

1983 WL 181993 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 7, 1983

*1 William A. McInnis
Deputy Executive Director
State Budget and Control Board
Post Office Box 12444
Columbia, South Carolina 29211

Dear Mr. McInnis:

You have asked three questions regarding § 3, Part II of the 1983-84 Appropriations Act (hereinafter the Act) which concerns the South Carolina Mental Health Department (hereinafter the Department). Each question is addressed separately.

I.

First, you have asked whether the Budget and Control Board can approve the diversion of a portion of the Department's paying patient revenues from a debt service fund established by the Act, and authorize the Department to use the diverted revenues to pay a consultant under a contractual arrangement by which the consultant's payment would be made from increased Medicare and Medicaid revenues resulting from his work. It is our opinion that the Board does not have the authority to approve this diversion.

The Mental Health Commission is directed by the Act 'to remit all revenues to the State Treasurer . . . ' [Supra](#), § 3(I).¹ Revenues are defined in the Act as 'revenue derived from paying patients.' § 3(A)(5), [supra](#). This is consistent with the general statute which requires that

'[a]ll State departments [or] . . . commissions . . . charged with the collection of any . . . fees . . . shall . . . deposit the same when collected with or to the credit of the State Treasurer . . . '

[Section 11-13-120, Code of Laws of South Carolina](#), 1976. We can find no statutory authority which would permit the Commission to avoid depositing these revenues with the State Treasurer.

Once deposited, of course, the Constitution requires that '[m]oney shall be drawn from the Treasury of the State . . . only in pursuance of appropriations made by law.' [Art. X, § 8, South Carolina Constitution](#). It appears that no appropriation has been made for the purpose of such a contract proposed here. Therefore, the Budget and Control Board cannot authorize the Department of Mental Health to use or divert patient revenues for the payment of the consultant contract. [State of South Carolina v. Corbin and Stone](#), 16 S.C. 533, 541 (1881). See also [MacDougall v. Board of Land Commissioners](#), 49 P.2d 663, 666 (Wyo. 1935). (A similar state constitutional provision held to prohibit a contract with an auditing company in which compensation to contractor would be a percentage of amounts recovered.)²

II.

Second you have asked whether the Board may authorize payment to the contractor out of the paying patient revenues that exceed the amount necessary for debt service requirements pursuant to the Act. It is our opinion that the Board has no authority to authorize such payment.

There is no statute which authorizes the Board to approve or permit such payments out of any portion of those revenues. The General Assembly has expressly provided in the Act that those revenues be credited to a special fund in the State Treasury for the purpose of meeting the debt service on certain capital improvement bonds. § 3(I), *supra*. It has also apparently made provision for the use of any excess amounts in that special fund to be withdrawn by the Commission and applied 'to improvements that have received the approval of the [Budget and Control] Board.' § 9, Act No. 1276, South Carolina Acts and Joint Resolutions, 1970 [56 STAT. 2711].³ There is no other statutory provision for the use of excess amounts in the special fund. In the absence of statutory authorization no other use of these revenues may be made. *State of South Carolina v. Corbin and Stone*, *supra*. For these reasons as well as those same reasons stated above in Part I of this opinion, the Board may not authorize the expenditure of any moneys out of that special fund for the proposed consultant's contract.

III.

*2 Finally, you have asked the status of Act No. 1276 of 1970 in light of the enactment of § 3, Part II of the 1983-84 Appropriations Act. It is our opinion that the earlier Act has been repealed, with the possible exception of the second paragraph in § 9 of the 1970 Act.

The 1983 Act follows the working of the 1970 Act except for four changes: (1) the 1983 Act expands the definition of 'improvements' funded pursuant to the Act (Subsection A(2)); (2) it restricts the use of revenues derived from paying patients at the Alcohol and Drug Addiction Center (Subsection A(5)); (3) it raises the debt ceiling on capital improvement bonds issued for the Commission (Subsection (E)); and (4) it omits the provision contained in § 9 of the 1970 Act allowing the Board to approve a limited use of excess revenues in the special fund. The 1983-84 Appropriations Act further provides that '[a]ll Acts or parts of Acts inconsistent with any of the provisions of Part II of this Act are hereby repealed.'

It is clear from the re-enactment of the earlier Act that the legislature intended that the 1983 Act repeal or supercede the 1970 Act with the possible exception of one provision in the 1970 Act. The first three changes in the 1983 Act noted in the preceding paragraph are inconsistent with the corresponding provisions in the 1970 Act. The law is well established that [w]hen a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict.

1A SUTHERLAND STATUTORY CONSTRUCTION, § 23.09. Such conflict is immediately apparent as to the first three changes.

There is no clear conflict with respect to the fourth change, that is, the omission in the 1983 Act of the second paragraph in § 9 of the 1970 Act. The 1970 Act contains a provision in § 9 for a limited use of excess revenues in the special fund; the 1983 Act is silent on the use of such excess revenues. One commentator has written that '[w]hen . . . an existing statute is reenacted by a later statute in substantially the same terms, a repeal by implication is effectuated . . . of those provisions which are omitted from re-enactment.' SUTHERLAND, *supra*, § 23.28. However, according to the law in this State, repeals by implication are not favored and will be found 'only when there is clearly an irreconcilable conflict.' In the *Interest of Shaw*, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980); *City of Spartanburg v. Blalock*, 223 S.C. 252, 262 75 S.E.2d 361, 366 (1953). There is no irreconcilable conflict between the 1983 Act and the subject paragraph in the 1970 Act. The 1983 Act can be given full effect while still permitting the limited use of excess revenues allowed in § 9 of the 1970 Act. Therefore, it is our opinion that the second paragraph in § 9 of the 1970 Act should still be deemed effective, while the remaining provisions of the 1970 Act have been superceded or repealed by the 1983 Act.

Sincerely yours,

*3 Joseph A. Wilson, II

Chief Deputy Attorney General

Footnotes

- 1 In addition to the statutory duty to remit all revenues to the State Treasurer, there is also a duty arising from a contractual obligation between the Commission and the Budget and Control Board, which obligation is expressly mandated by the Act as a condition for the receipt of funds for capital improvements. Since the contractual requirement to remit all revenues is mandated by statute, neither party has the authority to amend the terms of that contractual obligation to permit the arrangement under consideration here. 81A C.J.S. 'States,' § 120. See § 11-1-40, Code of Laws of South Carolina, 1976; See also [Beacham v. Greenville County](#), 218 S.C. 181, 186, 62 S.E.2d 92, 94 (1950).
- 2 The General Assembly has provided by statute that some of these paying patient revenues would be paid into the General Fund for other purposes. § 39, Part I of the 1983-84 Appropriations Act (1st and 3rd proviso). However, for reasons stated above, absent statutory authorization the diversion of these revenues for some other purpose, such as that under consideration here, would be unlawful.
- 3 The validity of this last statutory provision is not free from doubt for reasons set out below in Part III of this opinion. However, this does not affect the conclusion reached herein that the Board may not authorize payment to this consultant out of the special fund.

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