1984 WL 249814 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
January 30, **1984**

***1** Mr. Scott R. Inkley, Jr.
Director of Research
Ways and Means Committee
Post Office Box 11867
State House
Columbia, South Carolina 29211

Dear Scott:
You have requested an opinion as to whether or not State employees have any 'ownership or title' interest in funds which have accumulated in the 'State Health Insurance Reserve Fund.' [1] It is assumed that your question relates to the monies held by the State (or its designee) which are the product of premiums (either paid by the State with appropriated funds or paid by the employee directly or both) plus any investment income derived from these premiums. The question you raise is indeed a difficult and complex one, compounded by the need for an immediate answer.

The State of South Carolina makes available a complete health insurance plan to eligible employees and their dependents. Two plans are offered—Plan A and Plan B. Under each plan there are **four** types of coverage, to wit:
(1) Employee

(2) Employee and Spouse

(3) Employee and Children

(**4**) Full Family.

Under Plan A, the State pays the entire premium for employee coverage. The employee must pay an additional premium to obtain either employee and spouse coverage, or employee and children coverage, or full family coverage.

Under Plan B, the employee must pay an additional premium for each of the **four** types of coverage.

If an employee opts for a coverage which requires the employee to pay an additional premium, then ordinarily that premium payment is deducted from the employee's payckeck pursuant to the authority of South Carolina Code § 8-11-80 (1976 as amended).

The statutory authority for this group health insurance is found in section 14 of the Appropriations Act for the fiscal year beginning July 1, 1983 which provides, in part, as follows:
Provided, Further, That the provision of group health, life, accidental death and dismemberment and disability insurance for active and retired employees of the state and the public school districts of South Carolina and their eligible dependents shall be in accord with such plans as may be determined by the Budget and Control Board to be equitable and of maximum benefit to those covered.

****

Provided, Further, That the Budget and Control Board shall set aside in a separate continuing account, appropriately identified, in the State Treasury all funds, State appropriated and other received for actual health insurance premiums due. Provided, Further, That these funds may be used to pay the costs of administering the health insurance program. [2]

This 'separate continuing account' (hereinafter referred to as 'Fund') initially receives funding from two sources—(1) the State, through the monies appropriated for health insurance and (2) eligible State employees, through the payment of additional monies for expanded coverage.

To determine the ownership of this Fund one must initially analyze and apply the laws of insurance to the payment of these monies by the State and the employee. Next, one must analyze the statutory authority as to the creation and purpose of the Fund.

Analysis of Insurance Law

***2** Insurance is a branch and special application of the law of contract. 'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency.' 43 Am.Jur.2d, Insurance, § 1 at 73. Inherent in insurance is a general scheme to distribute actual losses among a large group of persons bearing a similar risk and as a consideration for the insurer's promise and performance the insured makes a ratable contribution to a general insurance fund. This contribution or consideration is denoted a 'premium.' See, In re: Smiley's Estate, 216 P. 2d 212; Bronson v. Glander, 77 N.E. 2d 471.

To create an insurance contract there must be an offer or proposal by one party and acceptance by the other. Acceptance of a proposal for insurance must be evidenced by some act that binds the accepting party. Hodge v. National Fidelity Insurance Company, 221 S.C. 33, 68 S.E. 2d 636, 639 (1952).

When one becomes an employee of the State, then the State offers to that employee comprehensive health insurance coverage. An employee accepts or rejects that offer by completing a NOTICE OF ELECTION form on which the employee selects the plan and type of coverage that he desires. Once this NOTICE OF ELECTION form is completed, signed by the employee and the conditions therein are met, then a contract is formed.

The NOTICE OF ELECTION form contains the following language: 'PAYROLL DEDUCTION AUTHORIZATION: I hereby authorize my employer to deduct from my salary premiums necessary to pay for the above selected programs.' (emphasis added).

This 'premium' is the amount paid to the State as consideration for the insurance. 44 C.J.S. Insurance § 340 at 1302. The employee, rather than receiving actual legal title to the Fund to which he has paid the premium, instead, receives the health insurance coverage he has contracted for with the State.

Analysis of Creation and Purpose of Fund

As mentioned earlier herein, the 1983-84 Appropriations Act, section 14, creates the Fund to provide, among other benefits, health insurance 'for active and retired employees of the State and public school districts of South Carolina and their eligible dependents' . . .' in accord with such plans as may be determined by the Budget and Control Board to be equitable and of maximum benefit to those covered.' The Appropriations Act further states: 'It is the intention of the General Assembly that the amounts appropriated in this Act shall be applicable to uniform plans of insurance for all persons covered.'

It would appear that this Fund is a special fund as distinguished from a general fund. [3] A special fund may be created by the legislature and the monies received to be used under the statutory provisions for the particular purpose of the special fund are to be kept as a separate fund and cannot be placed properly in the general fund. 81 A CJS, States, § 228 at 798-799.

***3** The Fund under analysis is utilized to pay benefits to eligible employees under the State's Group Health Insurance Plan and is utilized to pay the costs of administering the health insurance program. [4] Because the Fund is a special fund and not part of the general fund, the monies (both initial contributions and any interest or investment income) of the Fund clearly must be utilized to accomplish this purpose. Cox v. Bates, 237 S.C. 198, 116 S.E. 2d 828, 835 (1960).

However, it must be recognized that the General Assembly possesses full authority to make such appropriations as it deems necessary, in the absence of a specific constitutional prohibition against such appropriations. Clarke v. South Carolina Public Service Authority, 177 S.C. 427, 181 S.E. 481 (1935). See also, State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E. 2d 633 (1982). Indeed, '[t]he power of the Legislature over the matter of appropriations is plenary, except as restricted by the Constitution.' Cox v. Bates, 116 S.E. 2d, supra at 834.

Thus, the general law, recognizing the plenary power of the Legislature with respect to appropriations, is as follows concerning dispositions of special funds:
Where a special fund is created or set aside by statute for a particular purpose or use, it must be administered and expended in accordance with the statute, and may be applied only to the purpose for which it was created or set aside, and not diverted to any other purpose, or transferred from such authorized fund to any other fund.

The legislature has power, however, to transfer to another fund or appropriate to another purpose any surplus which may remain in a special fund after the accomplishment of the purpose for which it was established, and, in general, whether or not the purpose for which a special fund was created has been accomplished, such fund may be diverted by statute to another and different purpose as long as it remains subject to legislative control. [emphasis added].

81A C.J.S., States, § 228 at 799-801. This also appears to be the law in South Carolina. Cox v. Bates, supra; Parker v. Bates, 216 S.C. 52, 56 S.E. 2d 723, 726 (1949). See also, 63 Am.Jur.2d, Public Funds, § 56 at 445.

However, the general authorities also recognize certain limitations upon even the Legislature's authority by statute to divert funds from a special fund. It is established that
. . . the legislature cannot authorize the diversion of a special fund where such diversion would conflict with a provision of the constitution controlling such fund, or would impair the obligation of a contract or constitute a breach of trust, although a surplus in a trust fund may be diverted therefrom. (Footnotes omitted).

81A C.J.S., supra. The Court of Appeals of Michigan has also recognized this limitation upon legislative authority, by stating:
A fund becomes 'special' and immune from diversion by a subsequent legislative transfer only when the diversion would conflict with a constitutional provision or impair a contractual relationship such as where the State holds trust or retirement funds, holds funds obtained to repay a specific indebtedness such as revenue bonds, or holds funds obtained for a specific and no other purpose.

***4** Michigan Sheriffs' Association v. Michigan Department of Treasury, 75 Mich. App. 516, 255 N.W. 2d 666, 672 (1977).

Cases in other jurisdictions have applied the 'trust' limitation to particular funds held in the State Treasury, concluding that, if the fund is, in effect, a trust fund, the legislature may not divert it to other purposes. For example, a Rhode Island case, In Re Statehouse Bond, 19 R.I. 393, 33 A. 870 (1896), concluded that monies received from the sale of bonds for a new statehouse, which had been authorized by the people, was

analogous to a trust fund and cannot be legally applied to any other purpose than that for which it was created, except by consent of the people by whom it was created.

33 A., supra at 871. Therefore, said the Court even the Legislature could not divert the fund. Moreover, in State ex rel Trenholm v. Yelle, (Wash.), 25 P.2d 569 (1933) an attempt by the Legislature to divert a portion of the Washington Workmen's Compensation Fund, through payment to an individual in the general appropriations act was negated by the Washington Supreme Court. Said the Court,

The purpose of the Workmen's Compensation Act, as originally enacted, and as amended from time to time by later statutes, has been and is, to provide compensation for workmen injured in extrahazardous occupations as defined by the act. To that end, the act has created and established two funds, known as the 'accident fund' and the 'medical aid fund' respectively. The industries of the state engaged in extrahazardous work are required to pay into the accident fund certain premiums according to the schedule provided. The workmen so engaged are required to pay a certain percentage of their wages into the medical aid fund for its maintenance. These funds are therefore trust funds drawn from particular sources and devoted to special purposes. By the act itself the fund is impressed with a trust. 'The fund thereby created shall be termed the 'accident fund' which shall be devoted to the purpose specified for it in this act.' [statutory citation omitted]. These funds are therefore not subject to appropriation by the Legislature for purposes other than those contemplated by the act, nor by methods that run counter to the effective operation of the act. [Emphasis added].

25 P. 2d supra at 570. Moreover, certain authorities consider state employees retirement funds as trust funds. Michigan Sheriffs' Association v. Michigan Department of Treasury, supra. But, in Rein v. Johnson, 149 Neb. 67, 30 N.W. 2d 548 (1947) the Nebraska Supreme Court rejected the trust fund analysis with respect to the State Assistance Fund. See also, Opinion of the Justices to the Senate, (Mass.) 378 N.E. 2d 433 (1978); City of Waterville v. Kennebec Water District, (Me.), 25 A. 2d 475, 483 (1942) [a sinking fund is considered a 'trust fund' for certain purposes].

Even though the trust theory limitation, as well as the other restrictions upon legislative transfer described above, appear well established in other jurisdictions, it is not clear whether a South Carolina court would find them persuasive and applicable to the State Health Insurance Reserve Fund. First, it is not at all evident that South Carolina courts have adopted the trust fund limitation, or any other restriction except specific constitutional prohibitions. See, Cox v. Bates, supra. We have found only one South Carolina case where there is a suggestion that the imposition of a trust upon a fund might pose a limitation upon any legislative transfer. See, Foster v. Taylor, 210 S.C. 324, 331-332, 42 S.E. 2d 531 (1947).

***5** Secondly, even though we have found cases in other jurisdictions which have placed limitations upon the transfer of monies from various funds, we have located no case involving a fund precisely like the State Health Insurance Reserve Fund. Many of the cases cited above did not concern funds where, as here, the Legislature had appropriated a large portion of the money comprising the fund; in other words, the foregoing cases generally concerned funds made up primarily of private contributions. A court might find this distinction itself persuasive.

Moreover, the Appropriations Act does not unequivocally restrict or earmark the creation of the Fund by adding the words 'for no other purpose' or language of similar intent. Our Legislature has used much more restrictive language in creating other funds. [5]

Additionally, the Fund under consideration is distinct from various other State funds such as the Victims' Compensation Fund, Patients' Compensation Fund, the State Retirement Fund [6] and other funds which clearly are in the nature of trust funds.

In conclusion then, because the State Health Insurance Fund is 'set aside in a separate continuing account, appropriately identified' and is funded in large part by State appropriations, we believe the Fund is a special fund of the State. Thus, legal title to the Fund would appear to be in the State of South Carolina. The Fund, however, is to be utilized and expended in accordance

with the statutory authority of Section 14 of the 1983-84 Appropriations Act. At the very least, because the Fund is a special fund of the State, the purpose for which it was established should first be accomplished. [7] Cox v. Bates, supra.

On the other hand, whether surplus portions of the Fund may be transferred or diverted to other purposes is less certain and we would advise caution in this regard. We simply have not found sufficient authority to say with certainty whether the above mentioned limitations upon transfer, such as the trust fund limitation, would be applicable here. While the statutory language in Section 14 of the Appropriations Act certainly does not expressly create a trust fund in the State Health Insurance Reserve Fund, we note that cases in other jurisdictions have inferred the creation of a trust from the particular statutory purpose involved. On the other hand, the fact that a large portion of the Fund consists of State-appropriated money would suggest that at least a portion of the Fund is not a trust fund and the fact that the Legislature may provide that certain amounts when collected shall be paid into a certain fund does not of itself preclude a later General Assembly from ordering it paid into another fund. Department of Public Welfare v. Haas, 15 Ill. 2d 204, 154 N.E. 2d 265 (1958). Based upon the foregoing, we believe a court would probably conclude that the General Assembly possesses the power to transfer or appropriate to another purpose any surplus which may remain after the accomplishment of the purpose for which the Fund was established. Because, however, this is a novel issue which has, to our knowledge, not been fully addressed in this State and because it requires factual adjudication, judicial clarification may be deemed advisable.

Conclusion

***6** 1. The State Health Insurance Fund is a special fund of the State of South Carolina.

2. Legal title to the Fund is in the State of South Carolina.

3. The purpose for which the Fund was established should first be accomplished.

4. A court would probably conclude that the General Assembly would possess the power to transfer or appropriate to another purpose any surplus in the Fund which may remain after the accomplishment of the purpose for which the Fund was established.

Sincerely,

Charles W. Gambrell, Jr.
Assistant Attorney General

Footnotes

1 Not to be confused with the 'Insurance Reserve Fund' as defined by South Carolina Code § 38-5-840 and Reg. 19-415, pursuant to South Carolina Code § 1-11-140 (tort liability for State employees).

2 A proviso with essentially this language has been included in the Appropriations Acts every year since 1973.

3 All public monies and revenues coming into the state treasury, not specifically authorized by the constitution or by statute to be placed in a separate fund, and not given or paid over in trust for a particular purpose, constitute a part of the general fund of the state. 81 A CJS, States § 228 at 797; State ex rel. Brown v. Bates, 198 S.C. 430, 18 S.E. 2d 346 (1942).

4 The State, through the State Budget and Control Board, has contracted with Blue Cross and Blue Shield of South Carolina to perform the administrative services for the plan. Additionally, this contract between the State and Blue Gross and Blue Shield recognizes the State's ownership of the various funds, including the Incurred but Unreported Claims Reserve and the Unreported Claims Stabilization Reserves, including interest earned and credited.

5 See, e.g. Victims' Compensation Fund, South Carolina Code § 16-3-1290 (1976 as amended); Patients' Compensation Fund, South Carolina Code §§ 38-59-110, et seq. (1976 as amended); South Carolina Retirement System, South Carolina Code §§ 9-1-10, et seq. (1976 as amended).

6 It is interesting to note that generally funds for retirement systems derived in whole or part from voluntary or mandatory employee contributions (which funds are held in a quasi trust capacity) are considered state funds. 81A CJS, States, § 114b. at 528.

7 No opinion is expressed with respect to the Fund and the potential application of South Carolina Code § 38-35-980 (1976 as amended).

1984 WL 249814 (S.C.A.G.)

End of Document