

The State of South Carolina

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Office of the Attorney General

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May 19, 1988

The Honorable Jarvis Klapman
Member, House of Representatives
125 Hendrix Street
West Columbia, South Carolina 29169

Dear Representative Klapman:

Your letter to Attorney General Medlock regarding an interpretation of certain provisions of Proviso 129.40 of the 1987-88 Appropriation Act has been referred to me for a response. I shall address specifically the four questions you raise hereinafter; however, your central request deals with a clarification or definition of "what constitutes 'official use' of state aircraft." As I am certain you realize, "official use" is difficult to define without resorting to a specific factual situation. ^{1/} Thus, I shall discuss various general definitions of "official use" or similar phrases and I shall analyze several cases, both within and without South Carolina, dealing with official use in the context of motor vehicles. I found no case which dealt with "official use" in the context of aircraft transportation.

1. "What defines official use?"

Proviso 129.40 of the 1987-88 Appropriation Act provides in part that "[a]ny and all aircraft owned or operated by agencies of the State Government shall be used only for official business." "Official business" is not "defined" in this Proviso. Generally, words used in a statute are to be given their plain

1/ The scope of an Attorney General's opinion is to address questions of law rather than investigations of fact. Ops. S.C. Atty. Gen., April 5, 1984, and December 12, 1983.

and ordinary meaning absent an express intention to the contrary. Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980). I note no indication to give "official business" any meaning other than its plain and ordinary one.

In statutory construction the primary consideration is the intention of the legislature. Citizens and Southern Systems, Inc. v. South Carolina Tax Comm'n., 280 S.C. 138, 311 S.E.2d 717 (1984). When interpreting a statute, legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of the intended purpose of the statute. Gambrell v. Travelers Ins. Co., 280 S.C. 69, 310 S.E.2d 814 (1983). However, when a statute is plain and unambiguous, it should be applied literally. Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978).

"Official act" is defined generally as one "done by an officer in his official capacity under color and by virtue of his office." Black's Law Dictionary, 1236, 4th Edition, 1968.

While we have found no South Carolina cases construing "official business" in the context of Proviso 129.40 of the 1987-88 Appropriation Act, our Supreme Court has examined "official business" as it relates to the Governmental Motor Vehicle Tort Claims Act and stated:

Under the settled law of this State governmental entities have no business except "official business" and therefore the statutory phrase "while in and about the official business of such governmental entity" merely imposes the requirement that the employee be about the business of the employer.

Morris v. S.C. State Highway Dept., 264 S.C. 369, 215 S.E.2d 430, 433 (1975) (J. Bussey, dissenting).

Obviously, no meaningful analysis of "official business" can be undertaken without a specific fact situation to analyze (i.e. "official business" is determined on an ad hoc basis). I shall examine two cases which have discussed "official business."

In South Carolina, acts of adultery between a physician and Plaintiff's wife, both of whom were employed by the Department of Mental Health, were held not official actions sufficient to subject the Department of Mental Health to liability under a theory of respondent superior. Morris v. Mooney, 288 S.C. 477, 343 S.E.2d 442 (1986). The reason for this conclusion was that the acts of adultery were not reasonably necessary to the accomplishment of the physician's employment and, thus, were not within his scope of employment.

In Felton v. E.E.O.C., 820 F.2d 391 (Fed.Cir. 1987), Judge Bissell discussed whether the use of a discussed government vehicle to transport a typist was appropriate under the following facts:

[O]n that morning Ms. Mitchell a Clerk-Typist in the Louisville Area Office in June, 1984, was on her way to work in her personal vehicle when it broke down on the expressway. She was picked up by an acquaintance and dropped off at her office.... [S]he called a car dealership to have her car towed to be repaired. She then telephoned her supervisor, Ms. Felton, who was the Acting Area Office Director at that particular time. This occurred between 7:00 and 7:30 a.m., prior to the 8:00 a.m. regular starting time for the office..

Ms. Mitchell asked Ms. Felton if she could utilize the government vehicle used by the Louisville Area Office in order to go back to her vehicle on the expressway and secure it. Ms. Felton...initially ... misunderstood Ms. Mitchell, and thought Ms. Mitchell wanted to take the government car to her home. She advised Ms. Mitchell that it was improper to do so. At that point, Ms. Mitchell explained she was not going to her home, but just going to secure her personal vehicle which had broken down on the expressway.... [A]lthough [Felton] normally considered such a request inappropriate, she believed that in order to make it more convenient for the office to have its only typist available to work, it would be to the government's benefit to allow Ms. Mitchell to utilize the government vehicle. Hence, Ms. Felton admitted she authorized Ms. Mitchell to utilize the car. Ms. Mitchell ... took the

government car and started toward the expressway when it also broke down. At that point, she called for assistance to get the government car towed and she also was picked up by an acquaintance who took her to her personal vehicle on the expressway.

820 F.2d at 392. Based on these facts Judge Bissell concluded that, while technically this use may have been "nonofficial" in the mind of the employee who was disciplined for authorizing the use of the government motor vehicle, the use of the vehicle was for official purposes since the employee believed her authorization provided "an arguable benefit" to the government. Thus, the court held that the finding that the employee authorized the use of a government vehicle for other than official purposes was not supported by the evidence. The Felton case demonstrates the subjective nature that surrounds any analysis of official use.

To summarize the foregoing and offer a "rule of thumb" to officials of state government using state aircraft for official business, it is well to keep in mind that for an activity or use of an official in his business capacity to be official, such activity or use must be done in his official capacity, under color of his office. Such activity or use must be reasonably intended by the official to be one properly belonging to his office. Bailey v. Clausen, 192 Colo. 297, 577 p.2d 1207 (1976); People v. Raymo, 32 Misc. 2d 534, 223 N.Y.S. 2d 1014 (1962); People v. Norris, 40 Cal. 3d 51, 706 p.2d 1141 (1985). Any activity which a state official is invited or required to do that would not occur but for the public office or position he holds could thus be considered "official business" for the purposes of using state aircraft.

For your information I have enclosed the regulation, (Reg. 19-603) as amended, dealing with the use of State motor vehicles. This regulation demonstrates that while it is possible to specify specific uses and non-uses for State vehicles all situations must be analyzed individually.

2. "Which individual within an agency should be permitted to sign the statement of use?"

While it is not clear from your inquiry, I assume that your question relates to the portion of Proviso 129.40 which provides:

No member of the General Assembly,
no member of a state board,
commission or committee, and no
state official shall be furnished
air transportation by a state

agency other than the Aeronautics Commission unless such agency prepares and maintains in its files a sworn statement from an appropriate official of the agency certifying that the member's or state official's trip was in conjunction with the official business of the agency.

It appears that "appropriate official of the agency" refers to one who is positioned to swear to the connection between the official business of the agency providing the aircraft (other than the Aeronautics Commission) and the state official's use of the aircraft in connection with that business. The appropriate individual within an agency will vary from agency to agency and, therefore, any analysis obviously must be performed on a case-by-case basis. Frankly, without a specific fact situation it is difficult to distill or define the concept further than the language quoted above from the Appropriation Act.

3. "Is it advisable that the signature of the requesting agency alone be certification that the flight is for official business?"

An opinion from this Office is designed to address questions of law. The wisdom or advisability of a statute lawfully enacted by the General Assembly and signed into law by the Governor is not a matter of legal analysis and, therefore, is not a matter on which this Office is empowered to opine.

4. "Should the agency specify the exact purpose of the flight?"

Proviso 129.40 of the 1987-88 Appropriation Act provides in part that:

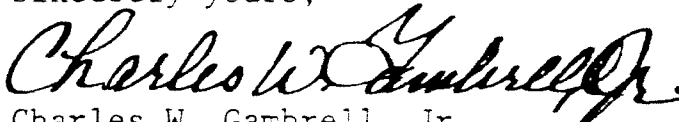
No member of the General Assembly, no member of a state board, commission or committee, and no state official shall use any aircraft of the Aeronautics Commission unless the member or official files within forty-eight hours after the time of departure of the flight with the Aeronautics Commission a sworn statement certifying and describing the official nature of his trip
(emphasis added)

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It is clear from this above-quoted language that the "official nature" of the trip must be described in affidavit form. This burden is placed on the official or member utilizing the state aircraft. Once this burden has been met, the official or member has complied with Proviso 129.40.

I hope the above information has been of assistance to you.

Sincerely yours,



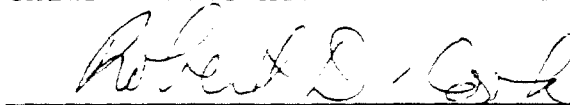
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Attachments

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