



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

February 21, 2003

Sandra G. Padget, Saluda County Director
108 South Rudolph Street
Saluda, South Carolina 29138-1744

Re: Your Letter of November 15, 2002

Dear Ms. Padget:

In your above-referenced letter, you request an opinion from this Office concerning certain expenditures of public funds by employees and/or officials of Saluda County. Your questions relate to reimbursements for travel and other expenses, inaccurate use of contract proceeds received by the County, and nepotism. Specifically, you ask questions related to the scenarios paraphrased as follows:

1. Employees/officials with the Saluda County Sheriff's Office received advances for travel and other expenses from an account maintained by that office. The employees/officials also requested reimbursement from County Council for expenses related to the same travel or event without adjusting for the advance. You now ask "... how County Council can properly recover these funds."
2. Saluda County receives "telephone commission checks from Evercom for pay phones that are located at the Detention Center for inmate use." County Council appropriated the money received through the County's contract with Evercom to the "Jail Renovation Account." The money, however, was "deposited into a Canteen Account" and was not spent in accordance with County Council's appropriation to the Jail Renovation Account. You now ask "... how Saluda County Council can properly recover the funds that should have been deposited into the Jail Renovation Account."
3. The Saluda County Treasurer paid her son \$4,000.00 to post tax sale notices. You ask "... whether this is legal and ethical."

Initially, it must be noted that this Office cannot and does not resolve factual disputes or make findings of fact. Ops. Atty. Gen. Dated August 14, 1995 & December 12, 1983. Thus, we may only assume facts as presented to us and we make no comment upon or attempt to resolve any

particular factual disputes which may be present here. Therefore, this opinion amounts only to an analysis of the laws and remedies that may be applicable to each of the situations.

QUESTION 1

In your first question, you have presented a situation where certain public employees/officers have received reimbursement for travel and other expenses over and above that to which they are entitled. Essentially, the receipt of this additional money can be considered unauthorized extra compensation. In a previous opinion, this Office recognized that “[g]enerally, compensation paid to a public officer which is not authorized by law, or which is in excess of the compensation authorized by law, may be recovered by the proper government body notwithstanding the fact that the payment was made under mistake of law or fact and without fraud.” Op. Atty. Gen. Dated February 17, 1983. The opinion went on to state that, therefore, “... an employee can be required to refund [the] overpayment.” Further, if the receipt of the money was the result of a breach in the ethical standards established by South Carolina’s Ethics Act, additional laws may be applicable. Specifically, S.C. Code Ann. §8-13-790 provides that “[t]he value of anything transferred or received in breach of the ethical standards ... by a public employee, public official, or a nonpublic employee or official may be recovered from the public employee, public official, or nonpublic employee or official.”

The February 17, 1983 opinion also addressed the method by which a governing body may collect unauthorized payments made to an employee or officer. There, we stated that “... obviously the agency would be entitled to file a legal action to recover those monies. Short of legal action, the employee and the employer could reach an agreement as to the method of repayment.” In my opinion, this statement remains an accurate assessment of the methods available for collecting the funds in question. I have been able to locate no other provision of the law which would provide for additional methods of recovery.

QUESTION 2

Your second question relates to public funds which were appropriated for one purpose, but ultimately used for another purpose. County Council’s ability to “properly recover the funds” could depend on a number of factors including the clarity of County Council action which appropriated the funds, the level of diligence of those persons responsible for the use of the funds and whether the funds were used for a public or private purpose.

Among other things, you provided as an attachment to your request the minutes from the February 12, 2001, Saluda County Council meeting. Those minutes reflect Council’s action concerning the funds received from commission checks related to the detention center pay phones and state as follows:

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On motion of Coun. Boland, seconded by Coun. Nichols it was unanimously approved that commencing with the December 2000 commission check and all subsequent commission checks received from the pay phones at the Detention Center be deposited in the Jail Renovation Account.

Despite the vote of Council, however, it is indicated that the money from the commission checks was deposited into a "Canteen Account" and used for purposes other than directed by County Council.

In a previous opinion, this Office recognized that "typically, a public officer responsible for the handling and collection of public funds is considered a trustee, a bailee, or an insurer with all applicable duties and responsibilities of such funds or property (internal quotations omitted)." See Op. Atty. Gen. Dated March 3, 1997. Such public funds

... are considered trust funds, and he [the public officer] is responsible to the same degree as the trustee of a private fund. It is the policy of the law to hold an official custodian of public funds to strict accountability, and he must exercise ordinary diligence to keep informed of the conditions of funds subject to his disposal. 67 C.J.S., Officers, § 211.

Id. When presented similar questions, our Supreme Court has expressed general agreement with the principle stated above. For example, in Sumter Co. v. Hurst, 189 S.C. 316, 319, 1 S.E.2d 242 (1939), the Court held that "when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended."

Furthermore, a "public officer has no right to give away public funds," and such officer

... must deliver such funds or property to the public official or function for whom or which they were intended. Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds is personally liable for such misappropriation or illegal payment. 67 C.J.S., Officers, § 212

Op. Atty. Gen. Dated March 3, 1997. Courts in other jurisdictions have followed this general tenet and have found public officials personally liable for improper expenditure of public funds or where such expenditure is not in accord with the governing law. See, e.g. Indiana v. Poindexter, 517 N.E.2d 88 (Ind.Ct.App. 1987)[clerk-treasurer required to repay additional compensation she paid herself in office without authorization by town ordinance]; Powers v. Goodwin, 291 S.E.2d 466 (W.Va.1982)[if public official acted in bad faith and willfully, official could be removed from office and personally liable for repayment of misappropriated funds]; Stevens v. Gedulig, 42 Cal.3d 24, 227 Cal.Reptr. 405, 719 P.2d 1001 (1986)[public officials were personally liable for negligent authorization of improperly appropriated funds],

In a recognized legal treatise in this area, it is stated that

[a]n officer may pay out public money only in the manner prescribed by law. Money disbursed by the officer in an unlawful manner is paid out at his or her peril. Accordingly, where funds are disbursed illegally by public officers or upon their authority, they are personally liable, e.g. unlawful appropriations in bad faith; ... payment on warrants in excess of appropriations; ... payments under illegal contracts; ... unauthorized payment to the officer him or herself; ... payment to one owing like sum to the municipality; ... unauthorized refunds; ... allowance of claims known to be illegal; ... and payment of paid warrants

McQuillin, Municipal Corporations, § 12.217. Moreover, it is said that "the fact that they [public officers] personally receive none of the money and act in good faith, believing that their conduct is for the best interest ... does not excuse them from liability where, in doing so, they disregard plain statutory and constitutional provisions." 56 Am.Jur.2d, Municipal Corporations, § 288. Such a rule is a "necessary one", because a taxpayer is an "equitable owner of [the public] ... funds, while the officers of the municipal corporation are the trustees in the management and application of them." Op. Atty. Gen. Dated March 3, 1997. Without such a rule, there would be the "resultant expenditure or waste of public funds." Apminio v. Butler, 440 A.2d 757, 762 (Conn.1981).

With reference to a public officer's personal liability for the inappropriate use of public funds, our Supreme Court has provided that "in the absence of any statutory law to the contrary a public official is not liable for the loss of funds deposited with him if he has exercised that degree of care and prudence in the management of the funds which a person of ordinary care and prudence would exercise in his own business." Chandler v. Britton, 15 S.E.2d 344, 197 S.C. 303 (1941).

Accordingly, it is apparent that a public official, such as an officer of county government, has a responsibility to use public funds subject to his or her control as the funds were intended by the governing body (i.e. county council). It is further apparent that, should a public officer fail to use public funds within his control as authorized, personal liability may result. As stated above, whether a public officer is personally liable can depend on a number of factors and this determination is dependent on the facts and circumstances surrounding the officer's actions.

The use of public funds for a private purpose is generally unauthorized and would most likely lead to personal liability. Public funds used in an unauthorized fashion for a public official's own benefit would, at the very least, be considered inappropriate extra compensation and be treated in a manner consistent with the analysis expressed in the response to Question 1. Further, even if not for the personal benefit of the official, the use of public funds for private purposes is unauthorized and would be an *ultra vires* act. This Office has previously opined that the "law in South Carolina is supportive of liability for public officers who perform *ultra vires* acts." See Op. Atty. Gen. Dated May 13, 1997. The question of personal liability for officers spending public funds for one public

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purpose when the governing body has expressed an intention that the funds be used for another public purpose is not as clear cut. Such would most likely have to be addressed as held by our Supreme Court in Chandler v. Britton, supra, by determining whether the official has "... exercised that degree of care and prudence in the management of the funds which a person of ordinary care and prudence would exercise in his own business." This, of course, is a factual determination which this Office is not authorized to make.

QUESTION 3

In your final question, you raise concerns over the legality and ethical implications of the Saluda County Treasurer employing her son to post tax sale notices.

The general anti-nepotism provision of state law is found in S.C. Code Ann. §8-13-750(A). That Section of the Code provides that

No public official, public member, or public employee may cause the employment, appointment, promotion, transfer, or advancement of a family member to a state or local office or position in which the public official, public member, or public employee supervises or manages.

"Family member," as used in §8-13-750(A), means an individual who is "the spouse, parent, brother, sister, child, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparent, or grandchild ... [or] a member of the individual's immediate family." See §8-13-100(15)(a)&(b).

As a county treasurer is a public official, member or employee, the prohibitions of Section 8-13-750 would be applicable. Therefore, a county treasurer could not employ his or her son in a position which he or she supervises or manages as the definition of family member clearly includes a person's son. There is, however, an exception to the prohibitions of Section 8-13-750. S.C. Code Ann §8-11-35(E) states that "[t]he provisions of ... Section 8-13-750 do not apply to employees hired for one hundred twenty days or fewer." Accordingly, depending on the specific facts involved, Section 8-13-750 may not prohibit the employment situation you describe in your letter.

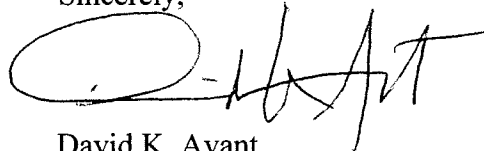
Our inquiry, however, does not necessarily end with an analysis of Section 8-13-750. There is an additional provision of our Ethics Act which may be applicable. Section 8-13-700(A) states that "[n]o public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated" An "Economic interest" means an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more." See S.C. Code Ann. §8-13-100(11)(a). Relevant to your question, "immediate family" member means "a child residing in ... a public official's, public member's, or public employee's

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household ... [or] ... an individual claimed by the candidate, public official, public member, or public employee or the candidate's, public official's, public member's, or public employee's spouse as a dependent for income tax purposes.”

It seems likely that a payment of \$4,000.00 to a county treasurer's immediate family member for the work you describe in your letter would constitute an "economic interest" for purposes of Section 8-13-700(A). Whether the treasurer's son is an immediate family member for purposes of Section 8-13-700(A) is a question of fact. That question would depend on (1) whether the son resides in the treasurer's household or (2) whether the treasurer or her spouse claims the son as a dependent for income tax purposes. In any event, Pursuant to S.C. Code Ann. §8-13-320(11), the South Carolina General Assembly has given primary responsibility for interpreting the provisions of the South Carolina Ethics, Government Accountability, and Campaign Reform Act of 1991 to the State Ethics Commission. Therefore, I would suggest that specific questions regarding this matter be addressed to the State Ethics Commission.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Avant', written over a horizontal line.

David K. Avant
Assistant Attorney General

DKA/an