

The State of South Carolina



Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

October 28, 1987

Edward D. Buckley, Esquire
Attorney for Charleston County
Aviation Authority
Post Office Box 953
Charleston, South Carolina 29402

Dear Mr. Buckley:

You have asked for the opinion of this Office relative to compensation of the members of the Charleston County Aviation Authority, the governing body of the Charleston County Airport District. Upon a review of various provisions of the Code of Laws of South Carolina, you believe that "there is no impediment to the Authority by proper enactment to provide for compensation of members of the District." The enabling legislation of the Authority, Act No. 1235 of 1970, provides in Section 3:

The members of the Authority shall be allowed the usual per diem, mileage and subsistence as provided by law for members of boards, commissions and committees and their actual and necessary expenses while in performance of duties prescribed under this Act.

Each of your questions relative to changing this provision will be addressed separately, as follows.

Question 1

May members of the Charleston County Aviation Authority be paid an annual salary?

Before this question may be reached, it is necessary to determine how and in what respect Section 3 of Act No. 1235 of

Edward D. Buckley, Esquire
Page 2
October 28, 1987

1970 may be changed. As you noted, Section 8-15-10 of the Code of Laws of South Carolina (1976, as revised) provides that

[e]xcept as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of this State or any political subdivision, department or agency thereof shall be as from time to time provided by the General Assembly or the particular political subdivision, department or agency concerned, as the case may be.

The only constitutional prohibition would be that imposed by Article III, Section 30 of the State Constitution, which prohibits additional compensation to be paid to anyone, for past services rendered, after contract made, and so forth.

If the Charleston County Airport District were deemed to be a special purpose or public service district, certain limits on compensation of Authority members would be imposed by Section 6-11-91 of the Code which provides:

Notwithstanding any other provision of law the governing body of any public service district or special purpose district may by resolution or ordinance fix or change the compensation or other benefits including insurance benefits for the members of the district governing body. Compensation shall not exceed the amounts authorized for mileage for members of state boards, committees and commissions, insurance benefits shall not exceed those provided for state employees and per diem shall not exceed thirty-five dollars a day.

In addition, Section 6-11-92 of the Code provides:

Any public service district or special purpose district operating on the effective date of §§ 6-11-91 through 6-11-93 may continue to use the compensation or benefit plan now in existence on the effective date of §§ 6-11-91 through 6-11-93.

Edward D. Buckley, Esquire
Page 3
October 28, 1987

These statutes would authorize the Authority, as the governing body of a special purpose or public service district, to continue to use the compensation plan created by Act No. 1235 of 1970 or to make changes consistent with Section 6-11-91 of the Code. However, it is doubtful that the District is actually such a district.

In Torgerson v. Craver, 267 S.C. 558, 230 S.E.2d 228 (1976), the Charleston County Airport District was called a "Charleston County political subdivision." Id., 267 S.C. at 562. The court in Torgerson noted that the problems addressed in that case could be solved by the "local governing body of Charleston County," problems which "the county governing authority" could and should deal with instead of the General Assembly. Id., 267 S.C. at 563. These ties to Charleston County and the governing body of Charleston County make it doubtful that the District is actually a special purpose or public service district. For these reasons, Charleston County Council might be the appropriate entity to make any changes in compensation as provided by the local act, following Graham v. Creel, 289 S.C. 165, 345 S.E.2d 717 (1986).

Section 3 of Act No. 283 of 1975, the Home Rule Act, provided:

All operations, agencies and offices of county government, appropriations and laws related thereto in effect on the date the change in form becomes effective shall remain in full force and effect until otherwise implemented by ordinance of the council pursuant to this act. Provided, however, that county councils shall not enact ordinances in conflict with existing law relating to their respective counties and all such laws shall remain in full force and effect until repealed by the General Assembly, or until January 1, 1980, whichever time is sooner... .

The court in Graham v. Creel, supra, addressed this portion of the Home Rule Act and held that a local act for Horry County would remain in effect, since it had not been repealed by the General Assembly, until such time as Horry County Council adopted an ordinance changing the law sometime after January 1, 1980. The same reasoning could be applied to amending Act No.

Edward D. Buckley, Esquire
Page 4
October 28, 1987

1235 of 1970 which set the compensation for Authority members.1/

Having identified the appropriate mechanism for amending Act No. 1235 of 1970, it must be determined whether there is any limit as to compensation which may be paid to Authority members. Section 8-15-10 of the Code, cited supra, appears to repose authority in the appropriate political subdivision to change the compensation of its officers and employees from time to time. No limitation appears within any statute except Section 6-11-91, which is most probably not applicable to the Authority. For that reason, we would conclude that Authority members may be compensated at whatever rate may be deemed appropriate by modification of Act No. 1235 of 1970 by Charleston County Council; this would be more of a policy question than a legal question. Such compensation could conceivably include a salary.2/

1/ The General Assembly would be precluded, by Article VIII, Section 7 of the State Constitution, from amending Act No. 1235 of 1970. Torgerson v. Craver, supra, is specifically on point. Further, we are unable to locate within the enabling legislation any authority for Authority members to adjust their own compensation. By way of contrast, see Section 4-9-100 of the Code (county council members specifically authorized to set their own salaries). Of course, the General Assembly could adopt a general law on the subject, increasing compensation or allowing the Authority members to adjust their compensation.

It should also be noted that the general rule is that public officers are to serve without compensation unless compensation is specifically authorized. 63A Am.Jur.2d Public Officers and Employees § 432; 67 C.J.S. Officers § 226.

2/ Because the chairman of Charleston County Council is an ex officio member of the Authority, this individual needs to be aware of the requirements of the State Ethics Act, Section 8-13-410 et seq. of the Code, should the issue come before Charleston County Council. Should questions arise about participation of the chairman in the decision-making process, the State Ethics Commission should be consulted.

Edward D. Buckley, Esquire
Page 5
October 28, 1987

Question 2

Would members of the Authority who are ex officio members also be entitled to compensation as members of the Charleston County Aviation Authority in addition to the compensation each receives from his respective elective position?

You have advised that Act No. 1235 of 1970 provides that the mayors of the cities of Charleston and North Charleston and the chairman of Charleston County Council serve as ex officio members of the Charleston County Aviation Authority. You have asked about the entitlement of each to the emoluments of both positions.

The general law relative to your inquiry is found in 67 C.J.S. Officers § 222: "Where an officer by law may, and as a matter of fact does, hold two offices, he is entitled to receive the compensation attached to both offices... ." See also State ex rel. Goodwin v. Rogers, 217 S.E.2d 65 (W.Va. 1975); Kendrick v. Boyd, 51 So.2d 697 (Ala. Ct. App. 1951); Hawkins v. City of Fayette, 604 S.W.2d 716 (Mo. Ct. App. 1980); Lindsley v. City and County of Denver, 172 P. 707 (Colo. 1918); Dumke v. Anderson, 44 Ill. App. 3d 626, 358 N.W.2d 344 (1976); Throop, Public Officers, §§ 496, 497. The key question addressed in all of these cases is whether the officer who holds a second position in an ex officio capacity holds the position in a separate and distinct capacity. If so, he is entitled to compensation for both positions. If, however, a new position is not created but only new duties are added to the already-existing office, no additional compensation has been permitted. Maginn v. McDevitt, 269 Ill. 196, 109 N.E. 1038 (1915); People ex rel. Coultas v. Wabash Ry. Co., 281 Ill. 311, 117 N.E. 1018 (1917); People ex rel. Ruesch v. Hire, 406 Ill. 341, 94 N.E.2d 161 (1950). Of course, each instance of an officer holding a second position ex officio would require individual examination to determine the appropriateness of compensation for both positions.

While it is a close question, it would appear that when the General Assembly created the Charleston County Aviation Authority, membership thereon was not intrinsic to the duties of the mayors of the cities of Charleston and North Charleston and the chairman of the Charleston County Council and, therefore, these

Edward D. Buckley, Esquire
Page 6
October 28, 1987

are additional positions which could have been performed appropriately by other persons. Therefore, these ex officio members would be entitled to compensation for service as ex officio Authority members.

Question 3

In the event salaries are permitted, would not this permit the members of the Authority to be placed under the South Carolina Retirement System?

By an opinion dated December 9, 1972, this Office concluded that the Charleston County Aviation Authority "is a political subdivision of the State and an 'employer' within the meaning of the Retirement Act." A copy of this opinion is enclosed herewith. See also R. 19-905.C (no retirement credit when payment is in the form of per diem).

Assuming that the Authority is a member of the South Carolina Retirement System and assuming further that Authority members are paid a salary, Authority members should be eligible for membership in the Retirement System. Section 9-1-480 of the Code provides for membership in the Retirement System by "employees" of member political subdivisions except as to those employees excluded by statute or those who have exercised a statutory option not to participate in the Retirement System. An "employee" is defined in Section 9-1-10 (4) in relevant part as

(c) any agent or officer of any county, municipality or school district, or of any agency or department thereof, which shall have been admitted to the System under the provisions of § 9-1-470, to the extent he is compensated for services from public funds... .

The term "officer" would include a member of the Authority. Op. Atty. Gen. dated November 18, 1986. Thus, such member should be eligible to participate in the South Carolina Retirement System if the assumptions stated above are correct. You may wish to seek the advice of the South Carolina Retirement System on this point, as that entity would, of course, make the final determination as to eligibility to participate in the System.

Edward D. Buckley, Esquire
Page 7
October 28, 1987

We trust that the foregoing has adequately responded to your inquiries. Please advise if clarification or additional assistance should be needed.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/rhm

Enclosure

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions