



ALAN WILSON
ATTORNEY GENERAL

September 19, 2012

The Honorable John Courson
President *Pro Tempore*
The Senate of South Carolina
P. O. Box 142
Columbia, South Carolina 29202

Dear Senator Courson:

Your seek an opinion as to "whether a municipal police officer, sheriff, or deputy sheriff who is an active member of the South Carolina Police Officer Retirement Systems who meets the definition of 'police officer' for purposes of Section 9-11-10(23) of the South Carolina Code because he is 'required by the terms of his employment, either by election or appointment, to give his time to the preservation of public order, the protection of life and property, and the detection of crimes in this State' is among the class of persons which may be appointed to the newly created Public Employee Benefits Authority (PEBA) pursuant to Section 9-4-10(B)(1)(b) of the South Carolina Code." By way of background, you further state:

As you are aware, this past legislative session the General Assembly created the Public Employee Benefits Authority to oversee the various state retirement systems and the Employee Insurance Program. The Public Employee Benefits Authority is governed by a board composed of nine members, including four members who are stake holders in that they must be active or retired members of the State Retirement System or the Police Officer Retirement System (PORS). Specifically, Section 9-4-10(B)(1)(b), requires me to appoint a representative member who may either be an active or retired member of the PORS. I have chosen to appoint Richland County Sheriff Leon Lott as my representative from PORS.

I am aware that your office has recently issued an opinion that the service on the PEBA board is considered an office for dual office holding purposes. I am also aware that on numerous occasions your office has issued opinions indicating that municipal police officers, sheriffs, and deputy sheriffs hold an office for dual office holding purposes. However, Section 9-4-10(B)(1)(b) clearly provides that I may appoint an active member of PORS which is almost entirely comprised of municipal police officers, sheriffs, and deputy sheriffs.

As a result, I am inquiring as to whether under the terms of Section 9-4-10(B)(1)(b), if a municipal police officer, sheriff, or deputy sheriff is among the class of persons that I may appoint as my PORS representative member to PEBA.

Law/Analysis

As we recently stated in an Opinion, dated September 13, 2012,

[t]he Legislature enacted 2012 S.C. Acts, No. 278 ("The Act") which became effective on July 1, 2012, to reform the State's retirement systems. PEBA was established in § 30A of the Act, and its authority is codified in S.C. Code Ann. §§ 9-4-10 *et seq.* Pursuant to the Act, the Employee Insurance Program and the Retirement Division of the South Carolina Budget and Control Board are transferred to, and incorporated into, PEBA. The governing body of PEBA consists of a Board of Directors (the "Board") consisting of 11 members serving for fixed terms, and whose qualifications are established for appointment.

Based upon the applicable criteria governing whether or not a governmental position is an office, we concluded that "a court would likely find that the statutory creation of the Board, its qualifications for appointment and salary, coupled with the explicit duties and power of the Board which appear to include the exercise of a portion of the State's sovereign power, meet the definition of an office for dual office holding purposes" We believe that conclusion is correct.

As you indicate in your letter, there is no question that municipal police officers, sheriffs, and deputy sheriffs hold an office for dual office holding purposes. *See, e.g. Op. S.C. Atty. Gen.*, July 19, 2012 (WL3142775) ["We have consistently advised that a law enforcement officer, such as a police officer, would be considered an office holder for dual office holding purposes." (citing *Ops. S.C. Atty. Gen.*, March 16, 2012; June 12, 1995; November 2, 1994; February 4, 1994; September 8, 1992; December 11, 1990). *See also, Ops. S.C. Atty. Gen.*, March 7, 2008 (Forestry Commission law enforcement officer); December 19, 2003 (deputy sheriff); June 21, 1999 [highway patrol officer]; June 13 1996 (reserve police officer). Cf. *Richardson v. Town of Mt. Pleasant*, 350 S.C. 291, 566 S.E.2d 523, 526 (2002) [municipal police officer is office holder for purposes of dual office holding prohibition]. You note, however, that "Section 9-4-10(B)(1)(b) clearly provides that I may appoint an active member of PORS (Police Officers Retirement System) which is almost entirely comprised of municipal police officers, sheriffs and deputy sheriffs." Subsection (B)(1)(b) does in fact authorize the President *Pro Tempore* of the Senate to appoint to the PEBA Board one nonrepresentative member and "one a representative member who is either an active or retired member of PORS."

The question thus now arises whether, notwithstanding that PEBA Board members are officers for dual office holding purposes, the Legislature, in enacting Act 278 of 2012, intended that active law enforcement officers are eligible for appointment to the PEBA Board pursuant to § 9-4-10(B)(1)(b). As discussed below, we conclude the Legislature so intended.

As our Supreme Court has recognized, the prohibition of dual office holding does not apply when the individual in question holds one office in an *ex officio* capacity by virtue of another office. In *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 92, 44 S.E.2d 88, 95 (1947), the Court stated:

[t]he rule here enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law. A common example is *ex officio* membership upon a board or commission of the unit of government which the officer serves in his official capacity, and the functions of the board or commission are related to the duties of the office.

The Court then explained the term "ex officio" means "by virtue of his office." *Id.* (internal quotations omitted). Thus, if membership on a board or committee is "ex officio" or by virtue of the person's office, it does not constitute an office for dual office holding purposes. *Op. S.C. Atty. Gen.*, May 27, 2004; July 18, 1989.

In interpreting Act No. 278, the cardinal rule of statutory interpretation is to ascertain the intent of the General Assembly. *State v. Martin*, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. *Caughman v. Cola. Y.M.C.A.*, 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. *State v. Blackmon*, 304 S.C. 270, 403 S.E.2d 660 (1990). Further, it is a general rule of construction with any statute that the Legislature is presumed to have intended by its action to accomplish something and not to have done a futile thing. *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 136 S.E.2d 778 (1964).

Thus, the issue is whether, in order to avoid a dual office holding situation, the Legislature intended that the appointment of an "active member" of SC PORS is an *ex officio* appointment for purposes of dual office holding. We note that § 9-4-10(B)(1)(b) does not mention the term "ex officio." However, the statute does distinguish between a "nonrepresentative member" and a "representative member" of SC PORS in terms of an appointment by the President *Pro Tem* of the Senate to the PEBA Board.

In previous opinions of this Office, we have concluded that a person may hold an office *ex officio* even though the term "ex officio" is not used in the relevant statute, when it can be determined that an *ex officio* capacity was intended by the Legislature. For example, in an Opinion, dated July 7, 2006 (WL 2382436), we concluded that a person serving as a member of the Education Oversight Committee would not be prohibited from simultaneously serving on the Public Charter School District Board of Trustees. Both positions were clearly offices for dual office holding purposes. Moreover, the statute providing for appointment to the Charter School District Board did "not specifically state these members serve in an *ex officio* capacity." Nevertheless, we analyzed the situation as follows:

However, assuming holding a position in a particular entity constitutes an office, we believe the member's *ex officio* status *may be implied*, as these members serve by virtue

of their positions with such entities. In an opinion of this Office dated March 13, 2003, we addressed whether a member of the GLEAMNS Human Resource Commission is an officer for dual office holding purposes. *Op. S.C. Atty. Gen.*, March 13, 2003. The Legislature created this commission by statute, which provided "one-third of the Commission must be comprised of 'elected public officials or their representatives unless the number of those officials reasonably available or willing to serve is less than one-third of the membership of the commission.'" *Id.* (quoting S.C. Code Ann. § 43-41-30(A)(1)). The individual in question in that opinion was a Commissioner of Public Works for the City of Greenwood who was asked to serve on the commission in his capacity as a public official. *Id.* The statute creating the commission did not specifically state these commissioners are to serve in an ex officio capacity. However, after looking at prior opinions and other statutes, we ... [concluded]:

A review of these statutes and opinions reveals that in some instances membership on the second board, commission, or committee is denominated "ex officio," and in others it is not, though the membership on the first body is always specified (i.e., membership in the General Assembly) as a prerequisite to membership on the second (i.e., Textile Industry Study Committee).

Id. Thus, we concluded although the statute did not specify the elected official or his or her representative is to serve in an ex officio capacity, if appointed to the commission by virtue of such person being a "elected public official," they are deemed ex officio members.

(emphasis added). Accord, *Op. S.C. Atty. Gen.*, July 18, 1989 (WL 508572) ["not every legislative enactment relative to an ex officio membership specifies a particular position (i.e. mayor, Governor) to be held in the first instance; often, only membership on the larger body (municipal council, General Assembly, as examples) is specified." Examining Act 278, we conclude these prior opinions are controlling. Section 9-4-10(B)(1)(b), while not expressly mentioning the term "ex officio," certainly implies that status, by authorizing appointment of "active or retired" members of PORS to serve as the "representative member" on the PEBA Board. Such designation, in our view, implies ex officio status to the same degree as recognized in the previous opinions, discussed above.

Conclusion

Here, the Legislature clearly included "active" members of PORS to be in the pool of candidates for appointment to the PEBA Board by the President *Pro Tem* of the Senate. It would have been a futile act for the Legislature to have included active members if they are unable to be appointed. We do not deem this to be the Legislature's intent, because, as you indicate, active members of the SC PORS comprise much of its membership. Moreover, the General Assembly is well aware of the dual office holding prohibition, and yet clearly included "active" members of SC PORS as part of the group for appointment to the PEBA Board as the "representative" member of SC PORS. Such would include police officers, sheriffs and deputy sheriffs in that category.

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Based upon our previous opinions concerning implied "ex officio" membership, as well as the Legislature's intent in enacting the present legislation - to insure that active law enforcement officers are candidates for appointment to PEBA as "representative" of SC PORS - we deem the General Assembly to have intended that such officers serve on the Board in an *ex officio* capacity. Furthermore, such *ex officio* status of active law enforcement officers, see § 9-11-10(23), is reasonably related to service on the PEBA Board. PEBA will make fundamental decisions regarding the SC PORS. Thus, the Legislature desired such *ex officio* representation on the Board. See, *Ashmore, supra*. Accordingly, in our opinion, an active law enforcement officer, including a municipal police officer, sheriff or deputy sheriff, may be appointed by you, pursuant to § 9-4-10(B)(1)(b). The *ex officio* exception to dual office holding is applicable here, and thus dual office holding would not be present.

Sincerely,



Robert D. Cook
Deputy Attorney General

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