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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

November 12, 2002

Edwin E. Evans, General Counsel
State Budget and Control Board
Post Office Box 11608
Columbia, South Carolina 29211

Dear Ed:

You have asked for an opinion regarding the eligibility of employees of ATC Vancom and TCT for participation in the South Carolina Retirement Systems. In response to an inquiry from the Amalgamated Transit Union, a letter was forwarded by Stephen R. Van Camp, managing Legal Counsel for the South Carolina Retirement Systems, providing his opinion that the employees of these two private companies are not eligible to participate in the Retirement Systems. In essence, you have asked that we review Mr. Van Camp's conclusions.

As I understand it, the two private companies, ATC Vancom and Connex TCT, contract with the Regional Transportation Authority in Charleston to provide public transportation services. Mr. Van Camp's opinion noted that, pursuant to S.C. Code Ann. Sec. 58-25-80, "the authority or operator providing public transportation on behalf of an authority may participate in the State Retirement System."

Mr. Van Camp's legal analysis regarding his conclusion that ATC Vancom and Connex TCT employees are ineligible for participation in the South Carolina Retirement Systems is as follows:

> [o]nly public entities are eligible to participate in the Retirement Systems. The Retirement Systems is a tax-qualified governmental plan under the Internal Revenue Code that enjoys favorable tax-deferred treatment of its members' contributions under federal law. Under the Internal Revenue Code, a "governmental plan" provides pension benefits "to employees of the government of the United States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing." 26 U.S.C. Section 414(d). Accordingly, only public employees paid with government funds and responsible to public officials are eligible to participate in a qualified tax-deferred governmental plan. See *Shannon v. United Services Automobile Association*, 965 F.2d 542 (7th Cir. 1991). The inclusion of private non-governmental entities, such as ATC Vancom and Connex TCT, in the Retirement Systems could jeopardize both the Retirement Systems' tax qualified

status with the Internal Revenue Service and its exemption from the provisions of ERISA. 26 U.S.C §§ 401(a), 414(d), 414(h)(2); 29 U.S.C. §§ 1002(32) and 1003(b)(1).

In S.C. Code Ann. Section 9-1-20, the General Assembly states that "[a] retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or departments thereof." The General Assembly enumerates those public entities eligible to participate in the Retirement Systems in the definition of "employer" set out at S.C. Code Ann. Section 9-1-10(14). Because the Retirement Systems is a governmental plan, the list of employers necessarily only includes public entities as eligible participants.

In Title 58 of the Code, the General Assembly provides for the creation and operation of Regional Transportation Authorities. There is little question that a Regional Transportation Authority is a governmental body and that the employees of an Authority would be eligible to participate in the Retirement Systems. Your letter is clear, however, that you are seeking participation of employees of private corporations that have contracted with the Transportation Authority rather than employees of the Authority itself. These companies are apparently "operators" under the provisions of Title 58 in that they have contracted to provide transportation services to the Authority.

Section 58-25-20 defines the term "person" as "any individual, public or private corporation, political subdivision, government agency, municipality, industry, copartnership, association, firm, trust, estate, or any other legal entity whatsoever." An "operator" means "any person engaged in, or intending to engage in, the business of providing public transportation . . . ." S.C. Code Ann. Section 58-25-20. Thus, public entities such as political subdivisions, government agencies, public corporations or municipalities can be "operators" as well as private companies such as ATC Vancom and Connex TCT. The question is whether through the language in Section 58-25-80, the General Assembly intended to provide Retirement Systems participation to only the public entities who serve as operators, or whether private entities may participate as well.

Reading Section 58-25-80 in conjunction with the federal laws governing public pension plans and the Title 9 provisions governing Retirement Systems eligibility leads us to the conclusion that the General Assembly intended that only public entities that serve as transportation "operators" may participate in the Retirement System. As set out above, Section 9-1-20 clearly states that the Retirement Systems was created to provide benefits to employees of the State and

political subdivisions. ATC Vancom and Connex TCT are obviously not the State or a political subdivision. Furthermore, these private companies do not meet the definition of an "employer" set out in S.C. Code Ann. Section 9-1-10(14) (Supp. 2000):

> (14) "Employer" means this State, a county board of education, a district board of trustees, the board of trustees or other managing board of a state-supported college or educational institution, or any other agency of this State by which a teacher or employee is paid; the term 'employer' also includes a county, municipality, or other political subdivision of the State, or an agency or department of any of these, which has been admitted to the system under the provisions of Section 9-1-470, a service organization referred to in item (11)(e) of this section, an alcohol and drug abuse planning agency authorized to receive funds pursuant to Section 61-12-20, and a local council on aging or other governmental agency providing aging services funded by the Office of Aging, Department of Health and Human Services.

It would be inconsistent and incompatible for the General Assembly to have included private employers in a public pension plan which by definition is designed to benefit public employees.

Moreover, if Section 58-25-80 is read to include private transportation operators in the membership of the Retirement Systems, the Retirement Systems would be in violation of federal law governing the qualification and exemptions afforded public pension plans. It is unlikely that the General Assembly would have intended to include private entities in the Retirement Systems where their inclusion would cause the Retirement Systems to put into jeopardy the favorable tax treatment afforded some 200,000 public employees across the State of South Carolina.

Therefore, for the reasons enumerated above, we have unfortunately concluded that because ATC Vancom and Connex TCT are private companies, they are not eligible under South Carolina law to participate in the Retirement Systems. We regret that our determination could not be favorable.

LAW / ANALYSIS

I agree with Mr. Van Camp's analysis that, under current law, employees of the two companies are ineligible for participation in the State Retirement Systems. As his letter notes, a Regional Transportation Authority is clearly a governmental body see, Title 58 of the Code, and thus the employees of such entity are eligible to participate in the Retirement Systems. See, Op. Atty. Gen., September 20, 1976 (Pee Dee Regional Transportation Authority); Op. Atty. Gen.,

December 3, 1980 (Beaufort-Jasper Regional Transportation Authority). However, as seen below, the employees of private corporations which contract with a Regional Transportation Authority are in a different position.

S.C. Code Ann. Sec. 9-1-20 provides that "[a] retirement system is hereby established and placed under the management of the State Budget and Control Board for the purpose of providing retirement allowances and other benefits for teachers and employees of the State and political subdivisions or agencies or department thereof." Section 9-1-10(14) defines the term "employer" for purposes of those public entities authorized by law to participate in the Systems. Such Section states:

> (14) "Employer" means this State, a county board of education, the board of trustees or other managing board of a state-supported college or educational institution, or any other agency of this State by which a teacher or employee is paid; the term 'employer' also includes a county, municipality or other political subdivision of the State, or an agency or department of any of these, which has been admitted to the system under the provisions of Section 9-1-470, a service organization referred to in item 11(e) of this Section, an alcohol and drug abuse planning agency authorized to receive funds pursuant to Section 61-12-20, and a local council on aging or other governmental agency providing aging services funded by the Office on Aging, Department of Health and Human Services. (emphasis added)

The method for establishing regional transportation authorities is set forth at S.C. Code Ann. Sec. 58-25-10 et seq. In order to activate an RTA, certain criteria detailed in § 58-25-30 must be met, including the preparation of a transportation plan of service and the adoption of such plan by the majority of the governing bodies of the general purpose local governments in the in the service area. Powers and duties of regional transportation authorities are specified at § 58-25-50, among them being the authority to "... (b) contract for public transportation services."

The companies in question are apparently "operators" for purposes of the RTA Act inasmuch as they have contracted with the area Regional Transportation Authority for purposes of providing transportation services. An "operator" is defined in § 58-25-20 as "any person engaged in, or intending to engage in, the business of providing public transportation ...." The term "person" is defined by § 58-25-20 as "any individual, public or private corporation, political subdivision, government agency, municipality, industry, copartnership, association, firms, trust, estate, or any other legal entity whatsoever."

The question thus becomes whether the fact that ATC Vancom and Connex TCT serve as "operators" authorizes these private companies to participate in the Retirement Systems. The companies in question clearly do not meet the definition of "employer" provided by § 9-1-10(14); moreover, § 9-1-20 plainly provides that the Retirement Systems were established to provide benefits to employees of State and local governmental entities.

Moreover, as Mr. Van Camp correctly points out, the Retirement Systems is a tax-qualified governmental plan under Internal Revenue Code. It enjoys favorable tax deferred treatment of its members' contributions. Pursuant to the Internal Revenue Code, a "governmental plan" provides pension benefits "to employees of the government of the Untied States, any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing." 26 U.S.C. § 414(d). Thus, only governmental employees are eligible to participate in a qualified tax-deferred plan.

This Office has consistently concluded that employees of a private, non-profit corporation are not eligible to participate in the South Carolina Retirement Systems. See Op. Atty. Gen., August 18, 1981; January 16, 1984; June 22, 1978; December 16, 1976; March 4, 1977; February 29, 1984; October 26, 1976; March 2, 1978. In each of these examples, we concluded that the private, eleemosynary corporation was not an "employer" for purposes of § 9-1-10(14) and, therefore, the employees thereof were ineligible for participation in the Systems.

It is true that in certain instances, a private non-profit corporation may be deemed a State or governmental entity. While each situation is fact specific, generally speaking, where the private entity is, in effect, acting as the alter ego or the instrumentality of the government, it may be viewed as a governmental entity. See, Op. Atty. Gen., September 6, 1996 (and authorities cited therein). Accordingly, in Op. Atty. Gen., November 29, 1988, we concluded that the employees of the Association of Counties, a non-profit corporation which, by state law, is designated as an "instrumentality of the counties" were eligible to participate in the State Health Insurance Plan. In that opinion, we concluded:

> [i]n an analogous situation in the area of corporate law, there are circumstances in which the identity of a second corporation will essentially be disregarded if that corporation, created by the first corporation, is actually under the domination of the first corporation to the extent that the second corporation is indistinct from the first or parent corporation. The second corporation is said to be the instrumentality of the first corporation. Mills v. Murray, 472 S.W. 2d 6 (Mo. Ct. App. 1971). Considering the corporate nature of the counties and the Association created by the counties (governed by officials of the creating counties), application of the above-stated general rule might well be appropriate in the circumstance. Thus, the Association for some purposes could be the alter ego of its member counties. et al.

In that Opinion, we recognized, however, that there exists "a special relationship" between the Association of Counties and its member counties. Rare would be the case, we cautioned, in which a private corporation would be the alter ego of the state or a political subdivision for purposes of membership in a governmental health program or retirement system. We stressed that the situation involving the Association of Counties

> ... is a unique situation, as we are not aware of the addressing, by the General Assembly, of similar relationship between such associations and member political

> subdivisions; thus, today's conclusion would be applicable only to the South Carolina Association of Counties vis-a-vis Section 1-11-142 of the Code.

It is also true that § 15-78-30(h) of the Tort Claims Act defines a "political subdivision" as including

> ... the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of Section 58-25-20 which provides public transportation on behalf of a regional transportation authority .... (emphasis added).

Thus, it could perhaps be argued that because operators are deemed "political subdivisions" for purposes of the Tort Claims Act, employees of such "operators" would likewise be entitled to participate in the South Carolina Retirement Systems. This reasoning reaches too far, however.

Again, in determining eligibility for the South Carolina Retirement Systems, the key is the definition of "employer" contained in § 9-1-10 (14). There is no suggestion therein that the General Assembly intended to include an "operator" which provides public transportation on behalf of a regional public transportation authority within the definition of "employer" or "political subdivision" of the State. A private entity is typically not viewed as a political subdivision unless specifically defined as such by specific statute such as the General Assembly to do in § 15-78-30(h). The fact that the General Assembly did not likewise include private "operators" in the Retirement statute's definition of "employer" indicates an intent to exclude such private entities therefrom. See, Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000).

CONCLUSION

For all the foregoing reasons, it is our opinion that under current law the employees of the two companies in question are ineligible for participation in the South Carolina Retirement Systems.

Sincerely,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an