

March 6, 2008

The Honorable Richard Eckstrom
Comptroller General, State of South Carolina
305 Wade Hampton Office Building
1200 Senate Street
Columbia, South Carolina 29201

Dear Mr. Eckstrom:

You seek an “opinion regarding two statutory provisions (S.C. Code Ann. § 8-11-30 and § 8-11-35) that affect the statewide payroll that [your] ... Office processes.” Your concern is the Department of Mental Health’s “inability to recruit and retain adequate numbers of nursing staff.” By way of background, you present the following information:

One partial solution that we discussed was developing a method to more quickly compensate DMH nursing staff for overtime worked. DMH may be able to provide its inpatient nursing employees a timely advance for actual overtime worked. The amount of the advance would have to take into account the employees’ mandatory deductions so that amounts advanced by DMH would not exceed the net amount due each employee, and the advance could be recouped/deducted from employees’ regular payroll checks issued twice monthly.

S.C. Code Ann. § 8-11-30 states in part that “[i]t is unlawful for a person ... employed by the State to issue vouchers, checks, or otherwise pay salaries or monies that are not due to state employees.” We understand that this prohibition clearly precludes an agency from making a payroll advance to an employee for hours not yet worked. But does this prohibition preclude DMH and this Office from advancing the payment of earned overtime compensation for overtime worked, as discussed above?

Secondly, S.C. Code Ann. § 8-11-35 states in part “appropriations for compensation of state employees must be paid in twice-monthly installments to the person holding the position.” Contained in this same section is the provision “[T]he State Budget and Control Board may approve changes to this schedule where circumstances are considered justifiable.” Does this section permit the Budget and Control Board to approve a plan by DMH and this Office to advance the payment of earned overtime compensation in the manner described above?

Law / Analysis

S.C. Code Ann. Section 8-11-30 provides as follows:

- (A) It is unlawful for a person:
 - (1) to receive a salary from the State or any of its departments which is not due; or
 - (2) employed by the State to issue vouchers, checks, or otherwise pay salaries or monies that are not due to state employees, except that monies due to employees of the State or any department of the state earned during the month of December may be paid either just before or just after Christmas.
- (B) A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than three years, or both.

Section 8-11-35(A) further states in pertinent part as follows:

- (A) Except as otherwise provided by law, appropriations for compensation of state employees must be paid in twice-monthly installments to the person holding the position. To provide a regular and permanent schedule for payment of employees, the payroll period begins on June 2 of the prior fiscal year with the first pay period ending on June 16 of the prior fiscal year. The payroll period continues thereafter on a twice-monthly schedule as established by the State Budget and Control Board. This schedule must continue from one fiscal year to another without interruption, on a twice-monthly basis. *The State Budget and Control Board may approve changes to this schedule where circumstances are considered justifiable.*

(emphasis added).

The answer to your question is contingent upon the meaning of the word “due” as employed in Section 8-11-30. In other words, the question here is what was the purpose and intent of the Legislature in enacting Section 8-11-30, and, more specifically, in prohibiting the payment of a state employee’s salary “which is not due.”

Several principles of statutory construction are pertinent here. When interpreting the meaning of a statute, the cardinal rule of interpretation is to ascertain and give effect to legislative intent. *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). Typically, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary

significance. *Martin v. Nationwide Mutual Ins. Co.* 256 S.C. 577, 183 S.E.2d 451 (1971). Resort to subtle or forced construction for the purpose of limiting or expanding the operation of a statute should not be undertaken and statutes should be given a reasonable and practical construction which is consistent with the policy and purpose expressed herein. *Walton v. Walton*, 282 S.C. 165, 318 S.E.2d 14 (1984); *Jones v. South Carolina Highway Department*, 247 S.C. 132, 146 S.E.2d 166 (1966). Moreover, a statute must be interpreted with common sense to avoid unreasonable consequences. *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949); *Ops. S.C. Atty. Gen.*, dated June 15, 2004 and May 20, 2004. Additionally, as noted in an opinion of this Office dated April 10, 1985, a criminal statute must be strictly construed against the State and in favor of the defendant.

Generally speaking, it is well recognized that

... a public officer's right to compensation depends entirely upon his or her being able to show clear warrant of law entitling him or her to *remuneration for the performance of public duties*.

63 C Am.Jur.2d, *Public Officers and Employees*, § 271 (emphasis added). As the Supreme Court of North Carolina stated in *Leete v. County of Warran*, 341 N.C. 116, 462 S.E.2d 476, 478 (1995), "... the right of a public officer to receive compensation can only arise *out of the rendition of the public services related to his office*." (emphasis added).

Section 8-11-30 was undoubtedly enacted with the desire to promote the public policy concerns of insuring that state employees are paid their salary only for services rendered. As we previously concluded in *Op. S.C. Atty. Gen.*, April 7, 1975, the purpose of Section 8-11-30 is to prohibit "state employees from receiving salary in advance." And, as we stated in *Op. S.C. Atty. Gen.*, May 21, 1996, "... payments in advance of work performed cannot be made to faculty members under § 8-11-30 without violating this provision."

This interpretation is supported by case law which has examined generally the common and ordinary meaning of the word "due." As was stated in *Lessler v. Paterson Nat. Bank*, 97 N.J.Eq. 396, 128 A. 800 (1925), the word "due" is often used "to signify the present existence of a debt to 'be paid hereafter.'" And, as was observed by the Court in *S.T.C., Inc. v. Dept. of Treasury*, 257 Mich. App. 528, 669 N.W.2d 594, 599 (2003), the "word 'due' means 'owing or owed, irrespective of whether the time of payment has arrived.'" (citing *Random House Webster's Unabridged Dictionary* (2d ed. 1998)). Thus, when the Legislature used the word "due" in Section 8-11-30's prohibition upon receipt of salary "which is not due," we conclude that the word was employed in the sense of "owing" regardless of time for payment.

Accordingly, we read Section 8-11-30 consistently with our earlier opinions as a statute designed to prohibit state employees from the receipt of salary in advance of services rendered or work performed. Such an interpretation is particularly warranted in light of the fact that the statute is a criminal statute and thus must be construed against the State and in favor of the defendant.

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Moreover, we do not believe that Section 8-11-35 is not an absolute prohibition upon the receipt of overtime pay immediately following the performance of work by the nurses in question. As referenced above, Section 8-11-35 provides in pertinent part that “appropriations for compensation of state employees must be paid in twice-monthly installments to the person holding the position. However, the same provision contains the exception providing that “[t]he State Budget and Control Board may approve changes to this schedule where circumstances are considered justifiable.” Thus, in our opinion, the provision permits the Budget and Control Board, in its discretion, to make an exception to Section 8-11-35's general requirements that state employees be paid “in twice-monthly installments”

Conclusion

We reiterate our earlier interpretation of Section 8-11-30 as prohibiting state employees from receiving salary *in advance of work performed*. This interpretation is consistent with the common and ordinary meaning of the word “due” as used in Section 8-11-30 – meaning “owing,” irrespective of whether the time for payment has arrived. Inasmuch as you specify that the overtime pay would be made only after work performed by the nurses in question, we do not deem Section 8-11-30 as prohibiting such payment.

However, Section 8-11-35 does require that state employees “must be paid in twice-monthly installments” The provision further states that the Budget and Control Board “may approve changes to this schedule where circumstances are considered justifiable.” Thus, while Section 8-11-30 does not operate as a prohibition upon the proposed payment of overtime so long as the work has been performed, the Budget and Control Board would have to authorize such payment as an exception to the requirement of Section 8-11-35.

Very truly yours,

Henry D. McMaster
Attorney General

By: Robert D. Cook
Deputy Attorney General

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