



ALAN WILSON
ATTORNEY GENERAL

September 13, 2012

The Honorable John L. Scott, Jr.
Senator, District No. 19
612 Gressette Senate Building
Columbia, SC 29202

Dear Senator Scott:

We understand from your letter that you desire an opinion as to whether membership on the Board of Directors of the South Carolina Public Employee Benefit Authority ("PEBA") constitutes an "office" for purposes of the dual office holding prohibition.

As you know, Article XVII, §1A of the South Carolina Constitution provides that "no person may hold two offices of honor or profit at the same time ..." with exceptions specified for an officer in the militia, a member of a lawfully and regularly organized fire department, constable, or a notary public. As we advised in an opinion of this Office dated April 26, 1977, "[t]o determine whether a position is an office or not depends upon a number of circumstances and is not subject to any precise formula." The South Carolina Supreme Court, though, has held that for this provision to be contravened, a person concurrently must hold two offices which have duties involving an exercise of some portion of the sovereign power of the State. Sanders v. Belue, 78 S.C. 171, 58 S.E. 762 (1907).

One who is charged by law with duties involving an exercise of some part of the sovereign power, either small or great, in the performance of which the public is concerned, and which are continuing and not occasional or intermittent, is a public officer. Conversely, one who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Id., 58 S.E. at 763; accord Edge v. Town of Cayce, 187 S.C. 172, 197 S.E. 216 (1938). Other relevant considerations, as identified by the Court, are whether statutes, or other authority, establish the position, prescribe its tenure, duties or salary, or require qualifications or an oath for the position. State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, 62-63 (1980); see Ops. S.C. Atty. Gen., February 4, 2008; July 19, 2001; March 16, 1999. "No single criteria is conclusive; neither is it necessary that all the characteristics of an officer or officers be present." Crenshaw, 266 S.E.2d at 62-63 [citing 67 C.J.S. Officers §8(a) (1978)].

The 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. Board members receive an annual salary. Significantly, the Board is authorized to administer and operate the various retirement systems and retirement programs pursuant to Title 9 of the South Carolina Code and, beginning January 1, 2014, the Board will administer the deferred compensation program. The Act clearly vests the Board with broad powers to make policy decisions effecting public employees, the retirement systems and retirement programs, the deferred compensation program, to adopt rules and regulations, and so forth. Id.¹

¹The title of the Act shows the authority conferred upon PEBA by the Legislature. It reads, in pertinent part, as follows:

. . . TO AMEND CHAPTER 4, TITLE 9, RELATING TO RETIREMENT LAW, SO AS TO ESTABLISH THE SOUTH CAROLINA PUBLIC EMPLOYEE BENEFIT AUTHORITY (PEBA), PROVIDE FOR ITS MEMBERSHIP AND THEIR COMPENSATION, DEVOLVE FROM THE STATE BUDGET AND CONTROL BOARD TO PEBA THE ADMINISTRATION OF THE EMPLOYEE INSURANCE PROGRAM (EIP), ADMINISTRATION OF THE RETIREMENT DIVISION, COTRUSTEESHIP OF THE STATE RETIREMENT SYSTEM, AND THE DUTIES OF THE SOUTH CAROLINA DEFERRED COMPENSATION COMMISSION (SCDCC), TO PROVIDE THOSE ACTIONS OF PEBA REQUIRING APPROVAL BY THE STATE BUDGET AND CONTROL BOARD OR ITS SUCCESSOR, TO REQUIRE PEBA TO MAINTAIN A PUBLIC TRANSACTION REGISTER, AND TO REQUIRE AN ANNUAL FIDUCIARY AUDIT OF PEBA; TO AMEND SECTIONS 1-11-703, AS AMENDED, 1-11-710, AS AMENDED, 1-11-720, AS AMENDED, 1-11-725, 1-11-730, AS AMENDED, 1-11-740, 1-11-750, 1-11-770, 8-23-20, AS AMENDED, 8-23-30, AS AMENDED, 8-23-70, 8-23-110, 9-1-20, 9-1-210, 9-1-310, AS AMENDED, 9-1-1515, AS AMENDED, 9-1-1830, 9-2-10, CHAPTER 2 OF TITLE 9, SECTIONS 9-8-10, AS AMENDED, 9-8-30, 9-8-60, AS AMENDED, 9-9-10, AS AMENDED, 9-9-30, 9-10-10, 9-10-60, AS AMENDED, 9-11-30, AS AMENDED, 9-12-10, 9-16-10 AND 9-16-55, BOTH AS AMENDED, 9-18-10, 9-20-30, AS AMENDED, 9-21-20, AS AMENDED, 59-1-470, RELATING TO VARIOUS ELEMENTS OF THE EMPLOYEE INSURANCE PROGRAM, STATE RETIREMENT SYSTEM, AND THE SOUTH CAROLINA DEFERRED COMPENSATION COMMISSION, SO AS TO CONFORM THESE PROVISIONS TO PEBA GOVERNANCE; TO AMEND SECTION 9-1-1310, AS AMENDED, RELATING TO THE TRUSTEE OF THE RETIREMENT SYSTEM AND INVESTMENTS ALLOWED FOR THE ASSETS OF THE RETIREMENT SYSTEM, SO AS TO PROVIDE THAT PEBA AND THE STATE BUDGET AND CONTROL BOARD, OR ITS SUCCESSOR, ARE COTRUSTEES OF THE RETIREMENT SYSTEM . . .

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In our opinion, 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 based upon the foregoing criteria enunciated by the Court in Sanders and Crenshaw. See, e.g., Ops. S.C. Atty. Gen., May 4, 2007 [advising that "interim Director" of South Carolina Department of Transportation (DOT), designated by law to administer the DOT which is responsible for the State's roads, highways and bridges, exercises the sovereign powers of the State and is an officer for dual office holding purposes]; January 19, 1983 [advising that members of county airport commission were officers for dual office holding purposes, where their powers and duties included the authority to administer aeronautical laws and handle all matters affecting the county airports, and the members were given general authority over the lands and funds provided for the county's airports and aeronautical activities].

Of course, the fact that a person occupies an office does not prevent that person from offering for another office. The person may simply choose to give up the first office in favor of the second. Op. S.C. Atty. Gen., February 26, 2003.

We further advise that if a person assumes the second office while still holding the first, the law dictates the result. Basically, when an officer accepts a second office, that person is deemed by law to have vacated the first office. However, the person continues to serve as a *de facto* officer until the vacancy is filled. Ops. S.C. Atty. Gen., July 28, 2003; July 13, 1995; see Walker v. Harris, 170 S.C. 242 (1933); Dove v. Kirkland, 92 S.C. 313 (1912); State v. Coleman, 54 S.C. 282 (1898); State v. Buttz, 9 S.C. 156 (1877). As an officer *de facto*, any action taken as to the public or third parties would be as valid and effectual as those actions taken by an officer *de jure* unless or until a court should declare those acts invalid or remove that person from office. Ops. S.C. Atty. Gen., July 19, 2012; March 12, 2010; see State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976).

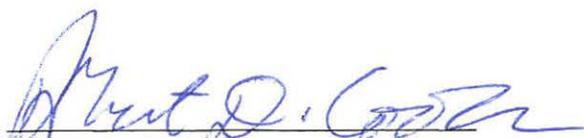
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Deputy Attorney General