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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

June 21, 2005

The Honorable David H. Wilkins
Speaker of the House
South Carolina House of Representatives
Post Office Box 11867
Columbia, South Carolina 29211

Dear Speaker Wilkins:

By letter, you request our opinion regarding the intent of the South Carolina Noneconomic Damages Awards Act of 2005 (Act No. 32 of 2005). Specifically, you inquire concerning the degree of control over the Patients' Compensation Fund (PCF) which the new legislation places in the Fund's Board of Governors. In your letter, you explain that Section 8 of the Act amending S.C. Code § 38-79-460 now provides that the Board of Governors *must* manage the PCF.

You explain that, prior to the Act's passage, the PCF consisted of a "Restricted Account" and an "Operating Account" which were maintained by the State Treasurer and monitored by the Office of State Budget. Your inquiry pertains to whether the Act's passage resulted in control of both PCF accounts being transferred to the Board of Governors, or whether the Act intended only to transfer control of the "Restricted Account" to the Board, thereby leaving maintenance and control of the "Operating Account" with the State Treasurer. Finally, you note that the PCF believes that the intent of the new legislation was to transfer only control of the "Restricted Account" to the Board of Governors. We advise that, in amending Section 38-79-460, the General Assembly intended that management authority over the fund in its entirety rests with the Board of Governors. However, as will be shown below, Section 38-79-430 also provides that the Board possesses broad discretion with respect to its managerial duties, and thus the Board has authority to designate the State Treasurer as its agent to administer the "Operating Account."

Law/Analysis

We begin by assessing the statutory language in order to properly determine the impact of the amendments to Section 38-79-460 on the Board of Governors and its authority to manage the Fund. The cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.E.2d 203 (Ct.App.2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used,

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and that language must be construed in the light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct.App.1999) cert. denied as improvidently granted, *State v. Hudson*, 346 S.C. 139, 551 S.E.2d 253 (2001).

The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan, supra*. Words must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. *Id.* When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. *Id.* In the interpretation of a statute, the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law should all be considered. *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *Hudson, supra*.

When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct.App.1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.* Any ambiguity in a statute should be resolved in favor of a just, equitable, and beneficial operation of the law. *Id.*; *City of Sumter Police Dep't v. One (1) 1992 Blue Mazda Truck*, 330 S.C. 371, 498 S.E.2d 894 (Ct.App.1998).

Prior to amendment, § 38-79-460 required that the PCF be held in "trust" and maintained by the State Treasurer's Office. The former version of § 38-79-460 provided as follows:

> [t]he Fund, and any income from it, must be held in trust, deposited in the office of the State Treasurer and kept in a segregated account entitled "Patients' Compensation Fund," invested and reinvested by the State Treasurer in the same manner as provided by law for the investment of other state funds in interest-bearing investments and may not become a party of the general funds of the State. All expenses of collecting, protecting, and administering the Fund must be paid from the Fund.

However, even before passage of the new law, § 38-79-430 authorized the Board to "manage and operate the fund." In other words, the law as it previously existed, while expressly requiring the Fund to be deposited in trust with the State Treasurer for investment and reinvestment, nevertheless, placed ultimate management control of the Fund under the Board.

Section 38-79-460 was substantially amended by Act No. 32, § 8 of 2005. As amended, the new Act removed much of the language previously found in § 38-79-460, particularly as it related to the State Treasurer. The new version of § 38-79-460 states:

> [t]he fund, and any income from it, *must* be managed by the board *according to its plan of operation* developed pursuant to Section 38-79-430.

(emphasis added) Thus, the General Assembly, by passage of Act No. 32, has removed the Fund's trust fund status and has further removed *any requirement* that the Fund and any income from it be deposited with the Treasurer. However, this does not necessarily mean that the Fund, or at least its Operating Account, may not, as a matter of the exercise of the Board's discretion, continue to be deposited with and managed on a day-to-day basis by the State Treasurer.

Section 38-79-430 specifies certain requirements for the plan of operation for administering the PCF. Reference to § 38-79-430 was added to the language of the amended Section 38-79-460. In part, Section 38-79-430 provides as follows:

> [t]he board *shall* develop a plan of operation for the efficient administration of the fund *consistent with the provisions of this article*. The fund *must operate pursuant to a plan of operation* which shall provide for the economic, fair, and nondiscriminatory administration and for the prompt and efficient provision of excess medical malpractice insurance and which may contain other provisions including, *but not limited to*, assessment of all members for expenses, deficits, losses, commissions arrangements, reasonable underwriting standards, acceptance and cession of reinsurance appointment of servicing carriers, and procedures for determining the amounts of insurance to be provided by the association. The fund may not grant retroactive coverage to members. The plan of operation and any amendments to the plan are subject to the approval of the director or his designee. If the board fails to develop a plan of operation within the time frame established by the Governor or his designee, the director or his designee shall develop the plan of operation for the fund.

(emphasis added)

As a preliminary matter, we note that neither the former § 38-79-460 nor its amended version contain language referring to separate PCF accounts. The creation of these two accounts (Restricted and Operating) was likely the result of the Board's exercise of discretion with respect to creating a plan of operation authorized through Section 38-79-460. Inasmuch as the General Assembly did not reference the creation of separate accounts, references to the PCF are to the Fund *in its entirety*. Accordingly, when the General Assembly made reference to "the fund" in both the previous and amended versions of Section 38-79-460, it is our belief that it intended to speak to all monies in the fund, including all accounts.

With respect to the impact of Act No. 32 upon Section 38-79-460, we advise that a fair and reasonable reading of the statute as amended is that the General Assembly intended that the Board be given complete control over all PCF accounts. As noted, prior to Act No. 32's passage, the PCF was "held in trust, deposited in the office of the State Treasurer and kept in a segregated account..." This language clearly indicates that the Treasurer managed both accounts on a day-to-day basis, subject to the Board's ultimate authority to manage the Fund pursuant to § 38-79-430. Act No. 32, however, now simply requires "[t]he fund, and any income from it, must be managed by the board..." The General Assembly's replacement of the "State Treasurer" language with the reference

to the Board of Governors provides a clear intent to emphasize and insure that the ultimate management of the Fund is in the Board.

Further evidence of the General Assembly's intent is evidenced by the language used in the title section of Act No. 32 describing the Act's purpose. In part, the title provides as follows:

> TO AMEND SECTION 38-79-460, RELATING TO THE PATIENTS' COMPENSATION FUND, SO AS TO PROVIDE THAT THE FUND SHALL BE MANAGED BY THE BOARD OF GOVERNORS RATHER THAN THE STATE TREASURER

Thus, both the statutory language and the Act's title provide convincing evidence with respect to the intent of the Legislature. The legislative purpose in amending Section 38-79-460 was, as stated, to insure that the Board of Directors possesses authority for the ultimate management of the Fund.

As stated in your letter, the PCF is of the opinion that the General Assembly intended the Board of Governors to assume management responsibilities of the "Restricted Account," but leave management of the "Operating Account" with the State Treasurer. However, as noted above, Act No. 32 delegated management authority of the PCF *including both accounts* to the Board of Governors. In amending Section 38-79-460, it is clear that the General Assembly delegated broad discretion to the Board of Governors to manage the Fund. Section 38-79-460 provides that the Board must manage the Fund "according to its plan of operation developed pursuant to Section 38-79-430." Pursuant to Section 38-79-430, the Board "*must*" create a plan of operation. The statute notes that the plan is "*not limited to*" the list of criteria enumerated therein. Section 38-79-430 also requires that the plan of operation be "consistent with the provisions of this article." Therefore, notwithstanding the legislative changes which have been made, the Board as part of its Plan, could, if it so desired, designate the State Treasurer as its "agent" to administer the Operating Account."

This conclusion is well supported by fundamental legal principles. In a September 6, 1996 opinion, we addressed the legality of administrative delegation of authority and its governing law. It has long been settled law that the authority of a state agency or governmental entity created by statute "is limited to that granted by the legislature." *Nucor Steel v. S.C. Public Service Commission*, 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." *Bazzle v. Huff*, 319 S.C. 443, 462 S.E.2d 273 (1975). In this regard, we have consistently concluded that "... administrative agencies, as creatures of statutes, possess only those powers expressly conferred or necessarily implied for them to effectively fulfill the duties with which they are charged." *Op. S.C. Atty. Gen.*, February 11, 1993, citing *Captain's Quarters Motor Inn, Inc. v. South Carolina Coastal Council*, 306 S.C. 488, 413 S.E.2d 13 (1991). Thus, as we have repeatedly emphasized, "[g]overnmental agencies or corporations ... can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly inherently, or impliedly." *Op. S.C. Atty. Gen.*, September 9, 2002; *Op. S.C. Atty. Gen.*, January 8, 1999; *Op. S.C. Atty. Gen.*, September 22, 1988. See also, *Medical Society of S.C. v. MUSC*, 334 S.C. 270, 513 S.E.2d 352, 355 (1999).

In that same regard, the September 6, 1996 opinion referenced the following principles regarding further delegation of particular duties which have been delegated by the Legislature to an administrative agency:

> [i]t is well-recognized that "[i]n general, administrative officers and bodies cannot alienate, surrender or abridge their powers and duties, and they cannot legally confer on their employees or others authority and functions which under the law may be exercised only by them or other officers or tribunals. Accordingly, ... in the absence of [a] permissive constitutional or statutory provision, administrative officers and agencies cannot delegate to a subordinate or another powers and functions which are discretionary or quasi-judicial in character or which require the exercise of judgment. 73 C.J.S., Public Administrative Law and Procedure, § 56.
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> On the other hand,
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> > [i]t has been observed that in the operation of any public administration body subdelegation of authority, impliedly or expressly, exists and must exist to some degree. Accordingly, it is recognized that express statutory authority is not necessarily required for the delegation of authority by an administrative agency, and the omission by the legislature of any specific grant of, or grounds for, the power to delegate is not to be construed as a denial of that power. So, if there is a reasonable basis to imply the power to delegate the authority of an administrative agency, such an implication may be made, and the power to delegate may be implied. Id.
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> Legal authorities almost unanimously caution that whether administrative officers in whom certain powers are vested or upon whom certain duties are imposed may "deputize others to exercise such powers or perform such duties usually depends upon whether the particular act or duty sought to be delegated is ministerial, or discretionary or quasi-judicial in nature." Id. at 74. In other words, governmental agencies may delegate to assistants as long as the agency does not abdicate its power and responsibility" and reserves for itself the right to make the final decision. Id. at § [75].

Moreover, in *Op. S.C. Atty. Gen.*, Op. No. 85-85 (August 8, 1985), we discussed various authorities which had held that the power to "manage" and "control" a particular entity or operation included the power to subdelegate the administration of such entity or operation so long as the ultimate management power or supervision thereof was not delegated away. There, we stated:

> [t]his law has been applied to analogous situations such as the administration of hospitals. In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d 1 (1960), for example, the Supreme Court of Pennsylvania upheld a contractual agreement

between a municipality and two private universities relating to the operation, management and control of the city's general hospital. Reviewing the contract in detail, the Court concluded:

> It will suffice us to say that our study of the contract convinces us that neither the city of Philadelphia nor the Board of Trustees of Philadelphia General Hospital has unlawfully delegated their powers and responsibilities in and by the above mentioned contract.

161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School of Nursing, 350 Ill.App. 274, 112 N.E.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to 'furnish, direct and perform the nursing services required for the proper care and nursing of all patients in the County Hospital ....' 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), out own Supreme Court upheld a contract between a county and a private entity for the 'performance of a public, corporate function', i.e. medical services in the form of a hospital. Only recently, in S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982), our Court found a contract between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a private corporation for the management of a water plant. Green v. City of Rock Hill, supra. See also, 16 C.J.S., Constitutional Law, § 137 (a State may validly use a private corporation as an agent for the treatment of inebriates). See also, Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control over the corporation by virtue of a contractual agreement.

We found the *Robinson* case particularly instructive in this regard. We noted that in *Robinson* "the question was raised as to whether the City of Philadelphia possessed the authority to contract with private entities for the performance of certain functions relating to the 'operation, management and control' of Philadelphia General Hospital." In that case, the relevant statutory authority empowered the Philadelphia Department of Public Health to provide for the "care, management, administration and operation of city activities relating to public health, including hospitals." Specifically, the Board of Trustees of Philadelphia General Hospital were authorized to provide for the 'direction and control of ... [the] management of the hospital." Our analysis of the Court's opinion in *Robinson* was thus as follows:

> [t]he contract in question in Robinson provided that the private colleges would provide 'all medical and related services not provided directly by Philadelphia General Hospital for the proper and efficient operation of the division assigned to each university, including medical care and supervision in accordance with standards established by the Board of Trustees of Philadelphia General Hospital ....' The Court

> concluded that such a contract was within the authority of the City of Philadelphia and that it did not unlawfully delegate the duties and responsibilities of the city with regard to the management and control of the hospital. 161 A.2d at 3. Moreover, in subsequent decisions, the court's holding in Robinson was reiterated and expanded. Preston v. City of Phil., 362 A.2d 452 (Pa. 1976). Thus, other jurisdictions have concluded that governmental entities which have the legal responsibility for the supervision and management of institutions performing governmental functions, possess the authority to contract with other entities to assist in the performance of their duties.

Thus, there is considerable case law which concludes that the power to "manage" or "control" carries with it the authority to designate another entity to administer or carry out the details of such management so long as the ultimate supervision is maintained by the original agency or board. This being the case, the Board of Governors of the PCF would possess the power, pursuant to its authority to "manage[] [the fund] according to its plan of operation pursuant to Section 38-79-430," to designate the State Treasurer as its agent to carry out administration of the Operating Account. So long as the Board retains ultimate control and decision-making power, pursuant to §§ 38-79-460, and -430, no unlawful delegation of authority would occur. In using the term "not limited to" in § -430 in setting forth certain criteria for the Board's plan, the General Assembly reflected its desire to allow the Board wide flexibility in managing the PCF. In our view, this flexibility enables the Board, using its discretion, to subdelegate the day-to-day operation of the "Operating Account" to the State Treasurer.

In short, while at first glance there appears to have been major changes made in the statutes governing the Patients' Compensation Fund by the new legislation, the modifications are not as substantial as appear. The very same authority which the Board has always had to manage the Fund continues in the new Act. While the new law no longer requires that the Fund be deposited with the State Treasurer, the broad authority of the Board of Governors of the PCF to use the Treasurer's Office to assist it in the administration of the Fund remains intact. In other words, as part of its power to manage and control the Fund and the requirement that it develop a plan for such administration, the Board may continue to utilize the expertise of the State Treasurer.

Conclusion

In our opinion, Act No. 32 of 2005 empowered the Board of Governors of the Patients' Compensation Fund to manage the Fund according to its plan of operation developed pursuant to § 38-79-430. Such authority to manage encompasses both the "Restricted Account" and the "Operating Account" of the Fund. This authority in the new Act is consistent with the Board's previous powers pursuant to § 38-79-430 to "manage and control" the Fund. The principal difference between the former statute and the new law is that the Fund is no longer designated as a "trust" fund required to be kept in a separate account with the State Treasurer.

Thus, the Board retains broad discretion and wide latitude in the manner in which it manages the Fund. While § 38-79-430 enunciates certain criteria for the Board to follow, such criteria is by no means exclusive, as reflected in the General Assembly's use of the language "not limited to." Moreover, although the previous statutory requirement that the Fund be deposited in trust in a special account with the State Treasurer has been removed by the new legislation, the Board still retains its authority to manage and control the Fund and continues to be required to develop a plan of operation for such administration.

Case law and prior opinions of this Office have concluded that the authority to "manage" includes the power to contract with or designate agents to carry out the details of such management, limited only the by designating entity's supervision and control. Accordingly, the Board of Governors of the PCF, in our opinion, possesses broad authority to utilize the Office of State Treasurer to assist it in carrying out the management of the PCF's Operating Account. So long as the Board retains the ultimate supervisory power, it may designate the Treasurer to assist in such management of its day-to-day operations. How it chooses to do so is, of course, up to the Board as part of its power to develop its plan of operation pursuant to § 38-79-430.[1]

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

[1] Of course, § 38-79-430 requires the Board to amend its "Plan of Operation" to encompass any changes such as designating the State Treasurer as its agent). Any amendments must conform to the requirements of § 38-79-430.