authority in other jurisdictions that, under the particular educational structure, school trustees are deemed either state or county officers, even for purposes of a removal statute. See, 78 C.J.S., Schools and School Districts, § 106, pp. 861-862; § 116(c), pp. 884-885.

However, in view of the fact that we can find no authority in this State [1] which so characterizes these officers this office cannot advise you that that you possess the power to remove a trustee, pursuant to § 1-3-240. 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].

This office has also reviewed other statutory and constitutional provisions regarding removal. Section 8-1-100 is a general statute, enacted in 1956, which provides for suspension by the Governor of a state or county officer indicted for any crime. However, this statute must be read in a constitutional manner in light of Article VI, § 8. That constitutional provision authorizes the Governor to suspend an officer indicted by a grand jury only for a crime involving moral turpitude. In view of this constitutional requirement, § 8-1-100 must be limited to crimes of moral turpitude. See, State v. Watkins, 262 S.C. 178, 203 S.E.2d 429 (1973); see also, Opin. of Atty. Gen. (unpublished), dated Dec. 15, 1978.

***4** In addition, § 8 of Article XVII of the Constitution appears inapplicable under the facts as presented. That constitutional provision makes it unlawful for 'any person holding an office of honor, trust or profit to engage in gambling or betting on games of chance'. However, the provision also provides that the officer is disqualified from the further exercise of the functions of his office only upon conviction. In this instance however, there has as yet been no conviction.

Finally, there exists a statutory provision providing for the removal of a school district trustee by the County Board of Education. See, § 59-19-60, Code of Laws of South Carolina (1976). This office has recently issued an opinion concerning the applicability of that statute, and has concluded that the County Board possesses the power to remove the individual named in the indictment.
Sincerely yours,

T. Travis Medlock
Attorney General

Footnotes

1 It is noted that in State v. Elliott, supra the issue of whether or not a trustee is a 'county officer' for purposes of a removal statute was clearly presented to the South Carolina Supreme Court. There, the argument was made to the Court that a trustee is not a 'county officer'. However, the Court in affirming the trustee's removal did not specifically address that question.

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