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The State of South Carolina

Office of the Attorney General

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May 21, 1993

George L. Schroeder, Director
Legislative Audit Council
400 Gervais Street
Columbia, South Carolina 29201

Dear Mr. Schroeder:

You have advised that during an ongoing audit of a state university, several questions have arisen relating to the expenditure of funds by the institution. The funds in question are derived from laundromats and vending machines (dispensing sodas and snacks) located in several places on the university campus. You have asked our opinion on several questions, each of which will be addressed separately, as follows:

Question 1

> Do funds derived from university campus laundromats and vending machines fall within the purview of part of §129.13 of the current state appropriations act (Act No. 501, Part I, §129.13, 1992 Acts and Joint Resolutions) and similar provisions in earlier acts?

The referenced portion of §129.13 about which you inquire provides in relevant part:

> Notwithstanding other provisions of this act, funds at State Institutions of Higher Learning derived wholly from athletic or other student contests, from the activities of student organizations, and from the operations of canteens and bookstores,...may be retained at the institution and expended by the respective institutions only in accord with policies established by the institution's Board of Trustees. Such funds shall be audited annually by the State but the provisions of this Act concerning unclassified

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> personnel compensation, travel, equipment purchases and other purchasing regulations shall not apply to the use of these funds.

In interpreting an act of the legislature, the primary objective of both the courts and this office is to determine and effectuate the legislative intent if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). A statute should be given a reasonable and practical construction consistent with the policy or purpose of the statute. Hay v. South Carolina Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). The literal meaning of a statute may be rejected if such will permit the intent of the legislature to prevail. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948).

Applying these rules of statutory construction to §129.13, we believe that the spirit, if not the letter, of the law would be carried out if proceeds from laundromats and vending machines located on the campus of a state university were included as funds subject to §129.13. While the literal language might suggest otherwise, revenues generated from laundromats and vending machines seem sufficiently similar to revenues generated by operation of canteens and bookstores to treat them in similar fashion. It would be most difficult to draft a proviso which would list all possible, similar sources of revenue which should be treated similarly to bookstore or canteen revenue, revenue derived from athletic or other student contests, and the like.

Therefore, in our opinion, revenues derived from laundromats and vending machines located on a state university campus would fall within the purview of §129.13 of the current state appropriations act.

Question 2

> If funds from university campus laundromats and vending machines do not fall under the foregoing language of §129.13, what limitations would apply to their expenditure?

Because the response to Question 1 is that such revenues would fall within §129.13, it is unnecessary to respond to this question.

Question 3

> Section 129.13 provides that funds derived from operations such as canteens may be expended "only in

> accord with policies established by the institution's Board of Trustees." If an institution expends the funds without policies having been established by its board of trustees, could this result in a violation of or noncompliance with any law in addition to §129.13 of the appropriations act?

Expenditure of the specified funds without a policy having been adopted prior thereto could possibly place the institution in violation of S.C. Code Ann. §11-9-10, which provides:

> It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated,... .

Whether this statute may have been violated could be determined only after an analysis of the expenditure and how such was accomplished.

In addition, there may be other statutes or common law principles that may be violated by a particular expenditure made in the absence of a policy. To determine whether such violations have occurred, facts should be developed to show who made the expenditure; who authorized the expenditure; for what the expenditure was made; whether the "public purpose" test was met by the expenditure; whether the board of trustees may have ratified the expenditure after the fact; and so forth.

Question 4

> With reference to an opinion issued by our office dated April 4, 1983, which stated that the only restriction on expenditure of funds subject to §129.13 is that they be expended in accordance with policies established by the institution's board of trustees, you have asked whether such expenditures must also meet the "public purpose" test.

This Office has stated on several occasions that funds subject to predecessor provisos identical to those of §129.13 would be considered public funds. In Op.Atty.Gen. No. 85-132, we stated:

> "Public funds" are those monies belonging to a government, be it state, county, municipal or other political subdivision, in the hands of a public official. ...Such funds are not necessarily limited to tax moneys... .

> A similar question was addressed in an opinion of this Office dated August 10, 1973. Addressing funds derived from athletic contests, student organizations, and the operation of canteens and bookstores of state-supported colleges and universities, Attorney General McLeod concluded that while such funds were not State funds in the sense that they had to be turned over to the State Treasurer, they are nevertheless "public funds" and "are subject to such legislative directives as the General Assembly may provide." While this previous opinion interpreted a predecessor proviso, it is still applicable. Thus, athletic, bookstore, or canteen funds generated by state-supported colleges and universities would be considered "public funds" and must be expended in a manner consistent with state law.

One restriction or requirement of state law that must be taken into account is that every expenditure of public funds must directly promote a public purpose. Mims v. McNair, 252 S.C.64, 165 S.E.2d 355 (1969). This restriction or requirement thus is in addition to the requirement in §129.13 that these funds be expended in accordance with policies established by an institution's board of trustees. Thus, to the extent that the opinion of April 4, 1983, is inconsistent with today's opinion, today's opinion will be deemed to be controlling. (Whether a particular expenditure would meet the "public purpose" test would be a question of fact outside the scope of an opinion of this Office. See Ops. Atty. Gen. dated January 8, 1991 and August 7, 1991, among others.)

Question 5

> Can funds identified in §129.13 be transferred (given) to a private non-profit foundation (as a gift rather than payment for goods and services)? You cite to several opinions of our Office which would indicate that such payments would be unlawful without express statutory authority.

As discussed previously, the funds identified in §129.13 would be considered public funds. The opinion of this Office dated August 10, 1973 states that there must be specific statutory authority to loan public monies; that opinion found no such authority for a university to loan §129.13-type funds to an eleemosynary corporation affiliated with the university. Similarly, the opinion of April 26, 1983 provides that §129.13-type funds must be expended in accordance with the policies established by the institution's board of trustees and in

accordance with constitutional and statutory provisions; that opinion found no constitutional or statutory authority for a state agency to give public funds to a private foundation or other corporation or individual except in payment for goods and services. These opinions appear to be dispositive of your question.

Question 6

(A) Would the following types of expenditures be valid expenditures of funds under §129.13 (either with or without a board of trustees' policy providing for these expenditures)?

(B) Would the following types of expenditures meet the public purpose test of the State Constitution?

1. Compensation for personal property stolen from university students and guests of the university.

2. Food for Christmas parties for university employees.

3. Christmas bonuses for university employees.

4. Retirement gifts for university employees.

5. Retirement parties for university employees.

6. Food for parties for university seniors.

7. Food for receptions for alumni.

In any event, §129.13 requires that an expenditure of funds under §129.13 be made only in accordance with policies established by the institution's board of trustees. That language is clear and unambiguous and thus must be applied literally. Henderson v. Evans, 268 S.C. 127, 232 S.E.2d 331 (1977). It would be preferable for the policies to have been made prior to the expenditure; if the board of trustees ratified an expenditure after the fact, perhaps in a given instance that might be sufficient. The facts of a particular expenditure would require examination to validate the particular expenditure if a policy were not adopted prior to the expenditure.

Whether a particular expenditure meets the public purpose test as enunciated by the courts of this State becomes a question

of fact. Because this Office is authorized to provide legal advice but not to decide questions of fact, we must respectfully defer to the appropriate trier of fact in that regard. Op. Atty. Gen. dated December 12, 1983. We would offer the following observations for your guidance.

The public purpose test used by our courts is found in decisions such as Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975):

> As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose... .

As related to a university, it might be said that an expenditure would be required to promote the public health, safety, morals, general welfare, etc. of all of the inhabitants of the university, or at least a substantial part thereof. In a similar circumstance, this Office has advised that jail canteen profits should not be used for individual inmate benfits, but using such profits for the benefit of the entire inmate population could probably be authorized. Op. Atty. Gen. dated June 1, 1992. An opinion dated May 22, 1989, advised against using public funds for picnics and social events for county employees and members of county council. An opinion dated March 29, 1984 noted the remote benefit to the public accruing should public funds be used to give a reception to honor a public employee (i.e., a retiring public employee).

Considering the foregoing and without making the necessary finding of fact, we observe that compensation for personal property stolen from university students and guests of the university would appear to benefit only the involved individual, rather than all or a substantial part of the university inhabitants. Food for Christmas parties for university employees might well be in the same category of public fund expenditures discussed in the opinions dated June 1, 1992 and May 22, 1989. Christmas bonuses for university employees might be viewed as individual in nature; if the employee is unclassified, the express terms of §129.13 might permit the expenditure. As to retirement gifts, perhaps §129.35 (last paragraph) might permit such an expenditure; it could be argued that, by analogy the General Assembly has authorized such an expenditure of public funds for other state agencies, to the specified limits. The opinion of March 29, 1984 speaks to the use of public funds for

retirement parties, but §129.35 of the 1992-93 appropriates act should also be considered. Food for parties for alumni and university seniors might or might not be considered permissible, depending on the facts of the situation. (A single party might be viewed as permissible, whereas a weekly party during the year for seniors might not, for example.)

Because we do not have sufficient facts to be able to draw a legal conclusion, we hope that the foregoing observations and the opinions (copies of which your attorney also has) will offer as much guidance as is possible under the circumstances.

We trust the foregoing has satisfactorily responded to your inquiry. Please advise if additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

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Reviewed and Approved By:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions