

The State of South Carolina



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July 3, 1986

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Dear Jeannette:

You have raised several questions concerning § 4-9-30(7) of the Code and the proposed amendments thereto. Certain of your questions are difficult and there is no clear answer to them. Nevertheless, I will attempt to address each question you have raised in the order in which you have asked. First, however, a brief review of the statute and the proposed amendment may be helpful.

Section 4-9-30(7), in its pertinent part, presently authorizes county governing bodies

- (7) to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government but this authority shall not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government. Any employee discharged by the administrator, elected official or designated department head shall be granted a public hearing before the entire county council if he

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submits a request in writing to the clerk of the county council within five days of receipt of notice of discharge. The hearing shall be held within fifteen days of receipt of the request. The employee shall be relieved of his duties pending the hearing and in the event a majority of the council sustains the discharge, it shall be subject to judicial review, but if a majority of the county council reverses the dismissal the employee shall be reinstated and paid a salary for such time as he was suspended from his employment.

Notwithstanding the above provisions of this subsection, any employee who is discharged may elect to submit his grievances concerning his discharge to a county grievance committee in those counties where such committees are operative and in such case his discharge will be reviewed in the manner provided for in the rules of that committee retaining all appellate rights therein provided for.

H-3201, presently before the Senate Judiciary Committee, proposes to amend § 4-9-30(7). The proposed amendment clarifies the language "this authority" contained in the present act ("but this authority shall not extend to ...") as meaning "this employment and discharge authority ...". The proposed amendment makes a few additional changes regarding grievance procedures: the amendment provides that any employee discharged by the administrator, elected official or designated department head must follow the grievance procedures established by county council in those counties where grievance procedures are operative, retaining all appellate rights provided for in the procedures; where no grievance procedure is established, a county employee discharged by the administrator or designated department head must be granted a public hearing before county council provided he submits a request in writing to the clerk of council within five days of receipt of notice of discharge. Other procedural requirements are provided and procedures for reinstatement are specified, as in the earlier act.

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You have raised the following questions:

1. Would proposed bill H-3021 legislatively overrule Rhodes v. Smith, 273 S.C. 13, 254 S.E.2d 49 (1979) and Helen McDougald v. Chas. Co. et al., Civil Action No. 85-1217-8J?

Probably not. Rhodes and its progeny, Anders v. Co. Council for Richland Co., ___ S.C. ___, 325 S.E.2d 538 (1985) and McDougald v. Charleston Co., supra held that certain statutes which provided that deputy sheriffs and employees of the Solicitor served at the "pleasure" of the Sheriff and Solicitor were controlling with regard to grievance statutes relating to county employees generally. In Rhodes, the Supreme Court held that "[s]tatutes of a specific nature are not to be considered repealed by a later general statute [grievance] unless there is a direct reference to the former statute or the intent of the legislature to repeal the earlier statute is implicit.... Therefore, a deputy sheriff in South Carolina serves at the 'pleasure' of the Sheriff." 273 S.C. at 16.

In Anders, the Court reaffirmed its decision in Rhodes and held that § 4-9-30(7) is inapplicable to employees of a Solicitor. Instead, the more specific statute, Section 1-7-405 of the Code which states that employees of a Solicitor serve at his pleasure, controls. Anders reiterated that Section 23-13-10 provides similar power to Sheriffs. McDougald, supra held that Anders was controlling with regard to employees of a Solicitor.

In my view, H-3021 neither purports to overrule, nor changes the conclusions reached by the Court in these cases. As I read the proposed bill, the changes which would be made in § 4-9-30(7) are relatively technical in nature and seem to be primarily intended to provide clarification of the present act. Rhodes and Anders simply held that the more specific "pleasure" statutes were controlling over the more general county employee grievance provisions such as are contained in § 4-9-30(7) with regard to termination of deputies and employees of the Solicitor. Nothing in the proposed amendments to § 4-9-30(7) would indicate an intent by the General Assembly to alter the applicability of these specific "pleasure" statutes to a situation involving the discharge of deputies or employees of the solicitor.

2. Under current Section 4-9-30(7) does the case law disallowing grievance rights for employees serving at an official's pleasure also apply to employees who simply work in a

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department headed by an elected official but who are not subject to a "serve-at-pleasure" statute?

Probably not. Cases such as Rhodes and Anders are based upon specific "pleasure" statutes. Prior opinions of this Office discuss the situation which you have raised. In an opinion dated January 24, 1985, this Office stated that "for any personnel positions within the sheriff's office other than a deputy sheriff, such personnel would be entitled to the benefits of the employee grievance procedure established by Section 4-9-30(7). In an earlier opinion, it was stated that, with respect to employees of the Sheriff (other than deputies), clerk of court, probate judge, auditor, superintendent of education and treasurer, the grievance procedure established by § 4-9-30(7) would likely be applicable. Op. Atty. Gen., February 7, 1978. An opinion, dated December 11, 1985 reiterated the conclusion stated in the January 24, 1985 opinion. These opinions are enclosed for your review.

3. If the answer to question number two is no, how does that square with the portion of Section 4-9-30(7) which specifically states that county government cannot be responsible for the employment and discharge of any personnel employed in departments or agencies under the direction of an elected or appointed official? If county government can have no such responsibility, how could a county grievance committee or county council overturn an elected official's decision to fire an employee, a decision obviously contemplated in grievance procedures.

The answer to this question is simply not clear. In an opinion of this Office, dated February 18, 1983, (enclosed) we stated that County Council "does not have responsibility for the employment and discharge of county personnel in the Office of the Clerk of Court." While it was emphasized in the opinion that such personnel would be subject to general "personnel system policies and procedures for county employees by which all county employees are regulated", such could not be used to infringe upon the general authority of the Clerk of Court as an elected official "to make all decisions as to employment and discharge of personnel in the Office of Clerk of Court." On the other hand, as noted above, employees of an elected official who are not subject to a "pleasure" statute are generally entitled to grievance procedures, pursuant to § 4-9-30(7). See, Op. Atty. Gen., December 11, 1985.

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Obviously, there are employment decisions which are grievable but which do not involve employment and discharge of an employee and, of course, to that extent, there is no conflict within § 4-9-30(7). One alternative reading of § 4-9-30(7) further removing any apparent conflict might be an interpretation which concludes that the elected official possesses the exclusive legal authority to employ and discharge employees under his direction, but that such decision is also subject to the grievance provisions of § 4-9-30(7). Absent guidance by our courts, I cannot say that this particular construction would be adopted by the courts as the correct interpretation however. Such is simply an alternative interpretation of the statute.

In short, § 4-9-30(7) has never been considered in the context of your third question by our courts. Until such time as there is a definitive ruling or until the Legislature sees fit to clarify the statute further, I am of the view that deference should be given to that part of § 4-9-30(7) which states that hiring and discharge authority of the County governments "shall not extend to any personnel employed in departments or agencies under the direction of an elected official...." See Op. Atty. Gen., February 18, 1983; Op. Atty. Gen., January 24, 1985. 1/

4. You have generally questioned whether an employee's service at the "pleasure" of his employer encompasses more than the employee's duration of employment, including the authority to transfer, reassign or suspend, or whether such employment decisions would instead be grievable by the employee.

The purpose of a "pleasure" provision wherein a public employee serves at the "pleasure" of his employer is to promote the public interest in the smooth operation of the office.

1/ Moreover, some courts are of the view that it is not necessarily inconsistent to say that an employer possesses absolute authority with regard to hiring and discharge of his employees, yet also conclude that the employee is entitled to certain grievance procedures. In Bunting v. City of Cola., 639 F.2d 1090 (4th Cir. 1981), the Court held that municipal police officers served at the pleasure of the city, and thus possessed no federally protected property interest, but were entitled to a grievance hearing pursuant to § 8-17-110 of the Code. The purpose of the grievance procedure was deemed by the Court "to create a more harmonious relation between public employers and public employees thereby resulting in improved public service."

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Anders v. Richland Co. Council, supra. Generally speaking, where a "pleasure" provision is applicable, the employer possesses unrestricted control over the employee's appointment. Kropp v. Common Council of City of North Tonawanda, 207 N.Y.S.2d 411, 416 (1960). The employer also possesses unfettered power to terminate the employee's services. Zumwalt v. Trustees of Cal. State Colleges, 109 Cal. Repr. 344. An employee who serves at the "pleasure" of his employer holds his position at the employer's will and thus in the strict meaning of the word, the employee possesses no "term" of office. 67 C.J.S. Officers, § 66. See also, Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907). A "pleasure" employee generally possesses no federally protected property interest sufficient to invoke the 14th Amendment Due Process Clause and the procedures mandated thereby. Bishop v. Wood, 426 U.S. 341, (1976); Board of Regents v. Roth, 408 U.S. 564, (1972); Bunting v. City of Cola., supra. Such employee may be terminated from employment for no reason at all or for any reason except one which contravenes the Constitution. Bishop v. Wood, supra, Elrod v. Burns, 427 U.S. 347, (1976); Perry v. Sindermann, 408 U.S. 593 (1972); Bd. of Regents v. Roth, supra.

It is well recognized that the power to remove encompasses the power to suspend. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231 (1956); Craddock v. Bd. of Ed., 391 N.E.2d 1059 (Ill. App. 1979). Such is simply an application of the long recognized maxim that the lesser includes the greater. See, Op. Atty. Gen., July 31, 1985. Applying this basic principle, it is reasonable to conclude that an employee who, by statute, serves at the "pleasure" of his employer such as a deputy sheriff or employee of the Solicitor and thus could be removed for any reason, could likewise be suspended or transferred within the discretion of the employer. In my judgment, the same principles expressed by the Court in Rhodes and Anders with respect to hiring and discharge would also be applicable to less encompassing employment decisions such as reassignment, transfer or suspension. 2/

2/ Again, I note that certain courts see no inconsistency between a "pleasure" provision and the applicability of grievance procedures. Bunting, supra. The Court in Rhodes and Anders, however, is of the view that the presence of a "pleasure" statute is controlling vis a vis grievance statutes.

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If I can be of further assistance, please let me know.
With kindest regards, I remain

Very truly yours,



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Enclosures