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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 3, 1997

The Honorable Herbert Kirsh
Member, House of Representatives
532A Blatt Building
Columbia, South Carolina 29211

Dear Representative Kirsh:

You have asked us to address certain situations which were cited in the January, 1997 Legislative Audit Council's Management Review of Winthrop University. Your principal concern is Winthrop's "practice of allowing Charlotte-area students to pay the lower in-state tuition rate." The Audit Council Report elaborated upon this practice at page 5, wherein it was stated:

> Winthrop has allowed non-South Carolina graduate students to enroll at Winthrop and pay in-state tuition and fees. In academic year 1995-96, approximately 72% of Winthrop's out-of-state graduate students who should have been charged out-of-state tuition and fees were charged the in-state rate. These unauthorized discounts totaled $376,474 for the year.
>
> South Carolina's statutes require state colleges and universities to charge higher tuition and fees to students who are not South Carolina residents. State law allows a waiver of the out-of-state fee differential for scholarship recipients and for students who enrolled in graduate school before the enactment of a fee differential. Winthrop has allowed a fee differential which requires nonresident students to pay a rate that is approximately 80% higher than the rate established for South Carolina students. However, only a small fraction of

Winthrop's out-of-state graduate students are actually charged the out-of-state tuition and fees.

Law / Analysis

S.C. Code Ann. Section 59-112-10 et seq. authorizes the rates for fees and tuition at State Institutions of Higher Learning in South Carolina. Section 59-112-20 provides as follows:

> South Carolina domicile for tuition and fee purposes shall be established as follows in determinations of rates of tuition and fees to be paid by students entering or attending State Institutions:
>
> A. Independent persons who reside in and have been domiciled in South Carolina for a period of no less than twelve months with an intention of making a permanent home therein, and their dependents, may be considered eligible for in-state rates.
>
> B. Independent persons who reside in and have been domiciled in South Carolina for fewer than twelve months but who have full-time employment in the State, and their dependents, may be considered eligible for in-state rates for as long as such independent person is employed on a full-time basis in the State.
>
> C. Where an independent person meeting the provisions of § 59-112-20 B above, is living apart from his spouse, or where such person and his spouse are separated or divorced, the spouse and dependents of such independent person shall have domiciliary status for tuition and fee purposes only under the following circumstances:
>
> (1) if the spouse requesting domiciliary status for tuition and fee purposes remains

> domiciled in South Carolina although living apart or separated from his or her employed spouse;
>
> (2) if the dependent requesting domiciliary status for tuition and fee purposes is under the legal custody or guardianship, as defined in § 59-112-10 I above, or an independent person who is domiciled in this State; or if such dependent is claimed as an income tax exemption by the parent not having legal custody but paying child-support, so long as either parent remains domiciled in South Carolina.
>
> D. The residence and domicile of a dependent minor shall be presumed to be that of the parent of such dependent minor.

An "independent person" as defined by Section 59-112-10 (F) is a "person in his majority or an emancipated minor ...." The term "domicile" is defined by Section 59-112-10 D to be

> ... a person's true, fixed, principal residence and place of habitation; it shall indicate the place where such person intends to remain, and to which such person expects to return upon leaving without establishing a new domicile in another state. For purposes of this section one may have only one legal domicile; one is presumed to abandon automatically an old domicile upon establishing a new one. Housing provided on an academic session basis for students at State Institutions shall be presumed not to be a place of principal residence, as residency in such housing is by nature temporary.

Section 59-112-30 deals with the situation where a student's domicile changes after enrollment at a State Institution. Such provision then requires that the student's tuition charges must be adjusted as follows:

> A. Except as provided in § 59-112-20 B above, when domicile is taken in South Carolina, a student shall not

become eligible for in-state rates until the beginning of the next academic session after expiration of twelve months from date of domicile in this State.

B. When South Carolina domicile is lost, eligibility for in-state rates shall end on the last day of the academic session in which the loss occurs; however, application of this subsection shall be at the discretion of the institution involved.

C. Notwithstanding the other provisions of this section, any dependent person who has been domiciled with his family in South Carolina for a period of not less than three years immediately prior to his enrollment may enroll in a state-supported institution of higher learning at the in-state rate and may continue to be enrolled at such rate even if the parent, spouse or guardian upon whom he is dependent moves his domicile from this State.

A number of principles of statutory construction are applicable here. First and foremost, is the time-honored tenet of construction that in construing a statute, the intent of the Legislature must prevail. State v. Salmon, 279 S.C. 344, 306 S.E.2d 620 (1983). Moreover, where the statute is clear and unambiguous, its terms must be given their literal meaning. Crown Cork and Seal Co., Inc. v. South Carolina Tax Comm., 302 S.C. 140, 394 S.E.2d 315 (1990). At that point, there is no room for construction, Garris v. Cincinnati Ins. Co., 280 S.C. 149, 311 S.E. 723 (1984), and nothing for the Supreme Court to construe. Bagwell v. Ernest Burwell, Inc., 227 S.C. 168, 87 S.E.2d 583 (1955).

Furthermore, any specific exceptions placed within a statute strongly indicate that no other exceptions were intended by the General Assembly. Pa. Nat. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (Ct.App. 1984). Where there is no ambiguity, words must neither be added to nor taken from the statute. Home Bldg. & Loan Assn. v. City of Sptg., 185 S.C. 313, 194 S.E. 139 (1938). The Courts will give effect to each and every part of the statute. Jolly v. Atlantic Greyhound Corp., 207 S.C. 1, 35 S.E.2d 42 (1945). The Legislature will always be presumed to accomplish something with each statute and not to engage in futile action. Purvis v. State Farm Mut. Auto. Ins. Co., 304 S.C. 283, 403 S.E.2d 662 (1991).

In addition, it is clear that where a statute requires a public officer to perform a plain, ministerial duty, he must do so. Walpole v. Wall, 153 S.C. 106, 149 S.E. 760 (1929). Our Supreme Court has recognized that a "'ministerial duty' is one described and defined by law with such precision as to leave nothing to the exercise of judgment or discretion." Parker v. Brown, 195 S.C. 35, 10 S.E.2d 625, 634 (1940). Such a duty is, in the words of the Court "absolute, certain and imperative, and involves the execution of a set task." Id.

Reviewing Section 59-112-10 et seq. in its entirety, it is clear that such statutory provisions impose clear, precise and mandatory duties upon all public institutions of Higher Learning in South Carolina, including Winthrop, and thus must be followed. While I have no way of knowing each and every factual situation with respect to whether the out-of-state or in-state fee is charged by Winthrop to any particular student because in an Attorney General's opinion, we cannot investigate facts, see Op. Atty. Gen., December 12, 1983, the Legislative Audit Council has examined these facts in considerable detail. The Council's conclusion is that "Winthrop has allowed non-South Carolina graduate students to enroll at Winthrop and pay in-state tuition and fees." Indeed, according to the Audit Council Report "approximately 72% of Winthrop's out-of-state graduate students who should have been charged out-of-state tuition and fees were charged the in-state rate."

It is well-settled that in the absence of additional statutory authority, no fee other than the one required by the particular statute in question may be charged. Op. Atty. Gen., Op. No. 78-192 (November 13, 1978). Without an express statute authorizing a reduction or waiver of a required fee, such may not be done. Op. Atty. Gen., Op. No. 3728 (March 7, 1974).

Accordingly, it is my opinion that Winthrop may not charge less than the statutory fee required for out-of-state students in accord with Section 59-112-10 et seq. Section 59-112-10 et seq. does contain certain exceptions. Section 59-112-70, for example, provides for abatement of the fees charged out-of-state students on scholarship. However, instances other than the specified exceptions, even where an out-of-state domiciliary becomes domiciled in South Carolina, "[e]xcept as provided in § 59-112-20 B, a student shall not become eligible for in-state rates until the beginning of the next academic session after expiration of twelve months from date of domicile in this State." The fact that there are no other exceptions except those specified in § 59-112-10 et seq., is a clear indication that the General Assembly intended no other departures from the statute with respect to the

payment of out-of-state rates.[1] The United States Supreme Court has held that "[t]he State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." Vlandis v. Kline, 412 U.S. 441, 453, n. 9. 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973). This is the clear purpose of Section 59-112-10 et seq. and must be followed.

We have previously advised Winthrop of the mandatory requirements of the tuition rate statutes. In 1972, with respect to an earlier version of this same law, we stated that "[t]he definition of residence that appears ... is the controlling law in this State as far as State supported institutions are concerned and should be adhered to by Winthrop College." (emphasis added). We reiterate this same requirement twenty-five years later. This statute must be followed and must be strictly adhered to.

Our Supreme Court has recognized that

> [t]he obligations of public officers as trustees for the public are established as part of the common law fixed by the habits and customs of the people. Among their obligations as recipients of a public trust are to perform the duties of their office honestly, faithfully and to the best of their ability ... (and) to use reasonable skill and diligence ... Every public officer is bound to perform the duties of his office honestly, faithfully and to the best of his ability, in such manner as to be above suspicion of irregularities and to act primarily for the benefit of the public.

O'Shields v. Caldwell, 207 S.C. 194, 216, 35 S.E.2d 184 (1945). Moreover, 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." Such public funds

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[1] The only other relevant authority, of which I am aware is the proviso contained in § 18A.9 of the 1996-97 Appropriation Act which permits USC-Aiken to waive out-of-state tuition. This waiver authority, however, is based upon the facts that the Georgia regents are allowing a similar waiver to those students residing in the Aiken area who attend schools of higher education in Georgia.

> ... 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. 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.

Id. at § 212 (emphasis added). See also, Sumter Co. v. Hurst, 189 S.C. 316, 319, 1 S.E.2d 242 (1939) ["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."] And in Joint Consolidated School Dist. No. 2 v. Johnson, 181 P.2d 504, 507 (Kan. 1947), it was stated that the fact that

> ... a public officer entrusted with public funds has no right to give them away is a statement so obviously true and correct as to preclude the necessity for the citation of many authorities.

Courts in other jurisdictions 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],

McQuillin, Municipal Corporations, § 12.217, moreover, states 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 ... .

It is also 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." 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). That is why our Supreme Court has recognized that

> [t]he principle is firmly settled in this State that a taxpayer may maintain an action in equity, on behalf of himself and other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law.

Kirk v. Clark, 191 S.C. 205, 210, 4 S.E.2d 13 (1939).

It is true that the South Carolina Tort Claims Act, § 15-78-10 et seq. is designed generally to immunize public officials from personal liability for their torts when acting within the scope of their employment. Section 15-78-70 (a) provides that "[t]his chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b). Subsection (b) states that

> [n]othing in this Chapter may be construed to give an employee of a governmental entity immunity from suit and liability if 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.

Section 15-78-40 further provides that "[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."

Cases in other jurisdictions have held, however, that such Tort Claims provisions do not shield public officials or immunize their wrongful conduct regarding the unlawful expenditure of public funds from personal liability. For example, in Burt v. Blumenauer, 84 Or.App. 144, 733 P.2d 462, the Court of Appeals in Oregon, held that an unlawful expenditure of public funds by public officials was not an action sounding in "tort for purposes of the Oregon Tort Claims Act. The Court concluded that to find otherwise would be to reach an anomalous and absurd result. Said the Court,

> [a]ny judgment that might be rendered in favor of plaintiff in his capacity as taxpayer of Multnomah County and against defendants would have to be paid by Multnomah County because of OTCA's indemnity clause ORS 30.285. In effect, Multnomah County would be liable to itself from the misspent funds. It would also be required to pay all of defendant's legal defense costs. We cannot impute such an intent to a legislative enactment ... . [A]ny unlawfully expended funds could never be recovered ... .

733 P.2d at 464.

Moreover, in Stanson v. Lott, 17 Cal.3d 206, 130 Cal.Reptr. 697, 551 P.2d 1 (1976), the California Supreme Court construed a provision similar to our own § 15-78-70. There, the Court concluded:

> [a]s noted above, under the tort claims act, a public employee generally must been the ultimate financial responsibility for his actions in cases of a fraud, corruption or actual malice ". ... There can be no question, of course, that the improper expenditure of public funds under similar circumstances would also render a public official personally liable. In light of the considerable authority enjoyed by officials who control public

> funds, and the important public interest in protecting such moneys from improper use, however, we believe that such officials may properly be held to a higher standard than simply the avoidance of "fraud, corruption or actual malice" in their handling of public funds. We conclude instead that such public officials must use "due care," i.e. reasonable diligence, in authorizing the expenditure of public funds and may be subject to personal liability for improper expenditures made in the absence of such due care.

551 P.2d at 15.

This is similar to the analysis by our Supreme Court in Chandler v. Britton, 197 S.C. 303, 15 S.E.2d 344 (1941) which held that in the absence of a statute to the contrary, a public officer could be personally liable for the loss of public funds where such officer has not "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." 197 S.C. at 310.

Furthermore, courts in other jurisdictions have recognized, as has our own Court, that it is proper for a court of equity to enjoin the practice of payment of public funds which is not in accord with the law. Carter v. Jernigan, 227 N.W.2d 131 (Iowa, 1975). In Brown v. Wingard, 285 S.C. 478, 480, 330 S.E.2d 301 (1985), our Supreme Court recognized that taxpayers have standing to bring lawsuits who fail to spend public funds in compliance with state law, concluding that "... taxpayers ... have an interest in seeing that ... officials disburse funds in a lawful manner." Accord, Kirk v. Clark, Id. ["a taxpayer may maintain an action in equity on behalf of himself and other taxpayers, to restrain public officers from paying out public money for purposes unauthorized by law."]

Again, facts establishing that the statute is being ignored by Winthrop are beyond the scope of an Attorney General's opinion and could only be established with finality by a court. If such is occurring, however, as is indicated in the Audit Council Report, officials at Winthrop or their sureties could be rendered personally liable for such monies as have not been collected in compliance with the law. Moreover, a court could mandate compliance with the law either through a mandamus or injunction and the failure to do do could result in the penalty of contempt. This reasoning would govern not only the

collection of out-of-state tuition fees, but also fees associated with the Executive MBA program. See p.8 of the Audit Council Report.[2]

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an

REVIEWED AND APPROVED BY:

Zeb C. Williams, III
Deputy Attorney General

[2] The Audit Council Report found that some students have not yet paid fees related to the Executive MBA program and did not review certain records to determine if other students owed fees. Again, a public officer cannot give away or waive the collection of public monies.