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Office of the Attorney General

State of South Carolina

Opinion No. 4244

February 5, 1976

*1 The authority of the Governor in certain specific instances to suspend or remove judicial officers of less than statewide jurisdiction includes the power to appoint by executive order an advisory commission to hear complaints and grievances against magistrates, municipal and county judges.

TO: Honorable James B. Edwards
Governor

QUESTION PRESENTED:

Does the Governor have authority to create by executive order a commission to hear complaints and grievances against magistrates, municipal and county judges of less than statewide jurisdiction?

AUTHORITIES CITED:

81 C.J.S. 'STATES' § 60;

38 Am.Jur.2d 'GOVERNOR' § 8;

[52 A.L.R. 7](#) Annot.;

[92 A.L.R. 998](#) Annot.;

Article 6, § 8 Constitution of South Carolina;

Article 6, § 9 Constitution of South Carolina;

Article 5, § 13 Constitution of South Carolina;

Article XV Constitution of South Carolina;

Article XV, § 1 Constitution of South Carolina;

§ 1–124 Code of Laws of South Carolina;

§ 43–3 Code of Laws of South Carolina;

§ 50–8 Code of Laws of South Carolina;

§ 50–9 Code of Laws of South Carolina;

§ 50–10 Code of Laws of South Carolina;

[Heyward v. Long](#), 178 S.C. 381, 183 S.E. 13 (1936);

[State v. Rhame](#), 92 S.C. 455, 75 S.E. 881 (1912);

[State v. Hough](#), 103 S.C. 87, 87 S.E. 436 (1915);

[McDowell v. Burnett](#), 92 S.C. 469, 75 S.E. 873 (1912);

[State v. Ballentine](#), 152 S.C. 365, 150 S.E. 46 (1929);

[State v. Pridmore](#), 163 S.C. 97, 161 S.E. 340 (1931);

[State v. Ansel](#), 76 S.C. 395, 37 S.E. 185 (1906);

[State v. Seigler](#), 230 S.C. 115, 94 S.E.2d 231 (1956);

[Pettiford v. S. C. State Board of Education](#), 218 S.C. 322, 62 S.E.2d 780 (1950);

[Final Report of the Committee to Make A Study of the South Carolina Constitution of 1895](#) (June, 1909).

INTRODUCTION:

On September 25, 1975, Governor James B. Edwards issued Executive Order No. 75–12 creating the South Carolina Judicial Grievance and Discipline Commission. This Order set forth provisions establishing the composition, terms and authority of the Commission. The responsibilities of the Commission are limited to hearing complaints and grievances against magistrates, municipal and county judges who have less than statewide jurisdiction.

The authority of the Commission is limited to the making of recommendations to the Governor with sole responsibility for a final decision remaining with the Governor. Four possible sanctions are outlined as possible recommendations to the Governor whenever the Commission, pursuant to rules set forth by the Governor, determines a complaint or grievance against a judicial officer subject to the order has merit. These include:

- (1) To recommend private censure of such persons;
- (2) To recommend public censure of such persons;
- (3) To recommend suspension from office of such persons;
- (4) To recommend removal from office of such persons.

DISCUSSION:

*2 It is a well known principle of law that the Governor has no prerogative powers, but possesses only such powers and duties as are vested in him by constitutional or statutory grant. 81 C.J.S. 'STATES' § 60 at 982. This principle has been quoted with approval by the courts of this State. See [Heyward v. Long](#), 178 S.C. 351, 183 S.E. 145 (1935). Thus, the only authority of the Governor is that derived from a specific grant by constitutional or statutory provision.

In applying this broad limitation on the powers of the Governor, the courts of this State have said that the Governor can neither appoint to office nor suspend or remove from office unless the power to do so is conferred upon him by the Constitution or statute. [State v. Rhame](#), 92 S.C. 455, 75 S.E. 881 (1912); [State v. Hough](#), 103 S.C. 87, 87 S.E. 436 (1915); [McDowell v. Burnett](#), 92 S.C. 469, 75 S.E. 873 (1912); [State v. Seigler](#), 230 S.C. 115, 94 S.E.2d 231 (1956).

Therefore, a determination must be made as to what powers, if any, have been vested in the Governor for suspending, removing or otherwise disciplining magistrates, municipal and county judges of less than statewide jurisdiction.

While the Governor has no inherent power to remove public officers, it is not uncommon to have such power vested in the Governor by specific statutory or constitutional provision. See 38 Am.Jur.2d 'GOVERNOR' at 938; See generally [52 A.L.R. 7](#) Annot.; [92 A.L.R. 998](#) Annot. The Constitution of South Carolina in Article 6, § 8 places limited authority in the Governor to suspend and remove certain public officers under specific circumstances. Article 6, § 8 provides:

Article 6, § 8. Whenever it appears to the satisfaction of the Governor that probable cause exists to charge any officer of the State or its political subdivisions who has custody of public or trust funds with embezzlement or the appropriation of public or trust funds to private use, then the Governor shall direct his immediate prosecution by the proper officer, and upon indictment by a grand jury or, upon the waiver of such indictment if permitted by law, the Governor shall suspend such officer and appoint one in his stead, until he shall have been acquitted. In case of conviction, the position shall be declared vacant and the vacancy filled as may be provided by law.

Any 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.

The Constitution of South Carolina further provides in Article 6, § 9:

Article 6, § 9. 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.

***3** Thus, unless an alternative mode of trial or removal of magistrates, municipal and county judges is provided by the Constitution, clearly the General Assembly could vest the Governor with authority to suspend or remove such officers for incapacity, misconduct or neglect of duty.

Provision is made by Article 5, § 13 for removal or retirement of judges within the unified court system 'upon a finding of disability seriously interfering with the performance of his duties which is, or is likely to become, of a permanent character'. This section is apparently based upon a recommendation contained in [Final Report of the Committee to Make A Study of the South Carolina Constitution of 1895](#) (June, 1969). The recommendation, contained in Section M at Page 67, states as follows: The Committee feels that there should be some agency empowered to hear misconduct and other charges made against judges as well as to determine disability. The Committee believes that the Supreme Court is the proper agency for these purposes. Of course, this power would not interfere with the right of the General Assembly to impeach.

By limiting the power of the Supreme Court to remove or retire judges upon a showing of disability, the General Assembly rejected that part of the recommendation relating to misconduct or other charges against judicial officers within the unified court system.

Article XV provides the general procedures for impeachment of certain public officers. Article XV, § 1 limits the scope of impeachment as a means of removal of public officers by restricting impeachment to 'cases of serious crimes or serious misconduct in office by officials elected on a statewide basis, state judges, and such other state officers as may be designated

by law'. Construing the term 'state judges' in the light of [McDowell v. Burnett](#), 92 S.C. 469, 75 S.E. 873 (1912), decided under impeachment provisions similar to those contained in the current Article XV, judges of less than statewide jurisdiction (i.e. magistrates, municipal and county judges) are not such officers as are removable by impeachment.

Since neither the authority of the Supreme Court to remove or retire judges within the unified court system upon a showing of disability or the powers of the General Assembly in impeachment cases are applicable to questions involving alleged misconduct or neglect of duty by judges of less than statewide jurisdiction, there appears to be no procedure in the Constitution, other than that applicable by virtue of Article 6, § 8, for resolution of such questions. Therefore, these judicial officers are subject to removal in such manner as may be provided by the General Assembly. Article 6, § 9.

Article 6, § 8 which allows the Governor to suspend and remove certain public officers from office under certain specific circumstances excepts officers of the judicial branch from its provisions. This limitation on the scope of Article 6, § 8 must be construed *in parimateria* with provisions of Article XV relating to impeachment. Thus, it cannot be assumed that the General Assembly intended to create a class of judicial officers who would be immune both to impeachment and suspension or removal by the Governor. Therefore, the reference to officers of the judicial branch can logically be construed only as having reference to those judges possessing statewide jurisdiction and being subject to impeachment and not inclusive of either magistrates, municipal or county judges.

***4** In addition to the powers conferred on the Governor by Article 6, § 8, the General Assembly has vested the Governor with authority to suspend and remove public officers in certain specific situations. These include:

(1) § 1–124—Any officer, county or State, except an office whose removal is provided for in Section 4 of Article XV of the State Constitution and an officer guilty of the offense named in Section 22 of Article IV of the Constitution, 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. But before removing any such officer the Governor shall inform him in writing of the specific charges brought against him an opportunity on reasonable notice to be heard.

(2) § 43–3—Such magistrates may be suspended by the Governor for incapacity, misconduct or neglect of duty. The Governor shall report any suspension, with the cause thereof, to the Senate at its next session, for its approval or disapproval.

(3) § 50–10—Any State or county office who is indicted in any court for any crime may, in the discretion of the Governor, be suspended by the Governor, who in event of suspension shall appoint another in his stead until he shall be acquitted. In case of conviction the office shall be declared vacant by the Governor and the vacancy filled as provided by law.

Additional authority to remove from office any public officer whose authority is limited to a single election or judicial district is granted the Governor by § 50–9 whenever such officers are convicted under § 50–8 of any official misconduct, habitual negligence, habitual drunkenness, corruption, fraud or oppressive conduct. But while §§ 1–124, 43–3 and 50–10 grant substantial discretion to the Governor in matters falling within their purview, § 50–9 requires the Governor to remove any officer convicted under § 50–8 by declaring a vacancy in the office. Since no discretion is vested in the Governor by provisions of § 50–9, it is not relevant to the creation of a commission whose purpose is to find fact and make recommendation to the Governor in making what are essentially judgment decisions.

The power of the Governor to suspend or remove from office has been construed as a judicial power. [State v. Ballentine](#), 152 S.C. 365, 150 S.E. 46 (1929); [State v. Pridmore](#), 163 S.C. 97, 161 S.E. 340 (1931). In [Ballentine](#) the Court expressly notes the power of the legislature to make the Governor, in limited circumstances, a judicial tribunal. However, neither any of the statutes authorizing the Governor to suspend or remove public officers from office nor any court decisions construing these statutes establish or require a specific procedure for the exercise of this power. Absence of a specific procedure would not abrogate, however, the due process requirement in those instances when a hearing is required by law, as in § 1–124. In [Pettiford v. S.](#)

[C. State Board of Education](#), 218 S.C. 322, 62 S.E.2d 780 (1950), the Court, while reviewing the action of the State Board of Education in revoking the teaching certificate of the petitioner, noted the following:

***5** [D]ue process requires that an administrative board, or body, when acting in a quasi-judicial capacity, must consider all the evidence before rendering its decision upon any particular question. This does not mean that this administrative board, or body, must itself hear the evidence, but it must have the evidence before it, and consider such evidence when rendering its decision. [Emphasis Added]

Thus, due process would require that the Governor render a final decision on the question of removal or suspension on the basis of all evidence presented at hearing but would not require that he personally preside at such hearing.

Whenever no mode of inquiry is prescribed for the Governor to pursue, it rests with him to adopt that method of inquiry which his judgment may dictate. See generally [52 A.L.R. 7](#) Annot. This principle was recognized by the courts of this State in [State v. Ansel](#), 76 S.C. 395, 37 S.E. 185 (1906) when questions were raised over the manner in which the Governor removed certain members of the Board of Directors of the State Dispensary. There the Court noted:

In the absence of any direction as to the particular procedure by which removal was to be made, the statute conferred on the Governor the power to remove at his discretion under such procedure as he chose to adopt for his own satisfaction.

Thus, as the statutes vesting the Governor with power to suspend or remove neither establishes nor requires a specific procedure, the Governor may adopt any mode of inquiry consistent with the duties imposed upon him by law. He can employ such fact finding processes and investigatory procedures as he deems necessary but he cannot delegate that authority vested in him by the Constitution or statute to an independent body. Such a body could be utilized, however, for fact finding purposes provided its authority is limited to the making of recommendation to the Governor of suspension, removal or other sanctions provided by law. Public or private censure, being of less severity than either suspension or removal, is an implied power existing within the framework of the Governor's power to suspend or remove. cf. [State v. Seigler](#), 260 S.C. 115, 94 S.E.2d 231 (1956). Disciplinary action by the Governor is contingent in all instances upon a grant of power, either express or by clear implication, to the Governor by the Constitution or by statute to so act.

A summary of the authority of the Governor to suspend or remove certain judicial officers indicates many of the statutes authorizing such action are overlapping and largely dependent upon the class to which the office belongs (i.e. state, county or municipal). It is important to note that magistrates, municipal and county judges are not subject, in all instances, to identical disciplinary measures by the Governor and therefore separate and distinct consideration must be given each class of judicial officers. The following is a summary of the authority of the Governor over each of the following classes of judicial officers:

(1) Magistrates

- *6** (a) May remove, following hearing, for misconduct or persistent neglect of duty. § 1–124.
- (b) May suspend for incapacity, misconduct or neglect of duty subject to approval of Senate on ultimate question of removal. § 43–3.
- (c) May suspend upon indictment for any crime and remove upon conviction. § 50–10.
- (d) May direct prosecution for misuse of public funds and suspend upon indictment and remove upon conviction. Article 6, § 8.
- (e) May suspend upon indictment for a crime involving moral turpitude and remove upon conviction. Article 6, § 8.

(2) County Judges

- (a) May remove, following hearing, for misconduct or neglect of duty. § 1–124.
- (b) May suspend upon indictment for any crime and remove upon conviction. § 50–10.
- (c) May direct prosecution for misuse of public funds and suspend upon indictment and remove upon conviction. Article 6, § 8.
- (d) May suspend upon indictment for a crime involving moral turpitude and remove upon conviction. Article 6, § 8.

(3) Municipal judges

- (a) May direct prosecution for misuse of public funds and suspend upon indictment and remove upon conviction. Article 6, § 8.
- (b) May suspend upon indictment for a crime involving moral turpitude and remove upon conviction. Article 6, § 8.

CONCLUSION:

As no mode of inquiry or procedure is provided in the statutory and constitutional provisions vesting the Governor with authority to remove or suspend public officers, including judges of less than statewide jurisdiction, the Governor may create by executive order a commission to hear complaints and grievances against magistrates, municipal and county judges.

This Commission, however, can function only in an advisory capacity within the Office of the Governor. It is, in effect, an arm of the Governor's Office representing an administrative means by which he reaches a decision as to whether executive action should be undertaken. Its role must be restricted to fact finding and to the making of recommendations to the Governor. The Governor cannot divest, however, the Office of the Governor of ultimate responsibility for removal or suspension of judicial officers of less than statewide jurisdiction and the commission, a creature of the Office of the Governor, can exist and function only at the pleasure of the Governor. Nor can the Governor exercise his powers of suspension or removal solely on the basis of the recommendation of the commission but must make an independent evaluation of all evidence before him. The duties and responsibilities of the Commission can extend in no instance beyond such matters as fall within the purview of the specific grants of authority by either constitutional or statutory provisions to the Governor to suspend or remove for cause judges of less than statewide jurisdiction.

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