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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

May 19, 2003

Donald Howe, Esquire
Post Office Box 598
Charleston, South Carolina 29402

Dear Mr. Howe

You have requested an advisory opinion from this Office concerning the legality of on-duty charitable activities by employees of the St. John's Fire District. By way of background, you state that the District recently agreed to participate in several Habitat for Humanity construction projects. You indicate that the firemen of the St. John's Fire District could potentially be required to work on these projects while on duty. You further note that several members of your district have objected to these activities as being illegal, and that you would like to have the legal issues clarified.

Law / Analysis

The St. John's Fire District was created by Act No. 369 of 1959 for the specific purpose of providing fire protection for the areas within the District. Local legislation amending this enabling Act has been enacted numerous times over the years. The District is a special purpose district and, as such, is a creature of statute. As was noted recently in Op. S.C. Atty. Gen., June 27, 2002, "the powers of a public service district are construed strictly. Public service districts have only such powers as are specifically granted by statute or which may be reasonably implied therefrom."

In that same opinion, we concluded that the St. Andrews Public Service District possessed no statutory authority to permit an employee voluntarily to deduct association membership dues from his or her paycheck because no provision of law authorized such deduction. In our opinion,

> ... the General Assembly has granted specific authority for certain payroll deductions with respect to certain types of employees ... . [We] are unaware of any statute specifically authorizing payroll deductions for St. Andrews Public Service District employees ... . No where in [the various enactments relating to the District] ... is there provided any authority for the kinds of deductions which you reference. Thus, in my opinion such authority is not present.

Rebuttal Letter

To a certain extent, involvement by public employees on behalf of various charitable organizations, has been authorized by § 8-11-92 which establishes criteria to enable state employees to make contributions to non-profit, charitable organizations. However, we are unaware of any statute, including the various amendments to the enabling legislation relating to St. John's Fire District, which would authorize the Fire District to work on behalf of or solicit for a particular charity on work-time or while on duty. Barring the enactment of a specific statute which authorizes this type of involvement by the employees of the Fire District, we would advise that these duties exceed the limited scope or purpose for which the Fire District was created. See, S.C. Code Ann. § 6-11-100. Accordingly, any such authorization would need to be enacted by the General Assembly.

Even were such a statute to be enacted by the Legislature, the proposed activity would face major constitutional hurdles. As former Attorney General McLeod stated in an opinion, dated June 18, 1975, "[i]n a number of cases, the view has been taken that it is not within the power of a [governmental entity] even with express legislative authority, to donate funds in aid of a private institution, although it is devoted to charitable or education work ...." [quoting 56 Am.Jur.2d, Municipal Corporations § 591]. The type of activity referenced in your letter would likely run afoul of the "public purpose" doctrine. All legislative action must serve a public rather than a private purpose. Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). A court would likely deem the use of government resources for the sole purpose of promoting or assisting a specific private charity as infringing upon this fundamental constitutional principle. S.C. Const. Art. I, § 3; Art. 10, § 11. See also, Op. S.C. Atty. Gen., December 18, 2000 [and authorities referenced therein, including Op. S.C. Atty. Gen., April 18, 1971, concluding that appropriation to Marlboro Area Arts Council is constitutionally suspect]. See also, Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949) [Court declared unconstitutional an act calling for the issuance of bonds by a county in order to construct a war memorial building; a substantial portion thereof would be devoted to the use of the American Legion]; Jacobs v. McClain, 262 S.C. 425, 205 S.E.2d 172 (1974) [general obligation bonds cannot be constitutionally issued to finance the construction of building to provide offices and facilities to be leased to dentists and physicians; Court concludes "the primary beneficiaries of the building erected with public funds and leased for office space are the physicians and dentists."] As the Court recognized in Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1884), "[h]owever certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental."

The Attorney General of Idaho has issued an advisory opinion concerning the application of the public purpose doctrine to a similar set of circumstances as are raised by your letter. The issue in that instance was whether the State of Idaho could "loan" state employees to the United Way for eight weeks during an annual fundraising campaign, during which time the state would continue to pay those employees' salaries. See, Idaho Attorney General Opinion No. 95-7 (November 1, 1995). The Idaho Attorney General concluded that the activity would violate the public purpose doctrine. Id.

Based upon the longstanding opinions of this Office, the proposed activity in this instance would, in all likelihood, be declared by a court as not serving a public purpose. The issue of whether an act is for a public purpose is primarily one for the Legislature, and the judiciary will not interfere unless the legislative determination is clearly wrong. Elliot v. McNair. However, our courts have, on occasion, addressed the issue of what constitutes a public purpose. In Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (186), our Supreme Court stated that "[p]ublic purpose is not easily defined." The Court further commented that "[i]t is oftentimes stated that a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all of the inhabitants or residents, or at least a substantial part thereof." Nichols approved a three-part test first enunciated in Byrd v. County of Florence, 281 S.C. 402, 315 S.E.2d 804 (1984) for determining a public purpose:

> [t]he Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered.

Applying this test to the present situation, it is the opinion of this Office that, at the very least, the Fire District would be unable to clear the second hurdle. The primary beneficiaries of the proposed activity would be the particular charity and the specific individuals and families served by the charity. While these are undoubtedly worthy purposes, a court would likely conclude that the State Constitution does not permit these activities. Accordingly, the courts would likely view the proposed activity as a violation of the public purpose doctrine, even if the Legislature enacted a statute which would permit it.[1]

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[1] This Office notes that the constitutional problems of the proposed activity apply only in regards to *on-duty* charitable endeavors. Government employees may freely take part in these endeavors, so long as neither the resources nor the property of government are used. Likewise, we do not address herein situations such as the "Buc-a-Cup" campaign in which police officers, in the course of their day-to-day duties, make incidental contacts for donations to Buc-a-Cup. The Buc-a-Cup campaign, as well as many other similar activities which occur incidentally would not pose the legal problems which are encountered here. See, e.g., 41 Or. Op. Atty. Gen. 347 (February 20, 1981) [Legislature in authorizing payroll deductions for contributions to United Way implicitly authorized a certain amount of incidental activity to take place during office hours in order to reasonably implement the program it was authorizing]. See also, Rule 506, SCAR, Staff Atty. Conduct, Canon 5 [South Carolina Appellate Court Rules govern conduct of employees of Judicial Department concerning involvement in charitable activities]. Here, by allowing employees to use work time to support Habitat for Humanity, the District runs the risk of a taxpayer bringing a lawsuit alleging that public funds are being used for private purposes.

Conclusion

Based upon the foregoing authorities, the proposed charitable activities referenced in your letter face several significant legal problems. First, there is no state statute which specifically permits this type of activity. This presents a problem because the St. John's Fire District is an entity created by state statute, and the scope of its authority is defined by state statutes. Most importantly, the proposed activity could be held by a court to violate the "public purpose doctrine" pursuant to the test enunciated by the South Carolina Supreme Court in Nichols v. South Carolina Research Authority, even if the legislature enacted a statute authorizing such activity.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

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