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The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

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Mrs. Phyllis B. Beighley
Assistant Director
Division of Insurance Services
State Budget and Control Board
Post Office Box 11960
1122 Lady Street
Columbia, South Carolina 29201

RE: Eligibility of various entities to enter the State Health Insurance Plan

Dear Ms. Beighley:

As you are aware, on June 8, 1988, §1-11-142 of the South Carolina Code of Laws came into effect. This statute provides that the Budget and Control Board through the South Carolina Retirement System is authorized to provide health and dental insurance coverage to counties under the State Health Insurance Plan. The State Health Insurance Plan is provided for in the State's annual Appropriations Act and is limited to active and retired employees of the State and the public school districts of South Carolina (see, Proviso 14.10 of the 1989 General Appropriations Act). Before the effective date of §1-11-142, counties, municipalities and other political subdivisions were not authorized to receive coverage under the State Health Insurance Plan, though they were entitled to be admitted to the State Retirement System and their employees were entitled to membership in the Retirement System (see, §§9-1-470 and 9-1-480). Because the State did not afford them health insurance coverage, many counties, municipalities and political subdivisions secured their own health insurance separate from the State Plan.

With the passage of §1-11-142 counties are now able to come within the State Health Insurance Plan. Please note that §1-11-142 makes no provision for municipalities or other political subdivisions to come under the State Health Insurance Plan, thus if municipalities and political subdivisions wish to have health insurance

coverage, they must maintain or secure separate health insurance coverage.

Many counties have expressed an interest in coming under the State Health Insurance Plan due to the fact that the State Plan can provide greater or substantially similar benefits for lower cost. The question has arisen as to whether, when a county joins the State Health Insurance Plan, all other entities formerly covered under the separate county health insurance plan can also come in under the State Health Insurance Plan.

The General Assembly, in §1-11-142, states that the benefits of the State Health Insurance Plan as applied to county employees shall be the same as those benefits provided to state and school district employees. (See also, Proviso 16.13 of the 1988 General Appropriations Act which provides that it is the intent of the General Assembly that amounts appropriated in the Appropriations Act shall be applicable to a uniform plan of insurance for all persons covered.) This evidences an intent by the General Assembly that the State Health Insurance Plan be a unified system whereby the benefits, obligations and limitations of the Plan will be the same for all members whether they are employees of the State, counties or school districts.

The following guidelines and suggestions are offered in order to allow your office to determine whether entities (whether or not they were formerly covered under a separate county health insurance plan) are county instrumentalities such that they would be entitled pursuant to §1-11-142 to come under the State Health Insurance Plan.

It should be noted from the outset that the word "counties" as used in §1-11-142 should be given its plain and ordinary meaning. A county is one of the 46 political subdivisions into which the State is divided. (See, South Carolina Constitution Art. VIII, §§1-3 and §4-1-10 South Carolina Code of Laws.) Counties have the powers accorded them by the General Assembly as found at §§4-9-30 and 4-9-1030 of the South Carolina Code. "County" could reasonably include: (a) any agency, board or commission delegated by the county (b) to perform a county function. Both of these requirements must be met for the entity to qualify as an instrumentality of the county. (See, Ciulla v. State, 77 N.Y.S.2d 545 (1948).)

It should be pointed out that the mere fact that an entity includes in its name the county wherein it is located, is not conclusive on the issue of whether it is an instrumentality of the county. Indeed, any private enterprise may call itself whatever it chooses, thus, while the name of the entity may provide a clue as to its nature, the inquiry must go beyond simply examining the name.

Conversely, a county entity may not include the name of the county in the name of the entity and yet be a perfectly appropriate county instrumentality. You should look to be sure that you are dealing with an entity of the county and not a private entity that simply has a contractual relationship with the county. Although in rare instances, a private entity has been deemed an agency of government, typically a private entity would not be an instrumentality of the county or any government entity.

Inquiry should be made into the function performed by the entity in question. If it is a function traditionally performed by counties or within the statutory authority of counties then in all likelihood it is a county function.

Inquiry should also be made into the manner in which the entity in question was created. If created by a county ordinance, this is strong evidence that it is a county instrumentality. You should also examine whether the entity has a board appointed by or answerable to the county. This too would also be evidence that it is a county instrumentality.

An examination should be made of the entity's finances. The more involvement of the county in the entity's finances, the more likely the entity is an instrumentality of the county. For example, where entity employees are paid with a check drawn from the county's account, this is evidence that the entity is an instrumentality of the county; however, I strongly emphasize that the lack of this one factor is not conclusive on the issue. It should be noted that the mere fact that an entity receives funding from a county is not conclusive on the question of whether the entity is an instrumentality of a county. The fact that the county approves the entity's budget is evidence that the entity is an instrumentality.

Look at the entity's personnel policies. If the entity's employees are under the county personnel classification and grievance system, then this is evidence that the entity is an instrumentality of the county.

It should be noted that it is possible for an entity to perform functions in a multi-county area and still be a county entity. In such a circumstance it is conceivable that the entity would be an instrumentality of each county whose area it serves (see, Opinion of Patricia D. Petway dated November 29, 1988 - copy attached).

The fact that the entity was previously covered by the county's separate health insurance plan, while not conclusive, is evidence that the entity is an instrumentality of the county. I would think that a formal declaration by the county that the entity is a county instrumentality would also be evidence on the issue. Also, I see nothing to prevent a county from taking steps to change the nature

of its relationship with a particular entity so as to ensure that the entity is an instrumentality of the county.

Look to see whether the county has the right to control the activities of the entity. If the county has control, then most likely the entity is an instrumentality of the county.

Finally, I would urge you to look at all of these factors as a whole. Your examination should be more than a mere tallying of the separate issues to see how many favor considering the entity a county instrumentality and how many militate against the conclusion. The answer is neither black nor white but varying shades of gray.

The administrative decision you are called upon to make is a factual determination that is outside the ability of this Office to make. Once you have decided that an entity is an instrumentality of a county, then upon admission of that county to the State Health Insurance Plan, the entity would be entitled to admission as well, assuming all other regulations and requirements of the State Health Insurance Plan are met.

Specifically, you have also inquired as to whether local commissions on alcohol and drug abuse are county entities. I refer you to an opinion issued by this Office on July 27, 1989, which addresses this question as it relates to the Union County Commission on Alcohol and Drug Abuse. I am enclosing a copy of this Opinion for your use. The Opinion concluded, primarily on the basis that the Union County Commission was the single county entity for alcohol and drug abuse, that the Commission was a county agency. Certainly, that factor would be important with respect to other alcohol and drug commissions. Many of the local commissions throughout the State are set up either in the same manner as Union County or are established by County ordinance. While individual commissions vary in structure from county to county, as a general rule, if a particular commission meets the test set forth in the opinion and as further amplified herein such commissions would likely be deemed county agencies.

For example, the Laurens County Commission of Alcohol and Drug Abuse has been established by County Ordinance. See, Act No. 301 (1973); Ordinance No. 99. As we understand it, the Commission is the single county agency for alcohol and drug abuse and is responsible for submitting a comprehensive plan to county council. Council appoints members to the Commission, fills vacancies and may remove members in certain instances. Subsection 6(d) of the Ordinance establishes the Commission as the "county authority" for alcohol and drug abuse. While Commission employees are not paid by the County or do not receive a county paycheck, again, this factor alone is not controlling. We believe, based upon the July 27, 1989 opinion, that the Laurens County Commission, therefore, is a county agency.

I would again suggest you employ the factors set forth in the previous opinion and herein to determine whether a particular entity is a county agency or instrumentality pursuant to Section 1-11-142. While each case must rest on its own facts, the various guidelines we have set forth may be used to make the administrative determination of eligibility pursuant to Section 1-11-142.

Yours very truly,

James Patrick Hudson
Deputy Attorney General

JPH/srcj
Enclosures

REVIEWED AND APPROVED BY:

Robert D. Cook
Executive Assistant for Opinions