5951 Kirkley

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 18, 1996

The Honorable Herbert Kirsh
Member, House of Representatives
Box 31
Clover, South Carolina 29710

Re: Informal Opinion

Dear Representative Kirsh:

You have asked the following question:

> I am very interested in knowing if it is legal for colleges and universities in the State of South Carolina to offer a contract to their president or to their athletic directors and coaches that is longer than one year. I have always thought that the state could only offer funding for one fiscal year per the budget appropriation. It has always concerned me that some of these schools were offering contracts two to five years over the one year limit.

Law/Analysis

In an opinion of this Office, dated February 22, 1982, we commented upon the various constitutional and statutory provisions governing multi-year contracts executed by state agencies. We stated therein:

> [p]ursuant to Art. 10, Sec. 10, South Carolina Constitution (1895), the fiscal year is set as commencing on the first day of July of each year. More definitively, Section 11-9-80 restates inter alia this constitutional provision. This

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> section further provides that all acts to be performed shall be within the fiscal year and that all officers are required to keep their accounts and records in conformity with the fiscal year.
>
> More specifically, Art. 10, Sec. 9 of the Constitution states that 'money shall be drawn from the Treasury only in pursuance of appropriations made by law.' This provision governs contracts made by public officers or officials. Beacham v. Greenville County, 218 S.C. 181, 185, 62 S.E.2d 92. It was intended to 'prohibit expenditures of the public funds at the mere will and caprice of those having funds in custody without legislative sanction therefor.' ... Grimball v. Beattie, 174 S.C. 422, 431, 177 S.E. 668. Contracts made by officers without a 'regular appropriation' of the monies expended by contract contravene Art. 10, Sec. 9. State of South Carolina v. Corbin and Stone, 16 S.C. 533, 538.

We further noted that state officials possess no authority to obligate the State of South Carolina beyond the life of an appropriation, almost always the fiscal year. We referenced State ex rel. Edwards v. Osborne, 193 S.C. 158, 173, 7 S.E.2d 526, where our Supreme Court stated that "it may be conceded that the legislature has plenary power ... to change its mind from year to year as to the purpose to which in each year it will apply the proceeds of particular sources of revenue ...." Further, we noted that the case of Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 concluded that Section 11-1-40 "represents a limitation or constraint upon an agency's general authority to contract." Section 11-1-40 makes it unlawful for any public officer "to enter into a contract for any purposes whatsoever in a sum in excess of the tax levied or the amount appropriated for such purposes ...." Our reading of the Long case, which held that so long as an agency possesses appropriated funds in its hands, the agency may contract and obligate those funds pursuant to its general power, was that "it would not represent an unfair extension of Long to conclude that a contract beyond the life of the agency's appropriation "would be invalid pursuant to Sec. 11-1-40."

Also referenced in the 1982 opinion was the more recent case of Beacham v. Greenville County, supra. In Beacham, an appropriation was made to pay an architect $400,000 for work done concerning repair of a courthouse. The architect proceeded with the work which ultimately totalled $863,000. The Court noted that the architect was "charged with knowledge of the limited power and authority of the Board, had actual knowledge of their intentions that the project should cost $400,000 and, finally, he had

actual and constructive notice of the amount of the legislative appropriation for the project ...." 218 S.C. at 188.

Further noting that "assurances by state officials of continuation of the program beyond the life of the appropriation for that program", the 1982 opinion concluded:

> [b]oth the Beacham and Long cases, together with the wording of Sec. 11-1-40 itself, strongly indicate that a contract made by a public officer, which seeks to obligate state funds beyond the fiscal year, where there is no existing appropriation providing for the expenditure of such funds is invalid. Unless the Legislature subsequently authorizes or ratifies the contract in the form of an appropriation, as the General Assembly did in Beacham, the contract may not be enforced.

The 1982 opinion recognized, however, that inclusion of the so-called "non-appropriations" clause in any contract rendered it valid for purposes of agency authority. As was stated in the opinion,

> [t]he only basis on which the State or an agency thereof could validly enter into a contract obligating public funds for a period beyond the fiscal year as determined by the constitution and statutes of this State, would be the inclusion of a proviso which would make continuation of the contract term contingent upon the fact that the General Assembly appropriated sufficient funds, from year to year, to pay the consideration under the contract as to be solely determined by the State or its agency.

Since the 1982 opinion was written, both this Office as well as our Supreme Court have reaffirmed the fact that a "non-appropriations" clause is necessary for multi-year contracts entered into by a governmental agency. In Op. No. 83-89 (November 15, 1983), we reaffirmed the 1982 opinion and applied it to counties. There, we noted that

> ... contracts executed for terms in excess of one year will be binding; however, the contract should contain a proviso to the effect that the contract is subject to cancellation if funds are not appropriated or otherwise made available for the contract after the first year.

And in Caddell v. Lexington Co. Sch. Dist. No. 1, 296 S.C. 397, 373 S.E.2d 598 (1988), our Supreme Court observed that "critical to" a lease-purchase arrangement for thirty years between a school district and a private corporation was "a provision known as the 'non-appropriation clause,' under which the District may decline, without penalty, to renew the annual lease by failing or refusing to appropriate the necessary funds." 373 S.E. 2d at 599. The Court, in rejecting the contention that the lease-purchase agreement constituted general obligation debt, pointed to the "non-appropriations clause" in concluding that it was not:

> ... a leaseback arrangement containing an explicit non-appropriation clause places no such requirement on the political entity. Under the plan here, rental payments are to be included in the District's annual budget. Liability under the leaseback agreement is, at most, contingent: The District has the option of terminating simply by refusing to appropriate money for rent.

See also, Whiteside v. Cherokee County Sch. Dist. No. 1, 428 S.E.2d 884, 888-89; Op. Atty. Gen., Op. No. 93-61 (Sept. 23, 1993); Op No. 91-6 (Jan. 18, 1991) ["Such a contract should contain a non-appropriation clause and be terminable with each fiscal year ..." Op. Atty. Gen., No. 85-140 (December 9, 1985).

In addition, this reasoning has been applied in the context of contracts of university personnel. The question of the validity of a multi-year contract for a university's men's basketball coach was litigated in University of Arizona v. Lindsey, 722 P.2d (Ariz. 1986). There, it was contended that the contract for four years was invalid because it was beyond the authority of the University of Arizona to grant it. The Court rejected that argument by stating:

> [t]here is no difference between promising Lindsey a four-year period in which to rebuild a basketball program and telling a tenured professor that his or her contract will be resubmitted year after year until resignation or retirement. It is clear that in both cases the final word is spoken by the legislature. Tenured faculty members can be released for budgetary reasons. ... Similarly, contractual obligations entered by the University of Arizona in non-tenure situations are necessarily conditioned upon funding by the legislature. The so-called "fiscal out" condition mandated by § 35-154 operates as a condition subsequent, allowing the University to avoid its

> obligations if the requisite funding is not forthcoming. Subject to this implicit condition, contracts for more than one year are valid and do not violate the statutory prohibition against financial obligations for which there is no appropriation. While neither side has so informed us, we can take judicial notice of the fact that the University of Arizona has maintained a men's basketball program after Lindsey's termination; legislative funding for Lindsey's position must necessarily have been approved.

722 P.2d at 255.

Likewise, by analogy, Section 11-35-2030 (1) [Consolidated Procurement Code] provides that

> [u]nless otherwise provided by law, a contract for supplies or services shall not be entered into for any period of more than one year unless approved in a manner prescribed by regulation of the board; provided, that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor. (emphasis added).

Subsection (3) further provides that "[w]hen funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled." Relative thereto, we stated in Op. No. 85-140 (December 9, 1985), that

> [t]hese statutory provisions clearly provide that, as a matter of law, every State contract for purchase of goods or services which is covered by the Consolidated Procurement Code and which extends beyond the first fiscal year, is conditioned upon there being an appropriation sufficient to meet payment and performance obligations; otherwise the agreement is automatically cancelled. See, Op. Atty. Gen. No. 77-123 at 105 (April 27, 1977).

It goes without saying that virtually every state university, college and institution of higher learning in this State possesses the express authority to enter into contacts. See Title 59 of the Code; e.g. Section 59-117-40 (4) [U.S.C. authority to make contracts]; 59-119-50 [Clemson, authority to employ]; 59-121-50 [Citadel]; 59-125-70 [Winthrop]. Moreover, it is generally recognized that many of these contracts for personnel are on a multi-year basis. Although there has been much litigation especially involving the University of South Carolina with respect to coaching contracts, to my knowledge the courts in approving settlement agreements reached between the parties, have never questioned the validity of such contracts on the basis that they extended for more than one year. It is evident that, as explained above, each such multi-year contract is subject to the availability of continuing appropriations.

It is recognized herein that oftentimes coaches and athletic directors at state universities and colleges are paid with athletic funds which are not raised through taxation. However, we addressed the nature of such funds in Op. No. 85-132 (November 15, 1985). We noted that such funds are appropriated by virtue of a provision in the State Appropriations Act, which states that

> ... notwithstanding other provisions of this act, funds at State Institutions of Higher Learning derived wholly from athletic or other student contents, from the activities of student organizations, and from the operations of canteens and bookstores, and from approved Private Practice plans may be retained at the institution and expended by the respective institutions only in accord with policies established by the Institutions Board of Trustees. Such funds shall be audited annually by the State but the provisions of this Act concerning unclassified personnel compensation, travel, equipment purchases and other purchasing regulations shall not apply to the use of these funds.

Despite the fact that such funds are not tax-generated, we concluded that they are "public funds", and thus must be expended "in accordance with the State Constitution and other statutory enactments." [citing Op. Atty. Gen., August 10, 1973]. Thus, while such funds are appropriated each year by the General Assembly to the particular college or educational institution which generates them, the General Assembly is, of course, free at any time it chooses, not to appropriate the funds for that purpose, just as it may do with respect to tax revenues or any other public funds. Thus, the general rules as to the appropriation of funds, discussed above, should be applicable to this situation as well.

Accordingly, while I have not examined any multi-year contract entered into by a state university or college, such contract is subject to the same legal principles as set forth in the 1982 opinion, discussed above, as well as other authorities herein. The multi-year contact is subject to the condition that the General Assembly will continue to appropriate funds therefor. State contracts with which I am familiar contain a provision making the multi-year contract contingent upon such appropriations. Based upon the foregoing, I am of the opinion that a multi-year contract by a state agency is valid, but must be "subject to" the continuing appropriation of funds therefore by the General Assembly.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an