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The State of South Carolina

Office of the Attorney General

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November 15, 1985

The Honorable Thomas A. Limehouse
Member, House of Representatives
Post Office Drawer 2005
Summerville, South Carolina 29484

Dear Representative Limehouse:

INTRODUCTION

You have asked this Office to advise you on a number of questions concerning the payment of funds by Clemson University to its former President and athletic director. We have consolidated your various requests into one letter in order to provide the most comprehensive response possible and because all of the requests are interrelated.

We will attempt to set forth herein the various legal issues which are raised by your request and the general law in each of those areas. In doing so, please be advised that we cannot anticipate every legal question which might arise or has arisen by virtue of the facts as they have developed. As you are aware, the number of questions which can be posed under general contract law are myriad and numerous treatises have been written thereupon. However, we have attempted to set forth below certain basic legal issues. These will be addressed in turn. For purposes of clarity, we have attempted to provide headings for the various questions addressed.

PUBLIC FUNDS

You have asked for the opinion of this Office as to whether funds such as athletic, bookstore, or canteen funds, generated by state-supported colleges and universities, would be considered public funds.

"Public funds" are those monies belonging to a government, be it state, county, municipal or other political subdivision, in the hands of a public official. Droste v. Kerner, 34 Ill.2d 495, 217 N.E.2d 73 (1966); City of Youngstown v. Youngstown Municipal Railway Co., 134 Ohio St. 308, 16 N.E.2d 541 (1938); 63A Am.Jur.2d Public Funds § 1. Such funds are not necessarily

limited to tax moneys, City of Phoenix v. Wittman Contracting Co., 20 Ariz.App.1, 509 P.2d 1038 (1973). Our Supreme Court cited with approval in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967), the definition of "public money" from State v. Town of North Miami, 59 So.2d 779, which stated that "[i]t does not matter whether the money is derived by ad valorem taxes, by gift or otherwise." 250 S.C. at 90 (emphasis in original). See also Part I, §§ 1 and 131, Act No. 201 of 1985.

A similar question was addressed in an opinion of this Office dated August 10, 1973, a copy of which is enclosed for your information. Addressing funds derived from athletic contests, student organizations, and the operation of canteens and bookstores of state-supported colleges and universities, Attorney General McLeod concluded that while such funds were not State funds in the sense that they had to be turned over to the State Treasurer, they are nevertheless "public funds" and "are subject to such legislative directives as the General Assembly may provide." While this previous opinion interpreted a predecessor proviso, it is still applicable. Thus, athletic, bookstore, or canteen funds generated by state-supported colleges and universities would be considered "public funds" and must be expended in a manner consistent with state law. 1/

1/ The 1985-86 State Appropriations Act does extend to institutions a great deal of discretion in the expenditure of such funds. Section 131 of Act No. 201 of 1985 provides in pertinent part as follows:

> Provided, Further, That notwithstanding other provisions of this act, funds at State Institutions of Higher Learning derived wholly from athletic or other student contests, from the activities of student organizations, and from the operations of canteens and bookstores, and from approved Private Practice plans may be retained at the institution and expended by the respective institutions only in accord with policies established by the institution's Board of Trustees. Such funds shall be audited annually by the State but the provisions of this Act concerning unclassified personnel compensation, travel, equipment purchases and other purchasing regulations shall not apply to the use of these funds.

Despite the broad discretion, however, clearly these funds, because they are public funds, must be expended in accordance with the State Constitution and other statutory enactments. Op. Atty. Gen., August 10, 1973.

QUESTION PRESENTED RE INDIVIDUAL ASSURANCES

In addition, you have asked whether individual assurances made by members of the Board of Trustees with regard to a contract of employment without official action of the Board would constitute an enforceable contract. With regard to this question, we would note that this Office was not involved in any previous settlement or contractual negotiations between the parties, nor have we approved any agreements consummated.

REVIEW OF OCTOBER 10, 1985 OPINION

On October 10, 1985, this Office issued an opinion which concluded that where an individual has voluntarily resigned, where there exists no contract authorizing severance pay, where no future services to the State are to be rendered, or where the State is not "purchasing a contract" severance pay to a public employee is prohibited by Article III, § 30 of the State Constitution. We further concluded in that opinion that if a public body made the decision to pay severance pay as described above, that public body would be required to ratify in public session any such decision.

In the October 10 opinion it was noted that there is a distinction between "severance pay" in the constitutionally prohibited sense and the purchase or "buying out" of an employment contract. Of course, the "buying out" of an employment contract often means simply the relinquishment or settlement of a possible legal claim by way of a monetary payment. See, Oxford English Dictionary (1961 ed.), p. 1225. On the other hand, "severance pay" as prohibited by Article III, § 30 of the Constitution is an additional payment such as a "bonus" for services already rendered. We believe the foregoing principles stated in the October 10 opinion are legally sound.

FACTUAL ISSUES AND PERSONNEL SETTLEMENTS

However, it is evident that an opinion of the Attorney General cannot review after the fact those personnel settlements or contractual agreements that might have been previously entered between a State agency and its employees. For, it goes without saying that whether or not any oral contract could be made would depend in part upon the particular facts involved. And we have stated repeatedly that an opinion of this Office is inadequate to resolve factual questions. See, Op. Atty. Gen., October 9, 1985.

Your question appears to be closely intertwined with an actual review of a personnel settlement or contractual agreement which may have been entered into by certain Clemson officials.

Inherently, any substantive comment by this office upon that question would amount to an expression of either approval or disapproval after the fact of any agreement which may have been reached by the parties. This Office of course, ordinarily does not approve personnel settlements or contractual agreements where it has not participated in the negotiation thereof. See, Reg. 19-707.10, Code of Laws of South Carolina, 1976 (1984 Cum. Supp.); State Policy On Approval of Legal Settlements. Such regulation or policy would be applicable where Clemson officials may have "bought out" or settled any previous agreements.

Moreover, as stated above, the ultimate resolution of your question is dependent upon the particular facts involved. A legal opinion cannot resolve such obviously critical questions as: precisely what expectations the parties may have had or what reliance was placed upon any representations made; exactly what "individual assurances" might have been given and by whom, to whom; or what legal authority under Clemson's own operating practices and procedures such "individuals" may have been delegated at the time; important may be the question of how any delegation of authority may have been communicated to those "individuals" and whether they may have been acting collectively as a committee of the full Board or individually. Further, it would be significant whether the individuals merely discussed the possibility of offering a contract or actually made such an offer. Too, there may be involved the question of whether any subsequent "buy out" of a "contract" represents the settlement of legal claims in dispute by the parties. These questions, among others, would clearly have to be answered before any conclusions regarding the validity of any agreement or settlement could be made. And as you know, the precise sequence of events is unclear. Only recently, we stated in this same regard:

> Because this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine the difficult factual questions present here.
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> A fact-finding body normally possesses the authority to call witnesses, swear them under oath and compel them to testify in a public proceeding. Witnesses are usually subject to cross-examination, to bring out

> all the relevant facts. A factual record of the proceedings is maintained and numerous documents admitted into evidence. ... Of course, none of these important mechanisms for bringing out all the relevant facts is available in a legal opinion of this Office.
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> In short, a legal opinion of this Office would be inadequate to properly answer the question .... Because such validity is so intertwined with and dependent upon the facts involved, only a fact-finding body could make that determination.

Op. Atty. Gen., October 9, 1985

LEGAL ISSUES PRESENTED

It is generally recognized that, absent a specific statute indicating otherwise, contracts entered into by the State are governed by the general law of contracts. 81A C.J.S., States, § 155. As you have indicated, pursuant to general contract law, an oral contract is not unenforceable in each and every situation; the particular facts involved usually govern whether or not an agreement is enforceable. See, 15A C.J.S., Compromise and Settlement, § 17; Bakaly and Grossman, Modern Law of Employment Contracts, Chap. 5. As our Supreme Court has stated, "[w]hether there is or not a contract is ordinarily a question of fact ... ." Tire Co. v. Storage Battery Co., 113 S.C. 352, 362, 101 S.E. 838 (1919). The Court has further noted that "[c]ontracts may be implied from [the particular] circumstances as well as by written papers and oral agreement...." Moore v. Palmetto State Life Ins. Co., 222 S.C. 492, 498, 73 S.E.2d 688 (1952). Thus, there is little doubt that the validity of a particular oral contract depends upon the factual circumstances. Coker v. Richtex Corp. 261 S.C. 402, 200 S.E.2d 231 (1973).

Moreover, while courts often conclude that a public body cannot contract except through a majority of its members, see, Op. Atty. Gen., September 6, 1984, 81A C.J.S., States, § 156, in the final analysis, the factual circumstances again determine whether the action taken is valid or binding. For example, the precise authority delegated by the body to its members or others is many times critical. In this regard, it has been stated:

> While legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer cannot be delegated to

> others, it is equally well established that ministerial or administrative functions may be delegated to subordinates. The law has always recognized and emphasized the distinction between instances in which a discretion must be exercised by the officer or department or governing body in which the power is vested, and the performance of merely ministerial duties by subordinates and agents. Hence, the appointment of agents to carry out the authority of the council is entirely proper, and does not violate the rule delegatus non potest delegare. So the council may authorize the mayor to make a contract which the council alone is authorized to make and itself afterwards ratify such contract and take action.... In such case the mayor merely acts as the instrument ... of the council. It is through him that the contract is made. The council by ratification finally determines and thus fulfills the duty.

2 McQuillin, Municipal Corporations, § 10.41. Thus, although as a general rule where the public body enters into a contract with another the public body must act collectively in making the contract, again one must know whether a delegation of authority to individual members, committees, or executive officers has occurred and the limits of that delegation. Such is ultimately a question of fact.

Further, questions of reliance by one or more of the parties upon what they may believe to be promises or assurances given must be given consideration in analyzing whether a contract is legally enforceable or binding. Sometimes, courts will protect assurances made where there is reliance thereupon even if no legal contract has been consummated or if the contract is otherwise unenforceable because of the Statute of Frauds. See, Murray on Contracts, § 93; Coker v. Richtex Corp., Supra; 10A S.C. Digest, Statute of Frauds, Key 129; Oswald v. Co. of Aiken, 315 S.E.2d 298 (S. C. Ct. of App. 1984). While the Statute of Frauds, § 32-3-10 et seq., requires a written memorandum or a writing for contracts where performance will be beyond a year, our Court has stated that certain equitable doctrines, such as performance or reliance may constitute an exception. See, Parr v. Parr, 268 S.C. 58, 231 S.E.2d 695 (1977); see also, Florence Printing Co. v. Parnell, 178 S.C. 119, 126, 182 S.E. 313 (1934) [equitable doctrine of reliance providing an exception to the Statute of Frauds is "peculiarly applicable to oral extensions...."]. Such issues of reliance and part performance undoubtedly require a factual determination to be satisfactorily resolved.

Finally, the question of whether the parties have consummated a legal settlement would undoubtedly arise. As mentioned earlier, sometimes the "buying out" of a contract means simply that the parties have reached a legal settlement of any dispute as to their previous contractual relationship. It is generally recognized that

> ... the settlement of a bona fide dispute or unliquidated claim, if made fairly and in good faith is sufficient consideration for a compromise based thereon....

15A C.J.S., Compromise and Settlement, § 11. Moreover,

> ... any disputed right or claim asserted in good faith and on reasonable grounds, whether it arises out of contract, or whether, on the other hand, it arises out of tort, may be the subject of compromise.

Supra, § 3. Of course, the fact that the parties settle a contractual dispute does not necessarily mean that there was originally in existence a legally binding contract. Id. It means simply that in good faith the parties have agreed that each may have an arguably sustainable legal position as to their own contractual rights and have decided to resolve their differences by a settlement agreement. Of course, any settlement agreement must itself "possess the essential elements of any other contract." Supra. Thus, it is apparent that, like the other relevant factors discussed above, a legal opinion is not able to address the issue of settlement adequately because the conclusions are too dependent upon the actual circumstances. 2/

RATIFICATION AND FREEDOM OF INFORMATION ACT

One further comment as it relates to your first question is in order. As noted above, because the facts are so relevant to this question in light of the numerous legal issues involved, this Office cannot say as a matter of law whether legally binding and enforceable contracts were ever made between Clemson and its former athletic director and president. Nor, as stated, do we ordinarily review any agreement to "buy out" or "settle" those agreements which were made or were thought to have been

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2/ Neither could the question be answered in the abstract. There are simply too many variables in contract law to be able to make a generalization as to whether an agreement is binding or enforceable. Again, whether a contract exists is "ordinarily a question of fact." Tire Co. v. Storage Battery Co., Supra.

made. As we further pointed out, under existing contract law, courts will usually recognize earlier agreements as binding where subsequently ratified by a majority of a governing body. 72 C.J.S., Supp., Public Contracts, § 4. With regard to the Clemson situation, we do not know whether such ratification is contemplated.

However, as we recognized in the October 10 opinion, and again here, where a public body itself has entered into an agreement, ratification of the agreement would have to be done in public session pursuant to the Freedom of Information Act in order to constitute the legally binding and effective action of the public body. This Office has consistently been of the opinion that the Freedom of Information Act requires that any action taken by a public body must be affirmed in public session in order to constitute legal action of that body.

South Carolina's Freedom of Information Act is presently codified as Section 30-4-10 et seq. Code of Laws of South Carolina (1984 Cum. Supp.). In enacting the FOIA in its present form in Act No. 593, 1978 Acts and Joint Resolutions, the General Assembly found

> that it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, this act is adopted, making it possible for citizens, or their representatives, to learn and report fully the activities of their public officials.

Act No. 593 of 1978, Section 2. In order to implement this basic purpose, Section 30-4-70(5) requires that

> [a]ny formal action taken in executive session prior to such action becoming effective. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action.

This provision was examined extensively in a previous opinion involving the selection of certain highway commissioners, wherein it was determined that for such election to be valid it must be affirmed in a public session of the Highway Commission. See, Op. Atty. Gen., April 24, 1984. Thus, should the Board choose to ratify any previous agreements or settlements reached

either by individual members of the Board, one of its committees or other Clemson officials or officers such action in order to be effective pursuant to the Freedom of Information Act, would undoubtedly have to be affirmed by a majority of the Board in public session. 3/ This is consistent with the previous advice of this Office:

> When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.

Op. Atty. Gen., No. 83-55, August 8, 1983.

RETIREMENT BENEFITS

You have also asked whether an individual whose employment contract has been purchased for the upcoming three years and also retired simultaneously with the agreement to purchase the contract would be entitled to draw his state retirement during the period of time he was receiving compensation under the contract. It is well settled that, unless restricted by the Constitution, it is a matter for the Legislature to determine in what circumstances and under what conditions an employee shall be entitled to retire and receive benefits. 81A C.J.S., States, § 115. Moreover, it is also established that there must be a statute prohibiting an individual from receiving his retirement benefits although he is being paid by the State. Id. By statute, an employee may be precluded from receiving both a retirement allowance and a salary for State employment.

Your attention is directed to § 9-1-1790 of the Code which appears to be the statute which most nearly addresses your

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3/ Our comments here are confined to the requirements of the Freedom of Information Act. Ratification is one important factor in considering whether an agreement would be legally binding, but even here, any broad generalization that ratification necessarily validates any agreement made would be speculative on our part. All of the other legal principles stated above would have to be applied to the particular factual situation. Obviously, this Office can only advise generally as to the legal issues which might arise and the general law relevant to these questions. Clemson's own legal staff would, of course, have to advise Clemson officials as to any future specific legal course of action to take.

question. Such section provides as follows:

> Any retired member of the System may return to employment covered by the System and earn up to seven thousand dollars per fiscal year without affecting the monthly retirement allowance he is receiving from the system. If the retired member continues in service after having earned seven thousand dollars in a fiscal year, his retirement allowance must be discontinued during his period of service in the remainder of the fiscal year. If the employment continues for at least forty-eight consecutive months the provisions of § 9-1-1590 apply. The provisions of this section do not apply to any employee or member of the System who has mandatorily retired because of age pursuant to § 9-1-1530.

It is clear that the applicability of § 9-1-1790 is dependent upon whether, from a legal standpoint, an individual who has retired continues in the "employment" of the State. In a previous opinion, this Office concluded that whether an individual continues in or has returned to employment by the State is largely a factual question dependent upon a number of factors set forth therein. See, Op. Atty. Gen., November 22, 1983, n. 5, pp. 6-7. I am enclosing a copy of this opinion for your review. Again, however, the ultimate answer to your question depends upon the particular facts involved.

SUMMARY OF ISSUES DISCUSSED

This Office has attempted herein to outline comprehensively for you many of the legal issues raised by your request. In summary, in the two related opinions, we have set forth the general law in the following areas: (1) the nature of severance pay and the state constitutional restrictions thereupon; (2) the requirements imposed upon a public body pursuant to the Freedom of Information Act in the context of that body's choosing to take formal action; (3) the general requirement of a majority vote in order for a collective body to act; (4) the characterization of certain revenues generated by a state institution as "public funds"; (5) the statutory and constitutional restrictions upon the expenditure of these public funds; (6) the applicability of the law of contracts to public agencies; (7) the nature and validity of oral contracts generally; (8) the delegation of authority to administrative officials and the ratification of previous agreements by a

majority vote of a public body; (9) contractual principles regarding equitable estoppel and detrimental reliance; (10) the applicability of the Statute of Frauds to oral contracts beyond a year and the applicability of principles of estoppel and reliance to the Statute of Frauds; (11) the legal principles concerning a settlement agreement; (12) approval of settlement agreements; and (13) the present statutory provision dealing with the simultaneous receipt of retirement benefits and compensation by virtue of State employment.

Each and every one of these legal areas is inherently complex. And any conclusions as to the applicability of one or more of these in the absence of particular facts would be speculative on our part. As we have stated, such cannot be done in a legal opinion particularly where action has already been taken. However, we have attempted to generally set forth for you the law in all of these areas.

As you have recognized, the questions presented raise issues of policy and practice as much as strictly legal inquiries. Your concern may be with whether public funds have been wisely spent as much as with whether they have been expended in a lawful manner. Of course, our Supreme Court has stated that

> ... the Legislature is primarily the judge as to what laws should be enacted for the protection and welfare of the State and its people.

State ex rel. Zimmerman v. Gibbes, 171 S.C. 209, 218, 172 S.E. 130 (1933). Accordingly, you may wish to consider legislation which would further clarify in future circumstances the various legal and policy concerns which you have expressed.

Sincerely,

Robert D. Cook
Executive Assistant for Opinions

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Enclosures