

3771 Library

The State of South Carolina



Office of the Attorney General

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November 29, 1989

The Honorable Herbert Kirsh
Member, House of Representatives
Post Office Box 31
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Dear Representative Kirsh:

You have advised that the University of South Carolina has entered into an agreement whereby the bookstore of the University will be run by a not-for-profit corporation, the Carolina Auxiliary Services (formerly known as the Carolina Auxiliary Services Foundation). You have inquired about the legality of this arrangement and the transfer of property to the corporation by the University.

As I have indicated to you by telephone, this arrangement presents novel legal questions which have not apparently been addressed by the courts of this State. I was able to locate several judicial decisions of other jurisdictions in which similar contractual arrangements for managing bookstores or other auxiliary services existing between a university and a not-for-profit corporation, were mentioned, but legality of such arrangements was not at issue. See Matter of Employees of Student Services, 432 A. 2d 189 (Pa. 1981) (Edinboro State College); Matter of Faculty Student Ass'n of State University of Oneota, Inc., 79 App. Div. 778, 435 N.Y.S. 2d 75 (1980) (State University College of Oneota); City of Ann Arbor v. University Cellar, Inc., 65 Mich. App. 512, 237 N.W.2d 512 (1975) (University of Michigan); University of Oregon Co-Operative Store v. State Dept. of Revenue, 542 P.2d 900 (Or. 1975) (University of Oregon); Wanee v. Bd. of Dir. of Associated Students of California State University, Chico, 56 Cal. App 3d 644, 128 Cal. Rptr. 526 (1976) (California State University at Chico); 1983/84 Rep. Va. A. G. 290 (Commonwealth's institutions of higher education). Thus, the question you have raised is one of first impression in this State though the Attorney General of Kentucky has previously examined the issue and found no legal problem therein. Opinion of the Attorney General of Kentucky 80-486 dated August 9, 1980 (relative to Murray State University).

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The University of South Carolina is an institution of higher education which is governed by a board of trustees acting pursuant to Section 59-117-10 et seq., Code of Laws of South Carolina (1976 & 1988 Cum. Supp.). The board of trustees is constituted as a body politic and corporate and has been given various corporate and other powers to enable it to govern the University, as specified in Section 59-117-40 and other relevant Code sections. The ownership or operation of a bookstore for the convenience of students and faculty is not specifically provided for within these statutes, but power to do so may be fairly implied. Certainly there is no requirement that the University own or operate a bookstore.

The Carolina Auxiliary Services has been chartered as an eleemosynary corporation, for the purpose of promoting "the educational purposes of the University of South Carolina by obtaining or otherwise providing, funds to said institution through the leasing, purchasing or otherwise providing services excepting debts, all to the benefit of the University of South Carolina." See Article Fourth, Certificate of Incorporation by the Secretary of State. The corporation is one not for profit, with no stock being issued and no profit inuring to the benefit of any individual or shareholder.

The corporation and the University have entered into an agreement whereby the corporation will undertake the operation of the University's bookstore. The contract provided to this Office for review commenced on January 1, 1989, with several provisions which set forth the ownership of property and the like which are relevant to your inquiry. By section 2, the duties of the University include: the sale of inventories, vendor and customer accounts receivable and current accounts payable; use of certain premises and equipment by the corporation; the maintenance of adequate insurance by the University, with fixtures installed by the corporation becoming property of the University at the termination of the contract; and others.

Duties of the corporation are established in section 3 of the agreement and include: provision of management and operation services of the bookstore; reimbursement to the University in full for all inventories, vendor and customer accounts receivable, and current accounts payable; excess funds (remaining after providing for necessary expenses, allowances and contingencies) being transferred to the University to be applied to the sole use and exclusive use and benefit of the University; reimbursement to the University of various expenses incurred in the operation of the bookstore; responsibility for insurance coverage on inventory; and so forth.

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A review of the foregoing establishes that the University retains title to all real property and current fixtures involved with the bookstore and indeed will own the fixtures which may be installed by the corporation, at the end of the contract period. The inventory and accounts formerly owned by the University were transferred to the corporation upon reimbursement (i.e., not gratis). It therefore appears that no real property has been transferred by the University, and any personal property has been transferred in an arm's-length transaction for consideration. In return, all excess funds (but in any event, a minimum of \$45,000.00 annually) are to be returned to the University for academic scholarships. See Section 3.4 of the contract.

The University's board of trustees, by Section 59-117-40(4) of the Code, is empowered to:

make contracts and to have, to hold, to purchase and to lease real estate and personal property for corporate purposes; and to sell and dispose of personal property and any buildings that are deemed by it as surplus property or not further needed and any buildings that it may need to do away with the purpose of making room for other construction. All such powers shall be exercised in a manner consistent with the provisions of Chapter 35 of Title 11 of the 1976 Code.

Additionally, Section 59-117-40(11) authorizes the board of trustees to "accept, receive and hold all moneys or other properties, real and personal, that may be given, conveyed, bequeathed or devised to the University and to use them for the benefit of the University..."

Examining the contract and the statutorily-authorized powers of the board of trustees of the University, it would appear that the contract as described above would represent an arm's-length transaction between the parties. The corporation received inventory and accounts of the bookstore, for which the University was to be compensated. The University has not divested itself of any real property and indeed stands to gain if the corporation makes improvements (i.e., adds fixtures) to the University's real property and improvements thereon. All excess income generated by operation of the bookstore by the corporation is to be returned to the University. At least on the face of it, it appears that the University is in the same position it would have been prior to execution of the contract; the difference is that the corporation, rather than the University, would employ bookstore personnel and incur those and other similar

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operational costs. The University will still be the beneficiary of any "profits" generated by the operation of the bookstore, as it was when bookstore operations were a function of the University.

Several other considerations must be mentioned. Proviso 129.3 of Act No. 189, 1989 Acts and Joint Resolutions requires that:

[F]unds at State Institutions of Higher Learning derived wholly from athletic or other student contests, from the activities of student organizations, and from the operations of canteens and bookstores, ...may be retained at the institution and expended by the respective institutions only in accord with policies established by the institution's Board of Trustees. Such funds shall be audited annually by the State but the provisions of this Act concerning unclassified personnel compensation, travel, equipment purchases and other purchasing regulations shall not apply to the use of these funds.

This proviso assumes, but does not require, that an institution of higher education will operate a bookstore. If such be the case, the funds so generated may be retained by the institution and must be spent in accordance with policies established by the board of trustees. In the instant case, bookstore funds are being returned to the University and will be spent in accordance with University policy, for academic scholarships.

Additionally, I had forwarded to you copies of Ops. Atty. Gen. No. 85-132 and 3597. Opinion No. 3597 concluded that the University of South Carolina could not loan funds derived from the operation of the athletic department, bookstore, or canteens to an eleemosynary corporation. That opinion would not be relevant in the instant case because the University is not loaning funds to the corporation. Opinion No. 85-132 concluded that athletic, bookstore, and canteen funds generated by state-supported colleges and universities are considered "public funds" and must be expended in a manner consistent with state law. As noted with respect to Proviso 129.3 of Act No. 189, this conclusion assumes that a college or university would operate a bookstore; nothing in that opinion would be contradicted in the instant case, since arguably the funds being returned to the University by the corporation would probably still be considered public funds so that the same must be expended in a manner consistent with state law.

In conclusion, it is the opinion of this Office that the University of South Carolina has, by contract, validly transferred the operation and management of its bookstore to a non-profit corporation, Carolina Auxiliary Services, in an arm's-length transaction.

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The University has not divested itself of any real property by virtue of the contract and will be the beneficiary of the excess funds generated by operation of the bookstore by the corporation. The corporation has not been given outright or loaned any property or funds of the University; the property which has changed hands (inventory and specified accounts) was for consideration. Such a transaction is authorized under the statutory authority of the University's board of trustees to enter into contracts.

The foregoing addresses only the legal issues raised in this transaction and does not offer any comment as to whether such a transaction is wise or judicious, leaving such policy considerations to the University Board of Trustees or, ultimately, the General Assembly. If it wishes, the General Assembly would have the right to oversee or monitor these operations.

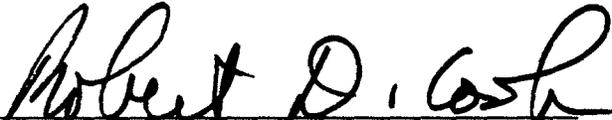
With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:


Robert D. Cook
Executive Assistant for Opinions

cc: Paul J. Ward, Esquire
General Counsel
University of South Carolina