

1983 WL 181876 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 5, 1983

*1 Honorable Richard W. Riley
Governor
State of South Carolina
Post Office Box 11450
Columbia, South Carolina 29211

Dear Governor Riley:

You have asked my advice with respect to whether the enclosed Indictment for violations of [Section 8-1-80, Code of Laws of South Carolina](#), 1976, against the members of the Beaufort County Board of Education and County Superintendent of Education concerns crimes of moral turpitude such that these officers should be suspended pursuant to [Article VI, Section 8 of the South Carolina Constitution](#).

I would advise that, while the question is not free from doubt, a violation of [Section 8-1-80](#) would not necessarily constitute a crime of moral turpitude, and the enclosed Indictment does not appear to allege such a crime.

[Section 8-1-80](#) provides as follows:

Any public officer whose authority is limited to a single election or judicial district who shall be guilty of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppression shall be liable to indictment and, upon conviction thereof, shall be fined not exceeding one thousand dollars and imprisoned not exceeding one year.

The enclosed Indictment contains two Counts. Count I alleges that the defendants committed the crime of official misconduct in that they were the duly qualified members of the Beaufort County Board of Education and the County Superintendent of Education, respectively, during the period set forth and were in full and complete control of expenditures of money to be used in the educational system for Beaufort County, South Carolina and as such did wilfully, knowingly, intentionally and unlawfully expend . . . (\$374,995.00) . . . of County money in excess of the funds authorized by the County Council as specified in line items of the County Budget, as approved by the County Council.

Count II contends that the defendants were 'guilty of wilfull, official and habitual negligence' based upon the same alleged facts as above.

It should first be noted that [Article VI, Section 8](#), as a provision for the suspension of public officers, is penal in nature and, thus, must be strictly construed. 'Nothing can be added' to a removal or suspension provision 'by inference or intendment.' 67 C.J.S. [Officers](#) § 117, pp. 479-480; Op.Atty.Gen. (March 30, 1983, letter to the Honorable Richard W. Riley). Accordingly, unless the offenses alleged in the Indictment are clearly ones 'involving moral turpitude', the Governor has no power to suspend the officer, pursuant to [Article VI, Section 8](#).

A crime of moral turpitude is defined by the Supreme Court of South Carolina as:

. . . an act of baseness, vileness or depravity in the private and social duties that 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.

State v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584 (1940); State v. Horton, 271 S.C. 413, 238 S.E.2d 263 (1978); State v. Lilly, Supreme Court of South Carolina, Op.No. 21840 (January 4, 1983). Usually, a crime of moral turpitude is an offense mala in se, i.e., 'immoral in itself', as opposed to one which is mala prohibita, prohibited by law. State v. Horton, *supra*; Op. Atty. Gen. (March 18, 1983, letter to the Honorable Richard W. Riley).

*2 It is well established that not every crime is one involving moral turpitude. State v. LaBarge, 275 S.C. 168, 268 S.E.2d 278 (1980). The decision does not rest simply upon whether the offense is a felony or misdemeanor. State v. Horton, *supra*. While some crimes involve moral turpitude as a matter of law, there are many other offenses, such as assault and battery of a high and aggravated nature, in which the factual situation must be examined on a case by case basis. State v. Bailey, 275 S.C. 444, 272 S.E.2d 439 (1980); 58 C.J.S. Moral at p. 1204. With respect to these offenses, all of the surrounding circumstances must be carefully scrutinized.

I would advise that the offense of official misconduct probably falls in the category of offenses which must be viewed in light of all circumstances. 'Official misconduct' is defined generally as any unlawful behavior by a public officer in relation to the duties of his office, willful in character, involving intentional wrongdoing or total lack of concern for the conduct. The phrase 'misconduct in office' [or 'official misconduct'] is broad enough to embrace any willful malfeasance, misfeasance or nonfeasance in office, including any act involving moral turpitude, or which is contrary to justice, honesty, principles of good morals, if performed by virtue or authority of office; but it does not necessarily imply corruption, in improper purpose or criminal intent. [Emphasis added.]

67 C.J.S. Officers § 121, p. 490. In other words, there are obviously some forms of official misconduct where moral turpitude is involved, such as in the willful failure by a public supervisor to perform his duty to inspect and receive repairs with the intention of defrauding the county. See, State v. Jacques, 65 S.C. 178, 43 S.E. 515 (1903); State v. Hess, South Carolina Supreme Court, Op.No. 21880 (March 15, 1983). On the other hand however a conviction for official misconduct does 'not necessarily involve moral turpitude.' [Emphasis added.] People ex rel. Rice v. Appellate Court, 48 Ill.2d 195, 268 N.E.2d 420, 422 (1971). For, in some instances, the underlying basis for the official misconduct may well be a violation of a statute which is malum prohibitum, rather than mala in se, *supra*. Therefore, the facts alleged in the Indictment must be scrutinized to determine if official misconduct is in this instance an offense involving moral turpitude; and the same reasoning applies with equal force to the allegations of habitual negligence. The Governor may not look beyond those facts alleged in the Indictment.

A review of the Indictment reveals no allegations clearly involving moral turpitude. The Indictment, in essence, simply alleges that the defendants spent county money in excess of their authority to do so. No allegations that the money was used for the defendants' personal gain appear. Neither are there any contentions in the Indictment that there was fraud, deceit, dishonesty or corruption on behalf of the defendants. Thus, the Indictments themselves do not appear to allege offenses involving moral turpitude as contemplated in [Article VI, Section 8](#).

*3 I must emphasize that this conclusion is not free from doubt, and call your attention to the recent South Carolina Supreme Court case, State v. Hess, *supra*. There, the Court suggested at least that the common law offense of official misconduct may involve dishonesty as one of its elements. Slip Op., *supra* at 11-12. However, the precise holding of the case is not clear in this regard and may well be limited to the facts in issue there. And, as stated, Hess involved the common law offense of misconduct in office whereas here the Indictment is brought pursuant to statutory [Section 8-1-80](#). The statute, of course, makes no mention that dishonesty or corruption is a requisite element of the offense. 67 C.J.S. Officers § 257, at p. 791. But see, State v. Tarrant, 24 S.C. 593 (1885) ['evil intent']; see also, Perkins on Criminal Law, p. 484-485 ['misconduct in office is corrupt behavior by an officer in the exercise of the duties of his office while acting under color of his office.' ¹

It should again be emphasized that we have found no South Carolina case which squarely holds that the statutory offense of official misconduct is per se a crime involving moral turpitude. The offense, like others such as those which involve assault,

are too dependent upon the particular circumstances for this office to advise that is the law. Instead, I would advise that the offenses alleged in the Indictment probably do not constitute moral turpitude, as that term is used in [Article VI, Section 8](#).

Very truly yours,

T. Travis Medlock
Attorney General

Footnotes

- 1 It should be pointed out that [Article VI, Section 8](#) provides that the Governor 'may' suspend upon indictment for crimes involving moral turpitude. Thus, even if the offenses here involve moral turpitude, the matter ultimately rests in the Governor's discretion, as the provision is not mandatory. Op.Atty. Gen. (October 25, 1978, letter to the Honorable Vinton D. Lide, Executive Assistant to the Governor).

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