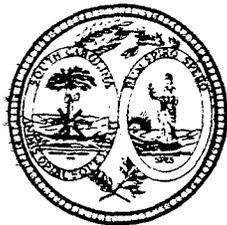


7837 February



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

October 7, 2004

The Honorable Mark Sanford
Governor, State of South Carolina
Post Office Box 12267
Columbia, South Carolina 29211

Dear Governor Sanford:

You have raised a question concerning whether lottery proceeds may be used to restore partially some of the previous reductions in the budget of the Department of Alcohol and Other Drug Abuse Services (DAODAS). By way of background, you provide the following information:

In the 2004-2005 Appropriations Act, the General Assembly cut over \$2 million of general funds from the operating budget for the Department of Alcohol and Other Drug Abuse Services (DAODAS). In order to partially restore some of this general fund cut, the General Assembly appropriated to DAODAS \$1 million from the Education Lottery Account (2004-2005 Appropriations Act, Part 1B, Proviso 1AA.1). This is the first time the legislature has made this type of appropriation to DAODAS from the lottery account. The proviso places no limitations or restrictions on how the agency is to use the funds.

As you are aware, the South Carolina Constitution mandates that lottery funds can only be used for "education purposes." DAODAS has three employees who oversee programs that directly affect students in the public schools. The agency pays two of these employees with federal funds and one with a mix of federal and state funds. DAODAS implements these school programs through grants and contracts with county alcohol and drug abuse authorities. Because of the budget cuts that DAODAS has absorbed, it would like to use the lottery funds to pay for the general operating expenses of the agency. Under this scenario, the lottery funds would underwrite salaries and other expenses of employees who do not engage in any work related to the public schools. We have concerns about the agency's legal authority to use its lottery appropriation to fund any agency operations that are not directly related to our public schools. Accordingly, I respectfully ask for your opinion regarding whether or not DAODAS can use its lottery appropriation for the general operating expenses of the agency when those expenses are unrelated to any programs the agency administers in the public schools.

2. [Handwritten signature and notes]

Law / Analysis

Article XVII, Section 7 of the South Carolina Constitution provides in pertinent part as follows:

[o]nly the State may conduct lotteries, and these lotteries must be conducted in the manner that the General Assembly provides by law. The revenue derived from the lotteries must first be used to pay all operating expenses and prizes for lotteries. The remaining lottery revenues must be credited to a separate fund in the state treasury styled the 'Education Lottery Account', and the earning on the account must be credited to it. Education Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law.

(emphasis added). Thus, the question presented is whether restoration of previous cuts in DAODAS' budget from lottery proceeds to be used for general operating expenses is an "education purpose" as intended by Art. XVII, § 7 of the South Carolina Constitution. We conclude that it is not.

We begin with the legal proposition that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits" Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within ... [its] constitutional power" State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. A statute will not be considered void unless its unconstitutionality is clear beyond a reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While we may comment upon an apparent conflict with the Constitution, we may not declare the Act void. Put another way, a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

Several principles of construction of the Constitution are applicable. In interpreting constitutional amendments, the Court applies rules similar to the interpretation of statutes. McKenzie v. McLeod, 251 S.C. 226, 161 S.E.2d 659 (1968). Constitutional amendments should be construed so as to effectuate the purpose for which obviously intended. Holland v. Kilgo, 253 S.C. 1, 168 S.E.2d 569 (1969). The fundamental principle in construction of the Constitution is that the will of the Legislature and of the people in adopting constitutional amendments should be given effect. Ansel v. Means, 171 S.C. 432, 172 S.E. 434 (1934). Words of the Constitution are presumed to be used in their ordinary and popular meaning. State v. Broad River Power Co., 177 S.C. 240, 181 S.E. 41 (1935). Moreover, construction of the Constitution adopted by the General Assembly

The Honorable Mark Sanford

Page 3

October 7, 2004

in the enactment of statutes is entitled to weight. Evans v. Beattie, 137 S.C. 496, 135 S.E. 538 (1926). See also, McDowell v. Burnett, 92 S.C. 469, 75 S.E. 873 (1912). However, a court is not at liberty to change the wording of a constitutional provision through interpretation. Neel v. Shealy, 261 S.C. 266, 199 S.E.2d 542 (1973).

We turn now to your specific question as presented. The 1895 Constitution of South Carolina forbade all lotteries. This broad constitutional prohibition remained virtually unchanged (with the exception of bingo) for more than 100 years. However, Art. XVII, § 7 was amended in 2000 to authorize state-run lotteries as an exception to South Carolina's continuing constitutional prohibition. A favorable vote was conducted in 2000 and the General Assembly ratified the people's decision the following year. Pursuant to the express provision of the Constitution, the proceeds of the South Carolina Education Lottery, "may be used only for education purposes as the General Assembly provides by law."

The term "education purposes" is not defined by Art. XVII, § 7 of the Constitution. However, in Powell v. Thomas, 214 S.C. 376, 52 S.E.2d 782 (1949), our Supreme Court concluded that a statutory provision authorizing the issuance of general obligation bonds by Chester County for the construction of a "cattle barn and show ring" was valid under a constitutional provision empowering the General Assembly to authorize a county to issue bonds for an "educational purpose." The Court concluded that

... it may reasonably be inferred that the proposed undertaking is of an educational nature designed to disseminate among farmers, for practical purposes, scientific knowledge for the improvement of the cattle and milk business. Courses of study in agriculture are being taught in many of the public schools and colleges of this State and such courses are recognized as an important part of the curriculum. In Briggs v. City of Raleigh et al., 195 N.C. 223, 141 S.E. 597, 599, the Court, in sustaining the expenditure of public funds by the City of Raleigh for a state fair, said: 'The purpose and design of a state fair is to promote the general welfare of the people, advance their education in matters pertaining to agriculture and industry, increase their appreciation for the arts and the sciences, and bring them in closer touch with many things which otherwise might remain in reserve or 'caviare to the general,' to borrow an expressive phrase from Shakespeare's Hamlet.' The purpose here is a somewhat similar one. Also, see State ex rel. Leaverton et al. v. Kerns, 104 Ohio St. 550, 136 N.E. 217. It was held in Wright, Comptroller General v. Atlantic Coast Line R. Co., 40 Ga. App. 785, 151 S.E. 553, that a tax levy for the maintenance of a county demonstration agent was for an educational purpose.

572 S.E.2d at 786. The Powell Court, however, also noted that

[w]e confess that we have reached the conclusion that the construction of this cattle barn and show ring will subserve an educational purpose within the contemplation of Article 10, Section 6 of the Constitution, with some degree of hesitation, but we

are not prepared to say that the unconstitutionality of this feature of the Act manifestly appears beyond a reasonable doubt. It will be presumed that the General Assembly had in mind a constitutional purpose rather than an unconstitutional one

Id.

However, in a subsequent case, Leonard v. Talbert, 225 S.C. 559, 83 S.E.2d 201 (1954), the Supreme Court held that a statute which authorized the issuance of bonds by Richland County to promote a system of physical education for the public school system and further provided for public use of recreational facilities during school vacation periods was not for an "educational purpose" as required by the state Constitution. The Court concluded that the principal purpose of the Act was "recreation" rather than "education" and thus "could not have comported with the intent of the framers of the Constitution when they used the term 'education'." In the Court's view, the "usual meaning" of the word "education"

... contemplates training of the mind ... and we think that it would be an unwarranted enlargement of the meaning to hold that within it came the recreational facilities which the act purports to provide for public use and during school vacation periods. The concluding phrases of the legislative findings quoted above, make the last observation clear, 'whose [the facilities'] use, under proper supervision, would promote the health and physical well being of the school children of the County, particularly during the summer vacations, and [the facilities] would also benefit other members of the public who could make use of the same.' We do not think that this can be reasonably related to the 'educational purposes' in the minds of the writers of the Constitution of 1895, which governs.

83 S.E.2d at 203.

In a variety of contexts, courts in other jurisdictions have reached similar conclusions to that of our Supreme Court in Leonard v. Talbert. For example, in Lomax v. McBrayer, 248 Ga. 753, 286 S.E.2d 35 (1982), the Georgia Court concluded that the payment of retirement benefits to school employees was not an expenditure for an "educational purpose." A nursing home in which education would be only informally gleaned from the interplay among residents was not considered to be operated for an "educational purpose" in Whitinsville Retirement Soc., Inc. v. Town of Northbridge, 394 Mass. 757, 477 N.E.2d 407 (1985). Buildings owned by a university and used as a housing facility for faculty members was deemed not an "educational purpose" in Univ. of Vt. v. Town of Essex, 129 Vt. 607, 285 A.2d 728 (1971). In Staker v. Brown, 41 Ohio Misc. 144, 324 N.E.2d 793 (1974), a child day care center was not engaged in an "educational use." Neither was a research institution that intended to make available information to scholars, news media and general public an "educational institution" in Nat. Security Archive v. U.S. Dept. of Defense, 880 F.2d 1381 (D.C.Cir. 1989).

In each of these cases, while there was a tangential relationship to "education" in the loosest sense of the word, the primary purpose of the expenditure was not education in the traditional understanding of that term. As the Court in Town of Essex reasoned, "the use of such buildings must serve the primary purpose of serving educational purposes, and not serve such purposes as merely in a remote and consequential manner." 285 A.2d at 731. And in Town of Northbridge, it was stated that

... the words "educational purpose" are "every day words and should be interpreted 'according to the common and approved usages of the language ... without enlargement or restriction and without regard to ... [the court's] own conceptions of expediency.'" The issue is whether the plaintiff's project "is operated primarily for an educational purpose."

477 N.E.2d at 409.

Section 44-49-10 establishes the Department of Alcohol and Other Drug Abuse Services. The Department is vested with the powers of the former South Carolina Commission on Alcohol and Drug Abuse and possesses "full authority for formulating, coordinating and administering the State plans for controlling narcotics and controlled substances and alcohol abused." Specific powers of the Department are enumerated in § 44-49-40. Among these are the following:

- (A) The department shall arrange for the exchange of information between governmental officials concerning the use and abuse of controlled substances.
- (B) Results, information, and evidence received from the Department of Health and Environmental Control relating to the regulatory functions of this chapter and Article 3 of Chapter 53, including results of inspections conducted by such department, may be relied upon and acted upon by the department in conformance with its administration and coordinating duties under this Chapter and Article 3 of Chapter 53.
- (C)(1) The department shall: Plan, coordinate and cooperate in educational programs for schools, communities and general public designed to prevent and deter misuse and abuse of controlled substances;
- (2) Promote better recognition of the problems of misuse and abuse of controlled substances within the regulated industry and among interested groups; and organizations;
- (3) Assist the regulated industry, interested groups and organizations in contributing to the reduction of misuse and abuse of controlled substances;

- (4) Consult with interested groups and organizations to aid them in solving administrative and organizational problems;
- (5) Evaluate procedures, projects, techniques, and controls conducted or proposed as part of educational programs on misuse and abuse of controlled substances;
- (6) Disseminate the results of research on misuse and abuse of controlled substances to promote a better public understanding of what problems exist and what can be done to combat them;
- (7) Assist in the education and training of state and local law enforcement officials in their efforts to control misuse and abuse of controlled substances;
- (8) Encourage research on misuse and abuse of controlled substances;
- (9) Cooperate in establishing methods to assess accurately the effects of controlled substances and to identify and characterize controlled substances with potential for abuse;
- (10) Cooperate in making studies and in undertaking programs of research to
 - (a) Develop new or improved approaches, techniques, systems, equipment and devices to strengthen the enforcement of Section 44-49-10, 44-49-40 and 44-49-50 and Article 3 of Chapter 53;
 - (b) Determine patterns of misuse and abuse of controlled substances and the social effects thereof; and
 - (c) Improve methods for preventing, predicting, understanding and dealing with the misuse and abuse of controlled substances.
- (D) The department may enter into contracts with public agencies, institutions of higher education, and private organizations or individuals for the purpose of conducting research, demonstrations, or special projects which bear directly on misuse and abuse of controlled substances.
- (E) The department may enter into contracts for educational and research activities without performance bonds.
- (F) The department is authorized to accept gifts, bequests, devices, contributions, and grants, public or private, including federal funds, or funds from any other source for use in furthering the purpose of the department. The department is authorized to

The Honorable Mark Sanford

Page 7

October 7, 2004

administer the grants and contracts arising from the federal program entitled the Drug-Free Schools and Communities act of 1986, P.L. 99-570.

Thus, DAODOS does possess certain authority and responsibility relative to "education" in the broad sense of the word. However, numerous other agencies possess a general relationship to "education" as well. For example, law enforcement agencies work closely with the school regarding drug education programs as do public health agencies regarding a variety of topics.

Of course, the "South Carolina Education Lottery was approved by the voters in 2000 with the understanding that the proceeds therefrom would be used strictly for "education" in the usual sense of the word – i.e. in support of elementary and secondary as well as higher education. Such purpose is reflected in the General Assembly's enactment following adoption in 2000 of the Constitutional Amendment authorizing the State Lottery of § 59-150-350(D) which enumerates the various educational purposes for which lottery proceeds may be used.

You have advised that the Lottery proceeds appropriated to DAODAS would be used for the agency's general operating expenses. In addition, you note that such funds would "underwrite salaries and other expenses of employees who do not engage in any work related to the public schools. (emphasis added).

This being the case, we are of the opinion that "South Carolina Education Lottery" proceeds may not be constitutionally used for such purposes. The state Constitution requires that such proceeds must be used for "education purposes" and that requirements must be strictly and steadfastly adhered to.

Conclusion

It is our opinion that use of "South Carolina Lottery" proceeds for restoration of budget cuts to DAODAS is not an "education purpose," as contemplated by Art. XVII, § 7 of the South Carolina Constitution. As we understand it, these funds will not be used for any arguable education purpose, but instead would fund the day to day expenditures of DAODAS. In our view, the framers of the 2000 Amendment to Art. XVII, § 7 intended the term "education purposes" to be used in its usual and ordinary meaning – support for the education system in South Carolina.

It is true that the General Assembly possesses broad discretion pursuant to the language of Art. XVII, § 7 to determine which "education purposes" to fund using Lottery proceeds. However, in our opinion, such discretion does not extend to the appropriation of these funds for general operating expenses of an agency such as DAODAS, whose primary purpose is treatment of drug abuse and alcoholism rather than "education" in the usual and ordinary sense of that word. Moreover, as you indicate, the funds in question would not be used in support of the Agency's function in providing education concerning drug and alcohol abuse to the public schools.

The Honorable Mark Sanford

Page 8

October 7, 2004

Accordingly, it is our opinion that a court would conclude that the restoration of agency budget cuts to DAODAS for its general operating budget is an unconstitutional expenditure pursuant to Art. XVII, § 7 of the South Carolina Constitution.

Yours very truly,



Henry McMaster

HM/an