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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLIE CONDON
ATTORNEY GENERAL

June 25, 2001

G. Hubbard Smalls, Chief of Staff/General Counsel
S.C. Dept. of Alcohol and Other Drug Abuse Services
101 Business Park Boulevard
Columbia, South Carolina 29203-9498

Dear Mr. Smalls:

By your letter of June 6, 2001, you have requested an opinion of this Office concerning the liability of a county for the contractual obligations of "an entity developed under state law but managed and controlled by the county through its ordinance."

By way of background, you have provided the following information:

A local county alcohol and drug abuse commission was formed by ordinance to carry out the functions as defined above. The organization/corporate structure of this entity was not defined in the ordinance. The ordinance calls for a county appointed board to select a management team for the alcohol and drug abuse commission. The county council appointed board has sole hiring and firing control of the management team. Financial accounts and contractual relationships are entered into through the authority of management team and the county council appointed board. The alcohol and drug abuse commission is not a non-profit and/or corporate entity of record in South Carolina.

The county's liability for any particular contractual obligation incurred by the management team on behalf of the alcohol and drug commission will, of course, depend on the facts and circumstances surrounding each transaction. It is beyond the scope of an opinion of this Office to adjudicate questions of fact, and ultimately a court would be the appropriate body to determine the liability of the county on a given contract. However, we will be happy to provide some very general law on the agency theories of liability by which the county may be responsible for the obligations of the commission.

Agency is a fiduciary relationship that results when a person, or in this case, an entity,

Rembert C. Dennis

Mr. Smalls
June 25, 2001
Page 2

consents to act on behalf of and under the control of another. See Fleming v. Asbill, 326 S.C. 49, 483 S.E.2d 751 (1997). Agents can render their principals liable in contract as well as tort, but that liability varies according to the classification of the agent, the limitations on the agent's authority, and the factual circumstances of the contract. Some of these factors will be discussed below.

The extent to which an agent may bind a principal depends upon the nature of the agency. Generally there are three categories of persons or entities that perform acts on behalf of others: servants, agents who are not servants, and independent contractors. The relationship varies by the amount of control the principal retains over the person. See generally Fernander v. Thigpen, 278 S.C. 140, 293 S.E.2d 424 (1982). A servant is typically subject to the direct supervision of the principal and may render the principal liable in tort for acts committed in the scope of the servant's employment. See Goble v. American Ry. Express Co. et al, 124 S.C. 19, 115 S.E. 900 (1923). An agent who is not a servant is one over whom the principal does not have the right of physical control. See id. These agents may bind the principal in contract, but usually not in tort, and whether the principal is bound will also depend on the limits of the agents' authority. Finally, the principal exercises the least amount of control over the independent contractor, who cannot bind the principal either in tort or in contract.

Turning these general guidelines to the case at hand, the local alcohol and drug commission is likely an agent that is not a servant of the county, the principal. Although the county does not directly control the physical, or day to day, activities of the commission, the county certainly exerts some control over the operation of the commission.

State law requires the counties to create an entity or appoint an already existing entity to serve as the local alcohol and drug abuse planning commission. See S.C. Code Ann. §61-23-10. et seq. The county must develop a plan for the prevention and treatment of alcohol and drug abuse and the entity is responsible for the expenditure of funds in the implementation of the county's plan. In fact, the county's ultimate oversight of the local drug and alcohol abuse commission's efforts is also mandated by state statute. Section 61-12-50 states:

Each county governing body must:

- (a) establish methods of administration necessary for the proper and efficient operation of the programs and services or projects, including the provision of annual reports of progress toward implementing county plans to the Department of Alcohol and Other Drug Abuse Services;
- (b) provide for accounting procedures necessary to assure proper disbursement of and accounting for the funds, including an annual audit of fiscal records, a copy of which must be furnished to the Department of Alcohol and Other Drug Abuse Services.

Furthermore, you inform us that the county ordinance creating the commission specifically requires

Mr. Smalls
June 25, 2001
Page 3

the county appointed commission members to select a management team responsible for the daily operations of the alcohol and drug abuse programs. All of these factors, both statutorily mandated and imputed by local ordinance indicate the degree of control the county exercises over the alcohol and drug abuse commission. That degree of control creates the agency relationship between the county and the local alcohol and drug abuse planning commission that may allow the commission to bind the county in contract.

The agent's ability to bind the principal in contract is limited by the agent's authority, which always derives from the principal. See R & G Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 540 S.E. 2d 114 (Ct. App. 2000). Only the principal, by its actions or manifestations to third parties, can create the authority. See id. The principal creates the agent's express authority when the principal tells the agent what the agent is authorized to do. Implied authority is that authority which, though not directly expressed to the agent, is reasonably necessary to carry out the agent's express authority. See Stone v. Mellon Mortgage Co., 771 So.2d 451 (Ala. 2000). In the instant case for example, the county gives the commission the express authority to select a management team to carry out the operations of the drug and alcohol planning programs. The commission would then likely have the implied authority to enter into employment contracts with the team and other such contracts providing for the staffing of the programs.

Significantly, the principal may be bound in contract for the actions of its agent, even if the actions are outside the agent's express or implied authority, because of the principal's manifestations to a third party of the agent's authority. See Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996). Adequate manifestations of the agent's authority may result from a holding out, or from a course of dealing on which a third party may reasonably rely. See id. For example, if the county designates the local commission as the "_____ County Alcohol and Other Drug Abuse Commission," then the county is manifesting to third parties the commission's affiliation with the county. Another example: if the county allows the commission to meet in county facilities and utilize county equipment and personnel, then the county also represents to third parties that the commission is a county entity. Or, if payments to third parties for services rendered are routed through the county's usual billing procedures, then the third parties may establish a course of dealing with the county upon which they might reasonably rely.

As you can see, whether a county will be liable for the contractual obligations of a local alcohol and drug abuse commission is a highly fact-specific determination. While we have attempted to comment in general terms on various agency theories of liability, many factors would contribute to any definitive conclusions about the county's liability. We would also suggest that the county consult its attorney in the matter. The county attorney may be more familiar with the circumstances surrounding the commission's contractual obligations and may be able to advise the county on its liability with more certainty.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney

Mr. Smalls
June 25, 2001
Page 4

General and represents the position of the undersigned attorney as to the specific question asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,



Susannah Cole
Assistant Attorney General