

A simple review of the chain of events, actions and inactions taken by the "South Carolina State Blue Ribbon Advisory Committee" (the "Advisory Committee"), the Joint Bond Review Committee (the "JBRC") and the S.C. Budget and Control Board (the "B&CB") pursuant to Proviso 19.2 of the 2014-15 Annual Appropriations Act reveals a textbook example of the unlawful delegation of legislative authority, the illegal appropriation of public funds, and the resulting abuse of unbridled power. The S.C. Office of the Attorney General has standing to take action against the JBRC, and given the \$12 million of public funds at issue, has a duty to do so regardless of political heavy-handedness. Simply put, unlawful acts are unlawful acts regardless of the perpetrators' position, power or possible motives.

Proviso 19.2 of the 2014-15 Annual Appropriations Act established the Advisory Committee to be composed of current and former state university presidents. The Proviso called for the President and Board of Trustees of S.C. State University, in consultation with the Advisory Committee, to "develop a budgetary plan to reduce expenditures and stabilize the university," and to approve and implement this budgetary plan in a manner that "must prevent the university from running another other funds operating deficit." The Proviso states that "[u]pon certification by the advisory committee that funds for implementation of the budgetary plan are required," the university must forward the budgetary plan to the JBRC for approval. The Proviso then requires the B&CB to "identify accounts from which the State Treasurer must transfer to the university" the amount of funds required by the budgetary plan and approved by the JBRC. While the Proviso mentions the possibility of the budgetary plan including a recommendation of a loan, there is no requirement in the Proviso that S.C. State repay any funds it receives. The authors of the Proviso, who apparently foresaw or anticipated legal challenges to, or potential litigation concerning, the implementation of the Proviso, concluded the Proviso with a provision that protects the Advisory Committee from civil liability. More specifically, the Proviso ends by stating members of the Advisory Committee "shall be indemnified in the same manner as members of the Retirement System Investment Commission, *mutatis mutandis*."

The Advisory Committee submitted a rudimentary one-page budgetary plan to the JBRC calling for the State to "loan" S.C. State \$12 million in public funds over three years. On December 3, 2014, the JBRC – which consists of five members of the Senate and four members of the House of Representatives – approved the budgetary plan, thus requiring the B&CB, in accordance with the Proviso, to identify accounts from which the \$12 million in public funds would be transferred. Missing from the budgetary plan and the Proviso? Any language mentioning a note<sup>1</sup> or indicating S.C. State is required to, or even intends to, repay the State and its taxpayers the \$12 million. What does this mean? S.C. State is set to receive, courtesy of unlawful decisions made by the Advisory Committee and the JBRC, a \$12 million gift in the form of taxpayer dollars.

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<sup>1</sup> The legal definition of a "loan" is "[a] thing *lent* for the borrower's temporary use; esp., a sum of money *lent* at interest." Black's Law Dictionary (9th ed. 2009) (emphasis added). To "lend" means "[t]o provide (money) temporarily *on condition of repayment, usu. with interest*." *Id.* (emphasis added). It is rare, if not unheard of, for \$12 million loans (albeit, lawful ones) to not be evidenced in writing by a note that specifically defines repayment terms. When Treasurer Loftis asked at the December 8, 2014 B&CB meeting "who will sign the note?," Senator Leatherman replied that no note is necessary and the Proviso can be relied upon to transfer the funds. Comptroller General Eckstrom voiced his concerns, noting that this amounts to an appropriation.

Of course, the traditional (and lawful) manner in which State funds are appropriated is through the Annual Appropriations Act. While the Legislature undoubtedly possesses the sole authority, as between the three branches of government, to appropriate public funds, our State Supreme Court has *repeatedly* held that *legislative authority may not be delegated*. The Court has held that an unlawful delegation of legislative authority occurs when the Legislature makes a law which "vests unbridled, uncontrolled or arbitrary power in an administrative agency." Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978). More specifically, the Court has held that the Legislature is absolutely prohibited from delegating its appropriation power, even if the attempted delegation is to a committee composed of its own members. See State ex rel. McLeod v. McInnis, 278 S.C. 307, 295 S.E.2d 633 (1982); State ex rel. Condon v. Hodges, 349 S.C. 232, 562 S.E.2d 623 (2002). Such holdings have been reiterated in several opinions issued by the S.C. Attorney General's Office. See Ops. S.C. Att'y Gen., 2006 WL 269606 (Jan 24, 2006); 2005 WL 3352845 (Dec. 2, 2005); 2003 WL 22862787 (Nov. 13, 2003).

Part of the rationale underlying the Court's decisions is the simple notion that determinations concerning matters which are solely within the province of the Legislature – *e.g.*, the passage of laws or the appropriation of funds – should be made by the *entire* legislative body pursuant to the established legislative process. When such powers are delegated to a select few or to an administrative body with little to no restrictions, they become subject to abuse and the unbridled, arbitrary exercise of such powers.

The instant case provides a textbook example of the unlawful delegation of legislative authority and the resulting abuse of unbridled power. Pursuant to the Proviso, the Advisory Committee and the JBRC were delegated the power to appropriate an undefined and *unrestricted* amount of public funds to S.C. State. Seizing upon this grant of unbridled authority, the Advisory Committee and the JBRC circumvented the legislative process and approved a transfer of \$12 million of taxpayer funds. The legislative process was entirely circumvented as the appropriation of the funds was *never* brought to a vote before the *entire* Legislature. Perhaps this is what was intended all along as it is widely acknowledged that the \$12 million appropriation, if properly brought to a vote before the entire General Assembly, would never have been approved.

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