

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803 734 3680

February 23, 1988

Mr. Purvis W. Collins
Director, South Carolina Retirement System
Post Office Box 11960
Columbia, South Carolina 29211

Dear Mr. Collins:

You have requested an opinion as to whether the South Carolina Deferred Compensation Plan has "legal access" to funds contributed to the Plan from political subdivisions other than state agencies. Stated differently, the question as I understand it is whether all "employer" funds held by the Plan are State funds, or whether there are two broad categories of "employer" funds within the Plan, namely, State funds and funds of other political subdivisions.

There is no question that the majority of the funds are "employer" funds and assets of either the State or the political subdivisions, as opposed to being funds belonging to the employees. The entire purpose of the Deferred Compensation Program is to permit the tax advantage of deferring compensation. § 8-23-10. I am informed that most of the funds in the Plan were deferred pursuant to § 457 of the Internal Revenue Code; under that section, the funds remain assets of the employer. A relatively small percentage of the deferrals occurred pursuant to Sections 401(k) or 403(b) of the Internal Revenue Code. Those funds remain employee funds, but are not the subject of this opinion request.

Since the purpose of the Deferred Compensation Plan is to permit employers to withhold and defer compensation, it is logical that the funds so deferred would remain assets of the particular employer, i.e., the State or a political subdivision. The legislation creating the Plan contains a number of disjunctive references to "the State or any political subdivision." See § 8-23-30 (State or any political subdivision may contract with employee to defer compensation); § 8-23-40 (similar to § 8-23-30); § 8-23-50 (payment of funds so deferred as a premium for

Mr. Collins

- 2 -

February 23, 1988

annuities, etc., not a prohibited use of assets of the State or political subdivision).

Section 8-23-80 provides that "[t]he financial liability of the State or political subdivision...shall be limited to the value of the particular...contract purchased." By referring to the funds deferred as assets or liabilities of either the State or a political subdivision, this section and § 8-23-50 confirm beyond doubt that any deferred funds which remain "employer" funds also remain assets of the particular employer. Thus, funds deferred by employers who are political subdivisions do not in any sense become State funds. The only funds which could be reached by creditors of the State are those which were deferred by the State as the employer of State employees.

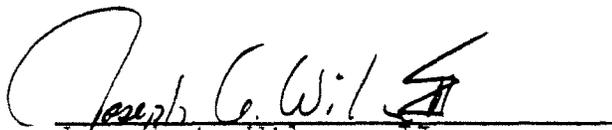
Sincerely yours,



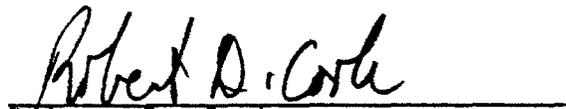
Kenneth P. Woodington
Senior Assistant Attorney General

KPW:jca

REVIEWED AND APPROVED BY:



Joseph A. Wilson, II
Chief Deputy Attorney General



Robert D. Cook
Executive Assistant, Opinions