1979 WL 43204 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
December 12, 1979

***1** Mr. R. D. Wilson
Office of the Governor
Division of Economic Development and Transportation
Edgar A. Brown Building
1205 Pendleton Street
Columbia, South Carolina 29201

Dear Mr. Wilson:
You have asked the opinion of this Office on the following questions:
(1) With funds provided by the Secretary of Transportation pursuant to 49 U.S.C. § 1614, as amended [hereinafter referred to as § 1614], can the Governor through his Office of Executive Policy and Programs contract with a nonprofit corporation or a profit-oriented corporation to subsidize the financial losses incurred by the corporation in furnishing transportation services to citizens of South Carolina?

(2) Could such a contract be made with the Berkeley-Dorchester Economic Development Corporation?

In connection with these questions, you also asked this Office to differentiate between private, public and nonprofit corporations as defined under the laws of this State. This latter inquiry will be discussed first.

A private or business corporation [hereinafter referred to as profit-oriented corporation] is a corporation for profit formed by individuals, organizations and/or investors which issues capital stock. §§ 33-1-10, et seq., Code of Laws of South Carolina, 1976, as amended. A public corporation is a public entity created by a specific act of the General Assembly, or perhaps by an ordinance of a political subdivision. York Co. v. Fair Association Tax Commission, 249 S.C. 337 (1967). A nonprofit corporation is one established without the issuance of capital stock by individuals or organizations pursuant to §§ 33-31-10, et seq., as amended, [eleemosynary corporations]; §§ 33-33-10, et seq., [church corporations]; or §§ 33-34-10, et seq., as amended, [corporations originally financed under the Consolidated Farmers Home Administration Act of 1961, as amended].

As I understand circumstances related to your request, the Secretary of Transportation under the authority of § 1614 has apportioned funds to the State for public transportation services. With reference to these funds, subsection (e) of § 1614 provides:
. . . States may utilize sums apportioned under this section for any projects eligible under this chapter which are appropriate for areas other than urbanized areas, including purchase of service agreements with private providers of public transportation service . . .. Eligible recipients may include . . . nonprofit organizations, and operators of public transportation services. [Emphasis Added].

Prior to addressing the specific questions raised by you on the use of the funds pursuant to this subsection, it must be determined if any laws of South Carolina are applicable to § 1614 grants; and, if so, is such application proper.

Section 130 of Part I of the General Appropriation Act for the fiscal year beginning July 1, 1979, states:

All Federal funds received shall be deposited in the State Treasury, if not in conflict with Federal regulations, and withdrawn therefrom as needed in the same manner as that provided for the disbursement of state funds . . .. Act No. 199, 1979 Acts and Joint Resolutions.

***2** In addition, § 11-13-125 generally requires that all funds received by any department or institution of the State must be deposited in the State Treasury. Article X, § 18 of the South Carolina Constitution mandates that money shall be disbursed from the State Treasury 'only in pursuance of appropriations made by law.' Section 9 of Part II [Permanent Provisions] of Act 199, supra, provides that all Federal funds may be used for the fiscal year for which they are appropriated or made available, and '[w]hen practicable, all agencies and institutions having [F]ederal . . . funds available for financing their operation shall expend such funds in accordance with the line item appropriations.' The cumulative effect of these provisions demonstrates that Federal funds received by the Office of Executive Policy and Programs pursuant to § 1614 are required to be managed in the same manner as are State funds if this does not conflict with Federal regulations. More specifically, the Federal funds so received are to be deposited in the State Treasury and listed in the General Appropriations Act. See Section 5C, Act 199; Harris v. Fulp, 178 S.C. 332 (1935).

The next step in responding to your inquiry is to determine if it is proper for the State, as described above, to treat and manage § 1614 funds in the same manner as State funds.

A recent case which deals with the legitimacy of applying state statutory and constitutional provisions similar to those cited above to Federal grants is Shapp v. Sloan, 391 A.2d 595 (Supreme Court of Pa., 1978). The controversy in this case was whether the State Treasurer of Pennsylvania could disburse funds which had been furnished to the Office of the Governor by the Law Enforcement Assistance Administration without an appropriation made by the General Assembly as required by Article III, § 24 of the Pennsylvania Constitution. [1] See 42 U.S.C. § 3701, et seq. Ibid., at 599-601. In holding that the Federal funds were subject to the constitutional provision, the Supreme Court of Pennsylvania enunciated the following principles:

The funds which Pennsylvania received from the federal government do not belong to officers or agencies of the executive branch. They belong to the Commonwealth. The agency or official who is authorized to apply for federal funds does so only on behalf of the Commonwealth. The federal grants are made to the State, not to a single branch of government. Ibid., at 604.

. . . As long as the funds are not diverted from their intended purposes and the terms and conditions proscribed by the Congress are not violated, there is no inconsistency between the provisions of the federal programs and the state legislative administration of the funds. Ibid., at 606.

. . . the General Assembly cannot be assumed to be diverting the funds. It is merely exercising its appropriation power within the purposes of the federal grants. Ibid.

The right of the General Assembly to appropriate funds from the State Treasury is expressly mandated by our Constitution . . .. In the federal system the state retains its sovereign power over spending within the state, ... Ibid., at 607.

***3** A result comparable to that in Shapp v. Sloan was reached by the Supreme Court in Wheeler v. Barrera, 417 U.S. 402 (1974). This case from Missouri examined the use of funds offered under the Elementary and Secondary Education Act of 1965 to local public educational officials to provide, among other services, special programs in private schools. Missouri educational officials refused to utilize the funds for these programs in that it violated a provision of the Missouri Constitution prohibiting the use of public funds for private schools. Ibid., at 412, n. 9. In reviewing the propriety of this

refusal, the Court held that it was a question governed by the law of Missouri because the state constitutional spending proscriptions were not preempted by the 1965 Act. Ibid., at 416-420.

Applying the principles established by Shapp v. Sloan and Wheeler v. Barrera and the requirements established by the provisions cited at pages 2-3 hereof, it must be concluded that § 1614 funds may be treated in the same manner as State funds but with the permitted uses being defined by Federal law. It further must be concluded that the constitutional and statutory spending limitations of this State are applicable to § 1614 funds in absence of a conflict with Federal regulations or a preemption by Federal laws. Thus, the next step in this inquiry is to determine if there are any State provisions which prohibit the contractual arrangement described in your request.

Article X, § 11 of the South Carolina Constitution states:
The credit of . . . the State . . . shall [not] be pledged or loaned for the benefit of any individual, company, association, corporation . . .. [Formerly Article X, § 6]

The word 'credit' in this provision is intended to protect the State against pecuniary liability. Elliott v. McNair, 250 S.C. 75 (1967); Bauer v. State Housing Authority, 246 S.E.2d 869, 875-876 (1978). In addition, the use of the phrase 'any individual, company, association, corporation' must have been intended to include both nonprofit and profit-oriented corporations. See Bolt v. Cobb, 225 S.C. 404 (1954); Gilbert v. Bath, 227 S.E.2d 177 (1976).

A contract obligating State funds to subsidize the financial leases of a nonprofit or a profit-oriented corporation appears to fall within the prohibition against the pledging of funds in the State Treasury for the benefit of an association or corporation. See Bauer v. State Housing Authority, supra; Casey v. State Housing Authority, 267 S.C. 303 (1975); Jacobs v. McClain, 262 S.C. 425 (1974); Hunt v. McNair, 255 S.C. 71 (1970). Such a contractual obligation clearly creates a potential pecuniary liability against funds in the State Treasury for the direct benefit of a corporation. [2]

The application of the Article X, § 11 prohibition to § 1614 grants does not appear to conflict with or to be preempted by the Federal Public Transportation Act of 1978 [Public Law 95-599, 92 Stat. 2735] of which § 1614 is a part. Supporting this is that § 1614 permits the State much latitude in the utilization of the grants for the provision of public transportation; it does not mandate the State to expend the funds in a specific manner or for specific programs. See Wheeler v. Barrera, supra.

***4** The second question raised asks whether a contract with the aforementioned obligation could be made with the Berkeley-Dorchester Economic Development Corporation [hereinafter referred to as Development Corporation]. This entity has been declared by the Secretary of State to be a nonprofit corporation formed pursuant to §§ 33-31-10, et seq. The certificate of incorporation containing this declaration recites that the purpose of the Development Corporation is to combat poverty and to implement the Economic Opportunity Act of 1965, 42 U.S.C. §§ 2781, et seq. [hereinafter referred to by specific sections only]. The Development Corporation, therefore, appears to be a community action agency.

As discussed above, if the Development Corporation is a nonprofit corporation, the aforementioned contract should be prohibited by Article X, § 11. However, if the Development Corporation is a public corporation, this provision should not be an obstacle in that it would be a public entity for the State could incur pecuniary liability. See Gilbert v. Bath, 227 S.E.2d 177 (1976), which involved the Pee Dee Health Services District created pursuant to §§ 44-7-1810, et seq. Thus, the ability of the Office of Executive Policy and Programs to enter into such a contract with the Development Corporation depends, in the opinion of this Office, on whether it can be construed to be a public corporation under State or under Federal law due to the involvement of §§ 2781, et seq.

Under the laws of South Carolina, the Development Corporation cannot be considered a public corporation. A conclusion to the contrary is precluded by York County Fair Association v. Tax Commission, supra. In part, this case states:

[Public corporations] are founded by the government for public purposes, and the whole interest in them belong to the public. But, if the foundation be private, the corporation is private, however, extensive the uses may be to which it is devoted . . . or the nature of the institution . . . though dedicated . . . to general charity. [Citing State v. Heyward, 37 S.C.L. 389] Ibid., at 340.

It might be asserted that despite the Development Corporation being a nonprofit corporation, contracts of the aforementioned nature would be permitted under the authority of Bolt v. Cobb, supra and Gilbert v. Bath, supra. The instant situation, however, is distinguishable. In these cases, public funds were to be expended or pledged for the direct benefit of a governmental or public entity and incidentally for the benefit of a nonprofit corporation. However, in the arrangement posed in your request, public funds are to be expended or pledged for the direct and immediate benefit of a nonprofit corporation. Also see Anderson v. Baehr, supra. The precedent established by Bolt v. Cobb and Gilbert v. Bath cannot be expanded to include an arrangement such as this thereby obviating the plain language of Article X, § 11.

As concluded with regard to State laws, it does not appear that the Development Corporation may be considered a public corporation under the applicable Federal statutes. See §§ 2790, 2795. This observation is supported by two cases from the Federal courts which examined the status of Community action agencies for various purposes. In United States v. Orleans, 425 U.S. 807, 816-819 (1976), the Supreme Court concluded that these agencies are not federal agencies or enterprises so as to be subject to the Federal Tort Claims Act; instead, the Court found them to be local organizations. The Fifth Circuit Court of Appeals in Hines v. Cenla Community Action Committee, Inc., 474 F.2d 1052 (1973), determined that the agency involved therein, which was incorporated under Louisiana laws as a 'private non-profit corporation,' did not become a public corporation merely because it received federal funds or was organized as a community action agency under §§ 2790, et seq. Therefore, the Court held that the agency was a private employer to which the Fifth and Fourteenth Amendments to the United States Constitution were inapplicable. The holdings in these cases also indicate that §§ 2781 et seq. were not intended to preempt state laws. See § 2795(a); PAAC v. Rizzo, 502 F.2d 306, 314-315 (3rd Cir. 1974).

***5** Although this opinion has concluded that the Development Corporation is a nonprofit corporation for which the pecuniary liability of the State cannot be pledged, legislation exists which would allow it to avoid this prohibition. Act No. 127 of the 1973 Acts and Joint Resolutions directs that the Development Corporation may organize as the Berkeley-Dorchester Economic Opportunity Commission, 'a body politic and corporate.' However, the Development Corporation has not yet chose to assume this public status.

Based on the foregoing, it is the opinion of this Office that the Governor's Office of Executive Policy and Programs cannot contract with a nonprofit corporation or a profit-oriented corporation to use funds provided the State pursuant to 49 U.S.C. § 1614 to subsidize the losses of the corporation in furnishing public transportation services. It is the further opinion of this Office that such a contract could not be entered into with the Berkeley-Dorchester Economic Development Corporation, a nonprofit corporation. An arrangement of this nature with these corporations would pledge funds in the State Treasury for the benefit of a corporation in violation of Article X, § 11 of the South Carolina Constitution.

Sincerely,

James M. Holly
State Attorney

Footnotes

1 The language thereof is similar to the language of Article X, § 8 of the South Carolina Constitution quoted above at page 2.

2 Cases interpreting the former Article X, § 6 also mandate that the use of public funds serve a substantial public purpose. Elliott v. McNair, supra; Anderson v. Baehr, 265 S.C. 153 (1975); Jacobs v. McClain, supra; Bauer v. State Housing Authority, supra.

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