1984 WL 249940 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 24, 1984

***1** George L. Schroeder
Director
Legislative Audit Council
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:
By your letter of June 1, 1984, you have asked the opinion of this Office as to the scope of authority and responsibility of the Legislative Audit Council in reviewing the Harbor Pilot board or program, which is scheduled for termination on June 30, 1985, pursuant to Section 1-20-50(F)(1), Code of Laws of South Carolina (1983 Cum.Supp.). It is the opinion of this Office that the Legislative Audit Council has the authority to conduct its review of the Harbor Pilot board or program just as the Council would review any other state agency under the 'sunset' legislation.

By Section 1-20-10 et seq. of the Code, the Council is required to furnish the State Reorganization Commission a review and evaluation of specified state agencies or boards twelve months prior to the scheduled termination of such agency or board. By Section 1-20-5(F)(1) the Harbor Pilot agency or board is scheduled for termination as of June 30, 1985. A question has arisen as to whether the Harbor Pilot board or program is a state agency or program subject to review by the Council It is the opinion of this Office that the Harbor Pilot program or agency would be such an agency or program subject to review.

While numerous agencies and programs subject to review by the Council are specified in Section 1-20-50, the term 'agency' is not defined within that portion of the Code. However, Section 1-20-80 provides that '[t]he requirements of this chapter [Chapter 20 of Title 1] shall be in addition to the requirements set forth in §§ 1-19-10 through 1-19-260 of the 1976 Code.' Thus, Chapters 19 and 20 of Title 1 are considered to be in pari materia and must be construed together, to render both operative and to be explanatory of each other. Fishburne v. Fishburne, 171 S.C. 408, 172 S.E. 426 (1934). Section 1-19-40 of the Code provides that the term 'agency' or the term 'executive and administrative agency' and the plural of such terms shall mean any executive or administrative department, commission, board, bureau, division, service, office, officer, authority, administration or corporate entity which is an instrumentality of the State or any other establishment having executive or administrative functions in the government of the State. . . .

The commission to regulate harbor pilots for the port of Charleston was established initially by Act No. 370, 1873 Acts and Joint Resolutions. Licensure and control of pilots for the port of Charleston has been regulated by the General Assembly continuously since 1873 and is presently governed by Section 54-15-40 et seq. of the Code. Section 54-15-40 creates the commissioners of pilotage for the port of Charleston; provides for their appointment; and specifies their tenure. Section 54-54-60 authorizes the commissioners to appoint a board of examiners and specifies what such examination for licensure is to include. Section 54-15-80 provides for an examination fee. Section 54-15-100 (1983 Cum.Supp.) specifies the procedures for pilots taking apprentices and the qualifications which an apprentice must meet. Section 54-15-110 provides for the licensing and oath of pilots. Section 54-15-120 (1983 Cum.Supp.) contains prerequisites for licensing for the port of Charleston. Finally, Section 54-15-130 (1983 Cum.Supp.) limits the number of pilots which may be licensed for the port of Charleston. The statutes pertaining to licensure and other regulation of pilots and apprentices for the port of Charleston were amended in 1982 by Acts No. 285 and 339. Thus, the General Assembly has continually regulated the harbor pilots and by its Acts in 1982 has continued to exert control over their licensure.

***2** Moreover, the licensing of professions is generally regarded as the State's exercise of police power. South Carolina State Board of Dental Examiners v. Breeland, 208 S.C. 469, 38 S.E.2d 644 (1946). In particular, a pilot's license has been found to be a privilege granted to the pilot by the sovereign state in its exercise of police power. Fitzgerald v. Davis, 160 So.2d 345 (La.Ct.App. 1964). Furthermore, it has been stated that '[the] power [and duty of the Legislature to prescribe rules for ascertaining and declaring who are competent by reason of age, character, skill, experience, etc.] comes within the principle upon which the state prescribes the qualifications of those who are admitted to practice law, medicine, etc.' St. George v. Hanson, 239 N.C. 259, 78 S.E.2d 885, 888 (1954). The Board of Pilotage Commissioners of Charleston has been denominated a commission by the Supreme Court in State ex rel. McDonald v. Courtenay, 23 S.C. 180 (1885). Therefore, it is apparent that the Harbor Pilot board or agency would be a commission charged with administrative (i.e., ultimately responsible for licensing) functions of the State and would qualify as an agency as defined by Section 1-19-40 of the Code.

It must be presumed that the General Assembly intended that the Harbor Pilot agency or program be a state agency or program. The General Assembly will not be presumed to have done a futile act. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). By enacting legislation as recently as 1982 on this subject, the General Assembly obviously intended to continue its control over the regulation, by licensure, of the harbor pilots; any other interpretation would render the 1982 acts, as well as Section 1-20-50(F)(1), adopted in 1978, meaningless. In considering all of the above-cited legislation, the General Assembly clearly intended that the Harbor Pilot board or agency be a state agency; absent convincing evidence to the contrary, the General Assembly's intention should not be disregarded.

That pilotage commissions are state agencies appears to be consistent with authority from other jurisdictions. Congress, by 46 U.S. § 8501(a) (1983 Cum.Supp.), has provided that '[e]xcept as otherwise provided in this part [46 U.S.C.S. §§ 8101 et seq.], pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.' Citing the 'State's interest in promoting the public safety in its harbors and on its waterways,' the court in Adams v. Leatherbury, 388 So.2d 510, 514 (Ala. 1980) stated that the State Pilotage Commission of Alabama was a state agency. That court also stated that 'regulation of bar pilots is a matter to be decided by the states, absent congressional intent to preempt that state regulation.' 388 So.2d at 513. In State ex rel. Tarrant v. Board of Commissioners of Port of New Orleans, 161 La. 361, 108 So. 770 (1926), that Board of Commissioners was found to be a state agency. Further, the Board of Commissioners of Pilots for the port of New York was declared to be a public body, created by statute, exercising state authority, having been charged with the overall supervisory responsibility in establishing and conducting an apprentice program, and in carrying out its specified duties. Buschmann v. New York Sandy Hook Pilots' Association, 46 App.Div.2d 391, 362 N.Y.S.2d 556 (1975). These state agencies were created in a manner similar enough to the provisions in South Carolina' statutes as to be practically indistinguishable; thus, it would be appropriate to consider the Harbor Pilot board or program a state agency in South Carolina.

***3** State regulation of harbor pilots would be justified for other reasons, thus indicating the need for state control, by an agency or program, for regulation of South Carolina's harbor pilots. Article XIV, Sections 1 and 4 of the Constitution of South Carolina declare that all navigable waters within the state shall be common or public highways. In State ex rel. Lyon v. Columbia Water Power Company, 82 S.C. 181, 63 S.E. 884 (1909), the court stated, 'Navigable water is a public highway which the public is entitled to use for the purpose of travel either for business or pleasure.' 82 S.C. at 189. See also State ex rel. Lyon v. Columbia Water Power Company, 90 S.C. 568, 74 S.E. 76 (1912); Manigault v. Springs, 199 U.S. 473, 26 S.Ct. 127, 50 L.Ed. 274 (1903). Additionally, by Section 54-1-10 of the Code, the port of Charleston has been declared to be the State port of South Carolina. As has been noted with respect to the Port of New York Authority, operation and maintenance of a highway system, including ports, is an important, primary governmental function. Miller v. Port of New York Authority, 18 N.J.Misc. 601, 15 A.2d 262 (1939). See also Title 57 of the South Carolina Code, pertaining to state regulation of the highway system. Just as the General Assembl has continually regulated the highway system, the General Assembly has continued to enact legislation concerning airports. In Kleckley v. Pulliam, 265 S.C. 177, 217 S.E.2d 217 (1975), the court observed that

the function of [an] airport is not peculiar to a single county or counties. To a large segment of the population of this State, the maintenance of the airport is as important as the existence of an interstate highway. It, therefore, follows that since the

governmental purpose under the Act establishing the [airport] District is not one peculiar to a county, the power of the General Assembly to legislate for this purpose continues, despite Article VIII, Section 7.

265 S.C. AT 185, 217 S.E.2d at 221. Considering the denomination of the port of Charleston as the State port and the similarities of the port to the public highways and airports, the State would appropriately continue to exercise control over the port by licensing and regulating harbor pilots who are responsible for the public safety and welfare in the exercise of their duties within the harbor. While the waters and the harbor are located geographically within Charleston County, those waters are jurisdictionally the territorial waters of the State, and thus the General Assembly's continued control is justified as for public highways and airports.

By Article IX, Section 1 of the state Constitution, it is provided that '[t]he General Assembly shall provide for appropriate regulation of common carriers . . ..' A common carrier is 'one who undertakes for hire to transport from place to place the property of others, offering such services to the public generally.' Huckabee Transport Corporation v. Western Assurance Company, 238 S.C. 565, 571, 121 S.E.2d 105 (1961). Clearly, a harbor pilot, for a fee, undertakes to transport from place to place (i.e., from the mouth of the harbor to the dock or vice versa) the property of others (ships or other vessels requiring pilotage), offering his services to the public generally. Other courts have declared persons transporting similar goods, persons or property to be common carriers; see, for example, Henderson v. Taylor, 315 S.W.2d 777 (Mo. 1958) (ferryman); Kaminsky v. Arthur Rubloff & Co., 72 Ill.App.2d 68, 218 N.E.2d 860 (1966) (operator of passenger elevator); Beck v. Lasater, 286 S.W.2d 957 (Tex.Civ.App. 1956) (drayman or truckman); see also State ex rel. Gwynn v. Citizens' Telephone Company, 61 S.C. 83, 29 S.E. 257 (1901) (telephone company) and Reaves v. Western Union Telegraph Company, 110 S.C. 233, 96 S.E. 295 (1918) (telegraph company). Because the General Assembly is mandated by the Constitution to regulate common carriers, the General Assembly's continuing to control harbor pilots, as common carriers, would be proper.

***4** It has been argued that the Harbor Pilots board or agency is not an agency as that term is defined by Section 2-15-50 of the Code, which specifies that

[f]or the purposes of this chapter 'State agencies' means all officers, departments, boards, commissions, institutions, universities, colleges, bodies politic and corporate of the State and any other person or any other administrative unit of State government or corporate outgrowth thereof, expending or encumbering State funds by virtue of an appropriation from the General Assembly, or handling money on behalf of the State, or holding any trust funds from any source derived, but shall not mean or include counties. [Emphasis added.]

Because the Harbor Pilots agency or program does not receive state funds under the annual Appropriations Act, it has been argued that the agency or program is not a state agency within the definition. A statute must be read literally, absent any ambiguity. Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977). Taken literally, this definition would apply only to the provisions of Chapter 15 of Title 2 of the Code, relative to duties of the Legislative Audit Council other than sunset reviews, which are provided for in Chapter 20 of Title 1. Moreover, by Section 54-15-80, a fee for examination is specified; because the board of examiners, acting on behalf of the commissioners and thus for the State, would receive this fee on behalf of the State, the Harbor Pilots agency could be an agency under this definition. Agencies not receiving funds from a state's appropriations act have nevertheless been held to be state agencies. Opinion of the Justices, 118 N.H. 582, 392 A.2d 125 (1978). Whether the Harbor Pilots agency or program meets the definition of Section 2-15-50 may be a close question, but it is unlikely that Section 2-15-50 even applies to the sunset review process of Section 1-20-10 et seq.

Furthermore, the definition of state agencies contained in Section 1-1-920 of the Code would not be applicable for the same reason that the definition in Section 2-15-50 did not apply. Section 1-1-290 of the Code begins: 'As used in this article: . . ..' The definition of state agencies contained therein would apply only to Article 15 of Chapter 1, Title 1, and need not be considered herein.

This Office understands that Charleston County has enacted an ordinance concerning harbor pilots. Because it is the opinion of this Office that legislative jurisdiction over harbor pilots has been and continues to be with the General Assembly, as discussed above, this Office need not address the county ordinance.

In conclusion, it is the opinion of this Office that the Harbor Pilot agency or program is a state agency and should be reviewed by the Legislative Audit Council just as any other state agency would be reviewed under Section 1-20-10 et seq. of the Code.
Sincerely,

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Assistant Attorney General

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