



ALAN WILSON
ATTORNEY GENERAL

November 28, 2018

The Honorable Alan D. Clemmons
Chairman, Rules Committee
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 29211

Dear Chairman Clemmons:

You have asked for our opinion as to whether there is any prohibition with respect to the Governor ordering state employees not to do business with a company which discriminates against the State of Israel. You note that “[t]he virtual short-term rental property platform, Airbnb announced yesterday that it will no longer offer rental property listing of Jewish homes in the Israeli territories of Judea and Samaria.” You reference § 11-35-5300 as setting forth the State’s policy prohibiting state agencies and political subdivisions from doing business with companies which discriminate on the basis of religion or national origin. In addition you have enclosed an article from the Wall Street Journal authored by a professor at George Mason University’s School of Law, dated November 25, 2018, (“Airbnb’s Anti-Israel Hypocrisy”) which states:

[u]nder Airbnb’s policy, an American Jew with a rental property in the West Bank is barred from listing it for rent on the website. But an American Arab is welcome to list his home a few hundred meters away, even though the Palestinian law forbidding real estate deals with Jews carries a maximum penalty of death. That openly racist policy doesn’t trigger Airbnb’s delisting policy.

See www.wsj.com/articles/airbnbs-anti-Israel-hypocrisy-1543175767.

Law/Analysis

S.C. Code Ann. § 11-35-5300(A) provides that:

- (A) A public entity may not enter into a contract with a business to acquire or dispose of supplies, services, information technology, or construction unless the contract includes a representation that the business is not currently engaged in, and an agreement that the business will not engage in, the boycott of a person or an

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entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in this article.

The statute was enacted as Act No. 63 of 2015. Various terms contained in subsection (A) are defined in the Act. The Act reflects the policy of South Carolina that the State will not do business with a company which is currently boycotting “a person or entity” when “the action is based on race, color, religion, gender, or national origin of the targeted person or entity.” The statute further excludes from its reach those actions of a company “based on business or economic reasons” or sections applied in a nondiscriminatory manner.” Subsection B. It is your contention that the company Airbnb is discriminating against Jewish property owners who rent in the West Bank because other property owners are not included in any action by Airbnb.

Of course, this Office is not authorized to determine facts in any opinion issued. As we have consistently stated, “only a court, not this Office, may serve as a finder of fact and conclusively determine the outcome of a factual issue.” Op. S.C. Att’y Gen., 2009 WL 2406412 (July 7, 2009) (quoting Op. S.C. Att’y Gen. August 24, 2006). Thus, we cannot determine herein whether § 11-35-5300 is applicable to the Airbnb situation because such inquiry would require a factual investigation. What we can say about § 11-35-5300 is that the statute represents the overarching policy of the State that it will not do business with companies which engage in discriminatory boycotts, as defined.

Your question, however, focuses more upon the Governor’s authority and whether the Governor is authorized to address this issue upon a thorough examination by him. Your thought is that the Governor could, if he deemed it warranted, bar state employees from doing business with Airbnb by using the company to book accommodations and have the State reimburse the employee for lodging on official business. Of course, such would be a matter for the Governor to determine.

In South Carolina the Governor is the chief magistrate and the State’s “supreme executive authority.” S.C. Constitution, Art. IV, § 1. He or she is “charged with executing the law.” State v. Edwards, 383 S.C. 82, 91, 678 S.E.2d 412, 417 (2009). As the Edwards Court further recognized, “[e]xecutive agencies are required to comply with the General Assembly’s enactment of a law until it has been otherwise declared invalid.” Id.

In Heyward v. Long, 178 S.C. 351, 377, 183 S.E. 145, 156 (1935), our Supreme Court held that under the American system of government, the Governor possesses no prerogative powers, but is confined to the exercise of powers conferred upon him by the Constitution and statutes. Pursuant to South Carolina’s Constitution, the Governor is required to “take care that the laws be faithfully executed.” S.C. Const., Art. IV, § 15.

Executive orders by the Governor “are a method for the [Governor] to ensure that the laws are faithfully executed.” 83 C.J.S. States § 257. The “take care” clause authorizes a chief executive, such as the President or Governor, to “supervise and guide” executive officers and

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employees in the construction of statutes so as to secure a “unitary and uniform execution of the laws. . . .” Myers v. U.S., 272 U.S. 52, 135 (1926).

We addressed a similar situation to the one presented by you in Op. S.C. Att’y Gen., 1971 WL 17589 (No. 3216) (November 30, 1971) in the context of the Governor’s authority under Art. IV, § 15. There, former Attorney General McLeod opined:

[t]he Constitution imposes the duty upon the Governor to see that the laws be faithfully executed, and it appears clear that this mandate includes the power to make certain that no invidious discrimination in public employment exists. The constitutional right to be free of such discrimination is certainly a part of the law of this State.

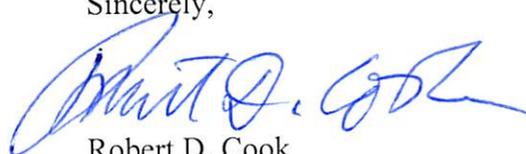
I conclude that this constitutionally vested authority places in the Governor a right of inspection superior to that of the public when the purpose of the Governor’s inspection is to see that discrimination does not exist.

Thus, consistent with other existing laws, General McLeod concluded that, pursuant to Art. IV, § 15, the Governor possessed the authority to investigate and determine whether discrimination existed in public employment. Likewise, here, the Governor possesses the constitutional power to investigate and address discrimination by a company such as Airbnb by prohibiting government employees from using this company to book accommodations as part of their official duties and to be reimbursed therefor. As in the 1971 opinion, there is a “constitutional right to be free” of discrimination as part of State law. Of course, herein, we are addressing only the Governor’s constitutional authority, and not whether or not he chooses to exercise such authority for this purpose.

Conclusion

Section 11-35-5300 represents the public policy of the State that it will not do business with companies which engage in discriminatory boycotts. Pursuant to Art. IV, § 15 of the South Carolina Constitution, the Governor possess the constitutional authority to address the situation concerning Airbnb. Such authority would include, should the Governor see fit, to mandate that public employees not book accommodations through this company as part of their official duties and to be reimbursed therefor. Of course, the exercise of any such authority is a matter for the Governor to determine within his sound discretion.

Sincerely,



Robert D. Cook
Solicitor General