



ALAN WILSON
ATTORNEY GENERAL

June 5, 2017

The Honorable Charles L. Reel
Edgefield County Clerk of Court
PO Box 34
Edgefield, SC 29824

Dear Mr. Reel:

Our Office received your opinion request regarding a clerk of court's use of the fees paid by bail bondsmen pursuant to section 38-53-100(D)¹. Specifically, you ask if the clerk of court can use the fees to pay his employees a "small moral[e] improvement incentive" for "their continuous hard work." You explain that the account containing the fees "is known throughout the S.C. Clerk of Court community as the 'Clerk's Discretionary Account' and is not part of the County General Budget, but is held by the County Treasurer's Office for the Clerk of Court."

You point out that our Office has issued a November 1, 1988 opinion which states the following regarding the use of the bail bondsmen fees:

[i]n conclusion, fees distributed to the clerks of court by the Insurance Commissioner should be deposited with the county treasurers to the credit of and for the full benefit of the clerks of court for their offices. Of course, as you know, such fees may not be used for the personal financial benefit of the Clerks of Court, but must be used for the benefit of the clerks' offices. See Ops. Atty. Gen. (January 8, 1987, September 24, 1987 and November 4, 1987.)

¹ Section 38-53-100 of the South Carolina Code provides:

(D) In addition to the fees herein provided, a professional or surety bondsman shall pay to the clerk of court of his home county the sum of one hundred fifty dollars annually for each licensee to be paid directly to and retained by the clerk. In addition, each bondsman and runner shall pay to any other county where he is doing business the sum of one hundred dollars to be paid to and retained by the clerk. The fee must be paid annually and directly to the clerk of court who shall deposit it in an account maintained by the clerk.

S.C. Code Ann. § 38-53-100(D) (1976 Code, as amended).

Op. S.C. Atty. Gen., November 1, 1988 (1988 WL 383567) (emphasis added).²

You also ask if the County Administrator has any authority over the Clerk of Court's use of this account, especially since section 38-53-100(D) states that the account is to be maintained by the Clerk of Court.

LAW/ANALYSIS:

We will begin with your final question. In order to determine whether a county administrator³ has any authority over a clerk of court's use of the bail bondsmen fees, we must consider section 4-9-650. Section 4-9-650 provides:

[w]ith the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected officials of the county whose offices were created either by the Constitution or by the general law of the State.

S.C. Code Ann. § 4-9-650 (1976 Code, as amended).

In McCormick Cty. Council v. Butler, 361 S.C. 92, 603 S.E.2d 586 (2004), our State Supreme Court held that the clerk of court, and not county council, had the authority to assign office space and possess the keys to the offices in the county courthouse. The Court explained its reasoning as follows:

[t]he office of clerk of court is an elected one, created by Article V, § 24 of the South Carolina Constitution. This section states that the General Assembly shall provide for the clerk of court's duties. In S.C.Code Ann. § 14-17-210 (1976), the General Assembly has provided that the county clerk of court has charge of the courthouse and must open the courthouse when required for public use and close it at all other times. . .

Although the statutes do not specifically provide who has the authority to assign offices and possess the keys thereto in the county courthouse, the provision of § 14-17-210 giving the clerk of court charge of the courthouse must include the assignment of offices and possession of keys. Further, since § 4-9-650 specifically states that the county administrator does not have authority over elected officials whose offices are created by the Constitution, the county has no authority to control the Clerk of Court. . . .

² In our November 1, 1988 opinion, we determined that the clerks of court having the use and benefit of the bondsmen fee money was consistent with the duties given to the clerks of court with respect to bondsmen. Our determination is supported by Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 579 S.E.2d 334 (Ct. App. 2003), in which our State Court of Appeals stated: “[w]e acknowledge that the legislative purpose of the statute [section 38-53-100(D)] is to obtain fees to defray the costs of monitoring and licensing bondsmen.”

³ Edgefield County has adopted a council-administrator form of government. See Edgefield County, S.C. Code of Ordinances, § 2-19.

Id. (emphasis added).⁴

The Butler case made it clear that a county council and its administrator can not interfere with a clerk of court's discharge of his duties. However, the issue is whether the county administrator can control the clerk of court's expenditure of funds which are for the exclusive use of the clerk. Our Office has addressed similar situations in which there was a conflict between a county and an officer or an agency over the officer's or agency's expenditure of funds which were not county funds. In our July 31, 1991 opinion⁵, we considered whether a county could control a sheriff's department's expenditures of money obtained from drug forfeitures. We reviewed Section (3)(B) of Act No. 604 of 1990, part (6), which provided:

[t]he first one thousand dollars of any cash seized and forfeited pursuant to this article remains with and is the property of the law enforcement agency which effected the seizure unless otherwise agreed to by the law enforcement agency and prosecuting agency.⁶

After a review of our prior opinions, we determined that:

the first one thousand dollars of forfeiture funds is considered to be the property of the appropriate law enforcement agency. Prior advice of this Office as noted has indicated that these funds should not be considered county funds or funds subject to county approval or regulation. Nor do we believe the county could identify these funds to supplant current or future items in a sheriff's budget. As to use of the funds, it is our conclusion that these funds can be used for general law enforcement expenses of a department. However, as specified, these funds could not be expended in a manner inconsistent with [state or county] provisions restricting the use of public funds generally.

Id.

In our June 9, 1995 opinion⁷, the issue was whether a clerk of court had to follow a county's procurement procedures to expend funds he had received pursuant to a contract with the South Carolina Department of Social Services. We opined that the funds were for the exclusive use of the clerk of court and that the county could not take any action which would deny the clerk the exclusive use of the funds (which was not disputed by the county). However, we concluded that the county's procurement policies or regulations should be followed by the clerk of court while expending the funds.

⁴ In Butler, the Court discussed how an administrative order from the Chief Justice also granted the clerk of court the authority to assign offices and possess the keys to the offices in the courthouse.

⁵ See Op. S.C. Atty. Gen., July 31, 1991 (1991 WL 633027).

⁶ The forfeiture law has been amended and this language is currently found in S.C. Code Ann. § 44-53-530(f) (1976 Code, as amended).

⁷ See Op. S.C. Atty. Gen., June 9, 1995 (1995 WL 803674).

After reviewing section 4-9-650, we explained in the June 9, 1995 opinion that county procurement policies were exceptions to section 4-9-650, since they qualified as “organizational policies established by the governing body.”⁸ We relied upon a prior opinion of this Office dated February 7, 1978, in which the Honorable Karen LeCraft Henderson, then Assistant Attorney General, opined:

First, there is no language in the provisions of the “home rule” legislation that would provide the [county] council with the authority to add to the duties of, or alter the functioning of, an elected official other than in areas such as employee grievances [§4-9-30(7), CODE OF LAWS OF SOUTH CAROLINA, 1976], the establishment of an accounting and reporting system [§4-9-30(8), CODE OF LAWS OF SOUTH CAROLINA, 1976] and of a centralized purchasing system [§4-9-160, CODE OF LAWS OF SOUTH CAROLINA, 1976] and the submission to it of annual fiscal reports from all county offices, departments, boards, commissions or institutions receiving county funds [§4-9-140, CODE OF LAWS OF SOUTH CAROLINA, 1976]. . . .

Id. (quoting Op. S.C. Atty. Gen., February 7, 1978 (1978 WL 34687)).

We stated in regard to the February 7, 1978 opinion:

Citing to §4-9-650, supra, she [Karen LeCraft Henderson] further opined that the phrase “organizational policies” would include “those areas in which the Council is expressly authorized to act, e. g., in handling employee grievance matters, in establishing accounting, reporting and purchasing systems and in formulating budgetary matters.”

Id.

Based upon the aforesaid, it is our opinion that a clerk of court has exclusive use of the bail bondsmen fees and a county administrator has no authority to control the expenditure of the funds. However, the clerk of court must comply with a county’s accounting, reporting, and purchasing systems and submit annual fiscal reports. And the clerk of court can not expend the fees in a manner inconsistent with state or county provisions restricting the use of public funds.

You also ask whether a clerk of court may use the bail bondsmen fees to pay his employees a “small moral[e] improvement incentive.” Our Office has determined in many prior opinions that bonus payments (or such pay that amounts to bonus payments) to county employees are prohibited under the South Carolina Constitution and by statute. In an August 1, 2016 opinion, we gave a thorough analysis:

Article III, Section 30 of the South Carolina Constitution states:

The General Assembly shall never grant extra compensation, fee or allowance to any public officer,

⁸ See S.C. Code Ann. § 4-9-650, supra.

agent, servant or contractor after service rendered, or contract made, nor authorize payment or part payment of any claim under any contract not authorized by law; but appropriations may be made for expenditures in repelling invasion, preventing or suppressing insurrection.

S.C. Const. Art. III, § 30 (emphasis added). The Supreme Court of South Carolina has interpreted “extra compensation” to mean “any compensation over and above that fixed by law or contract at the time the service was rendered.” State ex rel. McLeod v. McLeod, 270 S.C. 557, 559, 243 S.E.2d 446, 447-448 (1978) (emphasis added); see also Bynum v. Barron, 227 S.C. 339, 346, 88 S.E.2d 67, 70 (1955) (upholding the validity of an act of the General Assembly under Article III, Section 30 to the extent it authorized a change in compensation for county officers prospectively, but disallowed portions permitting a retroactive change in compensation). Similarly, Section 4-11-170 of the South Carolina Code of Laws prohibits county governing body members from voting to pay an “extra allowance to any person who is paid by salary.” This section also prohibits the county treasurer from knowingly paying an extra allowance to any such person. Id.

This Office has interpreted Article III, Section 30 and Section 4-11-170 to limit the power of county governments as granted by the General Assembly. Op. S.C. Atty. Gen., 2003 WL 22970989 (December 11, 2003). We have repeatedly taken the position that bonus payments, or payments which would amount to bonus payments, are prohibited when they are “made after services have been rendered or a contract fulfilled.” Op. S.C. Atty Gen., 2003 WL 22970989 (December 11, 2003); 2013 WL 3762704 (July 8, 2013) (“the ‘[u]se of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public employees is unconstitutional if it is greater than that which the State [or political subdivision] has a contractual or legal obligation to provide.”); 1990 WL 599252, at *2 (April 3, 1990) (“Article III, Section 30 would prohibit the payment of additional compensation to public officers, agency, employees, or the like after services have been rendered. To avoid difficulties relative to this constitutional prohibition, compensation or increases thereof should be undertaken prospectively.”); 1989 WL 406130 (April 3, 1989) (S.C. Const. Art. III, § 30 and § 4-11-170 specifically prohibit “bonus payments, retroactive compensation or severance pay” as extra compensation “where such uses of public funds were not fixed by law at the time services were rendered by the public employee.”).

Based upon our August 1, 2016 opinion, we believe that a clerk of court can not use the bail bondsmen fees to pay his employees a “small moral[e] improvement incentive.” A clerk of court can not pay an employee compensation which is greater than the amount that the employee agreed to work for under contract or that is greater than the employee’s salary. A clerk of court also can not pay an employee after the work has been performed. However, contracts providing for a regular salary plus bonuses for service for a stated period of time are legally enforceable and may be a method for a clerk of court to reward employees for their continuous hard work. Although please keep in mind that pursuant to section 8-15-10,⁹ the county council sets the compensation for county officers and employees.

In your opinion request, you emphasize that the bail bondsmen fees are not part of the county general funds. However, the bail bondsmen fees are public funds. See Op. S.C. Atty. Gen., February 1, 1996 (1996 WL 93962) (quoting Droste v. Kerner, 34 Ill.2d 495, 217 N.E.2d 73 (1966)) (“public funds” are “moneys belonging to a government, or any department of it, in the hands of a public official”). As stated in our August 1, 2016 opinion, “the ‘[u]se of public funds to provide any form of compensation (extra compensation, insurance payments, pension payments, etc.) for public employees is unconstitutional if it is greater than that which the State [or political subdivision] has a contractual or legal obligation to provide.” Op. S.C. Atty. Gen., August 1, 2016, supra (quoting Op. S.C. Atty. Gen., July 8, 2013 (2013 WL 3762704)). Furthermore, we determined above that a clerk of court can not expend the bail bondsmen fees in a manner inconsistent with state or county provisions restricting the use of public funds.

CONCLUSION:

In our opinion, a clerk of court has exclusive use of the bail bondsmen fees and a county administrator has no authority to control the expenditure of the funds. However, the clerk of court must comply with a county’s accounting, reporting, and purchasing systems and submit annual fiscal reports. And the clerk of court can not expend the fees in a manner inconsistent with state or county provisions restricting the use of public funds.

Additionally, we believe that a clerk of court can not use the bail bondsmen fees to pay his employees a “small moral[e] improvement incentive.” A clerk of court can not pay an employee compensation which is greater than the amount that the employee agreed to work for under contract or that is greater than the employee’s salary. A clerk of court also can not pay an employee after the work has been performed. However, contracts providing for a regular salary plus bonuses for service for a stated period of time are legally enforceable and may be a method for a clerk of court to reward employees for their continuous hard work. Although please keep in mind that pursuant to section 8-15-10, the county council sets the compensation for county officers and employees.

Please be aware that this is only an opinion as to how this Office believes a court would interpret the law in this matter.

⁹ S.C. Code Ann. § 8-15-10 states:

[e]xcept as otherwise provided or as prohibited by the Constitution of this State, the compensation of all officers and employees of the 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.

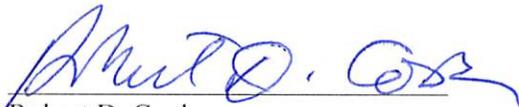
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Sincerely,

A handwritten signature in blue ink that reads "Elinor V. Lister". The signature is written in a cursive style with a small mark above the 'i' in "Lister".

Elinor V. Lister
Assistant Attorney General

REVIEWED AND APPROVED BY:

A handwritten signature in blue ink that reads "Robert D. Cook". The signature is written in a cursive style with a horizontal line underneath the name.

Robert D. Cook
Solicitor General