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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

November 10, 2004

The Honorable Thomas L. Moore
Senator, District No. 25
Box 400
Clearwater, South Carolina 29822

Dear Senator Moore:

You have enclosed a copy of Proviso IB from the General Appropriations Act – a proviso "which mandates for state employees and various public officials the subsistence rate as provided by the General Assembly." As you indicate, "Part IB provisos from the 2004 Appropriations Act are effective for the July 2004 - June 2005 fiscal year, and supplant and supersede permanent law to the contrary." By way of background, you state the following:

> [i]t is my understanding that any attempt of an agency, whether through its director of through formal action by the membership of the board or commission, to increase or decrease the subsistence amount which may be claimed by an individual board member or commissioner, such amount having been established by the General Assembly, would be void and therefore not binding. I am not questioning the prerogative of an individual board member, if he or she so chose, to forego subsistence altogether or to claim a lesser amount than that to which he or she was entitled. However, I am unaware of any legal authority of a state agency or board to override or circumvent the statutory law enacted by the General Assembly by attempting to either mandate reduction of or increase the amount authorized by state law for such reimbursements. The same would hold true, as I understand it, for similar attempts to add additional or different qualifications or restrictions for reimbursements from those imposed by law.
>
> Further, it is also my understanding that it would be either malfeasance or misfeasance for an agency director, whether directly or through another employee, to knowingly and willfully refuse to reimburse a public official who has met all the requirements of the proviso and has completed the appropriate paperwork for that amount of reimbursement, which is provided by law.

Please confirm whether the above are correct statements of the law.

Law / Analysis

It is evident that your questions are somewhat general in nature and do not reference a specific factual situation. Moreover, it goes without saying that each situation will be governed by its own unique facts. This Office is, of course, unable in an opinion to make factual determinations, draw factual conclusions or to weigh or assess the facts. See, Op. S.C. Atty. Gen., December 12, 2003. Accordingly, nothing herein should be construed as an opinion which addresses any specific factual circumstances. With that said, we will make general comments regarding the questions which you have raised.

A number of principles of statutory construction are relevant to your inquiry. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1991). A court must apply the clear and unambiguous terms of a statute according to their literal meaning. Id.

Furthermore, the limitations of administrative officers in executing state laws enacted by the General Assembly must be a point of emphasis here. In South Carolina Tax Commission v. S.C. Tax Bd. of Review, 278 S.C. 556, 559, 299 S.E. 489, 491 (1983), the South Carolina Supreme Court commented that

> [a]n administrative agency has only such powers as have been conferred upon it by law and must act within the granted authority for an authorized purpose. It may not validly act in excess of its powers nor has it any discretion as to the recognition of or obedience to a statute. The agency must obey a law found upon the statute books until in a proper proceeding its constitutionality is judicially passed upon. Quoting 2 Am.Jur.2d, Adm. Law, § 188, p. 21.

And, in Goodman v. City of Cola., 318 S.C. 488, 458 S.E.2d 531 (1995), the Court noted that while regulations authorized by the legislature have the force of law, Faile v. S.C. Employment Security Comm. 267 S.C. 536, 230 S.E.2d 219 (1976), a regulation of an administrative agency may not alter or add to a statute. Society of Professional Journalists v. Sexton, 283 S.C. 563, 324 S.E.2d 313 (1984). Administrative rule making which materially alters or adds to the statutory law is void. Milliken v. S. C. Dept of Labor, 275 S.C. 264, 269 S.E.2d 763 (1980).

It has also been stated that the power to make laws is a legislative power and may not be exercised by executive officers or bodies, either by means of rules, regulations, or orders having the effect of legislation, or otherwise. Similarly, the power to alter or repeal laws resides only in the

General Assembly and executive officers may not by means of construction, rules and regulations, orders or otherwise, extend, alter, repeal, set at naught or disregard laws enacted by the Legislature 16 C.J.S. Constitutional Law, § 217. An administrative officer may apply only the policy declared in the statutes with respect to the matters over which he has authority and he may not set different standards or change the policy. 83 C.J.S., Public Administrative Law and Procedure, § 32. The agency or board, as a general rule, may not materially alter or add to statutory requirements. Brooks v. S. C. State Bd. of Funeral Service, 271 S.C. 457, 247 S.E.2d 820 (1978).

Moreover, it is well recognized that the General Assembly possesses full authority to make such appropriations as it deems necessary in the absence of a specific constitutional limitation. Clarke v. S. C. Public Service Authority, 177 S. C. 427, 181 S. E. 481 (1935). Such power residing in the Legislature to appropriate funds – i.e., the designation of how public monies are to be spent – is plenary, except as restricted by the Constitution. Cox v. Bates, 237 S. C. 198, 116 S.E. 2d 828 (1960). Indeed, Art. X § 9 of the South Carolina Constitution mandates that "money shall be drawn from the Treasury only in pursuance of appropriations made by law." Most recently, in Condon v. Hodges, 349 S.C. 232, 562 W.E.2d 623 (2002), the Supreme Court of South Carolina concluded that "there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money." 349 S. E. at 245. See, Gilstrap v. S. C. Budget and Control Bd., 310 S.C. 210, 423 S.E.2d 101 (1992) [the General Assembly cannot delegate its legislative power to appropriate money to executive branch members such as Budget and Control Bd.].

In an opinion dated November 18, 2002, we addressed the question of whether the Workers Compensation Commission could, by policy, deny payment, require hotel receipts or change the provision in the Appropriations Act which provided that members of the Commission, "shall be allowed" subsistence/per diem of $95.00 per day. We concluded that such change of alteration could not be done.

> [t]he General Assembly has established the per diem amount and the full Commission possesses no authority to alter or amend this amount established by law. Notwithstanding that the Commission possesses authority to promulgate regulations, this authority does not extend to an amendment of the statutes referenced above or a refusal to pay the authorized amount. Soc. of Profess. Journalists v. Sexton, supra. As to your question regarding hotel receipts, the law does not speak to such requirement. Such would be an administrative decision beyond the scope of an opinion of this Office. I would only note that any requirement regarding hotel receipts cannot change the statutory requirement regarding payment of per diem.

The conclusion expressed in the foregoing Opinion is further supported by the legal principle that in case of conflict between a Proviso in the state Appropriations Act and a permanent provision of law, the proviso is generally controlling for that fiscal year. As we stated in an Opinion of March 19, 2003,

> This Office has previously concluded that, in case of conflict between a provision of the annual appropriations act and an inconsistent general law, the provisions of the appropriations act would have the effect of suspending the provisions of the conflicting general law. See Ops. S.C. Atty. Gen Dated July 28, 1992, June 5, 1990, October 10, 1989 and November 21, 1978. Our opinion in this regard is based on and supported by longstanding authority from our Supreme Court. In State ex rel McLeod v. Mills, 256 S.C. 21, 180 S.E.2d 638 (1971), the Court cited with approval Brooks v. Jones, 80 S.C. 443, 61 S.E. 946 (1908); United States v. Mitchell, 109 U.S. 146, 3 S.Ct. 151, 27 L.Ed. 887 (1883); and, State ex rel. Buchanan v. State Treas., 68 S.C. 411, 47 S.E. 683 (1904) and held that "[a]n appropriation act, though generally in duration temporary, has equal force and effect as a permanent statute for the time being. If approved subsequently to such permanent act, and there is irreconcilable conflict, the latter is suspended during the time the appropriation act is of force." State ex rel McLeod v. Mills, 180 S.E.2d at 640.

Accordingly, based upon the foregoing authorities and, of course, dependent upon the particular factual and legal circumstances surrounding your situation, I would generally concur in your conclusion that a board or board member possesses no authority to alter or modify the per diem established by the General Assembly.

With respect to your question regarding misfeasance or malfeasance, such is also dependent upon the particular factual circumstances. Again, our comments herein are general in nature and do not address any specific factual situation.

We would not that the law generally defines the terms "misfeasance" and "malfeasance" by public officers as follows:

> "Misfeasance" as a cause for removal from office is a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done. "Malfeasance" is the doing of an act wholly wrong and unlawful... . While officers should not be removed from office for malfeasance without proof of willful and knowing wrongdoing, it is not necessary to show a specific intent to defraud or that the involved act is criminal or corrupt in character... .
>
> > Nonfeasance is the substantial failure to perform a duty, or, in other words, the neglect or refusal, without sufficient excuse, to do that which it was the officer's legal duty to do.

67 C. J. S., Officers, § 122. Our Supreme Court has held in Rose v. Beasley, 327 S. C. 197, 203, 489 S.E.2d 625, 628 (1997) that "[a] public officer's failure to comply with a statutory duty constitutes misfeasance in office." [citing Richland County v. Owens, 92 S.C. 329, 75 S.E. 549 (1912)]. See also, S.C. Code Ann. Section 1-3-240 (A) [removal by Governor of any state or county officer who

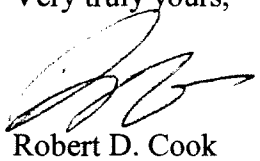
is guilty of malfeasance, misfeasance, etc.]; State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) [common law crime of misconduct in office].

Thus, it is clear that administrative agencies must comply with the statutes of the General Assembly as written. Failure by executive officers to adhere to or obey statutory mandates may be – dependent upon the facts, particularly the person's knowledge and intent – to constitute misfeasance.

Conclusion

Based upon the foregoing authorities, we would advise that, as a general matter, your letter sets forth correct statements of the law. An agency or administrative body generally possesses no authority to change or alter per diem amounts or requirements set forth by statute. Likewise, as a general rule, the agency or board may not materially alter or add to statutory requirements. Brooks v. S.C. State Bd. of Funeral Service, supra. Moreover, as our Supreme Court stated in Rose v. Beasley, supra, a public officer's failure to follow a clear statutory mandate may constitute misfeasance in office. However, we caution again that each situation necessarily depends upon the particular facts and law which may be applicable to that situation. We offer herein no opinion regarding any particular factual circumstances.

Very truly yours,



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