1981 WL 157839 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
June 26, 1981

***1** Mr. Purvis W. Collins
Chairman
South Carolina Deferred Compensation Commission
Post Office Box 11960
Columbia, South Carolina 29211

Dear Mr. Collins:
You recently have asked the opinion of this Office on whether contracts entered into by school districts, municipalities and other political subdivisions establishing employee deferred compensation plans independent of the Deferred Compensation Program [hereinafter Program] are lawful and valid. The Program referred to in this question is operated by the South Carolina Deferred Compensation Commission. Both the Program and the Deferred Compensation Commission are governed by Sections 8-23-10 to 8-23-100, Code of Laws of South Carolina (1980 Cum.Supp.), which is the codification of Act Number 97 of the Acts and Joint Resolutions of 1977, as amended. You noted in your request that Governor Riley recently signed into law Senate Bill 259 [hereinafter S. 259], which addresses this question.

On May 4, 1979, in an opinion construing Act Number 97, this Office concluded that school districts were excluded, or pre-empted, from establishing for their employees deferred compensation plans that were not a part of the Program. By implication, this conclusion also applied to counties, municipalities and other political subdivisions of the State.

S. 259 was signed into law on May 20, 1981, and provides in part as follows:
Nothing contained in [Act Number 97] shall be construed to prohibit counties, municipalities, school districts, and other political subdivisions of the State and their employees from participation in deferred compensation plans or programs offered independently of the State Deferred Compensation Commission by building and loan or savings and loan associations, banks, trust companies and credit unions chartered by the state or federal governments, and all such political subdivisions shall be empowered with such contractual authority as may be necessary or incident to such participation . . ..

This act clearly empowers and authorizes political subdivisions of the State to contract with the types of financial entities identified therein to establish employee deferred compensation plans that are independent of the Program. This opinion must next address whether, assuming the aforementioned opinion is correct, S. 259 applies retroactively to validate such contracts entered into before its enactment.

Statutes usually are presumed to be prospective in operation unless there is a specific provision or clear legislative intent to the contrary. Hercules, Inc. v. S.C. Tax Commission, 262 S.E.2d 45 (1980). S. 259 does not expressly state that its provisions are retroactive, and there is no clear evidence of that legislative intent which this Office can find in the language of S. 259 or its brief legislative history. Such statutory language was present in Green v. City of Rock Hill, 149 S.C. 234 (1929). In this decision, the Supreme Court held that the curative legislation involved retroactively validated, as was clearly intended by the General Assembly, certain invalid contracts previously entered into by a municipality. To the same effect, see 56 Am.Jur.2d, Municipal Corporations, etc., Section 512.

***2** As I understand the circumstances, after the enactment of Act 97 in 1977 and prior to S. 259 becoming law, some school districts and municipalities entered into contracts establishing deferred compensation plans that were not a part of the

Program. The uncertain status of these contracts in light of the conclusion in the aforementioned opinion of this Office was a circumstance existing during the consideration of S. 259 by the General Assembly, and the protection of the plans operating and the employee compensation deferred pursuant to such contracts, as I understand it, was one of the reasons for the introduction of the legislation. [1] Both of these matters can be given some weight in determining what the intention of the General Assembly was in enacting S. 259. Creech v. S.C. Public Service Authority, 200 S.C. 127, 138 (1942).

Part of the intent of the General Assembly in enacting S. 259 should have been to validate retroactively the contracts entered into prior to its enactment. This Office, however, cannot reach that conclusion, as discussed hereinabove, because it has not found this intent expressly stated or clearly implied in the language or legislative history of S. 259, so as to rebut the usual presumption of prospective application. Because of the noted extraneous circumstances existing during the consideration of the legislation, this Office also cannot conclude that the General Assembly did not intend for S. 259 to apply retroactively.

It is recognized that a political subdivision may ratify a contract which it could lawfully have made at the time of such ratification, although it had no such power when the contract originally was executed. 56 Am.Jur.2d, Municipal Corporations, etc., Section 509; 63 C.J.S., Municipal Corporations, Section 1009a. Such ratification should validate a contract from its inception. 63 C.J.S., Municipal Corporations, Section 1009c. While a court, recognizing the above-noted circumstances and using the precedent of Green v. City of Rock Hill, may hold that S. 259 applies retroactively to validate contracts executed prior to its enactment, any political subdivision which is party to such a contract, as a precautionary measure, should act formally to ratify the contract in its entirety.

Based on the foregoing, it is the opinion of this Office that S. 259 authorizes and empowers counties, municipalities, school districts and other political subdivisions of this State to enter into contracts with certain types of financial institutions to establish deferred compensation plans independent of the Program. The May 4, 1979, opinion of this Office issued to John R. Thomas, Esquire of Greenville, South Carolina is hereby rescinded insofar as it conflicts with the conclusions herein. It should be noted that the instant opinion does not consider whether specific sections of Act 97 are applicable to the plans authorized by S. 259. It should be further noted that S. 259 does not affect the State, its agencies and institutions with regard to Act 97.
Sincerely,

***3** James M. Holly
Assistant Attorney General

Footnotes

1 During the consideration of S. 259 by the General Assembly, litigation was in process concerning the status, with regard to Act 97, of the independent deferred compensation plan of one Anderson County school district [80-CP-40-4575].

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