



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 24, 2003

Edward T. McMullen, Jr., Chairman
South Carolina Research Centers of
Economic Excellence Review Board
c/o SC Commission on Higher Education
1333 Main Street, Suite 200
Columbia, South Carolina 29201

Dear Mr. McMullen:

As Chairman of the South Carolina Research Centers of Economic Excellence Review Board (Board), you seek an opinion as to several questions concerning administration of the South Carolina Centers of Economic Excellence Act (RCEE). These issues relate to the matching funds requirements contained in the Act. Your questions are quoted as follows:

1. When does the match need to be in hand in order to make the grant? The legislation appears to stipulate that all of the match must be in hand. Is this correct? Do pledges of forthcoming matching monies "count" as match in hand?
2. If a university foundation wishes to provide the match, must this contribution be deposited into the specific endowment account established under the RCEE Act for the specific awarded endowed professorship? (We think it should be.) Or, can it be retained in a separate foundation account (e.g., unrestricted) either permanently or temporarily until other matching funds are raised to "pay back" the unrestricted (or other) fund for funds that have essentially functioned as a loan or guarantee against matching funds to be raised at a future date from other allowable sources?
3. Proviso 5A.27 to the General Appropriations Act of FY 2003-2004 stipulates that "a research university may use funds from any source except state appropriations to the institution derived from taxes or fees imposed or authorized to be imposed by the General Assembly, or any other state appropriations derived from taxes or fees imposed or authorized to be imposed by the General Assembly."

Mr. McMullen

Page 2

June 24, 2003

- a. Does this proviso apply to FY 2002-03 funds? Or, does it take effect in FY 2003-04 for the second year of the endowed professorship program?
- b. Under this proviso, we assume that federal funds can be used as match, but should federal funds used as match be restricted only to those funds which can be placed into the specific endowment for the specific endowed professorship approved for funding? Or, could federal funds that cannot be placed into the specific endowment in question be allowed to be counted as the required match?
- c. Can more specific guidance be provided as to what constitutes "funds from any source..."?

Law / Analysis

The South Carolina Research Centers of Economic Excellence Act was enacted by Act No. 356 of 2002, codified at § 2-75-05 et seq. In § 2-75-05(B), the General Assembly expressed the clear legislative purpose of the Act through the following findings:

(B) The General Assembly finds that:

(1) it is in the public interest to create incentives for the senior research universities of South Carolina consisting of Clemson University, the Medical University of South Carolina, and the University of South Carolina to raise capital from the private sector to fund endowments for professorships in research areas targeted to create well-paying jobs and enhanced economic opportunities for the people of South Carolina;

(2) these endowed professorships should be used to recruit and maintain leading scientists and engineers at the senior research universities of South Carolina for the purposes of developing and leveraging the research capabilities of the universities for the creation of well-paying jobs and enhanced economic opportunities in knowledge-based industries for all South Carolinians;

(3) in communities across the United States in which better paying jobs and enhanced economic development in knowledge-based industries has flourished, the local or state government has created incentives and made a long-term commitment to public and private funding for a significant number of endowments for professorships in targeted knowledge-based industries;

(4) the South Carolina Education Lottery provides a source of funding and an incentive for the senior research universities to raise, in dollar-for-dollar matching amounts, sums from private sources sufficient to create endowed professorships;

Mr. McMullen
Page 4
June 24, 2003

A number of principles of statutory construction are pertinent to your inquiry. First and foremost, is the cardinal rule that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Cola. Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Most often, legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance. Martin v. Nationwide Mutual Ins. Co., 256 S.C. 577, 183 S.E.2d 451 (1971). The clear and unambiguous terms of a statute must be applied according to their literal meaning. State v. Blackmon, *supra*.

Moreover, we have consistently advised that governmental agencies can exercise only those powers conferred upon them by their enabling legislation. See, Op. S.C. Atty. Gen., April 21, 2003 (and authorities cited therein). An agency lacks the power to vary the terms of a statute. Op. S.C. Atty. Gen., July 9, 1990.

While an agency cannot by regulation or administrative policy alter the provisions set forth in their enabling statutes, administrators do possess discretion in the area of effectuating the policy established by the Legislature in the agency's governing law. As our Supreme Court has recognized, "construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons." Op. S.C. Atty. Gen., October 20, 1997, quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). The courts have stated that it is not necessary that the administrative agency's construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding. Ill. Commerce Comm. v. Interstate Commerce Comm., 749 F.2d 825 (D.C. Cir. 1984). Typically, so long as an administrative agency's interpretation of a statutory provision is reasonable, this Office would defer to that interpretation.

Furthermore, we have previously opined that provisos in an annual appropriations act inconsistent with general law would have the effect of suspending any conflicting provisions of the general law during the time the appropriations act is in effect. Op. S.C. Atty. Gen., March 19, 2003; Op. S.C. Atty. Gen., Op. No. 92-41 (July 28, 1992); Op. S.C. Atty. Gen., June 5, 1990; Op. S.C. Atty. Gen., October 10, 1989; Op. S.C. Atty. Gen., Op. No. 78-198 (November 21, 1978) [beginning July 1, 1978, proviso controls over general law provision for fiscal year, 1978-79]; State ex rel. McLeod v. Mills, 256 S.C. 21, 180 S.E.2d 638, 640 (1971) [... it was the intent of the legislature to temporarily suspend, until July 1, 1971, rather than repeal, the provisions of the permanent statute relating to the salaries of the Constitutional Officers."].

In enacting § 2-75-05 *et seq.*, it is clear that the General Assembly intended to insure that, while lottery funds would be used in support of the endowed chair program, all matching funds would be "committed and raised exclusively from sources other than South Carolina tax dollars"

§ 2-7-50 (2). The findings of the General Assembly in § 2-75-05(B)(1) speak of “incentives ... to raise capital from the private sector to fund endowments for professorships in research areas” Subsection (3) of § 2-75-05 notes that in other states where “better paying jobs ... in knowledge-based industries [have] ... flourished,” the “local or state government has created incentives and made a long-term commitment to public and private funding” Accordingly, it is evident that the General Assembly intended to preserve a public-private delineation in funding for the program.

With these rules of statutory construction in mind, we turn now to your specific questions.

1. Your first question concerns the time at which the matching funds need to be “on hand” to make the grant. Section 2-75-50(1) expressly provides that an application for an award shall “(1) provide to the board documentation of private matching funds, on hand, in an amount equal to the amount for which application is made” (emphasis added). No definition of the phrase “on hand” is contained in the statute. Typically, however, courts construe the term “on hand” in its most literal sense. The term commonly is interpreted to mean subject to a person’s “immediate possession” such as being contained in an account which may be immediately drawn upon. See, In the Matter of Estate of Farane, 65 N.Y.2d 764, 482 N.E.2d 556 (1985) [term “on hand” means “subject to ... [individual’s] right of immediate possession” and includes funds in bank accounts which may be drawn upon demand]. See also, Chicago, R.I. & G. Ry. Co. v. Risley Bros. & Co., 119 S.W. 897 (Tex. Civ. App. 1909) [freight intended to be shipped not yet in existence and thus not “on hand”]. Accordingly, in our opinion, the use of pledges or promises of forthcoming monies as matching funds would not appear to be consistent with the statute’s language because a pledge or promise is not yet “on hand.” In our opinion, for purposes of § 2-75-50(1)’s requirement, it would be reasonable for the Board to require that any matching monies be available for placement into the specific endowment for the specific endowed professorship approved for funding, as you indicate in your letter. Such a requirement by the Board would be consistent with the mandate of § 2-75-50 that the matching funds be “on hand.” Of course, there may be other reasonable applications as well.

2. Your second question relates to funds contained in a university foundation account. You ask whether a university foundation, wishing to provide the match, must deposit this contribution “into the specific endowment account established under the RCEE Act for the specific awarded endowed professorship?” You note that another alternative would be for these funds to be “retained in a separate foundation account (e.g. unrestricted) either permanently or temporarily until other matching funds are raised to ‘pay back’ the unrestricted (or other) fund for funds that have essentially functioned as a loan or guarantee against matching funds to be raised at a future date from other allowable sources....” Your question specifically is which of these alternatives is more consistent with the Act?

In your view, the General Assembly did not contemplate this arrangement as meeting the matching funds requirement. Again, we believe that a court would find that § 2-75-50(1) compels that the matching funds be “on hand” and thus immediately available. Courts generally will not

conclude that the General Assembly intended to do a futile thing. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Having such funds available among other funds which might be used for other purposes does not appear consistent with the statute's requirements. Such a "loan" or "guarantee" arrangement could be viewed by a court as little different from a pledge or promise that the matching funds will be there at some future date but not yet "on hand." In our opinion, the General Assembly required matching funds be "on hand," using those words for a reason – that is, to have these funds readily available for placement in the specific endowment account. As stated above, a requirement by the Board that the matching funds be only those funds which can be placed in the specific endowment would likely be in accordance with the mandate that these funds be "on hand."

3. Your third question relates to the recently enacted proviso 5A.27 contained in the 2003-2004 Appropriations Act. Such proviso states that

[n]otwithstanding the provisions of Section 2-75-05(B)(4) and (6) and 2-75-50 of the 1976 Code, a research university may use funds from any source except state appropriations to the institution derived from taxes or fees imposed or authorized to be imposed by the General Assembly, or any other state appropriations derived from taxes or fees imposed or authorized to be imposed by the General Assembly. (emphasis added).

It is evident that this Proviso was enacted either to broaden the general law, § 2-75-05 et seq., or at least to clarify these general law provisions as to the sources from which funds may be permissibly used as matching funds. While the Proviso does not appear to differ significantly from the terms of § 2-75-50(2), which states that all matching funds must have been "submitted and raised exclusively from sources other than South Carolina tax dollars ...," nevertheless, the Proviso controls in this regard for the upcoming fiscal year. If there was any ambiguity in the general law, the Proviso makes it clear, at least, that match monies may originate from any source except state appropriations derived from taxes or fees imposed or authorized by the General Assembly. You first ask whether the Proviso applies to FY 2002-2003 funds or, instead, takes effect in FY 2003-04 for the second year of the endowed professorship program. We believe a court would find that this Proviso takes effect July 1, 2003, and remains in effect throughout the 2003-04 fiscal year, unless otherwise amended or repealed by the General Assembly. Thus, any action taken by the Board on July 1 or thereafter (for the fiscal year 2003-04) with respect to an application must comply with the Proviso.

You also asked whether federal funds used as matching funds may be restricted only to those funds which can be placed in the specific endowment for the specific endowed professorship approved for funding. Our answer to this question would be the same as that provided above. We do not read the Proviso as in any way undermining the "on hand" requirement of § 2-75-50(1). Statutes must be interpreted in such a way as to reconcile them with each other, if possible. Powell v. Red Carpet Lounge, 280 S.C. 142, 311 S.E.2d 719 (1984). While the Proviso makes explicit that funds may be used for matching funds from "any source" except state appropriated tax funds, such

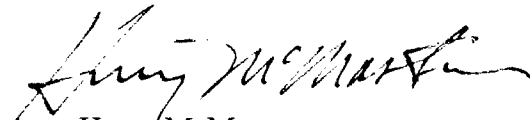
Mr. McMullen
Page 7
June 24, 2003

funds from these various sources still must be only those funds which are "on hand," as referenced above. In our view, the Proviso addresses the sources of matching funds, not their location.

Your final question is the meaning of the term "funds from any source" as used in the Proviso. There is nothing in the Proviso which defines that term. However, the language used by the General Assembly is broad in scope and should be so interpreted by the Board. Obviously, the term would include gifts from individuals, corporations or other entities. Federal grants, grants from local governments, as well as grants from private sources would be included, too, as would funds provided through testamentary or non-testamentary instruments. Again, it would be the Board's responsibility to determine whether the only exception for matching funds contained in the Proviso – state appropriated tax dollars – is applicable. While the language of the Proviso insures that matching funds may consist of "funds from any source," these funds must be readily available for deposit in the specific endowment account as discussed above. In other words, the matching funds must be "on hand."

In summary, it is the Board to which authority has been delegated by the General Assembly to execute § 2-75-05 et seq. Courts will generally defer to the Board's interpretation and application of these enabling statutes. As long as the Board's interpretation is considered by the courts as reasonable, such interpretation will likely be upheld.

Yours very truly,



Henry McMaster

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