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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

December 18, 2000

The Honorable Tom L. Swatzel
Member, Georgetown County Council
Post Office Box 1311
Murrells Inlet, South Carolina 29576

Dear Mr. Swatzel,

You have requested an opinion of this Office regarding a Georgetown County accommodations tax grant awarded to the Georgetown Labor Council (Labor Council).

By way of background, you inform us that the Labor Council represented itself as a not-for-profit organization and as registered with the Secretary of State on its accommodations tax grant application to the Georgetown Council. You indicate that the Labor Council requested $50,000 for a Labor Day parade. The Labor Council also provided a Federal Employer Identification Number that actually belongs to the United Steelworkers of America. The County awarded $3,000 to the Labor Council for the Labor Day parade. You inform us that you also believe that the $3,000 check was deposited into a bank account of the United Steelworkers of America.

Law / Analysis

At the outset, it is important to note that an opinion of the Attorney General cannot determine facts or adjudicate factual disputes. See, Op. Atty. Gen., April 3, 1989. Based upon the information you have provided, there appears to be numerous factual allegations which would need to be property investigated before an agency could determine if a violation of the law has occurred.

That being said, for the purposes of providing you with a definitive response, we will accept as true the facts as you have presented them. Based upon the situation as described in your letter, certainly the South Carolina Solicitation of Charitable Funds Act, codified at S.C. Code Ann. § 33-56-10 et seq. should be examined. Pursuant thereto, "no person shall knowingly and willfully misrepresent or mislead anyone by any manner, means, practice or device." S.C. Code Ann. § 33-56-120. The Secretary of State is authorized to investigate any charitable organization for violations of the Act" upon his own motion or upon complaint of any person." S.C. Code Ann. § 33-56-140. If you have not directed your allegations to the Secretary of State, I would certainly advise you to do so.

Second, the Department of Revenue serves as the oversight agency for questionable expenditures of accommodations tax revenues. See, S.C. Code Ann. § 6-4-30. That Department is granted investigatory authority to determine if this expenditure is improper under the legal requirements governing the use of accommodations tax revenues. Again, I would advise that if you have not yet contacted the Department of Revenue concerning the propriety of this use of the accommodations tax, that you immediately do so.

Finally, and perhaps most importantly, your question raises very serious concerns regarding the expenditure of public funds for a private purpose in violation of the South Carolina Constitution. Our Supreme Court, as well as this Office, have repeatedly recognized that public funds may be expended only for a public purpose, not a private purpose. See, e.g. Op. Atty. Gen., January 15, 1999, citing Elliot v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E. 596 (1923). The South Carolina Supreme Court defined a "public purpose" in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975), saying that "[a]s a general rule a public purpose has for its objective the promotion of public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents, or at least a substantial part thereof." In Bauer v. S.C. Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978), the Court warned that "[i]t is not sufficient that an undertaking bring about a remote or indirect public benefit to categorize it as a project within the sphere of public purpose." See, Article X, § 11 of the South Carolina Constitution (forbidding a pledge of the credit of the state to a private corporation). See also, Article I, § 3 (due process clause).

The Constitutional requirement of public purpose was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises. As the United States Supreme Court said long ago in Savings and Loan Assn. v. Topeka, 20 U.S. (Wall) 655 , 22 L.Ed. 455 (1874) "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it on favored individuals ... is nonetheless a robbery because it is done under the forms of law ... ."

This Office has frequently recognized that public purpose" is not easily defined. Each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare. Op. Atty. Gen., March 16, 1988. However, in Nichols v. S.C. Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986), the Court enunciated a general four-part test as a guide to state and local officials in determining whether expenditures meet the requirement of public purpose. These criteria include: (1) the ultimate goal or benefit to the public intended by the project; (2) whether public or private parties will be the primary beneficiaries; (3) the speculative nature of the project; (4) the probability that the public interest will be served and to what degree.

The expenditure of county funds to the Labor Council for the holding of a Labor Day parade presents serious constitutional problems under the Nichols test. This legal vulnerability is particularly so if, as you allege, the funds ended up in a bank account owned by the United

569 (1985) [state constitutional mandate forbids donations from or raids upon public purse to or for benefit of a private association including a labor union, in the absence of a legal obligation, statutory or contractual]; Arizona Op. Atty. Gen. No. I 83-078 [exclusive payroll option for teachers' union constituted a special privilege and the use of public funds for a non-public purpose]; 1986 WL 222132 (Utah Atty. Gen., 1986) [school district may not pay an officer for time off for union activities except in narrow circumstances. There, the Attorney General of Utah said that "union or association 'duties' are usually concerned with protecting and advancing the welfare of its membership and organization, not with the schools"].

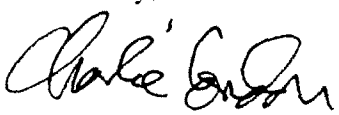
In our judgment, it would be difficult to imagine any circumstance justifying a donation of public funds to the United Steelworkers of America. Whether or not these public funds were obtained by way of misrepresentation as a nonprofit corporation by the labor union, or the funds were simply funneled to the union by the nonprofit corporation, based upon these limited facts, we do not see where a public purpose is being promoted.

Conclusion

The donation of public funds to a labor union cannot be condoned. If, as you allege, county funds were given to support a labor union, these expenditures would be unconstitutional and invalid. In our judgment, it would be difficult to imagine any circumstance justifying a donation of public funds to the United Steelworkers of America.

To subsidize a labor union under the guise of a charitable purpose serves no public purpose. Taxpayers have a right to know that their tax dollars are not being spent for private purposes in support of special interests. Accordingly, if the facts are as you have presented them, those expenditures would be unconstitutional.

Sincerely,



Charlie Condon
Attorney General

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Steelworkers of America. While recreation, as well as the promotion of tourism and cultural events have generally been upheld as a public purpose, see, Op Atty. Gen., January 8, 1997; Op. Atty. Gen., November 18, 1996; Op. Atty. Gen., January 16, 1997, we are aware of no authority upholding a county donating public funds for a Labor Day parade, particularly where a labor union would be the real beneficiary of those funds. If what you allege is true, public funds would have been expended to benefit private interests rather than the public interest.

On occasion, this Office has recognized that the expenditure of public funds to a non-profit corporation may constitute a valid public purpose, particularly where the government entity has contracted with the non-profit corporation for the performance of a proper governmental function. See, Op. Atty. Gen., March 19, 1985. See also, Op. Atty. Gen., January 16, 1997 (state agency's creation of a nonprofit corporation could constitute a proper public purpose). In such cases, the direct appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function of the State.

On the other hand, this Office has advised against expenditures of public funds which would result in benefits only to the members of civic organizations such as the Salvation Army (Op. Atty. Gen., April 13, 1971) or Boys' Club (March 31, 1981 and May 28, 1981). But see, Op. Atty. Gen, April 20, 1982 and November 16, 1983 (where we recognized the way that public funds may be utilized to assist Boy Scouts and private entities promoting tourism under the auspices of PRT). Where such expenditures have been upheld, we have stressed the importance of maintaining adequate controls to insure a public purpose.

In an opinion dated April 28, 1971, former Attorney General McLeod concluded that a direct appropriation by Marlboro County to the Marlboro Area Arts Council was constitutionally suspect because that donation did not serve a public purpose. Attorney General McLeod found there was not sufficient control maintained by the county in that instance so as to insure that taxpayer dollars were truly being expended on behalf of a public purpose as opposed to a private purpose.

Here, however, you allege that the purported nonprofit corporation involved is, in reality, a sham and that the public funds ended up in the account of a labor union. Again, if these facts are indeed true, such would surely be an expenditure for a private, not a public purpose. If a labor union represented itself as a nonprofit association for the purpose of obtaining public funds, such would clearly be an improper use of public funds.

In an opinion, dated February 28, 1989, we recognized that there is a clear difference between a labor union and a charitable, eleemosynary or educational corporation. And in an opinion of May 6, 1981, we concluded that the deduction of fees from teachers' paychecks would be improper. Moreover, authorities elsewhere have recognized that expenditures in support of a labor union do not promote a public purpose. See, State ex rel. Sheehy v. Ensign, 1971 WL 14073 (Ohio 1971) [contract between a municipality and a labor union serves no valid public purpose, instead being for the advantage of a special group]; Michael v. Comm. Workers of America, AFL-CIO, 495 N.Y.S.2d