The State of South Carolina

Office of the Attorney General

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May 14, 1986

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Dear Mr. Pruitt:

Your letter dated January 16, 1986, to Ken Woodington has been referred to me for reply. By your reference to a letter dated January 15, 1986, to you from Randolph B. Epting, Esquire, you have posed three questions:

> 1. To what extent can public employers - city and county employers, school districts and state employers - negotiate lower salaries with their employees?
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> 2. [D]oes "Earnable Compensation" as defined in S.C. Code § 9-1-10(16) include amounts that an employee voluntarily elects be reduced from his salary to fund Cafeteria Plan benefits under IRC § 125?
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> 3. Would the voluntary reduction of a state employee's salary or wages below $2.65 an hour violate S.C. Code § 8-11-140 if such reduction is used by his employer to purchase Cafeteria Plan benefits under IRC § 125?

QUESTION # 1

Statutes relating to the compensation of public officers or employers must be strictly construed in favor of the government, and such officers or employees are entitled only to that which is clearly given. 67 C.J.S. Officers and Public Employees § 226(d). Accord State v. Wilder, 198 S.C. 390, 18 S.E.2d 324 (1941).

State Employees

Section 8-15-10 of the Code of Laws of South Carolina, 1976, as amended, provides:

> Except as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of the State or any political subdivision, department or agency thereof shall be as from time to time provided by the General Assembly or the particular political subdivision, department or agency concerned, as the case may be.

Sections 8-11-70 (Deduction from pay for United States savings bonds.), 8-11-80 (Deduction for group life, hospital and other insurance.), 8-11-90 (Deductions for federal taxes.), 8-11-91 through 8-11-97 (Deductions for charitable contributions.), and 8-11-98 (Deductions for payment to credit union.) expressly authorize specific deductions from the salary or wages of public officers or employees. Except for the deductions for federal taxes, these authorized deductions must be requested or authorized by the public officer or employee. Deductions are also statutorily authorized for members of the South Carolina Retirement Systems. E.g., S.C. CODE ANN. §§ 9-1-1020 and 9-3-510 (1976 & 1984 Supp.). In addition, § 8-23-10 et seq. establishes a Deferred Compensation Program "to enable employees of the State, its agencies and political subdivisions to participate [, by contract,] in voluntary deferred compensation plans authorized by the United States Internal Revenue Code...."

After creating the State Personnel Division as a part of the State Budget and Control Board, § 8-11-230 authorizes and directs the State Budget and Control Board, in relevant part, to:

> Establish procedures for the regulation of compensation of all State employees where not otherwise regulated directly by the General Assembly. Such procedures and regulations shall distinguish between two categories of positions, classified and unclassified. A uniform Classification and Compensation Plan shall be provided for such regulation of all positions in the classified service. Such additional procedures shall be provided as in its judgment adequately and equitably regulate unclassified positions.

Exemptions from the State Personnel Division are enumerated in §§ 8-11-260 and 8-11-270. S.C. CODE ANN. R 19-702 (vol. 23A) is

the regulation established by the Budget and Control Board relative to the Pay Plan for classified state employees. 1/ R 19-702.02(E) provides that "[a]ll employees shall be paid in accordance with the rates shown in the official Pay Schedule and the provisions of this Regulation." R 19-702.03 regulates employment rates and R 19-702.06 regulates salary decreases; however, neither of these regulations addresses whether or not a state employee can voluntarily agree to a lower salary.

In Salley v. McCoy, 182 S.C. 249, 189 S.E. 196 (1936), the South Carolina Supreme Court considered a demurrer raised by the plaintiff to several defenses as to whether the plaintiff, the treasurer of Orangeburg County, was entitled to certain compensation, by way of salary and tax execution costs. Considering the specific defense of waiver, the South Carolina Supreme Court in Salley, adopting the lower court's decree, recognized:

> With practical uniformity the courts have held that a contract whereby a public officer agrees to accept some other compensation for his services than that provided by law, whether it be more or less, or whether the comparative value be uncertain, is against public policy and, therefore, void. I do not find that the question has been decided by our court, but the weight of authority from other jurisdictions is overwhelming and the public policy involved is plain.

1/ Section 16 of Act No. 201 of the 1985-86 appropriations act provides, in relevant part:

> Provided, Further, That the amounts appropriated to the Budget & Control Board for Base Pay Increase shall be allocated by the Board to the various state agencies to provide compensation increases for classified employees in accordance with the following plan:
>
> A. The State Budget and Control Board may develop and implement a revised pay schedule for classified positions. Provided, However, That the minimum wage shall be no less than $3.35 per hour.... [Emphasis added.]

> Under our scheme of government it is for the Legislature to fix plaintiff's compensation by proper enactment. It must be supposed that its action in this regard will be for the public good. If plaintiff could be bound by a contract entered into in respect to his compensation, the authority of the Legislature could be overthrown by "a few strokes of the pen." If by contract the compensation of a public officer could be reduced, then by contract it could be increased. [Emphasis in original.]

Id. at 281-2, 189 S.E. at 211.

According to 63A Am.Jur.2d Public Officers and Employees § 466,

> [a] number of courts, influenced by the view as to the invalidity of the agreement to accept a lesser compensation, allow the public officer or employee to recover his full compensation despite an agreement by him to accept, or acceptance of, a smaller amount, either by completely omitting any reference or discussion as to the effect of the doctrines of estoppel, waiver, or donation, or in open refusal to permit those doctrines to interfere with the operation of the rule declaring such an agreement invalid and therefore allowing full recovery, or by taking the view that the surrounding facts and circumstances were not sufficient to call into operation those doctrines. But other decisions have not permitted elements of waiver, estoppel, or laches on the part of the officer in accepting or agreeing to accept without protest the lesser compensation in full payment from preventing recovery of an officer or employee for the balance of his compensation. Other cases have reached a contrary result on the theory that there has been a valid voluntary gift or donation of a public or charitable nature, precluding recovery by the officer or employee.

See Williamsburg County v. Graham, 190 S.C. 233, 196 S.E. 547 (1938).

According to 67 C.J.S. Officers and Public Employees § 237,

> [s]ome cases hold, however, that the general rule, that acceptance by a public officer of less compensation for official services than that established by law, does not estop him from claiming his full compensation, does not apply to persons who merely hold a position of public employment. There is also authority holding that where an officer actually agreed to the acceptance of reduced compensation before his appointment, and after the compensation had been earned did so accept it, he will be held bound by his agreement and contract, and, under some statutes, the acceptance without protest by a public officer of compensation less that his salary bars recovery by him of any additional compensation.

Cf. Annot. 160 A.L.R. 490.

Although South Carolina's appellate courts have apparently not addressed whether the general rule enunciated in Salley v. McCoy applies to public employees as well as to public officers, 2/ other jurisdictions have concluded that the general rule is applicable to both public officers and employees. See Annot. 160 A.L.R. 490. In Allen v. City of Lawrence, 61 N.E.2d 133 (Mass. 1945), the Supreme Judicial Court of Massachusetts reasoned:

> By the great weight of authority, where the compensation of a public officer has been established by law, a contract in which he agrees to accept a less amount is invalid as contrary to public policy. [Citations omitted.] Attempts have been made to circumvent this rule on the doctrine of estoppel or waiver; but usually without success. [Citations omitted.] The reasons for the rule are obvious. Where the compensation for an office has been fixed by law, it would be detrimental to the public

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2/ This Office has previously opined that "[t]he rule that a public officer cannot agree to an assignment of compensation or to accept less compensation than that fixed for his services seems to apply also to school teachers." Atty. Gen. Op., June 15, 1964.

> service if the office could be let out to the lowest bidder. Laws designed to attract competent persons to the public office by providing them with adequate compensation could be set at naught at the caprice of those charged with their administration. The effects on the efficiency and morale of the public service, if this were permitted, are not difficult to imagine. This rule has been applied to employees as well as officers. Kehn v. State, 93 N.Y. 291. Clark v. State, 142 N.Y. 101, 36 N.E. 817. Golding v. New York, Mun.Ct., 140 N.Y.S. 1020. In the Clark case it was said by the Court of Appeals of New York, at pages 105, 106 of 142 N.Y., at page 818 of 36 N.E.: "Where the compensation of an employe' of the state is fixed by statute, it cannot be reduced by the state officer under whom he is employed; and the fact that the employe' takes for a time the reduced compensation does not estop him from subsequently claiming the residue." The lawfully established compensation of public employees should be protected from attempts to reduce it by contract to the same extent as that of public officers. The reasons for the rule in the one case are no less applicable in the other.

Section 137 of Act 201 of the 1985-86 appropriations act provides, in relevant part:

> Provided, Further, that the appropriated salaries for specified positions shall mean the maximum compensation for such position, except as specifically provided in other provisions of this act, and in any case where the head of any department can secure the services for a particular position or work at a lower rate than the salary specified in this Act, authority for so doing is hereby given.

Interpreting an almost identical proviso found in § 131 of Act 199 of the 1979-80 appropriations act, this Office opined: "[I]t is the opinion of this Office that the above-quoted proviso clearly authorizes a committee chairman or agency executive to pay an employee less than the line item appropriated." Atty. Gen. Op., April 10, 1979. That opinion further stated:

> Where the position is a classified position, i.e., its minimum and maximum salary levels have been set by the State Personnel Division, the employee would probably have to be paid at least the minimum amount for that classification; however, this question does not appear to be the one which has arisen at present.

The General Assembly has not seen fit to alter the conclusion as no South Carolina statute clearly gives classified State employees the authority to contract for a lower salary. See, Op. Atty. Gen., March 12, 1985. In fact, § 137 of Act 201 authorizes payments less than the line item appropriated only for "specified positions." Moreover, minimum rates of pay are prescribed for classified State employees in § 16 of Act 201 and in R 19-702 in specific situations. In addition, deductions from pay to State employees are statutorily authorized only for specific items. Because the South Carolina Supreme Court has specifically recognized the general rule in Salley v. McCoy, it is probable that the general rule as to public officers would be held to apply to classified State employees in South Carolina as well. Consequently, we doubt whether a contract whereby a classified State employee in South Carolina agrees to accept some other compensation for his services than that provided by law, whether it be more or less, or whether the comparative value be uncertain, is presently authorized. 3/

Perhaps it could be argued that in this instance there is no substantive "reduction" in salary because the employee is

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3/ An earlier opinion of this Office, dated December 3, 1981 is not inconsistent with this conclusion. There, it was concluded that "[t]here is no prohibition on employees voluntarily accepting a reduction of pay" in the context of agency budget reductions, because of revenue shortfalls. In such a budgetary crisis, where revenues do not meet legislative appropriations, the policy considerations underlying the rule stated in Salley are not present. The Legislature makes every appropriation of funds contingent upon available revenues, see, Act No. 201 of 1985, § 144, and where such revenues are not available to the agency, its employees would impliedly possess the authority to take voluntary reductions in pay, in order to meet budget reduction requirements. Courts have consistently refused to apply the general rule prohibiting reductions in the absence of a statute in cases of economic emergency. See, Collins v. New York, 136 N.Y.S. 648 (1912); Steele v. Chattanooga, 84 S.W.2d 590 (Tenn. 1935); 67 C.J.S., Officers, § 237, p. 754.

receiving a benefit of roughly equal value and is, in essence, "puchasing" such benefit by virtue of an adjustment in compensation. See, Malcolm v. Yakima County Consolidated School Dist. No. 90, et al, 159 P.2d 394, 396-7 (Wash. 1945) [Simpson, J., dissenting]. In his dissent in Malcolm, Justice Simpson distinguished those cases where a worker received a reduction in salary "without giving the worker anything of value for the amounts retained from the salary or wage." He noted, however, that "[i]n the present case the school district furnished living quarters...which certainly had value..." and thus he was unwilling to apply the general rule that public policy prohibited negotiated salary reductions. While this argument is somewhat persuasive, we have been unable to find cases which recognize Justice Simpon's reasoning as an exception to the general rule. Indeed, the majority opinion in Malcolm implicitly rejected such an exception. And apparently this Office in a Memorandum Opinion, dated June 15, 1964, likewise rejected such a distinction by concluding that, in the absence of statutory authorization, a position of a teacher's salary could not be withheld or diverted by school officials to purchase an annuity for the teacher. See Memorandum Opinion, dated June 15, 1964.

Of course, the General Assembly, if it so desired, could expressly authorize by statute such contracts. As the Court stated in Quayle v. City of New York, 278 N.Y. 19, 14 N.E.2d 835 (1938), so long as the statute does not violate either the state or federal constitution, it is valid. The Court in Quayle upheld a New York statute authorizing the reduction of the salary of city employees. By enacting this type of statute, the court concluded that "the legislature has defined for the future the public policy of the state." 14 N.E.2d at 837. See also, memorandum opinion, June 15, 1964.

City and County Employees

In compliance with Article VIII, § 7 of the South Carolina Constitution, the General Assembly enacted Act No. 283 of 1975 (codified at § 4-9-10 et seq. of the Code of Laws of South Carolina, 1976, as amended) establishing five alternate forms of county government. 4/ Section 4-9-30(7) provides, in relevant part:

4/ In Duncan v. County of York, 264 S.C. 327, 228 S.E.2d 92 (1976), the South Carolina Supreme Court held that the county board of commissioners form of county government provided as one of the five alternative forms of Act No. 283 was constitutionally impermissible.

> Under each of the alternate forms of government listed in § 4-9-20, except the board of commissioners form provided for in Article 11, each county government within the authority granted by the Constitution and subject to the general law of this State shall have the following enumerated powers which shall be exercised by the respective governing bodies thereof:
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> ...;
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> (7) to develop personnel system policies and procedures for county employees by which all county employees are regulated except those elected directly by the people, and to be responsible for the employment and discharge of county personnel in those county departments in which the employment authority is vested in the county government but this authority shall not extend to any personnel employed in departments or agencies under the direction of an elected official or an official appointed by an authority outside county government....
>
> The salary of those officials elected by the people may be increased but shall not be reduced during the terms for which they are elected, except that salary for members of council and supervisors under the council-supervisor form of government shall be set as hereinafter provided.... [Emphasis added.]

Article VIII, § 17 of the South Carolina Constitution provides:

> The provisions of this Constitution and all laws concerning local government shall be liberally construed in their favor. Power, duties, and responsibilities granted local government subdivisions by this Constitution and by law shall include those fairly implied and not prohibited by this Constitution.

This constitutional provision substantially modified the common law rule that counties and municipalities have only such powers as are expressly conferred upon them by statute. Atty. Gen. Op., September 20, 1983.

This Office has previously opined that:

> a liberal construction of § 4-9-30(7), as mandated by Article VIII, § 17 of the Constitution, supports the power of Laurens County to make cash payments equal to the cost to the County of providing health insurance to those of its employees who elect not to participate in the group health insurance plan provided to Laurens County employees at no expense to them. [Footnote omitted.]

Atty. Gen. Op., September 20, 1983.

Considering this mandated liberal construction, the import of the express language of § 4-9-30(7) permitting the increase but prohibiting the decrease of the salary of those officials elected by the people during the terms for which they are elected is unclear. This language does not comport with the principle recognized in Salley, supra, against increasing or decreasing a public officer's compensation. Therefore, the principle recognized in Salley may not apply to county and municipal employees.

Consequently, it could be argued that sufficient statutory authority presently exists for county employers to negotiate lower salaries with their employees, subject to the limitations imposed by § 4-9-30(7). With respect to such an argument, we recognize that the regulation of county employees rests primarily with the county under Home Rule and that the General Assembly has not chosen to impose restrictions except in certain limited areas. See e.g., § 8-13-410 et seq.; § 4-9-180; § 4-9-100 of the Code. Certainly, the General Assembly retains the authority to do so by general law, however, and thus caution must be urged in this area. While arguments can be made supporting the present authority of counties to negotiate salary reductions with their employees, the more cautious approach would be for the General Assembly to expressly authorize such reductions before any implementation. Thus, the General Assembly may wish to clarify county council's authority in the area by express statutory enactment.

With respect to employees of municipalities, the same reasoning would be applicable. While municipal governments possess broad authority with respect to the enactment of regulations and ordinances and with regard to municipal employees, see, §§ 5-7-30, 5-9-40, 5-11-40, 5-13-90 of the Code, the General Assembly may wish to clarify the authority of municipalities in this area.

School District Employees

Section 59-17-10 of the Code of Laws of South Carolina, 1976, as amended, provides that "[e]very school district is and shall be a body politic and corporate...." Section 59-19-10 provides, in relevant part: "Each school district shall be under the management and control of the board of trustees..., subject to the supervision and orders of the county board of education."

In South Carolina, school district boards of trustees have express authority to set teachers' salaries, subject to the supervision of the county boards of education. S.C. Code Ann. § 59-19-90(2) (1976 & 1985 Supp.). This authority, however, is limited by § 59-20-50(4)(a) which provides:

> Each school district shall pay each certified teacher or administrator an annual salary at least equal to the salary stated in the statewide minimum salary schedule for the person's experience and class. No teacher or administrator employed in the same position, over the same period, shall receive less total salary, including any normal incremental increase, than that teacher or administrator received for the fiscal year prior to implementation of this article.

Considering § 59-2-50(4), this Office has opined that: "a school district cannot reduce teachers' salaries below the [Education] Finance Act's minimum schedule absent legislative authorization." Atty. Gen. Op. No. 83-12, April 28, 1983. Accord, Atty. Gen. Op. No. 83-15, May 16, 1983.

This Office has previously considered the question of whether a teacher's salary could be withheld or diverted by school officials to purchase an annuity by the school officials at the election of the teacher. Memorandum Opinion, June 15, 1964. 5/ To answer that question, this Office reviewed S.C. Code Ann. § 21-230(2) (1962) which provided:

> The board of trustees shall also:
>
> ...;

5/ The South Carolina General Assembly subsequently enacted Act No. 1216 of 1972 (codified at §§ 9-15-10 and -20 of the Code of Laws of South Carolina, 1976, as amended), which authorized school districts to purchase annuity contracts at the request of their employees.

> (2) Employ and discharge teachers. Employ teachers from those having certificates from the State Board of Education, fix their salaries and discharge them when good and sufficient reasons for so doing present themselves, subject to the supervision of the county board of education....

Section 21-230(2) is identical to the first two sentences of current § 59-19-90(2), which provides:

> The board of trustees shall also:
>
> ...;
>
> (2) Employ and discharge teachers. Employ teachers from those having certificates from the State Board of Education, fix their salaries and discharge them when good and sufficient reasons for so doing present themselves, subject to the supervision of the county board of education. In reaching a decision as to whether or not to employ any person qualified as a teacher, consideration may be given to the residence of such person but it shall not be the deciding factor or a bar to employing such person.

This Office then quoted persuasive authorities on the proposition that public officers and school teachers cannot agree to accept less compensation than that fixed for their services and concluded: "The rule that a public officer cannot agree to an assignment of compensation or to accept less compensation than that fixed for his services seems to apply also to school teachers." Memorandum Opinion, June 15, 1964. Ultimately, this Office opined that "school boards do not have statutory authority to withhold or divert portions of school teachers' salaries to purchase annuities for the school teachers." Id.

Addressing the issue of whether specific contract language providing for teachers' salary reductions and layoffs upon losses in funding or changes in course programming could be invoked by school districts, this Office noted:

> [W]hen the duty of fixing teachers' salaries is imposed upon school boards, their power to reduce the salaries of permanent teachers cannot be doubted provided that the power is

> exercised in good faith, reasonably, and without discrimination or arbitrariness, and provided that no attempt is made after the beginning of the school year to reduce salaries for that year. [Citations omitted.]

Atty. Gen. Op. No. 83-15, May 16, 1983. This Office then opined that the specific contract language under review "should permit such mid-year salary reductions, but only under reasonable circumstances." Id.

At first blush, the Memorandum Opinion of June 15, 1964, and Atty. Gen. Op. No. 83-15, May 16, 1983, appear to be inconsistent. A closer analysis reveals a marked difference in the reasons for the contractual reductions. In Atty. Gen. Op. No. 83-15, May 16, 1983, the reduction in salary contemplates factors which may be beyond the school district's control and which may make payment under the contract an impossibility. 6/ See also Atty. Gen. Op., September 23, 1982 ("The validity of any salary reduction [for teachers' salaries to comply with the South Carolina Budget and Control Board's 4.6% cut in funds for the Education Finance Act] will depend upon its being properly based on the terms of individual contracts, the particular fiscal problem of each of the [school] districts, and any legislation passed by the General Assembly."). The contractual reduction proscribed by this Office in Atty. Gen. Op., June 15, 1964, would solely benefit the teacher and, thus, trigger the principle recognized in Salley, supra. See also Atty. Gen. Op., June 27, 1979 ("[A] school district may not make payroll deductions from the wages and salaries of district employees for the purpose of making payments on behalf of employees unless there is a statutory authorization therefor."); Atty. Gen. Op., May 21, 1979 ("School districts may not deduct dues from employees' compensation for the purpose of paying dues to organizations to which the employees belong."). Therefore, school districts probably cannot negotiate lower salaries with their employees except in contemplation of losses in funding or changes in course programming or other similar circumstances. This is in accord with the same reasoning expressed above with regard to state employees. See, n. 4. Of course, as noted earlier, if it so desired, the General Assembly could expressly authorize the negotiation of salary reductions in other areas.

6/ The specific contractual language considered by this Office in Atty. Gen. Op. 83-15, May 16, 1985, provided for a reduction in salary if, e.g., there was a "[l]oss or reduction in any amount of anticipated or appropriated state, local or federal funding."

QUESTION # 2

If necessary, in light of the above conclusions, Ken Woodington of this Office will respond to your second question by separate letter.

QUESTION # 3

Because classified State employees in South Carolina probably cannot negotiate lower salaries with their employer, a response to your third question is unnecessary.

CONCLUSION

In summary, in the absence of express statutory authority, we doubt whether classified State employees could negotiate lower salaries with their employers except in certain situations, such as budget reductions, where appropriated funds may not be available. The General Assembly could, if it so desired, expressly authorize such salary reductions.

Arguably, city and county employees can, under present law, negotiate lower salaries with their employers subject to certain limitations such as one found in § 4-9-30(7). However, the more cautious approach would require express statutory authority with respect to these employees as well.

With respect to school districts, again we doubt whether these entities can, under present law, negotiate lower salaries with their employees except in contemplation of loss by funding or other similar circumstances. Thus, if school districts desire to negotiate lower salaries with their employees, express statutory authorization is probably required.

If you have any further questions, concerning this matter, please do not hesitate to contact me.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Staff Attorney

REVIEWED AND APPROVED BY:

Robert D. Cook

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