



ALAN WILSON
ATTORNEY GENERAL

June 26, 2013

The Honorable J. Roland Smith
Representative, District No. 84
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Smith,

You seek an opinion of this Office concerning the potential liability exposure and insurance needs of the Aiken County Commission for Higher Education (ACCHE). Specifically, you ask the following questions:

- 1) Is the ACCHE considered an eleemosynary organization and, if so, does it have limitations to its level of liability? If so, what are those limitations including any dollar limitations?
- 2) Due to its affiliation with the State of South Carolina, does the ACCHE have limitations to its level of liability and, if so, what are those limitations including any dollar limitations?
- 3) To the extent ACCHE has liability exposure, does its affiliation with the state of South Carolina, or its composition of gubernatorial appointees qualify it for liability coverage (i.e. insurance that is paid for by the state or the Governor's office, or other state entity)?
- 4) If the answer to the above questions is "no," and with the understanding that members of the ACCHE want to be good stewards of the resources held by the ACCHE, is the ACCHE required to maintain insurance through the state's insurance reserve fund or through a private insurance company? If there is no such requirement, and the ACCHE remains uninsured, what is the maximum exposure to the ACCHE?
- 5) Are the personal assets of the individual members of the ACCHE exposed in any way to litigation resulting from their participation on the ACCHE? If so, is this exposure insured in any way through the Governor's office or the State of South Carolina? If not, would it be appropriate and/or required for the ACCHE to seek directors' and officers' insurance on behalf of its membership either through the state's insurance reserve fund or through a private insurance company?

Law/Analysis

The ACCHE was created by Act No. 103 of 1961. As stated in Act 103, the purpose of the ACCHE is described as:

[T]he encouragement of higher education in Aiken County and adjacent areas and, more specifically, the establishment in Aiken County of facilities to offer standard freshman and sophomore college courses, and such other course as deemed desirable. The Commission shall establish standards for the admission of persons to such courses.

Act 103, § 3.

The powers and duties of the ACCHE are described as follows:

To carry out this purpose and objective the Commission, with the approval of a majority of its members, shall be empowered to enter into contracts, make binding agreements, negotiate with educators and educational institutions and, generally, to take such actions in its name as are necessary to secure for Aiken County and adjacent areas the educational facilities above described; *provided*, that the County of Aiken shall not be bound nor held liable for any acts or omission or commission of the Commission, nor by any provision of any contract or agreement, expressed or implied, except upon written approval and consent of a majority of the Aiken County Legislative Delegation, including the Senator

The Commission may solicit funds and accept donations from various sources which it may expend in carrying out its objective.

Act 103, § 4.

Act No. 269 of 1977 then amended the provisions concerning the powers and duties of the ACCHE by providing, in part:

The Commission shall also be authorized to sell, mortgage, liquidate or otherwise dispose of any real or personal property devised, donated, acquired or otherwise given to the Commission or any institution over which the Commission has jurisdiction.

Act 269, § 1.

Nothing in the enactments creating the ACCHE indicates it is a nonprofit or eleemosynary entity. Nor are we aware of any articles of incorporation or other information indicating the ACCHE has been established or incorporated as such. In any event, the determination of an entity's status as a nonprofit or eleemosynary corporation is a matter beyond the scope of an opinion of this Office. See Op. S.C. Att'y Gen., 2006 WL 2849790 (Sept. 5, 2006) ("Because the determination of an organization's or entity's nonprofit status is a question of fact, only a court may ultimately make this determination") (citing Op.

S.C. Att'y Gen., 2006 WL 1207268 (April 4, 2006) ("this Office does not have the authority of a court or other fact-finding body, and therefore, it is unable to adjudicate or investigate factual questions").

Notwithstanding the above, we have previously concluded that the ACCHE and other county commissions for higher education are political subdivisions of the State. See Ops. S.C. Att'y Gen., 1986 WL 289839 (Sept. 18, 1986) (Horry County Higher Education Commission); 1973 WL 21053 (Aug. 13, 1973) (ACCHE); 1965 WL 11422 (Oct. 5, 1965) (Union County Commission on Higher Education). As we have previously advised, general questions regarding the potential liability of a particular entity are too broad and involve various subject areas of the law too complex to address in an opinion of this Office. See Op. S.C. Att'y Gen. 2013 WL 2121457 (May 6, 2013).

However, as a political subdivision of the State any tort claims against the SCCHE are subject to the South Carolina Tort Claims Act (the "TCA"), S.C. Code §§ 15-78-10 et seq. Under the TCA, "[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." § 15-78-40. Nothing in the TCA, however, "affects liability based on contract nor does it affect the power of the State or its political subdivisions to contract." § 15-78-20(d). A commissioner or employee of the ACCHE is not liable for torts committed while acting within the scope of his or her official duty unless "it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." § 15-78-70(a), (b); see also § 15-78-30(c) ("employee" means any officer, employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials").

The amount that may be recovered in damages as a result of a tort claim against the ACCHE or any entity covered by the TCA is limited by § 15-78-120. A single person may not recover more than \$300,000 "because of loss arising from a single occurrence regardless of the number of agencies or political subdivisions involved." § 15-78-120(a)(1). The most that can be recovered in any action arising out of a single occurrence, regardless of the number of entities or claims involved, is \$600,000. § 15-78-120(a)(2). Pursuant to § 15-78-120(b), no award of punitive or exemplary damages is permitted. Furthermore, with the exception of a reasonable attorney's fee which may be imposed as a sanction for frivolous filings, no attorneys' fees may be awarded to a successful plaintiff under the TCA. § 15-78-120(c).

Furthermore, under the TCA the ACCHE may procure tort liability insurance. The manner in which the ACCHE may do so is explained in § 15-78-140(b) as follows:

(b) The political subdivisions of this State, in regard to tort and automobile liability, property and casualty insurance shall procure insurance to cover these risks for which immunity has been waived by (1) the purchase of liability insurance pursuant to § 1-11-140; or (2) the purchase of liability insurance from a private carrier; or (3) self-insurance; or (4) establishing pooled self-insurance liability funds, by intergovernmental agreement, which may not be construed as transacting the business of insurance or otherwise subject to state laws regulating insurance. A pooled self-insurance liability pool is authorized to purchase specific and aggregate excess insurance. A pooled self-insurance liability fund must provide liability coverage for all employees of a political subdivision

applying for participation in the fund. If the insurance is obtained other than pursuant to § 1-11-140, it must be obtained subject to the following conditions:

(1) If the political subdivision does not procure tort liability insurance pursuant to § 1-11-140, it must also procure its automobile liability and property and casualty insurance from other sources and shall not procure these coverages through the Budget and Control Board;

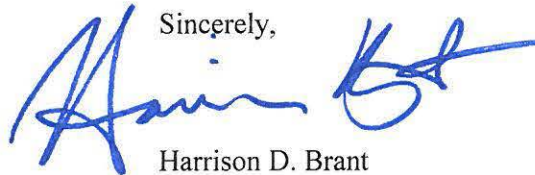
(2) If a political subdivision procures its tort liability insurance, automobile liability insurance, or property and casualty insurance through the Budget and Control Board, all liability exposures of the political subdivision as well as its property and casualty insurance must be insured with the Budget and Control Board;

(3) If the political subdivision, at any time, procures its tort liability, automobile liability, property, or casualty insurance other than through the Budget and Control Board and then subsequently desires to obtain this coverage with the Budget and Control Board, notice of its intention to so obtain this subsequent coverage must be provided the Budget and Control Board at least ninety days prior to the beginning of the coverage with the State Budget and Control Board. The other lines of insurance that the political subdivision is required to procure from the board are not required to commence until the coverage for that line of insurance expires. Any political subdivision may cancel all lines of insurance with the State Budget and Control Board if it gives ninety days' notice to the board. The Budget and Control Board may negotiate the insurance coverage for any political subdivision separate from the insurance coverage for other insureds.

(4) If any political subdivision cancels its insurance with the Budget and Control Board, it is entitled to an appropriate refund of the premium, less reasonable administrative cost.

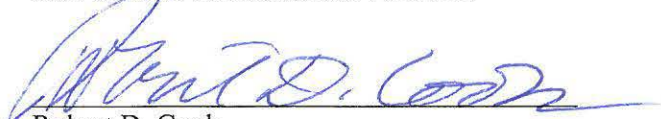
§ 15-78-140(b).

Sincerely,



Harrison D. Brant
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General