

8129 Liberty



HENRY MCMASTER
ATTORNEY GENERAL

March 24, 2006

Mr. Louis Morant
Member, Board of Directors
Georgetown County Water & Sewer District
Post Office Drawer 437
Georgetown, South Carolina 29442

Dear Mr. Morant:

We received your letter in which you requested an opinion of this Office on the following issue: "Does the Executive Director of a Special Purpose District have to be an employee of the District or can he be an independent contractor?"

We assume, given your position on the Board of Directors, your request is in relation to the Georgetown Water and Sewer District (the "District"). After a review of the enabling legislation creating the District, it appears the District may employ its executive director as an independent contractor. However, we caution the District that the status of the executive director as an independent contractor may not be recognized in various situations.

Law/Analysis

Initially, we note "the powers of a public service district are construed strictly. Public service districts have only such powers as are specifically granted by statute or which may be reasonably implied therefrom." Op. S.C. Atty. Gen., June 27, 2002. Therefore, we look to the District's enabling legislation to determine whether it may contract with an independent contractor for the performance of duties it normally assigns to its executive director. The Legislature established the District in its enactment of Act No. 733 of 1967. Act No. 733, 1967 S.C. Acts 1539. This act provides: "Without limiting the generality of the functions of the district, it shall be empowered as follows . . .," listing twenty-four enumerated powers given to the district. Id. Included in the District's enumerated powers is the power "[t]o appoint officers, agents, employees and servants, to prescribe the duties of such, to fix their compensation and to determine if and to what extent they shall be bonded for the faithful performance of their duties." Id. We presume the District, which we understand currently employs an executive director as an employee of the District, has the power to do so pursuant to this provision in the enabling legislation.

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With regard to the District's ability to employ an executive director as an independent contractor, we find no provision in the enabling legislation or the general law specifically addressing this issue. However, on numerous occasions our courts recognized an independent contractor can be an agent. See, e.g., M.B. Kahn Constr. Co., Inc. v. Three Rivers Bank & Trust Co., 354 S.C. 412, 581 S.E.2d 481 (2003); Love v. Gamble, 316 S.C. 203, 448 S.E.2d 876 (Ct. App. 1994); Palmer & Cay/Carswell, Inc. v. Condo./Apartment Ins. Serv. Inc., 306 S.C. 1, 4, 409 S.E.2d 806, 808 (Ct. App. 1991). Thus, assuming the independent contractor fulfilling the duties of the District's executive director is an agent, this provision of the enabling legislation grants authority to the District to employ such an individual.

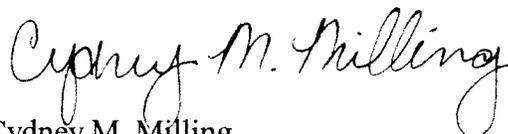
Additionally, another provision in the enabling legislation affords the District the power "[t]o make contracts of all sorts and to execute all instruments necessary for the carrying on of the business of the district." Act No. 733, 1967 S.C. Acts 1539. We believe this provision provides the District with the authority to enter into a contract with an independent contractor to carry out the functions of an executive director, assuming the District determines such action involves the "carrying on of the business of the district." Id.

Based on the two provisions in the enabling legislation cited above and the fact we find no authority prohibiting the District from contracting with an independent contractor, we presume the District may do so if it determines the independent contractor serving as its executive director is its agent or its contract with such an independent contractor is for the purpose of carrying out the business of the District. However, we caution the District in its decision to employ an independent contractor to fill the role of executive director. On many occasions South Carolina courts, as well as this Office, questioned whether individuals hired as independent contractors were in fact employees, rather than independent contractors. See, e.g., Nelson v. Yellow Cab Co., 349 S.C. 589, 564 S.E.2d 110 (2002) (holding, despite a signed contract declaring a taxi cab driver is an independent contractor, the taxi cab driver is an employee for purposes of worker's compensation); Smoky Mountain Secrets, Inc. v. South Carolina Employment Sec. Comm'n, 318 S.C. 456, 457, 458 S.E.2d 429, 430 (1995) (finding "the record contains substantial evidence supporting the finding that Respondent had the right and authority to control and direct persons delivering its products, thus qualifying them as employees rather than independent contractors" for purposes of unemployment taxation); Adamson v. Marianne Fabrics, Inc., 301 S.C. 204, 207, 391 S.E.2d 249, 250-51 (1990) ("Although Adamson was characterized in the contract as an independent contractor, it was for the jury to determine whether, under all the evidence, he was an employee so as to fall within the provisions of [the South Carolina Wage and Hour Law]."); Op. S.C. Atty. Gen., November 22, 1983 (considering whether an individual falls under the definition of "employee" under the State Retirement System, this office stated: "The label affixed by the employer is not controlling on the question of whether one is an employee or an independent contractor."). Therefore, we suggest the District keep these concerns in mind, as well as any other legal issues that may arise due to the

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independent contractor's status, in deciding to employ an independent contractor to fill the role of its executive director.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General