

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 803-734-3970

December 8, 1987

The Honorable Thomas F. Hartnett
Member, South Carolina State
Ports Authority
Post Office Box 221
Charleston, South Carolina 29402

Dear Mr. Hartnett:

By your letter of September 21, 1987, you have advised that the South Carolina State Ports Authority, through its governing board, has instituted an executive incentive pay plan whereby the top executives of the Authority would receive additional compensation based upon the annual income of the Authority and their annual salaries. You have asked for the opinion of this Office as to the constitutionality of such a practice.

Description of Plan

The executive incentive pay plan has been described to this Office as a performance incentive plan to be based on future performance rather than a bonus plan based upon past performance of the executives involved. Utilizing formalized goals determined and communicated in advance of the performance measurement period, the specific amount of compensation may be calculated for plan participants upon completion of measurable goals and objectives. Any compensation to be received under the plan is subject to performance of future duties, a fact clearly understood by the participants in the program.

Such a plan may also be called an "incentive contract." Such a contract is described in Wyles v. Campbell, 77 F.Supp. 343 (D. Del. 1948):

An incentive contract may be considered as one by which a corporation may obtain or continue the services of a desired employee by offering him some compensation in addition to a fixed monetary salary. It is

intended to give to the prospective or continuing employee an incentive to come to or remain with the company itself and to reap some reward from the success of the company and of his services to it which is the expectation of the contract. This additional incentive compensation for future services may be in the form of additional monetary grant or a reasonable contingent grant with relation to profits or a reasonable stock interest. ...

Id., 77 F. Supp. at 350.

It thus appears that whatever additional compensation may be paid under the executive incentive pay plan may be prospectively arranged prior to services being rendered. It is our understanding that the plan has been implemented in this manner. However, the employees were selected to participate in the plan based on their past performances.

Constitutional and Statutory Provisions

Article III, Section 30 of the Constitution of the State of South Carolina (1895, as amended), provides the following in relevant part:

The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law... .

In addition, Section 8-15-10 of the Code of Laws of South Carolina (1976, as revised) provides:

Except as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of the State or any political subdivision, department or agency thereof shall be as from time to time provided by the General Assembly or the particular political subdivision, department or agency concerned, as the case may be.

The Honorable Thomas F. Hartnett
Page 3
December 8, 1987

In part, the questions you have raised are answered by the fact that the executive incentive pay plan is prospective in nature rather than retroactive, as noted above. This is in accord with the opinion of September 4, 1987 to the Authority by its attorney, William H. Vaughan, Jr. and with the opinion rendered by Dean Robert McC. Figg, Jr. by his letter of October 19, 1987 to this Office.

Whether the executives chosen to participate in the executive incentive pay plan would fall within the proscription of Section 8-15-10 of the Code must now be determined.1/

Status of Authority and its Employees

The South Carolina State Ports Authority was created by the General Assembly by statutes now codified at Section 54-3-10 et seq. of the Code. Through the Authority, the State engages in promoting and developing the seaports within this State, such activities including the operation of terminal facilities. See Section 54-3-110 of the Code. The State of South Carolina has not provided an appropriation for the Authority since about 1959; the operations of the Authority are self-sustaining.2/ The Authority in effect engages in a commercial or business operation of the ports of this State similar to and in competition with other port facilities of both a public and private nature, according to information provided by Dean Figg.

The relationship between the Authority and the State of South Carolina has been succinctly described in Doris Trading Corporation v. SS Union Enterprise, 406 F. Supp. 1093 (S.D.N.Y.

1/ It should be noted that, by Section 54-3-140 (4) of the Code, the governing board of the Authority is given the power to "appoint and employ and dismiss at pleasure such employees as may be selected by the board of the Authority and fix and pay the compensation thereof... ."

2/ As stated in South Carolina Farm Bureau Marketing Association v. South Carolina State Ports Authority, 278 S.C. 198, 293 S.E.2d 854 (1982), "[t]he only expenditure by the State [for the Authority] has been its capital investment to build and expand the elevator. This was financed primarily by the proceeds of general obligation bonds which were duly authorized by the General Assembly... ." 278 S.C. at 201.

1976), as follows:

The Authority was created by [§54-3-10] of the Laws of South Carolina, to be governed by a board of seven members appointed by the Governor.

Section [54-3-130] states that the "Authority is created as an instrumentality of the State," for the purpose of developing the harbors and stimulating trade through the ports of South Carolina.

The powers of the Authority are defined in [§54-3-140], which provides that the Authority "shall have the powers of a body corporate, including the power to sue and be sued, to make contracts and to adopt and use a common seal and alter it as may be deemed expedient." This section also gives the Authority the power to pay all necessary costs and expenses arising from its formation and operation, and the power to accept loans.

Section [54-3-140(9)] specifically provides that "no indebtedness of any kind incurred or created by the Authority shall constitute an indebtedness of the State, or any political subdivision thereof, and no such indebtedness shall involve or be secured by the faith, credit or taxing power of the State, or any political subdivision thereof." The Authority is also empowered to acquire property through purchase or condemnation in its own name.

Financial matters of the Authority are covered by §§ [54-3-1010 through 54-3-1050]. The Authority is empowered to raise funds by issuing bonds, payable out of revenues derived from its operations. All funds are to be deposited in bank accounts, and all earnings not necessary for operating expenses are to be held "subject to further action of the General Assembly."

The Honorable Thomas F. Hartnett
Page 5
December 8, 1987

Analyzing the foregoing statutes, the court continued:

The relationship, as revealed by these statutes, establishes that the Authority is not an "alter ego" of the state The state created the Authority with broad powers to sue and be sued, to pay all expenses arising from its activities, and to incur indebtedness in its own name. Furthermore, the state has purposefully insulated its treasury from any possible liability for any indebtedness incurred by the Authority. ...

Id., 406 F. Supp. at 1096. Thus, at least one court has found that the Authority "is not a state or governmental organization." Id., 406 F. Supp. at 1097.

Several court decisions have held that the Authority can be considered a state agency. See, for example, South Carolina State Ports Authority v. Seaboard Air Line Railroad Company, 124 F. Supp. 533 (D.S.C. 1954) (impliedly overruled by Doris Trading Corporation, supra). See also Section 30-4-20 (a) of the Code (Freedom of Information Act's definition of "public body" specifically includes the South Carolina State Ports Authority). This Office, in considering such decisions, has noted that

when the courts have held the SCPA ... to be [a State agency], they have used the term State agency as a term of art. The courts adopted this term of art in order to show that there is a special relationship between the governmental functions of the State and the quasi governmental functions which have been granted to the SCPA... . In every decision that has labeled the SCPA ... as [a State agency], the court has gone on to point out the fact that [this authority is an] independent, quasi municipal corporation []; designed and created with the idea that [it] will be self-sustaining in terms of financial operations and internal management.

In essence, the term State agency as applied to the SCPA ... is only used to show that [this authority is] embodied with certain governmental powers, e.g. eminent domain. The term is not used to show that the

The Honorable Thomas F. Hartnett
Page 6
December 8, 1987

SCPA ... [is] under direct day to day financial operations control by the State as is generally understood when the term State agency is used. 3/

Op. Atty. Gen. No. 78-210 dated December 21, 1978. That opinion concluded that the Authority did not fall within the definition of "state agency" as that term was used by the General Assembly in Section 24 of the Appropriations Act for 1978-79.

There are other indicia that the Authority is not to be treated as the usual State agency with state employees. For examples, Authority employees are not within the state employee classification system; they do not receive paychecks issued by the State of South Carolina; they do not accrue sick, annual or military leave under the same guidelines as state employees. The employees apparently do participate in the South Carolina Retirement System, however. See Simmons v. South Carolina State Ports Authority, 495 F. Supp. 1239, aff'd 694 F.2d 63 (4th Cir. 1982). Attorneys for the Authority are not employed subject to the Attorney General, as are attorneys for departments and agencies of State Government. See Part I, §10.4, Act No. 170, 1987 Acts and Joint Resolutions.

It may also be noted that the Authority is exempt from the requirements of the South Carolina Consolidated Procurement Code, which applies to procurements by governmental bodies as that term is defined in Section 11-35-310(18) of the Code. See Section 11-35-710(c). Employees of the Authority are exempt from provisions of the State Employees Grievance Act, as well. See Section 8-17-370(9) of the Code.

To summarize the foregoing, it is the opinion of this Office that an employee of the South Carolina State Ports Authority probably would not be considered an employee of the State of South Carolina, nor would the Authority likely be considered a State agency, to bring the Authority's employees within the purview of Section 8-15-10 of the Code.

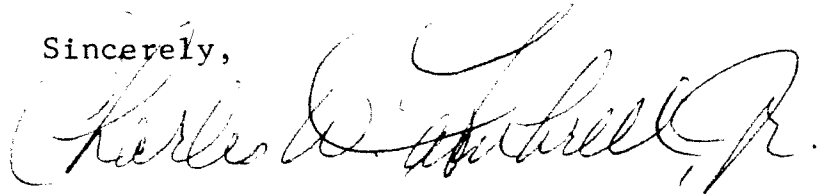
3/ SCPA refers to "South Carolina Ports Authority" throughout Op. Atty. Gen. No. 78-210, dated December 21, 1978.

The Honorable Thomas F. Hartnett
Page 7
December 8, 1987

Conclusion

In conclusion, it is the opinion of this Office that the executive incentive pay plan adopted by the governing body of the South Carolina State Ports Authority would probably not be violative of Article III, Section 30 of the State Constitution or Section 8-15-10 of the Code because the extra compensation would be for services to be rendered in the future by Authority employees who would probably not be considered to be state employees.

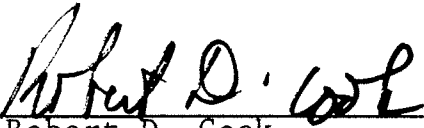
Sincerely,



Charles W. Gambrell, Jr.
Assistant Attorney General

CWGjr/rhm

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions