

The State of South Carolina



Office of the Attorney General

Opinion No. 87-26
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August 25, 1987

Jesse A. Coles, Jr., Ph.D., Executive Director
State Budget and Control Board
Post Office Box 12444
Columbia, South Carolina 29211

Dear Dr. Coles:

You have asked for a follow up opinion to our August 11, 1987 opinion wherein we concluded that the State Budget and Control Board has the authority to rescind its June 23, 1987 action, which reduced employer contribution rates to the Police Officers Retirement System. You now wish to know "what legal position county and municipal government employers whose employees are members of the System would be in if the Board were to rescind that June 23, 1987, action?" It is our opinion that should the Budget and Control Board decide to rescind its June 23, 1987 action and reinstate the previous employer contribution rate, counties and municipalities would be legally obligated to fund such additional contribution to the Police Officers Retirement System.

Section 9-11-220(1) provides as follows:

Commencing as of July 1, 1974, each employer shall contribute to the System seven and one-half percent of the compensation of Class One members in its employ and ten percent of compensation of Class Two members in its employ. Such rates of contribution shall be subject to adjustment from time to time on the basis of the annual actuarial valuations of the System. [emphasis added]

This provision clearly requires all "employers," including counties and municipalities, to make such contributions as are determined by the Budget and Control Board "from time to time." As

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we concluded in our August 11, 1987 opinion, this decision by the Board to determine the rate of contribution by employers is a legislative or policy making matter rather than a ministerial function. See Op. at p. 4. As the Court stated in Olds v. DeMarco, 237 N.E.2d 354 (Ill. 1968), the establishment of a pension system as well as contributions to be made and requirements of eligibility for benefits are within the legislative function. The General Assembly has delegated this function to the Budget and Control Board pursuant to Section 9-11-220. Thus, if the Budget and Control Board determines that its decision of June 23, 1987 should be rescinded and the three percent (3%) reduction reinstated, counties and municipalities would be required to comply with such decision.

By way of analogy, our Supreme Court stated in Kramer v. County Council for Dorchester County, 277 S.C. 71, 74, 282 S.E.2d 850 (1981), that "[i]t is certainly competent for the General Assembly to mandate county funding of county agencies" Consistent with this reasoning, in a previous opinion of this Office, Opinion No. 80-85, dated August 5, 1980, it was concluded that "[a] county cannot arbitrarily fail to fund the office of Master-in-equity for that county" Likewise, this Office has concluded that counties may not refuse to fund magisterial positions which have been established by the General Assembly. Op. Atty. Gen., Feb. 22, 1986.

Moreover, our Court of Appeals has held that when the General Assembly mandates a county or municipality to provide funding for a particular function, "there has to be flexibility in providing for the funding of governments." McMehan v. York Co. Council, 281 S.C. 249, 252, 315 S.E.2d 127 (1987). Accordingly, the fact that the policy making body, such as the Budget and Control Board, for policy reasons, may change its mind as to the rate of contribution required of employers would not alter the employers' legal obligations to make such contribution. As the Court stated in Hanson v. City of Idaho Falls, 92 Idaho 512, 446 P.2d 634, 636 (1968),

[a]lthough the amount thereof can be determined only through a proper and thorough actuarial study, the policemen have an inherent right to some contribution by the city each year. Such a right creates a concomitant duty which in turn is a liability enforceable against the city.

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In conclusion, since the General Assembly has mandated that counties and municipalities as employers in the Police Officers Retirement System must make such contributions as are determined by the Budget and Control Board, and since such decision is a legislative function, the fact that the Budget and Control Board would here reinstate or rescind an earlier reduction of employer contributions would not relieve the counties and municipalities of their obligation to make such contribution as directed by the Budget and Control Board.^{1/} If the Board should decide, therefore, to rescind its earlier rate reduction, counties and municipalities would be legally required to make contributions consistent with the Board's revised rate of contribution.

If we can be of further assistance, please let us know.
With kind regards, I remain

Very truly yours,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

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Executive Assistant for Opinions

^{1/} Counties or municipalities are arms or subdivisions of the State, subject to legislative control, created and existing with a view to the policy of the State and serving as its agencies. Parker v. Bates, 216 S.C. 52, 56 S.E.2d 723 (1950); Edgefield Co. v. Ga.-Carolina Power Co., 104 S.C. 311, 88 S.E. 801 (1916). As such, these entities may not question the authority of the State in the exercise of its police power on the ground that such exercise impairs the obligation of contract. 56 Am.Jur.2d, Municipal Corp., § 100; see also, Cola. Co. v. Bd. of Trustees of Wisconsin Retirement Fund, 116 N.W.2d 142 (Wis. 1962). A municipality or county has no vested rights which it may assert against the state and these entities have no vested rights in public property where the exercise of governmental powers is involved. 56 Am.Jur.2d, Municipal Corp. § 23. Accordingly, as a general rule, counties (or municipalities) may not sue the State or its agencies. Richland Co. Rec. Dist. v. Cola., 348 S.E.2d 363, 364 (1986); Hibernian Soc. v. Thomas, 319 S.E.2d 339 (S. C. App. 1984).