



HENRY McMASTER
ATTORNEY GENERAL

August 26, 2010

Mr. H. W. Funderburk, Jr.
Deputy Executive Director, Appeals Division
SC Department of Employment and Workforce
P. O. Box 995
Columbia, South Carolina 29202

Dear Mr. Funderburk:

In a letter to this office you referenced several statutory provisions related to the State Department of Employment and Workforce (hereafter "the Department") in raising the question of whether "deputies" of the Department may prosecute violations of the Department's laws, particularly violations within the jurisdiction of the magistrates' courts. See, e.g., S.C. Code Ann. § 41-41-10 ("[w]hoever makes a false statement or representation knowing it to be false or who knowingly fails to disclose a material fact to obtain or to increase any benefits or other payment under Chapters 27 through 47 of...(Title 41)...or under an employment security or unemployment compensation law of any other state, the Federal Government, or of a foreign government, either for himself or for any other person, shall be punished by a fine of not less than twenty nor more than one hundred dollars or by imprisonment for not longer than thirty days and each such false statement or representation or failure to disclose a material fact shall constitute a separate offense."). You particularly referenced statutes included in the newly-enacted Act No. 146 of 2010 which created the Department of Workforce.

In considering your questions, it must be acknowledged that as set forth in In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. 304, 305, 422 S.E.2d 123, 124 (1992), the State Constitution declares that it is the duty and the right of the Supreme Court the duty to regulate the practice of law in this State. In State v. Messervy, 258 S.C. 110, 187 S.E.2d 524 (1972), the State Supreme Court recognized the practice in magistrates' courts for an arresting patrolman to prosecute the cases that he made. In its decision in State ex rel. McLeod v. Seaborn, 270 S.C. 696, 699, 244 S.E.2d 317, 319 (1978), the Supreme Court upheld the practice of supervisory officers assisting arresting officers in the prosecution of misdemeanor traffic cases determining that

...the prosecution of misdemeanor traffic violations in the magistrates' courts by either the arresting officer or a supervisory officer assisting the arresting officer does not constitute the unlawful practice of law....

In State v. Sossamon, 298 S.C. 72, 378 S.E.2d 259 (1989) the Court limited its decision in Messervy and Seaborn holding that an officer who was neither the arresting officer or the supervisor of the arresting officer was not allowed to prosecute a case in magistrates' courts. In its decision in In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, 309 S.C. at 307, 422 S.E.2d at 125, the Court

...reaffirmed the rule that police officers may prosecute traffic offenses in magistrate's court and in municipal court. Only the arresting officer may prosecute the case, although if the officer is new or inexperienced, he may be assisted at trial by one of his supervisors.¹

¹In In Re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar, the Court authorized

...a business to be represented by a non-lawyer officer, agent or employee, including attorneys licensed in other jurisdictions and those possessing Limited Certificates of Admission pursuant to Rule 405, SCACR, in civil magistrate's court proceedings. Such representation may be compensated and shall be undertaken at the business's option, and with the understanding that the business assumes the risk of any problems incurred as the result of such representation. The magistrate shall require a written authorization from the entity's president, chairperson, general partner, owner or chief executive officer, or in the case of a person possessing a Limited Certificate, a copy of that Certificate, before permitting such representation. 422 S.E.2d at 124.

It was also stated that

[s]econd, we hold that State agencies may, by regulation authorize persons not licensed to practice law in South Carolina, including laypersons, Certified Public Accountants (CPAs), attorneys licensed in other jurisdictions and persons possessing Limited Certificates of Admission, to appear and represent clients before the agency. These regulations are presumptively valid and acts done in compliance with the regulations are presumptively not the unauthorized practice of law. We recognize, however, that such an agency practice could be abused, and reserve the authority to declare unenforceable any regulation which results in injury to the public. 422 S.E.2d at 124. (emphasis added).

These authorities therefore provide guidance with respect to the prosecution of cases in magistrate's and municipal court by a person other than an attorney.²

In State v. Wells, 191 S.C. 468, 5 S.E.2d 181, 186 (1939), the Supreme Court stated that

...[t]he policy of prohibiting laymen from practicing law is not for the purpose of creating a monopoly in the legal profession, nor for its protection, but to assure the public adequate protection in the pursuit of justice, by preventing the intrusion of incompetent and unlearned persons in the practice of law.

Included in Act No. 146, which became effective upon approval of the Governor, were provisions relating to the means of enforcing the Act's provisions. For instance, Section 41-27-580 of the newly enacted legislation states:

[i]n a civil action to enforce the provisions of Chapters 27 through 41 of...(Title 41)...the department and the State may be represented by a qualified attorney employed by the department and is designated by it for this purpose or, at the department's request, by the Attorney General. (emphasis added).

You also referenced certain provisions in raising your question. Reference was made to Section 41-29-70 of such legislation which states:

[s]ubject to the provisions of Chapters 27 through 41 of...(Title 41)..., the department may employ or retain on a contract basis other accountants, attorneys, experts necessary to perform the department's duties.

Section 41-29-110 included in the legislation states:

[t]he department may promulgate regulations necessary to carry out the provisions of Chapters 27 through 41 of...(Title 41)..., employ personnel, make expenditures, require reports not otherwise provided for in these chapters, conduct investigations or take other action as it considers necessary or suitable to administer its duties and exercise its powers pursuant to the title.

²In its decision in In the Matter of Lexington County Transfer Court, 334 S.C. 47, 51, 512 S.E.2d 791, 793 (1999), the Court stated that as to what constitutes the practice of law,

[w]e are convinced, however, that it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules. Instead, we are convinced that the better course it to decide what is and what is not the unauthorized practice of law in the contest of an actual case or controversy.

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Section 41-29-190 states that

[i]n the discharge of the duties imposed by Chapters 27 through 41 of...(Title 41)...the department or a duly authorized representative of it may administer an oath and affirmation, take a deposition, certify to an official act and issue a subpoena to compel the attendance of a witness and the production of books, papers, correspondence, memoranda and other records considered necessary as evidence in connection with a disputed claim or the administration of Chapters 27 through 41....

In your letter, you stated that pursuant to Sections 41-29-70, 41-29-110 and 41-29-190 cited above, "...the department employs tax and benefit payment control deputies to investigate failures to file reports and pay taxes and to investigate and recover fraudulently obtained or erroneously paid benefits." You have specifically questioned whether these "deputies" may prosecute violations of the department's laws.

As to the prosecution of violations of Chapters 27 through 41 of Title 41, amended Section 41-27-590 included in Act No. 146 states:

[a]ll criminal actions for violation of any provision of Chapters 27 through 41 of this title or of any rules or regulations issued pursuant thereto shall be prosecuted by the Attorney General of the State or at his request and under his direction by the solicitor of any circuit or any prosecuting attorney in any court of competent jurisdiction in the county in which the employer has a place of business or the violator resides.

A prior opinion of this office dated September 24, 2001 dealt with the similar question of the authority of the State Employment Security Commission "to prosecute cases on its own behalf or, in the alternative, authorization from the Attorney General allowing it to do so." That opinion, which referenced Section 41-27-590, stated that

South Carolina's Constitution provides that the "Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record." In State ex rel. McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (1976) the State Supreme Court noted that while the Attorney General "... has the authority to supervise the prosecution of all criminal cases, it is a fact of common knowledge that the duty to actually prosecute criminal cases is performed primarily and almost exclusively by the solicitors in their respective circuits..." Further, this Office has previously opined that the solicitor also has "control of any criminal case brought in magistrate's court." See Op. Atty. Gen. (Dated November 7, 1990). It seems doubtful that it would be the intent of the Legislature in Section 41-27-590 to subject the solicitor to the "request" and "direction" of the Attorney General and not subject any other prosecuting attorney to such.

Moreover, when the General Assembly has chosen to allow criminal prosecution by a State entity other than the solicitor or Attorney General, language specifically designating such has been used. For example, the Pesticide Control Act gives the Director of the Division of Regulatory and Public Service Programs, College of Agricultural Sciences, Clemson University authority to prosecute certain criminal cases. Within the Pesticide Control Act, Section 46-13-185 provides that:

The director may prosecute criminal violators of this chapter and may use his own counsel in inferior courts but only when the defendant chooses to be represented by counsel. Counsel employed by the director may assist the solicitor, when requested, in general sessions court, the Court of Appeals, and the Supreme Court.

Had the General Assembly intended that employees/attorneys of the Commission be granted authority to prosecute without direction from the chief prosecuting officer, it seems that such would have been expressed in much more specific language. In fact, in the same article and chapter of Title 41 as § 41-27-590, § 41-27-580 provides:

In any civil action to enforce the provisions of Chapters 27 through 41 of this Title the Commission and the State may be represented by any qualified attorney who is employed by the Commission and is designated by it for this purpose or, at the Commission's request, by the Attorney General.

Again, had the General Assembly intended to provide the Commission with similar authority in criminal cases, specific language such as that used in § 41-27-480 would have been used. Further, it appears as though the framers of our Constitution intended that the Attorney General have broad powers to “supervise the prosecution of all criminal cases...” Accordingly, § 41-27-590 must be construed in such a way as to carry out this intent.

Given the provisions of the State's Constitution, statutes and case law, as well as, the tenets of constitutional and statutory interpretation which must be employed, it is my opinion that the language “at his request and under his direction” used in § 41-27-590 applies to “the solicitor of any circuit” and “any prosecuting attorney,” not just the solicitor. Additionally, authorization for the Commission to prosecute cases on its own behalf cannot be addressed in this opinion. Any such authorization must come from the Attorney General by separate correspondence.

In the opinion of this office, Section 41-27-590 explicitly states the manner in which any criminal violation, including violations within the jurisdiction of a magistrate, are to be prosecuted.

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As stated in the opinion of September 24, 2001, any such authorization for the Department to prosecute cases "must come from the Attorney General by separate correspondence."

With kind regards, I am,

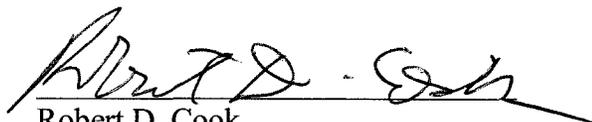
Very truly yours,

Henry McMaster
Attorney General



By: Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General