



HENRY McMASTER
ATTORNEY GENERAL

January 24, 2006

The Honorable Tracy R. Edge
Member, House of Representatives
503-B Blatt Building
Columbia, South Carolina 29211

Dear Representative Edge:

By letter, you request an opinion regarding the General Assembly's appropriation of the Cost of Living Adjustment (COLA) to state agencies. Specifically, you ask the following:

[i]f the General Assembly appropriates funding to a state agency specifically for Cost of Living Adjustments, is this funding discretionary for the agency director's spending or must that funding be allocated specifically for COLA?

Because your letter does not set forth any specific details regarding the situation surrounding your question, we may only comment generally with respect thereto. Thus, we assume herein that no statute provides for a transfer of funds, but that the appropriation involved simply specifies that "cost of living adjustments" are appropriated. With that caveat in mind, we advise that, because the General Assembly alone possesses the power to appropriate funds, once such funds are appropriated for the Cost of Living Adjustment, an agency director does not possess discretionary authority to expend such funds for any other purpose.

Law/Analysis

It is well recognized that "[t]he supreme legislative power of the State is vested in the General Assembly; the provisions of our State Constitution are not a grant but a limitation of legislative power, so that the General Assembly may enact any law not expressly, or by clear implication prohibited by the State or Federal Constitution...." *State v. Charron*, 351 S.C. 319, 569 S.E.2d 388 (Ct. App. 2003) (referencing *Moseley v. Welch*, 209 S.C. 19, 26-27, 39 S.E.2d 133, 137 (1946)). See also, *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002). "Governmental agencies...can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently, or impliedly." *Op. S.C. Atty. Gen.*, September 9, 2002; *Op. S.C. Atty. Gen.*, January 8, 1999; *Op. S.C. Atty. Gen.*, September 22, 1988. As we recently recognized in *Op. S.C. Atty. Gen.*, December 2, 2005, "... it is for the General Assembly, and the General Assembly only to determine how funds ... are allocated.

disbursements of State funds appropriated by the General Assembly to exceed the amounts and purposes stated in such appropriations, or to change or shift appropriations from one item to another; provided that transfers may be authorized by the General Assembly in the annual appropriation act for the State.

In *Condon v. Hodges*, 349 S.C. 232, 245-246, 562 S.E.2d 623 (2002), our Supreme Court made the following comments regarding the applicability of both Sections 11-9-10 and 11-9-20. The Court commented as follows:

...there is no provision in the South Carolina Code or Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money. In fact, there is clear legislative intent that the *ability to transfer appropriated money will lie only with the General Assembly*. (emphasis added). See S.C. Code Ann. § 11-9-10 (1986) ("It shall be unlawful for any moneys to be expended for any purpose or activity except that for which it is specifically appropriated, and *no transfer from one appropriation account to another shall be made unless such transfer be provided for in the annual appropriation act.*") (emphasis added); S.C. Code Ann. § 11-9-20(A) (Supp. 2001) ("It is *unlawful* for an officer, clerk, or other person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations, or *to change or shift appropriations from one item to another. Transfers may be authorized by the General Assembly in the annual appropriation act for the State.*") (emphasis added).

In the same case, the Court elaborated that even if it desired, the General Assembly was prohibited from delegating its appropriation power. The Court explained:

Furthermore, the General Assembly cannot delegate this legislative power even if it so desired. See *Gilstrap v. South Carolina Budget and Control Bd.*, *supra* (General Assembly may not delegate its power to make laws); *State ex rel. McLeod v. McInnis*, *supra* (General Assembly's attempt to delegate to Joint Appropriations Review Committee power to control expenditure of state and federal funds was found to violate separation of powers because committee was permitted to control expenditures by administration rather than by legislation); *Bauer v. South Carolina State Housing Auth.*, 271 S.C. 219, 246 S.E.2d 869 (1978) (non-delegation doctrine is based on the constitutional requirement that branches of government be forever separate and distinct from each other).

Therefore, the authority to transfer appropriated money lies with the General Assembly and not the executive branch (emphasis added).

Condon v. Hodges, *supra*, 349 S.C. 232, 246. And, in *Kirk v. Clark*, 191 S.C. 205, 4 S.E.2d 13, 15-16 (1939), the Court stated that [a]dministrative officials into whose custody and control the law

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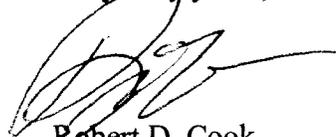
intrusts the same with the authority to invest, preserve or pay out, are without authority to make any diversion thereof, contrary to law.”

The forgoing authorities make it clear that the General Assembly possesses the exclusive power to appropriate funds. Furthermore, when the Legislature exercises its appropriation power in favor of another governmental branch, that branch is obligated to act in accordance with the legislature’s intent, meaning the funds must be expended in accordance with the will of the legislature. Accordingly, when General Assembly appropriates State funds, no other body or individual possesses the discretion to divert or utilize such funds for purposes other than the purpose for which they were appropriated. Therefore, with regards to your specific question, if State funds were appropriated specifically for the Cost of Living Adjustment, no other body or individual possesses discretionary authority to direct such funds for any purpose other than the Cost of Living Adjustment.

Conclusion

It has long been recognized that the General Assembly alone possesses the power to appropriate funds. Such authority may not be delegated to administrative officers or members of the executive branch. Accordingly, if such power has been exercised by the General Assembly, no other body or individual possesses the discretionary authority to expend such funds for any purpose other than the original purpose for which the appropriation was made. Thus, we advise that when the General Assembly specifically appropriates funds for the Cost of Living Adjustment, no agency director or any other person possesses the discretion to expend such funds for any other purpose.

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General