1981 WL 158065 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
December 4, 1981

***1** John L. Breeden, Jr., Esquire
Horry County Attorney
Post Office Box 1665
Conway, South Carolina 29526

Dear Mr. Breeden:
Your letter dated November 23, 1981, requesting an opinion concerning whether a County Administrator can force a county employee to submit to a lie detector test on pain of disciplinary action, including dismissal from employment, has been referred to me for response.

Although it is reasonably clear that a person—including a public employee—has the right not to be compelled to submit to a lie detector test, cf. § 40-53-180(b), South Carolina Code, 1976 (polygraph examiner's license may be suspended or revoked for failure to inform subject that subject's participation is voluntary), there is no statutory or decisional law in this state relating to the precise issue of whether a public employee who refuses to undergo a lie detector test may, for that reason, be disciplined or dismissed. The question posed, however, is closely analogous to one which has been authoritatively resolved by the United States Supreme Court, namely, whether a public employee may be discharged for invoking his constitutional right against compulsory self-incrimination. In a series of cases decided by the High Court, the following rule has emerged: A public employee may not be dismissed from public employment solely because he or she invokes his right against compulsory self-incrimination, and incriminating testimony obtained under threat of dismissal or discipline cannot be used in criminal proceedings against the employee. Lefkowitz v. Cunningham, 431 U.S. 801, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968); Uniformed Sanitation Men Ass'n., Inc., v. Commissioner of Sanitation, 392 U.S. 280, 88 S.Ct. 1917, 20 L.Ed.2d 1089 (1968); Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). The Supreme Court, though, has declared that 'public employees [] subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights.' Uniformed Sanitation Men Ass'n., supra, 392 U.S. 285, 20 L.Ed.2d 1093; see also Lefkowitz v. Turley, 414 U.S. 70, 84, 38 L.Ed.2d 274, 285-6, 94 S.Ct. 316 (1974). Lower courts have construed this language to mean that a public employee who is advised (1) that he will be asked questions specifically, narrowly and directly relating to the performance of his official duty; (2) that his answers cannot be used against him in any subsequent criminal proceedings; and (3) that the penalty for refusing to answer can be dismissal may constitutionally be dismissed if he refuses to answer. Uniformed Sanitation Men Ass'n., Inc. v. Commissioner of Sanitation, 426 F.2d 619, 627 (2d Cir. 1970); Kalkines v. United States, 200 Ct.Cl. 570, 473 F.2d 1391 (1973).

***2** Just as a public employee may not be compelled to be a witness against himself, he may not be compelled to submit to a lie detector test. In line with the above-cited decisions of the United States Supreme Court in the closely related area of dismissal for invocation of Fifth Amendment rights, however, it is my opinion that, in the absence of a statute prohibiting the same, a public employee may be dismissed for refusing a reasonable request (i.e., one occasioned by a genuine need such as an internal investigation into official misconduct, corruption in office, employee theft of public property) that he submit to a lie detector at least if, prior to refusing, he has been informed (1) that the questions will relate specifically and narrowly to the performance of his official duty; (2) that his answers cannot be used against him in any subsequent criminal proceedings; and (3) that he may be dismissed if he does not submit to the test. This accords with the views of the overwhelming majority of jurisdictions that have considered the issue. See, e.g., Eshelman v. Blubaum, 114 Ariz. 376, 560 P.2d 1283, 1285-6 (Ct.App. 1977); Seattle Police Officers' Guild, et al. v. City of Seattle, et al., 80 Wash.2d 307, 494 P.2d 485 (1972); Gandy v. State ex rel. Division of

Investigation and Narcotics, 607 P.2d 581 (Nev. 1980); Baker v. City of Lawrence, 409 N.E.2d 710 (Mass. 1979); Coursey v. Board of Commissioners, 90 Ill.App.2d 31, 234 N.E.2d 339 (1967); Dolan v. Kelly, 76 Misc.2d 151, 348 N.Y.S.2d 478 (1973); Clayton v. New Orleans Police Department, 236 So.2d 548 (La.App.1970); Richardson v. City of Pasadena, 500 S.W.2d 175 (Tex.Civ.App. 1975), rev'd on other grounds, 513 S.E.2d 1 (Tex.Sup.Ct. 1974); State Department of Highway Safety and Motor Vehicles v. Zimmer, 398 So.2d 463 (Fla.App. 1981). While all of the foregoing cases involved dismissals of police officers, I see no valid basis for distinguishing between police officers and other public employees: all are accountable for the performance of their public trust. See State Department of Highway Safety and Motor Vehicles v. Zimmer, supra.

If I can be of further assistance, please let me know.
Sincerely,

Vance J. Bettis
Assistant Attorney General

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