The State of South Carolina

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October 30, 1989

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Dear Mr. Vaughan:

You have sought the assistance of this Office regarding pending legal proceedings involving the South Carolina State Ports Authority and the National Labor Relations Board. Apparently, Local Union No. 509 of the General Drivers, Warehousemen, and Helpers (Teamsters' Union) filed a petition for election by workers of the Ports Authority with the National Labor Relations Board. The Authority has moved the National Labor Relations Board to dismiss the Union's petition on the grounds that the Authority is an "agency or political subdivision" under Section 2(2) of the National Labor Relations Act, 29 U.S.C. §152(2) and is thus exempt from the Board's jurisdiction. As I understand it, the National Labor Relations Board verbally notified legal counsel for the Authority that the Ports Authority's Motion to Dismiss would be denied. The National Labor Relations Board issued a Notice of Representation Hearing on October 19, 1989. The Ports Authority's counsel then requested the National Labor Relations Board to hold a bifurcated hearing on the jurisdictional and representational issues because of the importance of the jurisdictional question. This request was also denied.

You have requested that this Office appear on behalf of the Ports Authority on October 31 at the representation hearing and support the Authority in its argument that the National Labor Relations Board has no jurisdiction to conduct a representation hearing. We strongly support the Authority's position in this matter, and, if needed, will gladly appear on behalf of the Authority at the hearing on October 31. It is our view, as we summarize below, that Ports Authority employees are not subject to organization by a labor union, such as the Teamsters.

The law is well-settled in this State that public employees have no right to strike or to enter into collective bargaining agreements. In Medical College of South Carolina v. Drug and Hospital Union Local 1199 et al., Charleston County docket number 8117, by order dated July 7, 1969, the Honorable Clarence Singletary succinctly stated:

> At common law, public employees have no right to strike. Chief among the reasons behind the rule precluding public employees' strikes are:
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> > The sovereignty of the public employer; the fact that the government is established by and run for all of the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable in the public interest. 31 A.L.R. 2d 1142, Annotation: Labor-Public Employees, 1149 at 1152.
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> ...[T]he rule precluding public employees' strikes is the common law rule and the public policy of this State.
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> . . . .
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> At common law, public employees have no right to collectively bargain with the public employer. Some of the reasons behind the rule appear to have been aptly stated ...[as follows]:
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> > All government employees should realize that the process of collective bargaining as usually understood cannot be transplanted into the public service; that it has its distinct and insurmountable limitations when applied to public personnel management; that the very nature and purposes of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with government employee organizations; that

> the employer is the whole people who speak by means of laws enacted by their representatives in congress; and that accordingly, administrative officials and employees alike are governed and guided and in many instances restricted by laws which establish policies, procedures or rules in personnel matters. 31 A.L.R. 2d. 1142, Annotation: Labor-Public Employees, 1149 at 1171.
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> Another reason usually given by the courts for holding that the public employees have no right to collectively bargain is that public employers cannot abdicate or bargain away their legislative discretion. The Courts generally hold that in the absence of express constitutional or statutory authorization to do so the public employer lacks the power to bargain or enter into an enforceable collective agreement.

Id., pages 9, 10, 12, 13.

Judge Singletary's decision noted an exception to the above-stated general rule with respect to a portion of the employees of the State Ports Authority. Id. at 14. It is unclear at best whether the statute referred to therein actually granted that agency's railroad employees the right to collectively bargain, or whether it merely subjected the employees to the coverage of the federal Railway Labor Act. Op.Atty.Gen. dated March 14, 1972. This question need not be reached, however, because the railroad operations in question were transferred to the Public Railways Commission. See Section 58-19-40, Code of Laws of South Carolina (1976). Thus, there are no statutes or constitutional provisions in existence in this State which authorize the State of South Carolina or any of its political subdivisions to enter into collective bargaining agreements.

Federal law is in accord with the State's law, as well. For example, Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. §152(2), defines "employer" in the context of employee organization and bargaining and specifically exempts "State or political subdivisions thereof" from that definition. Therefore, States and political subdivisions are not subject to the jurisdiction of the National Labor Relations Board. In National Labor Relations Board v. National Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 91 S. Ct. 1746 (1971), the United States Supreme Court held that the utility district, based on a number of factors,

was a "political subdivision" of a state and thus not an "employer," even under the National Labor Relations Board's test, i.e.,

> entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

Id., 402 U.S. at 604-605, 91 S. Ct. 1749. Federal law rather than state law governs the determination of whether an entity is a "political subdivision" of a state and thus not an "employer" subject to the National Labor Relations Act.

We note that in Coakley v. South Carolina State Ports Authority et al., Civil Action No. 2:87-1442-2, in the United States District Court, District of South Carolina, the State Ports Authority was held to be an agency of the State of South Carolina and therefore entitled to Eleventh Amendment protection. See Order of the Honorable C. Weston Houck dated July 15, 1988, at page 15. The court noted such factors as the State Ports Authority having been created by statute as an instrumentality of the State for purposes of developing and improving the harbors of this State, the Authority being governed by a board whose members are appointed by the governor with the consent of the Senate, its property being tax-exempt, all net earnings not needed for operation of the Authority being turned over for further action of the General Assembly, and the broad grant of power to exercise eminent domain by the Authority. It is clear that the State Ports Authority would be considered a "political subdivision" of the State under either prong of the test set forth above and thus not subject to employee organization and collective bargaining under the National Labor Relations Act.

In conclusion, it is our view that unionization by a labor union such as the Teamsters, collective bargaining, or striking with respect to employees of the South Carolina State Ports Authority would be contrary to public interest and a violation of both state and federal law.

Very truly yours,

T. Travis Medlock
Attorney General

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