OFFICIAL OPINION NO. 89-40, Structure and operation of Airline Authority

December 29, 1989

Mr. Richard L. Howard, Secretary
S.D. Department of Transportation
DOT Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 89-40

Structure and operation of Airline Authority

Dear Mr. Howard:

You have requested an official opinion from this Office with regard to the following factual situation.

FACTS:

The S.D. Airline Authority is contemplating the selection of a provider of airline service pursuant to Chapter 50-14 in SDCL, generally. It is expected that a contract will be entered into with a provider. As a condition of the contract the provider may be required to identify its aircraft as operating under the auspices of the Airline Authority by use of a logo affixed to the aircraft.

The Airline Authority consists of seven members appointed by the Governor with advice and consent of the Senate.

Public funding will be expended by the Authority in providing the contemplated air service.

Based on the above facts, you have asked the following questions.

QUESTIONS:

1. Do competitive bid laws apply to selection of a provider of service or may such selection be done on the basis of negotiation?

2. What is the liability exposure of the Airline Authority and its individual members, personally, in entering into an agreement for providing air service as contemplated by Chapter 50-14, SDCL?

a. Does the use of a logo on the aircraft which identifies it as operating under the auspices of the Airline Authority enhance the exposure to liability?

3. In entering into an agreement for air service and in operating an air service, are the Authority and individual members subject to the coverage of the PEPL Fund or immune from suit?

IN RE QUESTION NO. 1:

The South Dakota Legislature in 1989 created the Airline Authority which is "a body corporate and politic" authorized to develop and improve intra-state airline operations in order to provide airline services to the State's citizens on a regularly scheduled basis at reasonable cost and expense. It is my opinion that for the limited purpose of the public bid laws, the Airline Authority is a state agency under SDCL ch. 5-23 which is not exempt under that chapter or elsewhere from the competitive bidding provisions. Any purchase or lease by the Airline Authority that is subject to SDCL ch. 5-23 competitive bid provisions is required to be bid. Therefore, if public funds are to be expended, you must comply with the bid laws in the selection of a provider of intra-state airline services.

The South Dakota Supreme Court, in reviewing competitive bidding provisions, stated in Bak v. Jones County, 87 S.D. 468, 475, 210 N.W.2d 65, 69 (1973):

Since they are based upon public economy and are of great importance to the taxpayers, laws requiring competitive bidding as a condition precedent to the letting of public contracts ought not be frittered away by exceptions, but, on the contrary, should receive a construction always which will fully, fairly, and reasonably effectuate and advance their true intent and purpose, and which will avoid the likelihood of their being circumvented, evaded or defeated.

Applying this legal premise, the Supreme Court has determined that local governmental bodies under SDCL ch. 5-18 were required to competitively bid services such as the collection of garbage and the transportation of students. See Northern Hills Sanitation v. Board of Commissioners, 272 N.W.2d 835 (S.D. 1978); Rapid City Area School Dist. v.

Black Hills, 303 N.W.2d 811 (S.D. 1981). In my opinion, the providing of air transportation for state citizens and ground transportation for students is indistinguishable for competitive bidding purposes. It is also my opinion that under the facts you state, the differences in statutory language between the general competitive bid provisions under SDCL ch. 5-18 and those provisions that govern the Bureau of Administration in SDCL ch. 5-23 are inconsequential. The South Dakota Supreme Court interpreted the phrase in SDCL ch. 5-18: "For the purchase of materials, supplies or equipment. . ." to include transportation of students. Thus, the comparable language of SDCL ch. 5-23 should include the transportation of citizens within the State.

The Airline Authority is, however, subject to the competitive bid provisions of SDCL ch. 5-23 and not those of SDCL ch. 5-18. SDCL ch. 5-23 requires the Bureau of Administration to purchase or authorize the purchasing of items for "each and every department of the state government, state institutions and state agencies, except when otherwise specifically provided. . ." A state "agency" has been defined under SDCL 1-26-1(1) to include state authorities. Absent any definition in SDCL ch. 5-23 or SDCL ch. 50-14 to the contrary, and absent a plain legislative intent to the contrary, SDCL 2-14-4 requires application of the SDCL 1-26-1(1) definition. Accordingly, it is my opinion that SDCL ch. 5-23 applies to purchases on behalf of the Airline Authority.

In expressing the above opinions, I am fully aware that the State Legislature has the power and authority to specifically exclude the Airline Authority from the competitive bid laws. Indeed, the South Dakota Legislature has specifically exempted other agencies, such as the South Dakota Health and Education Facility Authority (SDCL ch. 1-16A) and the State Cement Plant (SDCL ch. 5-17).

IN RE QUESTION NO. 2:

Your second question calls for an inquiry into the potential liability exposure of the Airline Authority and the members of the Board of the Authority. Whether liability will attach to any particular individual for any particular act is dependent upon specific facts relating to the identity of the individual, the character of his or her actions, the identity and action of the victim, the extent, nature, and cause of the injury, and the proclivities of the judge being called upon to make the determination. Accordingly, any opinions I express regarding this topic are to some degree speculative.

When addressing the liability of the Authority's board members, reference must be made to the concept of sovereign immunity. The South Dakota Supreme Court opinions regarding this subject are somewhat difficult to harmonize--one might call them erratic. See AGO 84-12. If the current state of the law is as set out in the case entitled In re Request for Opinion of Supreme Court, 379 N.W.2d 822 (S.D. 1985), the liability exposure of the Board members is limited to only such exposure as is covered by insurance or some type of risk sharing pool such as the Public Entity Pool for Liability set up in SDCL ch. 3-22. Prior to the issuance of the Court's adversary opinion, the Legislature enacted SDCL 21-32-16 and 17. The statutes provide:

21-32-16. To the extent such liability insurance is purchased pursuant to 21-32-15 and to the extent coverage is afforded thereunder, the state shall be deemed to have waived the common law doctrine of sovereign immunity and consented to suit in the same manner that any other party may be sued.

21-32-17. Except as provided in 21-32-16, any employee, officer or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity.

The Court said that the Legislature was acting within the broad authority of the South Dakota Constitution, art. III, 27, when it enacted those sections. In fact the Court stated that its own prior opinions on the subject had now been superseded by the Legislature's action in defining and limiting the scope of immunity for state employees. In 1986 the Legislature enacted SDCL 21-32A-2. That statute provides:

Except insofar as a public entity participates in a risk sharing pool or insurance is purchased pursuant to 21-32A-1, any employee, officer or agent of the public entity, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity. The immunity recognized herein may be raised by way of affirmative defense.

The Court has not had an opportunity to review this section; however, given the fact that it mirrors the language previously approved by the Court and applies it to risk sharing pools, one could expect a similar result.

At least three cases handed down by the Court since the In Re Opinion case cast some doubt, however, on the Court's dedication to the principles enunciated in that opinion. Bego v. Gordon, 407 N.W.2d 801 (S.D. 1987); Oien v. City of Sioux Falls, 393 N.W.2d 286 (S.D. 1986); and Foy v. South Dakota Cement Plant, 399 N.W.2d 340 (S.D. 1987) do not bode well for immunity to liability being afforded as discussed in In Re Opinion.

The foregoing discussion applies principally to the liability exposure of individual board members of the authority. Turning now to the liability of the Authority, itself, Foy imposed liability upon the South Dakota Cement Plant and indicated that absent some firm legislative action to the contrary that would be the most likely outcome when the State ventures into commercial activities. Given the Open Court's provision of our State Constitution it is possible that the Authority would have exposure to liability even if the Legislature specifically extended immunity to it.

Having said that liability may attach as a theoretical matter is a long step from saying there are circumstances in which this theoretical liability could or would actually be imposed. Since as a general matter the doctrine of respondeat superior does not apply to government agencies, a plaintiff would be quite limited in the theories upon which he could attach liability directly to the Authority. Of course, if the Authority acted in a reckless or careless manner such as imposing obligations upon the airlines it supports to fly regardless of the weather or in spite of other safety hazards, liability could attach. Generally, plaintiffs would attempt to attach liability through such theories as negligent selection and the like. The potential of liability for the Authority seems quite remote; however, the likelihood of it being named in a suit and having to defend itself is quite high. Accordingly, the Authority may wish to consider requiring, as a condition of contract with any operator, a provision that the provider be required to hold the State, the Authority, its board members, employees, and agents harmless from any liability arising as a result of the agreement.

You have also inquired whether the presence or absence of the State's logo on the aircraft would affect the liability situation. It is true that the presence of a logo may be used as part of the proof that some control or authority has been exercised by a parent or subsidiary. See 18 Am.Jur.2d Corporations, p. 59. Beyond doubt, the State's logo, standing alone, could not form the sole basis of any liability claim nor increase the exposure of the Authority and its board members. Of course, minuscule risk and far fetched examples could be supposed such as an individual being injured while placing the logo on the plane or the logo

being placed in such a manner that its obscured the pilot's vision. Such hypotheticals are not worthy of further mention.

As a general principle, then, the liability exposure of the Authority and its board members should not differ greatly from that experienced by a host of State agencies and their associated boards.

IN RE QUESTION NO. 3:

You inquire whether the entering into an agreement for air service and operation of air service by the authority is an activity that would be subject to coverage of the PEPL Fund. SDCL ch. 3-22 establishes a risk sharing pool known as the Public Entity Pool for Liability (PEPL Fund). Since the agreements activating the Fund presently provide coverage only for the employees of State and its agencies, the PEPL Fund is essentially a self-funded liability program for the State. There is nothing about the authorizing statutes that would lead to the conclusion that no coverage was afforded for activities or entities such as the Authority. There are, however, some restrictions on coverage to be found in the agreement between the Board of Directors or the PEPL Fund and the State of South Dakota. I have previously opined that the broad range of coverage possibilities found in the PEPL Fund legislation could be limited by agreement. See Official Opinion NO. 87-37.

As currently in effect, the Memorandum of Coverage between the PEPL Fund and the State of South Dakota excludes liability "arising out of the ownership, maintenance or use of any aircraft, except this exclusion shall not apply to the extent PEPL purchases insurance for such purpose." Coverage document, E,] 2. As I understand the facts that you have presented, it is not intended that the Authority own or maintain any aircraft. It could be argued that any liability exposure experienced by the Authority based upon the ownership or maintenance of aircraft by the organization the Authority contracts with to provide air service would be excluded by this provision. In addition, the coverage document excludes liability "arising out of the ownership, operation, engineering, or design of any airport, landing strip or similar facility." Coverage document, E,] 21. There is still another exclusion that could apply to agreements the Authority might enter into for provision of facilities for use by the air carrier.

It is simply not possible to determine with finality whether coverage is intended by the PEPL Fund under these facts. Accordingly, I would advise the Authority to request a determination from the Board of Directors of the PEPL Fund regarding whether liability

coverage exists under the current agreement. Should the PEPL Fund indicate that coverage exists, the Authority and its Board members should be entitled to rely upon that representation regarding coverage, up to the coverage limits. Should the PEPL Fund determine that coverage does not exist, the question would remain somewhat open. I say this because were an individual to be injured, it is very likely that a suit would be filed to determine whether a waiver of sovereign immunity, to the extent PEPL Fund coverage is afforded, has occurred. In any event, the Authority Board would then have the advantage of the PEPL Fund Board's opinion on this matter and could arrange its affairs accordingly.

The second part of your third question inquires whether immunity would apply. My discussion of your second question addresses this issue. In answer to your third question, given the ambiguity of the PEPL Fund's coverage document when considering the activities of the Authority, I would recommend that the Authority inquire from the Board of Directors of the PEPL Fund whether the Authority enjoys coverage at this time. You may also wish to explore the fact that the PEPL Fund is specifically authorized to purchase insurance for liability associated with aircraft.

Respectfully submitted,

ROGER A. TELLINGHUISEN
ATTORNEY GENERAL

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