



ALAN WILSON
ATTORNEY GENERAL

November 19, 2020

Richard B. Ness, Esq.
Bamberg County Attorney
PO Box 909
Bamberg, SC 29003

Dear Mr. Ness:

You have requested an opinion regarding whether a public officer who has been suspended from office for the alleged commission of a crime is entitled to compensation and benefits during the suspension. In your request letter, you explained the following:

By the above-referenced Executive Order [Executive Order 2020-69], on November 6, 2020, Governor Henry McMaster suspended Bamberg County Councilmember Kerry Trent Kinard upon his indictment on criminal charges until such time as he is formally acquitted or convicted of crimes of moral turpitude. The Order does not address whether the suspension is to be with or without pay. As the suspension was by the Governor, pursuant to the authority granted in the Constitution, we assume that only the Governor can determine the terms of Mr. Kinard's suspension.

Bamberg County's public officials generally receive the same insurance benefits as public employees. Additionally, when a public employee is suspended, the suspension can be with or without pay. Bamberg County requests your opinion and guidance as to whether Bamberg County should continue to pay Mr. Kinard during his suspension until such time as he is acquitted or convicted, and whether Bamberg County should continue the Councilmember's insurance benefits. I appreciate your input as Bamberg County wants to ensure it strictly adheres to the Governor's Order.

LAW/ANALYSIS

Our South Carolina Supreme Court has addressed your issue in Matter of Ferguson, 304 S.C. 216, 219, 403 S.E.2d 628, 630–31 (1991):

The salary pertaining to an office is an incident to the office itself and not to the person discharging the duties of the office. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). Consistent with this proposition is the common law rule that the officer's right to compensation arises out of his performance of his duties. DeMarco v. Board of Chosen Freeholders, 21 N.J. 136, 121 A.2d 396 (1956). Therefore, a public officer who is suspended from office is not entitled to compensation. 67 C.J.S. Officers § 221 (1978); 63 Am.Jur.2d Public Officers and Employees, § 473 (1984).

An August 24, 2004 opinion of this Office addressed whether the State Commissioner of Agriculture, who had similarly been suspended from office by Governor Sanford for being indicted for a crime of moral turpitude, had the right to receive compensation and related benefits during the suspension period. Op. S.C. Atty. Gen., 2004 WL 2016233 (Aug. 24, 2004). Citing the Ferguson case and this Office's prior opinions,¹ we determined:

Commissioner Sharpe would not be entitled to receive his salary or benefits during the period of his suspension from office. Such would include the employer's contribution to health insurance. In our opinion, such contribution would constitute "compensation" for purposes of Article VI, Section 8.²

Id. We also stated in the opinion that the Commissioner "would not be entitled to back pay for the period of his suspension is [if] he is subsequently acquitted or if the charges are dropped or withdrawn." Id.

¹ See Ops. S.C. Atty. Gen., 2003 WL 21294912 (May 27, 2003); 1985 WL 166071 (Sept. 18, 1985); and 1981 WL 96621 (Dec. 16, 1981) (a public officer who is lawfully suspended for the alleged commission of a crime does not generally receive compensation while suspended).

²S.C. Const. art. VI, § 8 provides:

[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.

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CONCLUSION

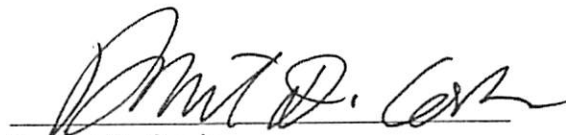
Based upon Matter of Ferguson, 304 S.C. 216, 219, 403 S.E.2d 628, 630-31 (1991) and this Office's prior opinions, we believe that Bamberg County should not pay Councilman Kinard compensation, which includes insurance benefits, during his suspension.

Sincerely,



Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General