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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 8, 1996

The Honorable Ronald N. Fleming
Member, House of Representatives
133 Fleming Hill Road
Jonesville, South Carolina 29353

RE: Informal Opinion

Dear Representative Fleming:

By your letter of March 21, 1996, you have sought an opinion from this Office as to several issues relative to Wallace Thompson Hospital and the Union County Hospital Board. You have advised of your understanding that the Board is fiscally autonomous, that the members currently are chosen by the Union County Council under the development of the Board, and that at least three members of the Board have been or must be physicians. You further advise that there has been a physician who has been chosen to serve on the Board, which physician is an employee of the Hospital. You have sought an opinion on the following questions: (1) Whether an employee of the Hospital, who is a physician, may be a member of the Hospital Board, and (2) Since the Board is fiscally autonomous, whether the members should be selected by Union County Council or chosen by the electorate of Union County.

The Union County Hospital District was established pursuant to Act No. 848 of 1946, as amended by Act No. 294 of 1985. The portion of the enabling legislation relative to the governing body of the District presently reads in pertinent part:

> The Union Hospital District is governed by a Board composed of seven members, known as the Union Hospital District Board of Trustees. Three of the members of the Board of Trustees must be medical doctors and practicing physicians within the Union Hospital District and four of the members must be resident citizens of that District. The members of the

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> Board of Trustees must be appointed by the Union County Council which also shall establish the terms of the members. ...

The members of the Board thus are appointed by Union County Council and, as you observed, three of the Board members must be medical doctors and practicing physicians within the Hospital District.

Question 1

Your first inquiry was whether a physician who is actually employed by Wallace Thompson Hospital may serve on the Hospital District's Board of Trustees.

Section 3 of Act No. 848 of 1946 sets forth the powers and duties of the Board of Trustees of the Hospital District; in part this section provides:

> The Union Hospital District Board of Trustees shall have power to build, construct, establish, extend, maintain and operate a public hospital in the Union Hospital district for the accommodation and benefit of the public subject to the rules and regulations of the Union Hospital District Board of Trustees and the provisions of this Act; ... . [Emphasis added.]

Additional powers and duties are specified in section 5 of that Act:

> The Union Hospital District Board of Trustees shall adopt and promulgate such rules, regulations and by-laws for the government of the public hospital as may be deemed expedient for the economic and equitable conduct thereof. They shall also have the power to appoint a Superintendent, and Assistant Superintendent, and Matron, and fix their compensation, and do all things necessary to carry out the spirit of interest for the establishment and maintenance of said public hospital. ...

Other duties not relevant to your inquiry are provided in other parts of the Act. It is observed that the Board of Trustees has the power to, inter alia, operate a hospital, to employ persons and fix their compensation, to promulgate rules and regulations, and to do "all things necessary to carry out the spirit of interest for the establishment and maintenance" of Wallace Thompson Hospital.

Placing an employee-physician of the Hospital on the Board of Trustees which has the power to, among others, prescribe rules and regulations and otherwise carry out activities necessary for the operation of the Hospital, by which the employee-physician

would be governed, would most probably be viewed as creating a situation in which the individual is both master and servant. The master-servant relationship is based on common law rather than statutory law and may be summarized as follows:

> [A] conflict of interest exists where one office is subordinate to the other, and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power of appointment as to the other office, or has the power to remove the incumbent of the other or to punish the other. Furthermore, a conflict of interest may be demonstrated by the power to regulate the compensation of the other, or to audit his accounts.
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> ....
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> [I]t is not the performance, or the prospective right of performance, of inconsistent duties only that gives rise to incompatibility, but the acceptance of the functions and obligations growing out of the two offices.... The offices may be incompatible even though the conflict in the duties thereof arises on but rare occasions.... In any event, the applicability of the doctrine does not turn upon the integrity of the officeholder or his capacity to achieve impartiality. ...

67 C.J.S. Officers §27. See also Ops. Att'y Gen. dated May 21, 1984; May 15, 1989; March 3, 1978; January 19, 1994; and others.

The South Carolina Supreme Court, in McMahan v. Jones, 94 S.C. 362, 77 S.E. 1022 (1913), declared employment of two commission members, by the commission, to be illegal. The court stated:

> No man in the public service should be permitted to occupy the dual position of master and servant; for, as master, he would be under the temptation of exacting too little of himself, as servant; and as servant, he would be inclined to demand too much of himself, as master. There would be constant conflict between self-interest and integrity.
>
> Should Richardson, as chairman of the commission, appoint the committee to investigate his own management of the infirmary, or check his accounts as treasurer? Should he be present, when his administration of the institution is being considered and discussed? Should he and Butler participate, when their own duties are being prescribed and their compensation fixed? It requires only a moment's reflection to see that the positions are utterly inconsistent, and ought not to be held by the same persons. Propriety, as well as public policy, forbids it.

> If it be said that there are three other members of the commission, who would make a quorum, the answer is that the legislature has expressed the intention that the State should have the benefit of the judgment and discretion, individually and collectively, of a commission of five members,--not three,--in the administration of this charity. By disqualifying two of their number, the commission has practically reduced its membership to three.

Id., 94 S.C. at 365.

Based on the foregoing, I am of the opinion that a master-servant relationship, in contravention of common law and public policy, would be created if an employee-physician of the Hospital were to serve on the Board of Trustees of the Hospital District.

Question 2

Your second inquiry is whether, since the Board of Trustees and the Hospital District are fiscally autonomous,[1] the members should be appointed by Union County Council, as is presently being done, or whether the members should be elected by the voters of Union County. The constitutional consideration here is Article X, Section 5 of the South Carolina Constitution, which provides in part:

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[1]By "fiscally autonomous," I am assuming that reference is being made to section 16 of Act No. 848 of 1946, the only section of that act which references the levy of taxes. That section provides for the repayment of bonds:

> That the officers of Union County charged with the assessment and collection of taxes shall, at the direction of the Union Hospital District Board of Trustees of Union Hospital District, levy and collect such a tax annually upon all property, real or personal, within Union Hospital District, as will raise a sum sufficient to pay the principal and interest on said bonds, as the same shall become due.

It is also observed that section 10 of that Act empowers the Board of Trustees to issue bonds as specified therein, but that section contains a proviso that "a majority of the voters of said Union Hospital District voting thereon at an election as hereafter provided shall vote in favor of issuing said hospital bonds."

> No tax, subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled. ...

This constitutional provision guards against what is commonly referred to as "taxation without representation." This provision requires consideration when taxes are levied by a body which is not elected.

Before analyzing the relevant portion of Act No. 848 of 1946 vis a vis the constitutional provision, it is helpful to review the presumptions of constitutionality which attach to all legislative enactments. In considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

One issue examined by the South Carolina Supreme Court in Crow v. McAlpine, 277 S.C. 240, 285 S.E.2d 355 (1981), was whether the Marlboro County Board of Education, at that time an appointed body, was violating the above-cited provision of Article X, Section 5 of the Constitution by directing the levy and collection of all tax millage necessary to meet the school district's operating budget. The Supreme Court stated:

> Article X, Section 5 recognizes that the power to levy taxes rests with the people. As such, we believe it constitutes an implied limitation upon the power of the General Assembly to delegate the taxing power. Where the power is delegated to a body composed of persons not assented to by the people nor subject to the supervisory control of a body chosen by the people, this constitutional restriction is violated.
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> The taxing power is one of the highest prerogatives of the General Assembly. Members of this body are chosen by the people to exercise the power in a conscientious and deliberate manner. If this power is abused, the people could, at least, prevent a recurrence of the wrong at the polls. However, where the power is reposed in a body not directly responsible to the people, the remedy is uncertain, indirect and likely to be long delayed. The unlimited power of taxation attempted to be conferred by [Act No. 1026 of 1966] is itself a forcible reminder that the power to fix and levy a tax

> should only be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax.
>
> Accordingly, we hold that the General Assembly may not, consistent with Article X, Section 5, delegate the unrestricted power of taxation to an appointive body. The Act in question is unconstitutional insofar as it undertakes to confer the arbitrary power upon the Board to fix and determine the amount of tax to be levied for school operations. ...

Id., 277 S.C. at 244-245.

As was the case with the Marlboro County Board of Education at the time Crow was decided, the governing body (Board of Trustees) of the Union Hospital District is appointed, not elected. The question then becomes whether the General Assembly has delegated the unrestricted power of taxation to an appointive body. As observed in footnote 1, the Board of Trustees is authorized to advise the Union County officials who are charged with assessment and collection of taxes concerning the sum of taxes which would be required on an annual basis to pay the principal and interest on bonds which may have been issued pursuant to Act No. 848 of 1946. And, as noted, the electorate of the Hospital District must vote favorably for such bonds to be issued. As a practical matter, if the terms of Act No. 848 are followed, the people have directly consented to incur the indebtedness and incur whatever taxes are needed to repay the indebtedness. Within Act No. 848, there does not appear to be a general grant of authority for the Board of Trustees to direct a levy and collection of taxes for the purposes of funding the operations of the District.

These facts may make the Crow decision distinguishable from the Union County situation. The unrestricted power of taxation examined in the Crow decision resulted from §21-3517, 1962 Code of Laws, which provided in relevant part:

> Unless the budget be modified, changed or affected by legislative enactment, the board of education shall direct the county auditor to levy and the county treasurer to collect all the millage necessary to meet that portion of the budget to be raised through direct ad valorem taxation, and such direction shall include any special levies which the board may approve under the provisions of §21-3514.
>
> It shall be the duty of the county auditor to ascertain if the budget which has been prepared was in fact transmitted to the General Assembly as required by the provisions of this section, and if the county auditor shall determine that the budget was so transmitted, and was not modified by

> subsequent legislative enactment, then in such event the county auditor shall levy, the county treasurer shall collect, such millage as may be required of him by the directive of the board of education.

No such enactment appears to exist with respect to the Union Hospital Board. Thus, the Union Hospital Board may well not have an unrestricted power to levy taxes, since the only authorization appearing to amount to a levy of taxes would be in section 16 of Act No. 848 of 1946, as previously stated.

If an unrestricted power to levy and collect taxes were to exist with respect to the Union Hospital District, clearly there would be a violation of Article X, Section 5 of the South Carolina Constitution if an appointive body were to levy and collect those taxes. Where, as here, there is not an unrestricted power to levy and collect taxes, however, it is less likely that the constitutional prohibition against taxation without representation is being violated by the Hospital District having an appointed governing body. As observed, the enabling legislation contemplates that the electorate of the Hospital District have a direct voice in the issuance of bonds pursuant to the Act and hence necessarily a voice as to the repayment.

At present, the General Assembly has seen fit to place the power of appointment of members of the Union Hospital District Board of Trustees with Union County Council. Whether that manner of appointment should continue is a matter to be addressed by the General Assembly.[2]

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

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[2]If the General Assembly wished to effect a change in the legislation relative to the Union Hospital District, such should most probably be accomplished by general legislation rather than by legislation specifically for the Hospital District, to avoid constitutional difficulty with Article VIII, Section 7 of the South Carolina Constitution. See Cooper River Parks and Playground Commission v. City of North Charleston, 273 S.C. 639, 259 S.E.2d 107 (1979); Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976); Hamm v. Cromer, 305 S.C. 305, 408 S.E.2d 227 (1991); Pickens County v. Pickens County Water and Sewer Authority, ___ S.C. ___, 439 S.E.2d 840 (1994).

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General