

1983 WL 182096 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 11, 1983

\*1 The Honorable Norma C. Russell

Senator—District No. 8

Route 6

Box 338 K-5

Columbia, South Carolina 29210

Dear Senator Russell:

You have asked us to advise you as to the following questions:

(1) Is the foreman of the Lexington County Grand Jury either a “county officer or employee” as those terms are used in [§ 4-9-180 of the 1976 Code of Laws of South Carolina](#)?

(2) Is the foreman of the Lexington County Grand Jury a “public official or public employee” as those terms are used in Chapter 13 of Title 8 of the 1976 Code of Laws of South Carolina?

(3) What statutory or common law prohibitions exist in this State that prohibit the Foreman of the Lexington County Grand Jury from directly or indirectly participating in governmental activities in his official capacity when those activities could result in personal profits to him.

We will deal with each of your questions in the order in which you have raised them.

[Section 4-9-180](#) provides in pertinent part as follows:

Any county officer or employee who has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or who personally engages in such matters shall make known that interest and refrain from voting upon or otherwise participating in his capacity as a county officer or employee in matters related thereto. (emphasis added).

It is important to note that [§ 4-9-180](#) contains no definition of the term “county officer or employee”, nor is there such a definition provided for in the entire Title 4 of the Code, which deals with counties. When a specific statutory definition is not present, courts will usually refer to the plain and ordinary meaning of the word. See, [Merchants Mut. Ins. Co. v. South Carolina Second Injury Fund](#), 277 S.C. 604, 291 S.E.2d 667 (1982).

It is well recognized that a “county officer” is one by whom the county performs its usual political functions, trusts or duties continuously and as a part of the regular and permanent administration of government. [Sheboygan Co. v. Parker](#), 70 U.S. 93, 18 L.Ed. 33 (1868). County officers are representatives of the government of the county. [Garner v. McCall](#), (Ala.), 178 So. 210 (1938); [Wall v. Harrison](#), (Kan.), 443 P.2d 266 (1968). An “employee” of the county on the other hand is one who performs the duties required of him by county officials who have employed him by express contract or otherwise to perform the county's business. See, [Sanders v. Belue](#), 78 S.C. 171, 58 S.E. 762 (1907).

With respect to grand jurors, we would advise that they are probably neither “county officers or employees” as those terms are used in [§ 4-9-180](#). Generally, a grand jury, although not the court itself, is considered an arm or agency of the court. 38 C.J.S.

Grand Juries, § 1. The South Carolina Supreme Court has stated that a grand jury is “a constituent part of the court ...”. [State v. Lazarus](#), 83 S.C. 215, 217, S.E. (1909). See also, [State v. Bramlett](#), 166 S.C. 323, 332, 164 S.E. 873 (1932). However, grand jurors are not considered judicial officers, but more frequently are referred to as officers of the court. 38 C.J.S., Grand Juries, § 1.

\*2 In fact, it appears that a grand juror does not have the status of a public officer at all. 38 Am.Jur.2d, Grand Jury, § 2. In concluding that grand jurors were not “public officers” for purposes of a quo warranto proceeding, the Georgia Supreme Court, quoting from [State v. Bradley](#), 48 Conn. 535, analyzed the status of grand jurors as follows:

Although jurors serve the public and perform important duties in the administration of justice, it does not follow that they are officers within the meaning of the constitution and law. Many persons perform duties of a public nature who are not officers. Witnesses, persons assisting sheriffs and other peace officers, persons in the military service, and the like. While the duties thus performed relate to and promote the public weal, yet the persons performing them lack some of the more important official elements. A juror summoned to attend court has no certain term of office. He may be discharged immediately with or without his consent. He may be excused from serving in any or in all cases at the will of either party, and when the term ends ordinarily his duties as a juror end for the year. The oath administered to him is not that prescribed by the constitution and laws for public offices, but is special, and is usually administered in each case, and has no binding force after the case is disposed of. These considerations serve to illustrate in some measure the difference between jurors and public officers.

[McDuffie v. Perkerson](#), (Ga.), 173 S.E. 151, (1933). The Georgia Court, in [McDuffie](#), also relied upon for its conclusion, the South Carolina case, [State v. Graham](#), 79 S.C. 116, 60 S.E. 431 (1908). In [Graham](#), the South Carolina Supreme Court had concluded that a grand juror did not hold a public office “of honor or profit” for purposes of dual office holding. Thus, our research discloses strong support for the conclusion that a grand juror is neither a county or a public officer. See also, 47 Am.Jur.2d Jury, § 91; [Adams v. State](#), 214 N.E.2d 84, 118 A.L.R. 1095 [in the legal sense, a grand juror is not an officer]; [Hicks v. Guilford County](#), 267 N.C. 364, 148 S.E.2d 240 (1966) [a juror is not a county officer].<sup>1</sup>

Nor does a grand juror generally appear to be a county employee. In [Hicks v. Guilford County](#), supra, the North Carolina Supreme Court considered the question whether a petit juror was a county “employee” for purposes of North Carolina’s Workmen’s Compensation statute. The statute defined an employee to include all officers and employees of the State’s municipal corporations and political subdivisions. The Court noted that the statutory definition added nothing to the common law definition of “employee” which, as noted earlier, is a person under the direction and control of county officials. And the Court noted in [Hicks](#), that the fact a juror’s employment is “involuntary and under the compulsion of legal process” did not necessarily defeat his status as an “employee”. What did defeat such status, however, was the function of a juror. Noted the Court,

\*3 Obviously, a juror is not subject to direction and control of county officials as to the manner in which the juror discharges his duties, in the sense that an employee in an industry is subject to direction by his employer. On the contrary, even the trial judge is expressly forbidden to convey to the jury in any manner at any stage of the trial his opinion as to how the jury should determine a question of fact.

148 S.E.2d supra at 243. The court went on to say:

A juror is not appointed by the county commissioners or by any county official.... His services, if he is accepted and empaneled to try the issues in an action, are not obtained or defined by a contract of hire between him and the county. There are no negotiations between him and the county, express or implied, for those services. He is not a public officer, an independent contractor or an employee. He is a juror.... (emphasis added).

148 S.E.2d, supra at 243-244. It is important to note that our Supreme Court has consistently recognized that in the absence of a controlling decision in this State concerning a Workmen’s Compensation question, one by the North Carolina Supreme Court is to be regarded as “highly persuasive”. [Parrott v. Barfield Used Parts](#), 206 S.C. 381, 34 S.E.2d 802 (1945). Thus, especially in view of the aforementioned decision by the South Carolina Supreme Court in [State v. Graham](#), supra, it is probable that the

courts in this State would follow the North Carolina decision in Hicks and conclude that a grand juror is not a county officer or employee for purposes of § 4-9-80.

For the same reasons expressed above, we would advise that a grand juror is not a “public official” or “public employee” for purposes of the State Ethics Act, codified at § 8-13-10 et seq. Although those terms are defined in the Act,<sup>2</sup> their statutory meaning appears no different from the common and ordinary definitions of those words. We would therefore conclude that the reasoning of the cases discussed above would apply with equal force to the Ethics Act and that the General Assembly did not intend to place grand jurors within the Act's regulation. As Justice Woods reasoned in *State v. Graham*, service as a grand juror is a duty which every good citizen “owes to his county and State”, but such service as a juror does not make that citizen either an officer or employee of the county or State. See, 79 S.C., supra at 118.

Your final question concerns whether there are any other legal prohibitions upon grand jurors who might stand to financially gain or profit by a decision made as a grand juror. As will be seen, the authority relating to this question is not entirely consistent, but there is a great deal of support for the proposition that a grand juror having a direct pecuniary interest in the outcome of a particular matter considered by the grand jury is either incompetent to serve or may be disqualified as a grand juror.

The general law appears to support the idea that prejudice or bias of whatever kind is not a ground for disqualification of a grand juror. As was stated in *State v. Knowles*, 147 F.Supp. 19, 21 (D.D.C.1957).

\*4 The basic theory of the functions of a grand jury does not require that grand jurors be impartial and unbiased. In this respect, their position is entirely different from that of petit jurors.... A grand juror does not pass on the guilt or innocence of the defendant, but merely determines whether he should be brought to trial. It is purely an accusatory body.

The Court in *Knowles* went on to say that “challenges for bias, or for any cause other than lack of legal qualifications are unknown as concerns grand jurors.” Supra. An annotation containing cases adopting this general view is contained at 88 A.L.R. 900 [“Prejudice of member of grand jury against defendant as ground of attack on indictment.”] And that is the view expressed in *United States v. Caldwell*, 8 Alaska 117 (1929).

However, many cases do appear to state an exception to this general rule where personal financial bias is involved. The rule appears to be as follows:

Generally, in the absence of a controlling provision, a person is not disqualified or incompetent to serve as a grand juror by reason of bias or prejudice on his part ... or by his interest in a particular prosecution other than a direct pecuniary interest. (emphasis added).

In 38 C.J.S., Grand Juries, § 6, it is also stated that “interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror.” (emphasis added). This rule is stated consistently by the North Carolina Supreme Court in cases such as *State v. Oxendine*, (N.C.), 278 S.E.2d 200, 206 (1981) and *State v. Pitt*, (N.C.), 80 S.E. 1060 (1914). See also, 20 Cyc. “Grand Jury”.

Those cases which have recognized “direct pecuniary interest” as an exception to the general rule have however not defined the meaning of the term “direct pecuniary interest”; nevertheless, it appears clear that more than an incidental interest must be found. In fact, we have not found an out-of-state case which has concluded that the facts were sufficiently strong to hold that a grand juror was incompetent or subject to disqualification from service on the ground of financial bias. For example, in *Pontarelli v. State*, (Ind.), 176 N.E. 696 (1931), the fact that three of the grand jurors owned real estate in the assessed area when the grand jury indicted a sewer contractor for presenting a false claim, was deemed by the Court insufficient to render the grand juror incompetent or to disqualify him. And in *Stapleton v. State*, (Ga.), 90 S.E. 1029 (1916), when a director of a bank was indicted, the fact that some of the grand jurors were depositors in the bank was considered insufficient to disqualify the grand jurors. This same conclusion was reached by the Court in *State v. Perry*, (La.), 90 So. 406 (1921), where members of

the grand jury who had lost money by reason of the bank's failure were not disqualified from service. See also, [Lake v. State, \(Fla.\), 129 So. 827 \(1930\)](#).

South Carolina law on the subject appears much stronger in favor of disqualification however. In [State v. Boyd, 56 S.C. 382, 34 S.E. 661, \(1899\)](#) the question of bias of a grand juror by reason of kinship was raised. While the Court concluded that the objection on this ground had come too late, the Court intimated that such an objection “may be ground for challenge before indictment.” 56 S.C., [supra at 384](#). And significantly, in [State v. Richardson, 149 S.C. 121, 123, 146 S.E. 676 \(1928\)](#), the Court stated:

\*5 There can be no doubt as to the proposition that in a criminal prosecution, the defendant is entitled to absolute impartiality of not only the grand jurors who pass upon the indictment, but of the commissioners who are charged with the duty of drawing them. (emphasis added).

The lower court had, in [Richardson](#), purged the grand jury of all depositors in a bank, the director of which, was indicted for breach of trust and conspiracy to cheat and defraud the depositors. The Supreme Court implicitly approved the trial court's action by stating the broad rule cited above.

Finally, in [State v. Rector, 158 S.C. 212, 155 S.E. 385 \(1930\)](#), the Supreme Court reiterated the rule expressed in [Richardson](#), noting that the cases in support thereof were “too numerous to mention.” 158 S.C., [supra at 241](#). The Court in [Rector](#) concluded that the right to have legally qualified grand jurors, e.g. who were qualified electors,<sup>3</sup> was “closely analogous” to the right to have a “fair and impartial grand jury consider the indictment.” [Supra at 240](#). In the [Rector](#) case 2 of 17 grand jurors were not registered electors and therefore, concluded the Court, the indictment rendered by that grand jury was properly quashed.

Thus, while South Carolina's statutes relating to disqualification of grand jurors do not themselves explicitly mention financial bias as a ground for disqualification, see, § 14-7-810 et seq. and compare, § 14-7-1020, the case law in this State does appear to support such disqualification so long as it is sought in timely fashion. [State v. Rector, supra](#); [State v. Bradford, 256 S.C. 51, 180 S.E.2d 632 \(1971\)](#).

A final basis for disqualification of grand jurors on the basis of financial bias is upon federal constitutional grounds. A number of federal courts have concluded that due process requires an unbiased grand jury. See e.g., [United States v. Rundle, 383 F.2d 421 \(3rd Cir.1967\)](#); [Candarella v. United States, 375 F.2d 222 \(8th Cir.1967\)](#); [U.S. v. Lawson, 502 F.Supp. 158 \(D.C.Md.1980\)](#); [U.S. v. Samergo, 450 F.Supp. 1097 \(D.Haw.1978\)](#), [affd. 607 F.2d 877 \(9th Cir.1979\)](#); [U.S. v. Azzarelli Const. Co., 459 F.Supp. 146 \(E.D.Ill.1978\)](#); [contra, In Re Balistrieri, 503 F.Supp. 1112 \(E.D.Wis.1980\)](#); [contra, Creamer v. State, \(Ga.\), 258 S.E.2d 212 \(1979\)](#); [contra, Quadra v. Sup. Ct. of City and County of San Francisco, 403 F.Supp. 486, 489, n. 3 \(N.D.Cal.1975\)](#) [the problem of conflicts of interest with respect to a grand jury is one of State law rather than constitutional law]. However, while there is language in United States Supreme Court cases which strongly suggests that there is indeed a constitutional right to an unbiased grand jury,<sup>4</sup> see [Costello v. U.S., 350 U.S. 356, 362 \(1956\)](#), that Court has as yet specifically declined to so hold. As was stated in [Beck v. Washington, 369 U.S. 541, 545 \(1962\)](#):

It may be that the Due Process Clause of the Fourteenth Amendment requires the State, having once resorted to a grand jury procedure to furnish an unbiased grand jury. [citations omitted] ... But we find that it is not necessary for us to determine this question; for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded that [the State of] Washington, so far as is shown by the record did so in this case.

\*6 Again, however it should be noted that numerous lower federal courts have already recognized the existence of such a right.

Thus, we conclude that there are several grounds in the law for disqualification of or rendering incompetent a grand juror on the basis of financial bias or pecuniary interest. The general law appears to recognize that a grand juror is incompetent to serve

or may be disqualified if he possesses a “direct pecuniary interest” in the outcome of the matter being considered by the grand jury. South Carolina case law seems to support the right of a criminal defendant generally to an unbiased grand jury if objection to the bias is timely raised, and appears to endorse disqualification of grand jurors where they possess financial conflicts of interest.<sup>5</sup> And there is strong support in federal case law for a constitutional right of a criminal defendant to an unbiased grand jury. Of course, any disqualification on this ground, as any other, would normally be made on a case by case basis by the Court and would depend upon the particular facts involved.<sup>6</sup>

If you have any further questions, please let us know.

Sincerely,

Robert D. Cook

Executive Assistant for Opinions

#### Footnotes

- 1 This is not to say that there exists no authority otherwise and that the matter is not free from doubt. It is stated in 50 C.J.S., Juries, § 1 as follows:  
While it has been held that jurors are “constitutional officers” and may be regarded as persons in county service under appointments of hire, it has also been held that a juror is not an officer of the state or county as that term is used in some statutory provisions. (emphasis added).  
See also, *Industrial Comm. v. Rogers*, (Ohio), 171 N.E. 35 (1930) (a juror is not an officer, but is in the service of the county). Other cases refer to a grand jury as an agency of the government, *Parton v. State*, 455 S.W.2d 645 (1970), and an instrumentality of the State, *Bd. of Trustees of Calaveras Unif. School Dist. v. Leach*, 65 Cal.Reptr. 588. And, of course, jurors are given absolute official immunity from liability under 42 U.S.C. § 1983. *Yaselli v. Goff*, 12 F.2d 396 (2d Cir.1926), *affd.* 275 U.S. 503 (1927); *Cawley v. Warren*, 216 F.2d 74 (7th Cir.1964); *Martone v. McKeithen*, 413 F.2d 1373 (5th Cir.1969). However, the *Graham*, *Hicks* and *McDuffie* cases, cited above all represent the views of courts in this area and appear to express the majority view in the context you have raised. But see, *State v. Rollins*, (Vt.), 27 A. 498 (1893).
- 2 Section 8-13-20(d) defines a “public employee” as “any person employed by the State or a county, municipality or any political subdivision thereof....” Subsection (3) of the statute defines “public official” as “any elected or appointed official of the State, county, municipality, or other political subdivision, other than the judiciary....”
- 3 Art. V, § 18 of the South Carolina Constitution (1895 as amended) requires that each grand juror must be a qualified elector under the provision of this constitution and of good moral character.
- 4 Of course, members of a grand jury may not be excluded on the basis of race or other arbitrary factors. *Castaneda v. Partida*, 430 U.S. 480 (1977); *State v. Moultrie*, 273 S.C. 532, 257 S.E.2d 730 (1979).
- 5 The South Carolina cases supporting this principle never expressly say whether such a right is of common law or constitutional origin, but the implication in *State v. Rector*, *supra*, is that the right is founded in due process. 168 S.C., *supra* at 230.
- 6 In addition, every grand juror in this State traditionally takes an oath to refrain from acting out of envy, hatred or malice, fear, favor, affection, reward or hope of reward. There is authority that where a grand juror determines through malice or bribery to violate that oath, such may constitute contempt of court. *Joslyn v. People*, (Col.), 184 p. 375 (1919).

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