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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

October 14, 1998

The Honorable Stephen P. Lanford
Chairman, Personnel & Benefits Subcommittee
Ways and Means Committee
House of Representatives
P. O. Box 11867
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Lanford:

You have requested an opinion concerning the following question:

> [c]an criminal fees and assessments imposed by a Magistrate's Court be used as a revenue source for funding the Court's operations? That is, can these funds be expended for operating expenses, salaries, and fringe benefits?

Law / Analysis

Of course, it is well recognized

> ... that the General Assembly possesses full authority to make such appropriations as it deems necessary, in the absence of a specific constitutional prohibition against such appropriations. Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). See also, State ex rel. McLeod v. McInnis, ___ S.C. ___, 295 S.E.2d 633 (1982). Indeed, '[t]he power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution.' Cox v. Bates,

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> [237 S.C. 198, 116 S.E.2d 828 (1960)], 116 S.E.2d, supra at 834.

Op. Atty. Gen., March 13, 1991. Moreover, as we have stressed time and again, in considering the constitutionality of an Act, it must be presumed that the Act is constitutional in all respects. No statute will be considered void unless the constitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 190 S.E. 539 (1938); 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.

The principal constitutional problem I see with the proposal which you have referenced is the potential conflict of interest in funding a court with the fines which such court imposes. The seminal case in this area is Tumey v. State of Ohio, 273 U.S.. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In Tumey, the defendant was arrested and brought before the mayor, charged with unlawfully possessing intoxicating liquor. The defendant challenged the mayor's bias in acting as judge in the case. The Court described the fee structure for the mayor's court as follows:

> [t]he fees which the mayor and marshal received in this case came to them by virtue of the general statutes of the state applying to all state cases, liquor and otherwise. The mayor was entitled to hold the legal fees taxed in his favor. General Code Ohio, s 4270; State v. Nolte, 111 Ohio St. 486, 146 N.E. 51, 37 A.L.R. 1426. Moreover, the North College Hill village council sought to remove all doubt on this point by providing (section 5, Ordinance 125, supra), that he should receive or retain the amount of his costs in each case in addition to his regular salary, as compensation for hearing such cases. But no fees or costs in such cases are paid him, except by the defendant, if convicted. There is, therefore, no way by which the mayor may be paid for his service as judge, if he does not convict those who are brought before him; nor is there any fund from which marshals, inspectors and detectives can be paid for their services in arresting and bringing to trial and furnishing the evidence to convict in such cases, except it be from the initial $500 which the village may vote from its treasury to get the court going or

> from a fund created by the fines thereafter collected from convicted defendants.

273 U.S. at 519.

The United States Supreme Court concluded that such system violated due process of law. In the view of the Court,

> [t]he mayor received for his fees and costs in the present case $12, and from such costs under the Prohibition Act for seven months he made about $100 a month, in addition to his salary. We cannot regard the prospect of receipt or loss of such an emolument in each case as minute, remote, trifling or insignificant interest. It is certainly not fair to each defendant brought before the mayor for the careful and judicial consideration of his guilt or innocence that the prospect of such a prospective loss by the mayor should weigh against his acquittal ... . There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law ... . It is also correctly pointed out that it is completely within the power of the Legislature to dispose of the fines collected in criminal cases as it will, and it may therefore divide the fines as it does here, one-half of the state and one-half to the village by whose mayor they are imposed and collected. It is further said with truth that the Legislature of a state may and often ought to stimulate prosecutions for crime by offering to those who shall initiate and carry on such prosecutions rewards for thus acting in the interest of the state and the people. The Legislature may offer rewards or a percentage of the recovery to informers. United States v. Murphy & Morgan, 16 Pet. 203, 10

> L.Ed. 937. But these principles do not at all affect the question of whether the state, by the operation of the statutes we have considered, has not vested the judicial power in on who by reason of his interest, both as an individual and as chief executive of the village, is disqualified to exercise it in the trial of the defendant.

Id., at 534-535.

A year after Tumey, the United States Supreme Court rendered another decision in this area, Dugan v. State of Ohio, 277 U.S. 61, 48 S.Ct. 439, 72 L.Ed.2d 784 (1928). There, the mayor received a set salary paid from the general fund and was not dependent upon fees or fines collected. The Court distinguished the facts in Dugan from Tumey, stating the following:

> [a]s the plaintiff in error contends, however, the mayor's individual pecuniary interest in his conviction of defendants was not the only reason in the Tumey case for holding the Fourteenth Amendment to be violated. Another was that a defendant brought into court might with reason complain that he was not likely to get a fair trial or a fair sentence from a judge who as chief executive was responsible for the financial condition of the village, who could and did largely control the policy of setting up a liquor court in the village with attorneys, marshals, and detectives under his supervision, and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made, and taxes reduced. This was thought not to be giving the defendant the benefit of due process of law.
>
> No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases

> would deprive him of or affect his fixed compensation. The mayor has himself as such no executive, but only judicial duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, as to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the Tumey case do not cover this.

277 U.S. at 64-65.

Also instructive is the case of State ex rel. McLeod v. Crowe, 272 S.C. 41, 249 S.E.2d 772 (1978). In Crowe, the South Carolina Supreme Court addressed the constitutionality of a non-unified magistrate's court system. The Court held that the magistrate court was part of the unified court system mandated by Article V of the South Carolina Constitution and that legislation could not constitutionally be enacted whereby different jurisdiction or fee schedules involving the magistrate's court existed. The Court also dealt with the constitutional problem engendered by legislation which enabled magistrates to retain fees collected in cases before them. Referencing the Tumey case, the Court stated:

> [l]astly, we must determine whether magistrates may accept fees derived from their performance as judicial officers. We conclude that they may not. In the context of criminal law, the United States Supreme Court has concluded a judicial officer should be disqualified from sitting in any case in which he possess a pecuniary interest through fees, forfeiture or fees paid by the litigants. See Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. This proscription is based on the theory that such pecuniary interest deprives the litigants of due process of law. Id. In recognition of the requirements of due process, magistrates are precluded by statute from receiving fees in criminal cases. See S.C. Code Sections 22-7-30 and 22-7-40. We believe the potential for deprivation of due process also exists in civil matters where judicial officers possess a pecuniary interest in the outcome of litigation.
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> In State, ex rel. Reece v. Gies, 156 W.Va. 729, 198 S.E.2d 211 (1973) a statutory scheme which afforded justices of

> the peace a financial interest in the result of civil litigation was held unconstitutional. Moreover, in State ex rel. Shrewsburg v. Poteet, 202 S.E.2d 628 (W.Va. 1974) the Court concluded a justice of the peace must be disqualified despite the fact that a standard fee was charged in civil actions regardless of the prevailing party. Recently, in Ward v. Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) Justice Brennan, speaking for the Court, set forth a test for determining whether a fee system possesses constitutional validity:
>
> > "Whether the ... situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused.'"
>
> While the facts in Ward involved a criminal proceeding, we believe the above principle is equally applicable to civil matters. See State, ex rel. Shrewsburg v. Poteet, supra..
>
> Several of the instant actions challenged statutes which authorized magistrates to collect and retain fees received for the performance of judicial acts. To the degree such statutes vest judicial officers with a pecuniary interest in the proceedings before them, they violate Article I, Section 3 of the South Carolina Constitution and are likewise impermissible under the Fourteenth Amendment of the United States Constitution.

249 S.E.2d, at 776.

Based upon the foregoing authorities, it is my opinion that the type of legislation which you contemplate would encounter constitutional difficulties. While such legislation would, of course, be entitled to a presumption of constitutionality, and only a court of competent jurisdiction could adjudge a statute to be unconstitutional, the Tumey and Crowe cases would render any attempt to fund a magistrate's court's operating expenses, salaries and fringe benefits through fees and assessments as constitutionally suspect. This type of

proposal would undoubtedly be subject to legal challenge. Thus, any proposal of the type you are contemplating would have to pass muster under Tumey, Dugan, Crowe, etc.

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