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ALAN WILSON
ATTORNEY GENERAL

December 1, 2014

Stephen R. Van Camp
General Counsel
Public Employee Benefit Authority
Post Office Box 11960
Columbia, South Carolina 29211-1960

Dear Mr. Van Camp:

You seek our opinion as to whether the simultaneous service as a member of the Irmo-Chapin Recreation Board and as a Director of the Public Employee Benefit Authority ("PEBA") constitutes dual office holding in violation of Art. XVII, §1A of the South Carolina Constitution. We conclude that such service does not constitute dual office holding.

Law/Analysis

Article XVII, Section 1A of the South Carolina Constitution provides that "[n]o person may hold two offices of honor or profit at the same time, but any person holding another office may at the same time be an officer in the militia, member of a lawfully and regularly organized fire department, constable, or a notary public." For a violation of this provision to occur, an individual must hold two public offices which have duties "involving an exercise of some part of the sovereign power" of the State. Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907). A public officer is "[o]ne 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." Id. at 58 S.E. at 762-763. Other relevant considerations include: "whether the position was created by the legislative; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign, among others." State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

There is little doubt that members of the Irmo-Chapin Recreation Commission are officers for dual office holding purposes. Indeed, Opinion No. 2715, 1969 WL 10714 (August 13, 1969) so concluded with respect to that particular body's membership. [members of Irmo-Chapin Recreation Commission are officers for dual office holding purposes]. Such opinion is consistent with subsequent opinions which have found that members of local recreation commissions are public officers. See, Op. S.C. Atty. Gen., July 17, 1984, 1984 WL 249932 ["This office has concluded on numerous occasions that members of county recreation commissions hold an office for dual office holding purposes. . . ."]; Op. S.C. Atty. Gen., January 29, 1987, 1997 WL 87948 [". . . members of [Charleston County Park and recreation Commission appear to be officers for dual office holding purposes. . . ."].

The real question here is whether Directors of the PEBA Board are also public officers for purposes of Article XVII, §1A. In an opinion dated September 13, 2013, 2012 WL 4459271, we concluded that Directors of PEBA are public officers for dual office holding purposes. We stated that “[i]n 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.”

Notably, however, the 2013 opinion failed to consider §9-4-45 of PEBA’s enabling legislation. See §9-4-10 et. seq (Act No. 278 at 2012). Section 9-4-45 provides as follows:

- (A) Policy determinations made by the South Carolina Public Benefit Authority are subject to approval by the State Budget and Control Board or its successor, by a majority vote of the board.
- (B) For purposes of this section, policy determination means a determination by law required to be made by the South Carolina Public Benefit Authority in its administration of the Employee Insurance Program relating to coverage charges and premium increases, and in its administration of the Retirement Division, actuarial assumptions governing the retirement system and adjustments in employer and employee contributions.

Section 8-23-30 also authorizes the PEPA Board to “contract for purchases of otherwise procure fixed or variable, annuities, savings, mutual funds, insurance, or such other investments as the Board may approve for carrying out the objectives of the [“Deferred Compensation] Program with the advice and approval of the State Treasurer.” (emphasis added). Again, the PEBA Board serves in a recommendatory capacity with regard to such duties.

As we stated in an Opinion, dated February 26, 2003 “[c]onsistently, this Office has opined that where the duties of a particular position are advisory only, no office has been created for dual office holding purposes.” There, we referenced Op. No. 83-79 (October 4, 1983), which had concluded that:

. . . it is clear that the Committee is capable of no binding exercise of sovereign power. To the contrary, its functions are advisory only. This Office has consistently expressed the view that committees which function in a purely advisory capacity are not offices within the dual office holding provisions of the South Carolina Constitution. E.g. 1976 Op. Att. Gen. 200; 1975 Op. Att. Gen. 195; unpublished Opinions dated: June 22, 1982; July 12, 1980; September 7, 1978.

See also, Op. S.C. Atty. Gen., February 23, 2012, 2012 WL 682076 [South Carolina Medical Disciplinary Commission Members, although they possess some characteristics of an office, do not hold an office because “. . . the Commission’s authority is limited to hearing formal complaints and making recommendations.”].

As former Attorney General McLeod once stated, “[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.” Op. S.C. Atty.

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Gen., April 26, 1979, 1977 WL 37320. There is no question that the PEBA Board possesses important administrative responsibilities in managing the Employee Insurance Program ("EIP") and the Retirement Division [formerly of the Budget and Control Board]. However, as we have emphasized, administrative duties do not necessarily mean an exercise of sovereign power, particularly where the administrative duties are largely recommendatory. Op. S.C. Atty. Gen., May 6, 2008, 2008 WL 2324810. While PEBA's duties regarding administration are indeed important, we believe that, because it must generally obtain approval from other agencies, such as the Budget and Control Board, its duties are largely recommendatory.

Conclusion

Based upon the foregoing analysis, it is our opinion that simultaneous service upon the Irmo-Chapin Recreation Board and as a Director on the PEBA Board does not constitute dual office holding. PEBA Board members primarily perform recommendatory duties, rather than any exercise of the State's sovereign powers. To the extent prior opinions may contradict this conclusion or did not consider these factors, such opinions are overruled.

Sincerely,



Robert D. Cook
Solicitor General