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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 10, 2003

The Honorable Sel Hemingway
Chairman, Georgetown County Council
Post Office Drawer 1270
Georgetown, South Carolina 29442-1270

Dear Chairman Hemingway:

You note that the voters of Georgetown County recently passed a referendum changing the form of government to the Council-Administrator form, effective July 1, 2003. By way of background, you state the following:

> [f]or a number of years prior to adopting this new form of government, the Council had arranged for the services of an individual to serve as its Administrator through a contract with that individual's consulting firm, which is a South Carolina corporation. This has been an extremely successful arrangement for the County, and both the County and the individual who has served as its Administrator desire to continue this arrangement by again contracting for this individual's services through the consulting firm. The County believes that this arrangement comes within the meaning of the word "employ" as used in S.C. Code Ann. [§4-9-620] .... Because that section establishes a right to a [pretermination] hearing for an individual employed as Administrator, the County proposes to appoint and employ a named individual as Administrator by resolution and to empower the Chairman of Council to execute a contract with the named individual's consulting firm to provide for remuneration of his services as Administrator.

Thus, you seek an opinion from this Office regarding the following question:

> [p]ursuant to S.C. Code Ann. § [4-9-620] ... may a county appoint an individual as Administrator and contract for that individual's services and provide for payment through a contract with a corporate entity wholly owned by the individual named as Administrator, under the conditions set forth below?
>
> 1. Council, by duly enacted resolution, appoints and employs the named individual as County Administrator, pursuant to S.C. Code [§ 4-9-620] ...,

with such powers and duties as are set forth by § 4-6-630, and authorizes the Chairman of Council to contract with the named individual's wholly owned corporation for the individual's services as Administrator for a definite term;

2. Council, through its Chair, contracts with the individual's consulting firm to provide the named individual to serve as its administrator, under the following terms:

   a. A contract for a definite 12-month term terminable upon notice from the Council, provided, that in the event the named Administrator seeks a pre-termination hearing pursuant to [§ 4-9-620] ..., termination shall be stayed until the outcome of the hearing;

   b. The corporation is to supply the services of the named individual to serve as Administrator, and to exercise those powers and duties provided by statute, and no substitution shall be allowed, nor shall any other employee of the corporation be allowed to perform under the contract.

You have enclosed the proposed contract as well.

It is our opinion, as set forth more fully below, that the proposed contract would present numerous legal problems. For the reasons which follow, we would advise that a court would likely conclude that such a contract is not legally valid. Thus, before implementing this proposal, we would suggest a declaratory judgment.

Law / Analysis

We begin by recognizing several fundamental legal principles involved in any analysis of your question. First, is the well recognized principle that an individual and a corporation are separate and distinct entities. Indeed, our Supreme Court has recognized that "a corporation is an entity separate and distinct from its officers and stockholders ...." Costas v. First Federal Savings and Loan Association, 283 S.C. 94, 321 S.E.2d 51, 56 (1984). Courts will disregard the fiction that a corporation is a separate legal entity only when the corporation is a mere instrumentality of a controlling individual. Henderson v. Finance Co., 273 N.C. 253, 260, 160 S.E.2d 39, 44 (1968). If the corporation is the "alter ego of the sole or dominant shareholder and a shield for his activities in violation of declared public policy or statute, the corporate entity will be disregarded and the corporation and shareholder treated as one and the same person ...." Id.

Moreover, it is a well recognized principle of law that an act which cannot be done directly cannot be accomplished indirectly, either. Ops. S.C. Atty. Gen., November 13, 2000; July 31, 1990. As the State Supreme Court cautioned in Richardson v. Blalock, 118 S. C. 438, 110 S.E. 678 (1922), "[t]hat which cannot be done directly cannot be done indirectly." The purpose of this rule is to prevent circumvention of the law by ruse or artifice.

We turn now to the applicable statutes. Pursuant to its constitutional authority to implement Home Rule under Article VIII, the General Assembly by § 4-9-20 designated four permissible forms of county government from which a county may choose. A county may select the council form – which Georgetown had until recently – or the council-supervisor form, the council-manager form or one which utilizes the council-administrator. As your letter indicates, Georgetown County by a vote of the people has now chosen to employ a council-administrator form of government, effective July 1, 2003.

Section 4-9-620 provides for the appointment of a county administrator under the council-administrator form of government. That statute specifies that

> [t]he council shall employ an administrator who shall be the administrative head of the county government and shall be responsible for the administration of all the departments of the county government which the council has the authority to control. He shall be employed with regard to his executive and administrative qualifications only, and need not be a resident of the county at the time of his employment. The term of employment of the administrator shall be at the pleasure of the council and he shall be entitled to such compensation for his services as the council may determine. The council may, in its discretion, employ the administrator for a definite term. If the council determines to remove the county administrator, he shall be given a written statement of the reasons alleged for the proposed removal and the right to a hearing thereon at a public meeting of the council. Within five days after the notice of removal is delivered to the administrator he may file with the council a written request for a public hearing. This hearing shall be held at a council meeting not earlier than twenty days nor later than thirty days after the request is filed. The administrator may file with the council a written reply not later than five days before the hearing. The removal shall be stayed pending the decision of the public hearing.

The powers and duties of the county administrator are enumerated in § 4-9-630. Those powers include the following:

(1) to serve as the chief administrative officer of the county government;

(2) to execute the policies, directives and legislative actions of the council;

(3) to direct and coordinate operational agencies and administrative activities of the county government;

(4) to prepare annual operating and capital improvement budgets for submission to the council and in the exercise of these responsibilities he shall be empowered to require such reports, estimates and statistics on an annual or periodic basis as he deems necessary from all county departments and agencies;

(5) to supervise the expenditure of appropriated funds;

(6) to prepare annual, monthly and other reports for council on finances and administrative activities of the county;

(7) to be responsible for the administration of county personnel policies including salary and classification plans approved by council;

(8) to be responsible for employment and discharge of personnel subject to the provisions of subsection (7) of § 4-9-30l and subject to the appropriation of funds by council for that purpose;

(9) to perform such other duties as may be required by the council.

Pursuant to § 4-9-640, the administrator prepares the county budget. It is abundantly clear from the language employed in §§ 4-9-620, 4-9-630 and 4-9-640 that the General Assembly intended the county administrator to be a high ranking county official, possessing wide ranging powers and considerable discretion in carrying out the policies of county government. Section 4-9-620 characterizes the administrator as "the administrative head of the county government ... responsible for the administration of all the departments of the county government which the council has the authority to control." Section 4-9-630(1) provides that the administrator serves "as the chief administrative officer of the county government." Our Supreme Court has termed the county administrator as "the chief executive officer" of the county. Patton v. Richland Co. Council, 303 S.C. 47, 398 S.E.2d 497 (1990). This Office has found that a county administrator exercises the sovereign power of the State and is, therefore, an officer for dual office holding purposes. Op. S.C. Atty Gen., May 30, 1979. In other words, the county administrator is the public officer deemed by the Legislature to be the person who carries out the policies of county council in the council-administrator form.

We turn now to the rule which private corporations are permitted to play in assisting government to carry out its necessary functions. As a general rule, courts draw a clear line of demarcation between the performance of ministerial duties by private corporations and the

implementation of discretionary functions by such private entities. Thus, it is well understood that "[i]n general, administrative officers and bodies cannot alienate, surrender or abridge their powers or duties, and they cannot legally confer on their employees or other authority and functions which under the law may be exercised only by them or other officers or tribunals." Op. S.C. Atty. Gen., September 6, 1996, quoting 73 C.J.S., Public Administrative Law and Procedure, § 56. For this reason, it is a recognized principle that

> ... in the absence of permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment.

Id.

Applying this basic tenet, we have concluded that without express statutory authority therefor, the governing board of MUSC could not turn over the operation of the MUSC Hospital to a private for profit corporation. Op. S.C. Atty. Gen., April 4, 1996. There, citing an earlier opinion (Op. No. 85-81, dated August 8, 1985), we applied the rule that there must "'exist statutory authority for an administrative officer or agency to subdelegate any portion of the authority which has been delegated to him by statute.'" We noted that "'strictly governmental powers ... cannot be conferred upon a corporation or individual.'"

In another opinion, dated March 6, 1980, we recognized that "[i]t has long been the law in this State that no municipality may by contract part with the authority delegated it by the State to exercise the police power ...."

In G. Curtis Martin Investment Trust v. Clay, 274 S.C. 608, 266 S.E.2d 82 (1980), our Supreme Court declared invalid an agreement whereby the North Charleston Sewer District entered into an agreement with a private company to transfer the privately owned sewer system to the district. Pursuant to the agreement, the company retained the power to approve or disapprove for connection to the system "any project other than a single family dwelling and small commercial establishments of a defined class." The Court, in concluding that the delegation of power to a private company was unlawful, reasoned that the district could not "delegate away those powers and responsibilities which give life to it as a body politic." In the Court's view, "[a] municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." 266 S.E.2d at 85. See, also, City of Bft. v. Bft.-Jasper County Water and Sewer Auth., 325 S.C. 174, 480 S.E.2d 728 (1997). See also, Salt Lake County Comm. v. Salt Lake County Atty., 985 P.2d 899 (Utah 1999) [where statute authorizes legal counsel with the duty of conducting legal business of a governmental agency, contracts with other attorneys for legal services are void]; Kendall v. Griffin-Spaulding County Hosp. Authority, 242 Ga. App. 821, 531 S.E.2d 396 (2000) [actions of county hospital

authority in creating trust from proceeds form sale of hospital to private entity and delegating to trust the power and discretion to carry out all the functions thereof not authorized by statute and thus ultra vires]; Commonwealth ex rel. Shumaker v. N.Y. & Pa. Co., Inc., 378 Pa. 359, 106 A.2d 239 (1954) [no statutory or common law authority permitting district attorney to delegate all of powers to private counsel].

In this instance, there is no authority provided by the General Assembly which would permit Georgetown County Council to delegate the duties of the County Administrator to the private corporation in question. While § 4-9-620 does reference the authority of county council to "employ" an administrator, clearly, the General Assembly had in mind an appointee of county council, not a private corporation, in the implementation of such broad and discretionary duties as are performed by the county administrator.

Here, the fact that the individual in question is actually "appointed" and the corporation is contracted with to provide the individual's services in order to perform the duties of administrator would not, in our opinion, save the arrangement. As stated earlier, that which cannot be done directly cannot be done indirectly, either. Clearly, the corporation could not be appointed outright by council as county administrator. It would thus make no legal difference that the individual is actually appointed but his corporation is contracted with to provide his services as administrator. The individual may indeed be the sole shareholder of the corporation; however, the corporation is a separate and distinct legal entity for purposes of analyzing the legality of the transaction. Thus, even though the same person may be involved, the law does not view the corporation and that individual as one and the same.

It is apparent that the contract has now been drafted in such a way as to emphasize that the principal role of the corporation is simply to provide Mr. Edwards' service to the county and that Mr. Edwards will, in essence, be performing the duties of administrator just as if the contract were between the county and Mr. Edwards himself. However, the problem is that unless the veil of the corporation is pierced such that the corporate entity is revealed to be a "shell," we must presume its separate and independent status from Mr. Edwards as an individual. See Sturkie v. Sifly, 280 S.C. 453, 459, 313 S.E.2d 316, 319 (Ct. App. 1984) [courts are reluctant to "disregard the integrity of the corporate entity."] If, indeed, the corporation is nothing more than a "shell" in this instance, such a conclusion by a court runs the risk of implicating other limitations, such as those relating to the compensation paid by governmental entities to retirees. See, § 9-1-1790 [retired member of state retirement system may only earn up to $50,000 in a fiscal year "without affecting the monthly retirement allowance he is receiving from the system."]

Secondly, the proposed transaction would, in our view, contravene the principles of Home Rule. In an opinion dated January 7, 1985, we discussed this concept at some length. For the County to adopt this "hybrid" form of government whereby the duties of administrator are assigned by contract and performed on behalf of a private corporation would, in essence, create a "fifth form

of government" a situation not contemplated by the General Assembly in effectuating Home Rule. Here, the voters approved the council-administrator form of government referenced in § 4-9-20 and set forth in § 4-9-620 and 630. The assignment of duties to a private corporation is not, in our opinion, authorized by statute.

Third, the contractual arrangement creates at least the appearance of a conflict of interest, if not a conflict in actuality. As our Supreme Court recognized in O'Shields v. Caldwell, 207 S.C. 194, 35 S.E.2d 184 (1945), "every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in a manner so as to be above suspicion of irregularity, and to act primarily for the benefit of the public." Moreover, in an opinion of this Office, dated February 28, 1974, we stated that "... when a public officer has a pecuniary interest, direct or indirect, in a contract for public work the contract is generally regarded as void or voidable."

In this instance, the appearance of a conflict would be substantial. While the individual in question might well in fact always put the interest of the county first, he would be placed, as sole shareholder of the corporation, in a position wherein any judgment exercised would be subject to question as to which interest was being primarily served – the county's or the corporation's. Such a position in which the appearance of a conflict is inevitably present, would be harmful to county government and certainly was never contemplated by the General Assembly.

Conclusion

For the foregoing reasons, it is our opinion that the proposed contract, referenced in your letter, would likely not be sustained as valid by a court. In our view, the contract seeks, without statutory authority, to delegate the discretionary duties of county administrator to a private corporation. While the contract is drafted along the lines that the private corporation is merely providing the "services" of Mr. Edwards as county administrator to the County, we must deem the contract as one between the county and the corporation itself rather than between the county and Mr. Edwards and thus a delegation of the discretionary duties of the administrator to the corporation.

While Mr. Edwards is the sole shareholder of the corporation, we must assume here that the corporation is not a "shell" and thus is a separate entity from Mr. Edwards. Even though the corporation is obligated under the agreement to provide the services of Mr. Edwards and no one else, nevertheless, it is the corporation which would sign the contract with the county and which would be obligated under that contract to perform the duties of county administrator. We do not think a court would sustain the arrangement and would conclude that the contract is ultra vires.

Secondly, the contract, in effect, creates a hybrid form of government neither authorized by the General Assembly nor voted for by the voters of Georgetown County in selecting this form of government.

Finally, the contract, at the very least, creates the appearance of a conflict of interest. Questions would inevitably be raised by the arrangement as to whether the individual's primary loyalty lies in a given instance with the county or with his corporation. Public policy would thus strongly dictate against creating such a perception of conflict in the public's mind.

While the foregoing represents our best legal judgment concerning this matter, we must also advise that only a court, and not this Office, could declare any contract entered into by the county to be invalid. Therefore, county council may wish to seek a declaratory judgment regarding this question.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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