

SEC AO98-003

November 19, 1997

SUBJECT: COUNTY GOVERNMENT SELLING SERVICES TO THE PRIVATE SECTOR.

SUMMARY: The Ethics Reform Act does not prohibit a County government from selling the services of a county employee to the private sector.

QUESTION: The Attorney for the County of Charleston asks whether the county, which has acquired expertise in a certain field, can use the expertise in the private sector for profit.

The Charleston County Attorney asks for an opinion concerning a proposal to assign a County employee the duty to provide specialized training to the private sector with the County retaining any profit.¹ The county proposes to amend a full-time employee's position description to include the duty of delivering a specified number of specialized lectures and training sessions per year to the private sector. Payment for the services of the employee will be made directly to the County rather than the employee.

At the time the employee was hired, he was authorized by the County to engage in off-duty employment consisting of presenting nationwide lectures and training in matters concerning hazardous materials. The original employment agreement resulted in the employee being permitted to present lectures and training throughout the country while on annual leave or in a leave without pay status. The employee received off-duty compensation directly from the recipients of the services.

The County and employee are considering a modification to the employee's job duties to provide that the employee provide hazardous materials training in the employee's official capacity. The County would charge the private sector recipient a fee for the employee's services. Payment for the services rendered would be made directly to the County, credited to the County General Fund, and directed to

¹ This is a question which must be addressed to the Attorney General's Office.

the County's Hazardous Materials Department where the employee is stationed. The County states that the employee will receive no increase in salary nor will the employee receive any additional benefits resulting from the arrangement. The County attorney asks if the arrangement would be considered a potential violation of S.C. Code § 8-13-705 or 8-13-715.

DISCUSSION:

This opinion is rendered in response to a letter dated October 9, 1997 requesting an opinion from the State Ethics Commission. The Commission's jurisdiction is limited to the applicability of the State Ethics Act, S.C. Code § 2-17-10; 8-13-100 (Supp. 1996). This opinion does not supersede any other statutory or regulatory restrictions or procedures which may apply to this situation.

S.C. Code § 8-13-705 states:

- (A) A person may not, directly or indirectly, give, offer, or promise anything of value to a public official, public member, or public employee with the intent to:
 - (1) influence the discharge of a public official's, public member's, or public employee's official responsibilities;
 - (2) influence a public official, public member, or public employee to commit, aid in committing, collude in, or allow fraud on a governmental entity; or
 - (3) induce a public official, public member, or public employee to perform or fail to perform an act in violation of the public official's, public member's, or public employee's official responsibilities.
- (B) A public official, public member, or public employee may not, directly or indirectly, knowingly ask, demand, exact, solicit, seek, accept, assign, receive, or agree to receive anything of value for himself or for another person in return for being:
 - (1) influenced in the discharge of his official responsibilities;
 - (2) influenced to commit, aid in committing, collude in, allow fraud, or make an opportunity for the commission of fraud on a governmental entity; or

S. C. Code § 8-13-715 states:

A public official, public member, or public employee acting in an official capacity may not receive anything of value for speaking before a public or private group. A public official, public member, or public employee is not prohibited by this section from accepting a meal provided in conjunction with a speaking engagement where all participants are entitled to the same meal and the meal is incidental to the speaking engagement. Notwithstanding the limitations of Section 2-17-90, a public official, public member, or public employee may receive payment or reimbursement for actual expenses incurred for a speaking engagement. The expenses must be reasonable and must be incurred in a reasonable time and manner in which to accomplish the purpose of the engagement. A public official, public member, or public employee required to file a statement of economic interests under § 8-13-1110 must

report on his statement of economic interests the organization which paid for or reimbursed actual expenses, the amount of such payment or reimbursement, and the purpose, date, and location of the speaking engagement. A public official, public member, or public employee who is not required to file a statement of economic interests but who is paid or reimbursed actual expenses for a speaking engagement must report this same information in writing to the chief administrative official or employee of the agency with which the public official, public member, or public employee is associated.

Generally speaking, S.C. Code § 8-13-705 prohibits giving and receiving a thing of value in order to influence an individual's performance of "official responsibilities". S.C. Code § 8-13-715 prohibits giving or receiving a thing of value in return for speaking in one's "official capacity". Under the facts presented, we do not believe that either prohibition is called into question.

The term "official responsibilities" is defined to mean the direct administrative or operating authority, whether intermediate or final and whether exercisable personally or through subordinates, to approve, disapprove, or otherwise direct government action. S.C. Code § 8-13-100(23) (Supp. 1996). "Official capacity" is defined to mean activities which: (a) arise because of the position held by the public official, public member, or public employee; (b) involve matters which fall within the official responsibility of the agency, the public official, the public member, or the public employee; and (c) are services the agency would normally provide and for which the public official, public member, or public employee would be subject to expense reimbursement by the agency with which the public official, public member, or public employee is associated. S.C. Code § 8-13-100(30) (Supp. 1996).

This Commission has repeatedly held that the application of S.C. CODE § 8-13-705 is fact dependant and judged on the intent of the donor and the donee. An arms-length commercial transaction between the government and the private sector where no individual² is compensated and all monies are paid directly to the governmental entity does not, without more, cause the Commission to find a reasonable likelihood of potential overreaching or the creation of an environment inviting corruption. Therefore, S.C. Code § 8-13-705 appears inapplicable under the facts submitted.

² The Ethics Reform Act defines an individual as one human being. S. C. Code §8-13-100(20) (Supp. 1996).

As to the manner of payment, a fee for services rendered is not an honorarium³. However, even characterized as an honorarium, the Commission has approved of an agency policy permitting payment of honoraria to the agency rather than the employee; however, the agency was advised that requests for expense reimbursement should be channeled through the agency in advance. SEC AO92-023. Concerning contractual arrangements such as the one anticipated, the Budget and Control Board's division of Human Resource Management (HRM) was advised that it could obtain expense reimbursement from an agency or group to whom services were provided. The Commission noted that HRM had a contract specifying reimbursement of travel and lodging between agencies and this was permitted provided there was no payment made directly to an employee. SEC AO 92-061. Thus, the method of payment appears to be in conformity with the Ethics Reform Act as long as no money is paid to the individual employee other than reimbursement for actual expenses as permitted in S.C. Code § 8-13-715(Supp. 1996).

As a final matter, we note that the Ethics Reform Act prohibits an employee from receiving money in addition to that received in his official capacity for advice or assistance given in the course of employment. S.C. CODE § 8-13-720 (Supp. 1996). Reimbursement for actual expenses incurred in participating in a speaking engagement will not be found to constitute receipt of additional money as provided in that statute as long as reimbursement or payment of expenses complies with S.C. Code § 8-13-715 (Supp. 1996). Thus, the County is cautioned to implement a contractual arrangement with the private sector anticipating the payment of the employee's expenses and providing for payment or reimbursement of expenses authorized by S.C. Code § 8-13-715 (Supp. 1996). The employee should also be adequately informed of his obligation to file a Statement of Economic Interests reporting the organization which reimbursed actual expenses, the amount and the purpose, date and location of the speaking engagement. If the employee is not required to file a Statement of Economic Interests but is reimbursed expenses, he must report the same information in writing to the chief administrative official or employee of the County. If the expenses are incurred out of state, the employee must receive prior written approval for reimbursement from the chief executive of the County. S.C. Code § 8-13-715 (Supp. 1996).

Based on the foregoing, it is our opinion that the Ethics Reform Act of 1991 does not prohibit a County government from selling services to the private sector. However, the payment or reimbursement of expenses incurred by the employee in his official capacity is controlled by S.C. Code § 8-13-715 (Supp.1996).

The State Ethics Commission lacks jurisdiction to render an opinion on whether the Home Rule Act allows political subdivisions to make money from the provision of public services.

³ The Secretary of State defined an honorarium as an amount paid without fee being set in advance. *Black's Law Dictionary, Fifth Ed.* defines honorarium "an honorary or free gift; a gratuitous payment as distinguished from hire or compensation for service. A voluntary reward for which no remuneration could be collected by law."