

The State of South Carolina



Office of the Attorney General

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The Honorable Thomas A. Limehouse
Member, House of Representatives
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Summerville, South Carolina 29484

Dear Representative Limehouse:

You have advised this Office that the Board of Trustees of the College of Charleston, subsequent to the resignation of the President of the College, has voted to pay the President \$60,000.00 in severance pay from the College. You have inquired as to the propriety of the Board's actions. You have also asked, hypothetically, whether such action taken by a board of trustees in executive session but not later ratified in a public session would be effective.

As to your first question, Article III, Section 30 of the State Constitution provides:

The General Assembly shall never grant extra compensation, fee or allowance to any public officer, agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law;

"Extra compensation" as used in Article III, Section 30 has been defined as "any compensation over and above that fixed by law or contract at the time the service was rendered." State ex rel. McLeod v. McLeod, 270 S.C. 557, 243 S.E.2d 446 (1978). Article III, Section 30 has been interpreted on numerous occasions by this Office; see Ops. Attv. Gen. of July 19, 1979; July 14, 1958; February 25, 1955; January 27, 1977; July 26, 1978; August 23, 1979; and September 29, 1981, copies of which are enclosed for your use. As you will see, this Office has opined repeatedly,

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based on Article III, Section 30, that severance or bonus pay is prohibited as being made after services have been rendered or a contract fulfilled. We understand that the individual has voluntarily resigned, that there exists no contract authorizing severance pay, that no future services to the State are to be rendered in consideration of the \$60,000.00 payment, 1/ and further that the Board is not purchasing a contract as is done occasionally upon involuntary termination of employment. The identical principles recited within these prior opinions would most probably be applicable to the situation you have presented as to the College of Charleston. 2/

You have asked whether the payment to the individual may be denominated a retraining fee and thus be authorized. We would advise that the payment, by whatever name it is called, would also be prohibited as an expenditure of public funds for a private purpose. See Article X, Section 11. A public purpose

has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation does not have to benefit all of the people in order to serve a public purpose merely because some individual makes a profit as a result of the enactment.

Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43 (1975). A payment to an individual with no assurance of more than a negligible advantage to the general public does not serve a public purpose within the meaning of the Constitution. Id., 265 S.C. at 163. In the instant situation it would appear that no one other than the individual will benefit from this expenditure

1/ No opinion as to the propriety of payment in advances for services to be rendered in the future is expressed herein.

2/ We would further mention that Section 138 of the 1985-86 Appropriations Act [Act No. 201, Section 138] provides that "salaries paid to officers and employees of the State including its several boards, commissions, and institutions shall be in full for all services rendered...." Such is consistent with Article III, Section 30's mandate.

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of public funds. Assuming that there is no contractual provision authorizing such a payment, that a voluntary resignation is involved, that no future services to the State are to be rendered, and further that a purchase of the employment contract is not involved, it would appear that the public purpose test would not be met by such an expenditure of public funds, whether it be denominated severance or retraining pay.

You have also asked this Office to address, hypothetically, a situation in which a board should decide in executive session to pay such severance but not subsequently ratify that action in open session. Section 30-4-70(a)(5), Code of Laws of South Carolina (1984 Cum. Supp.), provides the following:

Prior to going into executive session the public agency shall vote in public on the question and when such vote is favorable the presiding officer shall announce the purpose of the executive session. Any formal action taken in executive session shall thereafter be ratified in public session prior to such action becoming effective. As used in this item "formal action" means a recorded vote committing the body concerned to a specific course of action. [Emphasis added.]

This Code section has been discussed at length in Ops. Attv. Gen. No. 84-46 dated April 24, 1984; June 1, 1984, and October 23, 1984, copies of which are enclosed.

As stated in Opinion No. 84-46 relative to an election of officers by a public body which occurred in executive session,

[a]ccording to the provisions of Section 30-4-70(a)(5) an election held in executive session would not be effective until such action has been ratified in public session. This would be in keeping with the general law that only those matters considered openly, on the record, would be valid, absent statutory authority to the contrary. See, 73 C.J.S., Public Administrative Law and Procedure, § 17.

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To "ratify" is to recognize or confirm "that which has been done without authority, or done insufficiently." Davies v. Lahann, 145 F.2d 656, 659 (10th Cir. 1944). In Op. Atty. Gen. No. 77-279, ... , this Office concluded that "[s]uch ratification should come through a motion to confirm the action taken in executive session" Of course, upon such motion, the matter should also be voted upon in public session in the manner described above. See, Section 30-4-70(a)(5).

We believe the better practice, and one more in keeping with the spirit and intent of the Freedom of Information Act, is to ratify, in public, action taken in executive session immediately upon return to public session. ...

The same statute and principles would apply to the hypothetical situation. Any formal action taken during an executive session would not be valid or effective until such action is ratified in a public session.

We trust that the foregoing has satisfactorily responded to your inquiry. If we may provide additional assistance, please advise us.

Sincerely,

Patricia D. Petway

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REVIEWED AND APPROVED BY:

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