The State of South Carolina

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DAVID M. PASCOE
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September 10, 2020

The Honorable Alan M. Wilson
S. C. Attorney General
P.O. Box 11549
Columbia, SC 29211

Dear Attorney General Wilson:

I write to raise serious concerns about your intent to pay two law firms $75 Million from the proceeds of a $600 Million settlement with the United States Department of Energy (DOE). I believe such payment is prohibited by South Carolina law and appears to violate the canons of ethics which govern licensed attorneys. I request that you, Governor McMaster, and our legislative leaders get together to resolve these issues to avoid potential litigation.

South Carolina law prohibits the appropriation of State funds by any officer in the Executive Branch of government. The $600 Million allocated in the Settlement Agreement with DOE are public funds allocated to South Carolina. You, of all people, know that an Attorney General has no authority to direct how those public funds are spent. Recently, you filed a Brief in the South Carolina Supreme Court emphasizing the very point that executive officers do not have authority to direct funds from a settlement agreement.

The following is a specific quote from your Brief:

> Executive officers...possess no authority to appropriate funds. Such authority lies exclusively with the General Assembly, which has directed that all such funds be deposited in the State's general fund...See, *Condon v. Hodges*, 349 S.C. 232, 245, 562 S.E.2d 623 (2002)["...there is no provision in the South Carolina Code or Constitution which provides that members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money."]. As this Court squarely held in McInnis, supra, expenditures of public funds cannot be controlled "by administration rather than by legislation." Such would give the executive branch a "veto" over the General Assembly." Id. Such would violate separation powers. Art. I, § 8.

State v. Quinn, Attorney General's Memorandum In Response to Court's Order of March 12 pg. 25.

This above quote is one of the few points I agree with in your Brief. When money is directed to go to the State's General Fund as in the case with the DOE Settlement Agreement, you nor the Governor have the authority to transfer those funds. Only the Legislature controls what happens with the $600 million.

The Legislature has spoken through S.C. Code Section 1-7-150. This statute requires you to deposit all funds received by judgment or settlement into the State's General Fund, and the exception for investigative costs and litigation costs awarded by court order or settlement in this statute clearly does not apply. There was not any order awarding attorneys' fees. The Settlement Agreement does not allocate any portion of the $600 Million to attorneys' fees. In fact, DOE specifically carved out attorneys' fees in the Settlement Agreement. Section 5(a) provides for:

> Immediate *payment by the United States to the State of South Carolina* in the amount of $600 Million (Six Hundred Million), inclusive of interest, *with each party to bear its own costs, attorneys fees and expenses.*

Section 5(a) clearly requires that payment of the entire $600 Million be made directly to the State of South Carolina, and S.C. Code Section 1-7-150 directs you to deposit $600 Million into the State's General Fund. These are public funds, not a slush fund to dole out money to private law firms.

Your agreement to pay private law firms also raises ethical concerns. Based upon the information I have been able to review, the agreement that you entered with these firms on behalf of the State appears to violate the South Carolina Rules of Professional Conduct. Rule 1.5 of the Rules of Professional Conduct, S.C. App Ct. Rule 407 states that a "lawyer shall not make an agreement for, charge, or collect an unreasonable fee." Contingency fees are not exempt from this reasonable standard. *Id.* at Note 3. Fee agreements that run afoul of Rule 1.5 are unenforceable. See, *Getzen v. L. Offices of James M. Russ, P.A.* 323 S.C. 377, 475 S.E.2d 743 (2006). At the very least, I believe it would be prudent to seek an opinion from the South Carolina Bar Ethics Advisory Committee regarding the fee amount.

The payment of a $75 Million fee for the services performed by the law firms in this matter seems arbitrary and unreasonable. This is public money. It belongs to the Citizens of South Carolina, and awarding private law firms $75 Million is unconscionable when one considers it is almost 13 times the total amount every Solicitor's Office in the State receives in annual state judicial circuit support. This is more than the State funding received by all 32 of the Solicitors' Offices and Public Defenders' Offices combined. It is more than our State provides our entire Judiciary in annual funding. In fact, it is even 5 times more than the annual base budget for the Attorney General's Office. Perhaps most egregious is your attempt to award more money to

private law firms than will probably be received by the counties directly impacted by the storage of plutonium.

These law firms unsuccessfully filed suit to enforce a settlement reached by Governor Hodges which is codified in the United States Code at 50 USC § 2566. The federal statute requires DOE to pay South Carolina $100 Million per year for each year it fails to meet certain deadlines relating to the processing and disposition of surplus defense plutonium stored at the Savannah River Site (SRS). DOE never contested that it failed to comply with federal law. Rather, DOE took the position in federal court that Congress had not appropriated money from which DOE could pay the penalty.

Your lawyers first sued in federal court in South Carolina to collect the $100 Million penalty for failing to comply with the statute in 2017. The federal court dismissed this claim, ruling that any such lawsuit had to be filed in the U.S. Court of Claims. Subsequently, your lawyers refiled the same suit before the Court of Claims, this time seeking $200 Million because DOE had not complied with the statute for 2018. Once again, your lawyers lost the case. The Court of Claims ruled with DOE. Your lawyers then appealed the ruling to the U.S. Court of Appeals for the D.C. Circuit. While the appeal was pending, you reached this settlement with DOE.

From court records, it does not appear your lawyers engaged in any discovery whatsoever. I can't find any record of them serving interrogatories; taking depositions; hiring experts; or obtaining documents from DOE. Instead, your lawyers only drafted pleadings and wrote briefs to address the legal question of whether DOE is required to pay South Carolina the statutory penalty from funds appropriated by Congress. Quite frankly, I do not understand why our State felt the need to bring in private counsel in the first place to deal with a relatively straightforward issue that government leaders were ultimately able to negotiate among themselves.

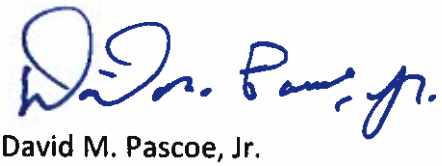
Under the terms of the settlement, you have agreed on behalf of the people of South Carolina to forgo enforcing their federal rights to have the plutonium removed or processed for another 15 years. In exchange, DOE has agreed to pay South Carolina a substantially reduced penalty of $600 Million. As you acknowledged in your press release, this was a political resolution brokered by elected leaders, including Governor McMaster and Senator Graham. Yet, you now plan to pay private lawyers a contingency fee on the entire $600 Million when they only sued for $200 Million. This makes absolutely no sense, and I agree with Governor McMaster's objection to your intention to pay $75 Million to these law firms.

The contingency fee agreement that you entered with these law firms is more favorable to the lawyers than your standard contingency fee agreements entered in other cases. Under the payment terms of your standard agreements, these law firms would have been entitled to receive approximately $25 Million, not $75 Million. Curiously, you have never posted the fee agreement for this matter on your office's official website, yet you have other contingency fee agreements posted: http://www.scag.gov/litigation-retention-agreements.

Finally, this deal reeks of political cronyism. The attorneys reportedly receiving this unconscionable amount of state funds are your closest political friends. Mr. Mustian's wife works for your campaign. In addition, you worked for Mr. Willoughby's law firm when you first ran for Attorney General, and your office has already awarded his firm approximately $7 Million for representing the State in a prior contingency fee matter.[1]

$75 Million is an enormous amount of money that can be used to make a real difference in the lives of South Carolinians. You cannot lawfully give funds directed to go into the State General Fund to your political friends and even if you could, you should not. I request that you do the right thing as a constitutional officer of our State and seek approval from our General Assembly before you make any attempt to pay public funds to private law firms.

Respectfully yours,



David M. Pascoe, Jr.
First Circuit Solicitor

cc: The Honorable Henry D. McMaster, Governor
The Honorable Curtis M. Loftis, Jr., Treasurer
The Honorable Richard A. Eckstrom, Comptroller General
President Pro Tem Hugh K. Leatherman, Sr., South Carolina Senate
Minority Leader Nikki G. Setzler, South Carolina Senate
The Honorable James H. "Jay" Lucas, Speaker of the S. C. House of Representatives
The Honorable James T. Rutherford, Minority Leader of S. C. House of Representatives
The Honorable G. Murrell Smith, Jr., Chairman of S. C. House Ways and Means

[1] https://www.postandcourier.com/politics/attorney-general-alan-wilsons-2010-campaign-loan-ties-to-quinns-draw-scrutiny-as-probe-lingers/article_c87f8a04-19fe-11e7-8c09-0be393963ec6.html