

7612 Letter



The State of South Carolina  
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER  
ATTORNEY GENERAL

September 4, 2003

The Honorable Glenn F. McConnell  
President *Pro Tempore*  
The Senate  
P. O. Box 142  
Columbia, South Carolina 29202

Dear Senator McConnell:

You note that Governor Sanford vetoed Part 1B, proviso 36.1 of the 2003-2004 Appropriations Act. This Proviso stated in pertinent part that "[t]he highway patrol must not charge any fee associated with special events for maintaining traffic control and ensuring safety on South Carolina public roads and highways unless approved by the General Assembly." Governor Sanford provided his reason for this veto in his veto message, stating that "I am vetoing this section because I believe that the Department of Public Safety, at its discretion, should be able to assess reasonable fees for support provided to special events."

You are informed that as a result of the veto of Proviso 36.1, DPS has now instituted a fee schedule for the support of the Highway Patrol at special events. In your view, "[t]he Highway Patrol traditionally provides traffic control for special events since that service is in the public interest to provide traffic control and to ensure the safety of those attending those special events." Your concern is that "the Department of Public Safety's position concerning charging entities, especially other state agencies, has no basis in law." Thus, you state:

[n]otwithstanding the language of Proviso 36.1 which has been included in the Appropriations Bill for several years, there is no provision of law that affirmatively provides that the Department of Public Safety may charge for providing this service. While the Governor may have vetoed the negative of the question to prevent the charging of a fee, there has never [been an] . . . Action to afford implementation of the positive aspect of the issue to charge a fee. I believe it would [be] in the best interest of the State to clear any cloud of doubt about the ability of an agency to be able to charge a fee for which the General Assembly has not given that power. It could certainly be argued that the charging of these fees would be a usurpation of the legislature's role as well as a violation of separation of powers.

Since the Department of Public Safety is preparing to levy these fees, I would appreciate a response regarding the validity of the Department of Public Safety or any

Deputy Letter

The Honorable Glenn F. McConnell

Page 2

September 4, 2003

state agency charging a fee for which there is no express authority given by the General Assembly to that agency in order to remove any doubt about the legality of these actions.

### Law / Analysis

It is well established that an agency of the State "has only such powers as have been conferred by law and must act within the authority granted for that purpose." Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1993). The authority of a state agency created by statute is, in other words, "limited to that granted by the legislature." Nucor Steel v. S. C. Public Serv. Comm., 310 S.C. 539, 426 S.E.2d 319 (1992). Accordingly, as part and parcel of these general principles, we have consistently concluded that an agency's authority to charge a fee must come from a specific enabling statute. Op. S. C. Atty. Gen., August 26, 1997; Op. S.C. Atty. Gen., Jan. 17, 1996; Op. S. C. Atty. Gen., Op. No. 2271 (May 4, 1967).

Based upon the information you have provided, it appears that Proviso 36.1 has been vetoed by the Governor. We are unaware of any other authority which permits DPS or the Highway Patrol to charge a fee associated with special events. You indicate that no such authority exists.

In other instances, the General Assembly has provided specific statutory authority to DPS to charge a fee in certain circumstances. See, e.g. S. C. Code Ann. Sec. 12-37-2860 (DPS authorized to charge one time fee on semitrailers and trailers currently registered and subsequently on each semitrailer and trailer before being placed in service); § 23-6-35 [the Department may charge and collect fees for providing copies of registration, title and driver's license information]; § 56-1-130 [the Department shall charge an appropriate fee for each complete examination or reexamination]. See also, Act No. 51 of 2003 [Department of Motor Vehicles established].

Although Proviso 36.1 forbade imposition by the Highway Patrol of any fee charged for special events unless approved by the General Assembly, the Proviso is apparently the only authority empowering the Patrol to charge such a fee. We have been able to locate no such statutory authorization and you indicate your research concludes there is none. Accordingly, the Governor's veto of Proviso 36.1, unless overridden by the General Assembly, "effectively nullifies the proviso ..., Op. S.C. Atty. Gen., October 6, 1981, and removes the only existing authorization by the General Assembly available under present law. Moreover, the Proviso's language indicated the General Assembly's intent to oversee the amount charged by the Highway Patrol by retaining the authority to approve the fee prior to any imposition. For DPS or the Highway Patrol to take it upon itself to charge a fee for special events without the necessary statutory enabling authority to do so could be deemed by a court to contravene not only the will of the General Assembly, but the constitutional mandate of separation of powers. See, State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002).

There is an additional reason why DPS or the Highway Patrol may not unilaterally charge a fee for special events. Generally speaking, a governmental body may not receive remuneration from a citizen for the performance of a duty imposed upon it by law. See, Op. S.C. Atty. Gen., April 18, 1995; Op. S.C. Atty. Gen., April 11, 1995; Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346, 360 (1929). The rationale for this rule, noted the State Supreme Court in Green, "is grounded upon the theory that such a contract would restrict the discretion of the [governmental body] . . . ; that is, embarrass or control it in the exercise of governmental functions, which cannot be surrendered or abrogated." 147 S.E. at 360.

Section 23-6-140 of the Code provides in pertinent part as follows:

[t]he patrol of the highways of the State and the enforcement of the laws of the State relative to highway traffic, traffic safety, and motor vehicles shall be the primary responsibility of the troopers and officers of the South Carolina Highway Patrol.

The Highway Patrol is deemed by law as the agency with "primary responsibility" for enforcement of traffic safety in this State. Thus, in the absence of a specific statute authorizing the Highway Patrol to charge a fee for special events, the foregoing public policy prohibition upon an agency's charging a fee for a duty which it is otherwise required to perform by law, would most probably be held by a court to preclude the imposition of such a fee.

One statute in particular should be mentioned, however, in connection with the authority of one law enforcement agency to contract with another. Section 23-20-10 et seq. was enacted in 2000 as the "Law Enforcement Assistance and Support Act." This Act authorizes any state, county, municipal, or local law enforcement authority to enter into a contractual agreement whereby law enforcement services, may be provided to the state, county, municipal, or local law enforcement authority by an in-state or out-of-state law enforcement agency. Section 23-20-30 (A) provides as follows:

(A) The General Assembly recognizes the need to promote public safety and further recognizes that there may be situations where additional law enforcement officers are needed to maintain the public peace and welfare. Therefore, the General Assembly authorizes a law enforcement agency of this State to enter into contractual agreements with other law enforcement providers as may be necessary for the proper and prudent exercise of public safety functions. Public safety functions include traditional public safety activities which are performed over a specified time period for patrol services, crowd control and traffic control, and other emergency service situations. All contractual agreements shall adhere to the requirements contained in Section 23-20-40.

Section 23-20-40 specifies the particular information which each such contract must include. Pursuant to § 23-20-50 (A), the agreement must be approved by the "appropriate state, county, or

local law enforcement authority's chief executive officer. Where a state law enforcement authority is involved, a copy of the agreement must be provided to the Governor and the Budget and Control Board's Executive Director "no later than one business day after executing the agreement." In accordance with § 23-20-60, the Governor is empowered to waive the requirement of a written agreement in certain emergencies.

Of course, this statutory authority clearly envisions a contract between the law enforcement agency seeking assistance and the assisting agency. Rather than unilaterally charging a fee, the law enforcement agencies involved contract with each other, presumably as part of a negotiation process. On the other hand, Proviso 36.1, which has been vetoed, authorizes the Highway Patrol specifically to charge a fee unilaterally for its special events services only if such fee is approved by the General Assembly.<sup>1</sup> That provision has, at least for now, been nullified by the Governor's veto and we are aware of no other statutory authority enabling the Patrol to charge such a fee.

### Conclusion

In our opinion, and in light of the Governor's veto of Proviso 36.1, there presently exists no statutory authority for either the Highway Patrol or DPS to charge a fee for assistance at special events. While Proviso 36.1 forbade the Highway Patrol from charging a fee for special events unless such fee is approved by the General Assembly, the Proviso apparently represented the only existing statutory authority for such fee to be charged. Moreover, the Proviso reflected the General Assembly's intent to oversee the imposition of such a fee. Without the existence of such an enabling statute, a fee charged by the Highway Patrol would likely be deemed by a court not only to contravene the Legislature's intent but the constitutional principle of separation of powers as well.

We note that § 23-20-10 et seq., authorizes a law enforcement agency to contract with another agency for law enforcement assistance in carrying out public safety functions including crowd control and traffic control. However, this statute, as well as others,<sup>2</sup> envision that such shared authority and responsibility shall be pursuant to a mutual contract with the proper approval of the agencies involved.

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<sup>1</sup> If Proviso 36.1 had been enacted, there would be a question as to whether the Proviso or § 23-20-10 et seq. is controlling. Since Proviso 36.1 deals with the specific situation of a fee being unilaterally charged by the Highway Patrol, for special events, we deem that it would have been controlling here. On the other hand, § 23-20-10 et seq. would govern neutral contracts between the Patrol and another law enforcement agency pursuant to the terms and conditions thereof. However, this question is made moot by the Governor's veto, as there is no Proviso 36.1.

<sup>2</sup> Section 23-1-215 also provides that law enforcement agencies can contract with each other to conduct joint criminal investigations. This provision, however, does not appear to be applicable with respect to traffic control.

The Honorable Glenn F. McConnell  
Page 5  
September 4, 2003

Thus, we have located no statute which currently authorizes the Highway Patrol to charge a fee unilaterally for law enforcement and public safety assistance at special events. To the contrary, such services are specifically required to be performed by the Patrol pursuant to existing state law. The one provision of law potentially authorizing such a fee has been vetoed. In our opinion, without an enabling statute authorizing this fee, such fee cannot be charged.

Yours very truly,



Henry McMaster

HM/ph