



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 18, 1996

The Honorable Ralph J. Wilson
Solicitor, Fifteenth Judicial Circuit
Post Office Box 1276
Conway, South Carolina 29526

RE: Informal Opinion

Dear Solicitor Wilson:

By your letter of March 8, 1996, to Attorney General Condon, you have sought an opinion as to whether it would be illegal, improper, or unethical for the School Board of Horry County to pay the Superintendent of the School District as described more fully below, the Superintendent having resigned by letter to the Fifteenth Judicial Circuit Solicitor effective March 1, 1996. This resignation was part of an agreement to end prosecution for Misconduct in Office charges for which the Superintendent was indicted.

In a letter dated March 1, 1996, to you as Solicitor, the Superintendent stated in part:

Considering these circumstances, I believe the time has come to put the interest of the Horry County School District and my immediate family members first. Therefore, I propose to resign effective today, March 1, 1996, as Superintendent of Horry County School District.

I would request of the Horry County School District that I receive my salary through June 30, 1996, when my contract expires, along with medical insurance for one year thereafter. My reasons for requesting the insurance is [sic] that, as I will be unemployed and have a previous existing medical condition, it will be difficult if not impossible to obtain medical insurance

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elsewhere. However, based on these circumstances I will not return to any active duties at the Horry County School District.

In connection with the considerations set forth in this letter and the serious implications for my health, I request that you dismiss with prejudice the pending indictments against me. ...

The letter is signed by the Superintendent and is notarized. As Solicitor, you have written across the bottom of the letter, "I hereby grant your request upon the terms and conditions stated." In addition, in a letter dated March 1, 1996, to the attorneys representing the Superintendent, you have stated, "As Solicitor I grant his request with the conditions cited in his letter."

From the face of the above-referenced documents, it would appear that the Superintendent intended to resign effective March 1, 1996, and further that he would not return to any active duties at the Horry County School District. From your request letter, however, it appears that the Superintendent then asked the School Board to grant him administrative leave from March 3, 1996, until the expiration of his contract on June 30, 1996, and that he be paid for this administrative leave and that he receive insurance benefits for one year. You question whether this individual can receive compensation for a period of time when he will not be performing any duties for the School District.

For purposes of this opinion, it is assumed that there is no contractual provision authorizing severance pay, that no further services to the school district are to be rendered (in keeping with the letters cited above), and that the school district is not "purchasing a contract."¹

Article III, Section 30 of the South Carolina Constitution provides as to extra compensation:

The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law;

¹The purchasing or buying out of a contract often means simply the relinquishment or settlement of a possible legal claim by way of a monetary payment. Severance pay usually refers to an additional payment or "bonus" paid for services already rendered. See Op. Att'y Gen. No. 85-132.

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"Extra compensation" as used in Article III, Section 30 has been defined as "any compensation over and above that fixed by law or contract at the time the service was rendered." State ex rel. McLeod v. McLeod, 270 S.C. 557, 243 S.E.2d 446 (1978). Article III, Section 30 has been interpreted on numerous occasions by this Office; see Ops. Att'y Gen. dated October 10, 1985; July 19, 1979; July 14, 1958; February 25, 1955; January 27, 1977; July 26, 1978; August 23, 1979; and September 29, 1981. This Office has opined repeatedly, based on Article III, Section 30, that severance or bonus pay is prohibited as being made after services have been rendered. This Office has also stated that while the constitutional provision by its terms prohibits only action by the General Assembly, it also serves to limit school boards and various other political subdivisions, at least in the exercise of powers delegated to them by the General Assembly. See Ops. Att'y Gen. dated January 7, 1986; July 19, 1979; 1954-55 Ops. Att'y Gen., p. 245. The opinion of January 7, 1986, concluded:

Use of public funds to provide any form of compensation (extra income, insurance payments, pension payments, etc.) for public employees is unconstitutional, if it is greater than that which the State has a contractual or legal obligation to provide.

Moreover, it is axiomatic that every expenditure of public funds must be for a public purpose. Article X, Section 5 of the South Carolina Constitution requires: "Any tax which shall be levied shall distinctly state the public purpose to which the proceeds of the tax shall be applied." 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. At the same time legislation is not for a private purpose as contrasted with a public purpose merely because some individual makes a profit as a result of the enactment.

Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975). A payment to an individual with no assurance of more than a negligible advantage to the general public does not serve a public purpose within the meaning of the Constitution. Id., 265 S.C. at 163. In the instant situation it would appear that no one other than the individual will benefit from this expenditure of public funds. Assuming, as stated earlier, that there is no contractual provision authorizing such a payment, that no further services to the school district are to be rendered, and that the purchase of a contract is not involved, it would appear that the public purpose test would not be met by such an expenditure of public funds.

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The foregoing constitutional considerations are in accord with common law and public policy, as well. It is stated in 63A Am.Jur.2d Public Officers and Employees §474:

Compensation of a public officer is incident to the office and belongs to the officer only so long as he holds the position. Where, therefore, the acts or conduct of an officer is such as to show clearly an intention upon his part to relinquish or abandon the office before the end of his term, he cannot ordinarily recover compensation for the remainder of the term. Abandonment of the position has the same effect as would the breach of a contract to render personal services: it bars the employee from recovering unearned wages. ...

The applicable common law principles are further stated in De Marco v. Board of Chosen Freeholders of County of Bergen, 21 N.J. 136, 121 A.2d 396 (1956), that a public officer's or employee's right to compensation grows "out of the rendition of the services and not out of any contract between the government and the officer that the services shall be rendered by him." (121 A.2d at 398; emphasis in original.) Moreover, the "right to emolument must be regarded as having no legal existence except as arising out of the rendition of services for which they are compensatory." Id. In addition, the "emoluments of the office are bestowed on him who performs the services... ." Id. Finally, the court stated the broad doctrine that "a public officer could not recover salary for a period during which he had performed no services... ." Id. Similarly, the court in Jones v. Town of Wayland, 373 N.E.2d 199 (Mass. 1978), later appeal 402 N.E.2d 63 (Mass. 1980), stated that "[t]he wages of a public employee are an incident of employment, and abandonment of the position has the same effect as would the breach of a contract to render personal services: it bars the employee from recovering unearned wages." 373 N.E.2d at 206. See also Township of Springfield v. Pedersen, 73 N.J. 1, 372 A.2d 286 (1977).

Based on the foregoing and under the assumptions as stated above, I am of the opinion that to pay an individual with public funds under the circumstances described above would likely be viewed as violative of Article III, Section 30 and Article X, Section 5 of the South Carolina Constitution, as well as common law principles which are against the payment of compensation to a public official or employee when services have not been (or will not be) performed.

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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With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General