ALAN WILSON
ATTORNEY GENERAL

May 8, 2013

David K. Avant, Interim Executive Director
South Carolina Public Employee Benefit Authority
Post office Box 11960
Columbia, South Carolina 29211-1960

Dear Mr. Avant:

You have requested an opinion "concerning whether PEBA may legally authorize private employers to participate in the State Health Plan Provider Networks, which will allow these private employers to obtain the same rates for medical services that the State Health Plan has negotiated." By way of background, you state the following:

Background

PEBA operates the State Health Plan (SHP), which is a self-funded, governmental health insurance plan that covers 255,000 public employees working for state government, public school districts, public higher education institutions, and other entities, such as counties and cities, specified in S.C. Code Ann. Section 1-11-720. Including both employees and their dependents, the SHP provides health insurance for over 450,000 total participants across the State of South Carolina. For your convenience and reference, the statutory authority for the SHP is set out below in S.C. Code Ann. Sections 1-11-703 et seq.

Pursuant to Section 1-11-710, the SHP is charged with providing the maximum benefit to covered public employees within available resources. The PEBA Board approves annually the rates and contents of the SHP subject to approval by the State Budget and Control Board. Section 1-11-710(A)(2) and 9-4-45.

The SHP is a governmental employee benefit plan that is not subject to the requirements set forth in ERISA. Under 29 U.S.C. Section 1002(32), the term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

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Federal law explicitly provides that ERISA requirements do not apply to an employee benefit plan described in 29 U.S.C. Section 1002(32). 29 U.S.C. Section 1003(b)(1). Therefore, because the SHP is clearly a plan maintained for employees of the State of South Carolina and its political subdivisions, the SHP is not subject to ERISA.

The SHP is self-funded, which means that all liability and risk with respect to health claims are borne by the State through PEBA. PEBA engages Blue Cross Blue Shield of South Carolina (BCBSSC) as an Administrative Services Only (ASO) provider. Unlike their fully-insured business, BCBSSC does not bear the risk of insuring the SHP participants. Under the ASO arrangement, BCBSSC handles the administrative tasks of processing health claim and handling payments to health providers (physicians and hospitals).

As part of its administration of the SHP, PEBA has developed a network of physicians and hospitals (SHP Network) that have agreed to accept negotiated rates in full satisfaction of their fees for providing services to SHP participants. Participation of the physicians and hospitals in the SHP Network is purely voluntary. Given the large number of participants in the SHP and the prompt payment of medical claims by PEBA, PEBA has been able to negotiate medical provider network rates that are slightly less favorable than those of Medicare and Medicaid, but much more favorable than the rates obtained by other insurers or employers in the State. Accordingly, businesses across the State are unable to negotiate health insurance rates as favorable as those of the SHP Network.

Proposal to Allow Private Businesses to Participate in SHP

PEBA has proposed making the SHP Network available to private businesses in the State. Under the proposal, the employees of the private businesses would not participate in the SHP because this would cause the SHP to lose its exemption from ERISA as a governmental plan. See 29 U.S.C. Sections 1002(32) and 1003(b)(1). Rather, participating businesses would be given access to the SHP Network's favorable rates for physician and hospital services.

The access of private businesses to the SHP Network may be structured in a couple of ways. The first option would involve participating businesses paying a fair "rental" fee to PEBA to have access to the SHP Network. This arrangement would be beneficial to the SHP because of increased revenue from the "rental fees" and because the addition of more participants would add to the negotiating leverage of the SHP in its dealings with medical providers.

The second option would not involve the rental fee and the businesses would have access without charge. The benefit to the SHP would hopefully be increased leverage to negotiate reimbursement costs with medical providers based [on] the increased numbers of participants.

Under either proposal, physicians and hospitals that enter the SHP Network contracts would be obligated to accept the relatively low SHP rate for both SHP participants as well as the employees of the participating private businesses.

The State of South Carolina would reap economic benefits from the availability of lower health insurance costs for businesses. This would provide a stimulus to economic development statewide and could generally aid business development.

Significantly, PEBA does not intend to become a joint owner of an enterprise with private businesses because this would violate Article X, Section 11 of the South Carolina Constitution. See *Nichols v. South Carolina Research Authority*, 290 S.C. 415, 351 S.E.2d 155 (1986). Rather, the private businesses would simply have access to the SHP Network. PEBA would at all times own its provider network and no private business would jointly own the SHP Network.

As we discussed on April 10th, PEBA requests that the Attorney General issue [an] opinion on the following questions:

1. Does the proposed access of private businesses to the SHP Network violate Article X, Section 11 or any other provision of the State Constitution?

2. Would it be legal for private businesses to be granted access to the SHP network without PEBA charging some fair fee?

3. Does the proposed arrangement violate any current statute or regulation?

4. Assuming the proposed arrangement is not prohibited by the Constitution, may PEBA undertake the SHP Network arrangement without legislation specifically authorizing this arrangement?

Law/Analysis

Your first question is whether the proposed access of private businesses to the SHP Network violates Article X, Section 11 or any other provision of the State Constitution? Art. X, § 11 provides in pertinent part as follows:

> [t]he credit of neither the State nor any of its political subdivisions shall be pledged or loaned for the benefit of any individual company, association, corporation, or any religious or other private education institution except as permitted by Section 3, Article XI of this Constitution. Neither the State nor any of its political subdivisions shall become a joint owner or stockholder in any company, association, or corporation ....

Your letter indicates that "PEBA does not intend to become a joint owner of an enterprise with private business because this would violate Article X, Section 11 of the South Carolina Constitution." Instead, you state that "private businesses would simply have access to the SHP Network. PEBA would at all times own its provider network and no private business would jointly own the Network."

Our Supreme Court, in *Taylor v. Richland Memorial Hospital*, 329 S.C. 47, 50, 495 S.E.2d 431, 433 (1997), stated the following with respect to the "joint ownership" provision contained in Art. X, § 11 :

> Article X, § 11 prohibits governmental entities from becoming either 1) a joint owner of or 2) a stockholder in a private company, association, or corporation .... Not every joint endeavor between a public entity and private business is constitutionally prohibited. See *Gilbert v. Bath*, 267 S.C. 171, 227 S.E.2d 177 (1976); *Chapman v. Greenville Chamber of Commerce,* 127 S.C. 173, 120 S.E. 584 (1923). We have approved arrangements where governmental entities leased assets to private entities without finding a violation of the joint ownership clause. *Johnson v. Piedmont Mun. Power Agency*, 277 S.C. 345, 287 S.E.2d 476 (1982); *Gilbert v. Bath, supra*; *Chapman, supra.*

As the Court in *Taylor* observed, "[t]he intent of Article X [§ 11] was to prevent the state from entering into business hazards which might involve obligations upon the public." *Id.* Based upon your assurances that there will be no ownership jointly of the SHP Network by PEBA and a private company, we do not believe this prohibition in Art. X, § 11 is implicated by your proposed arrangement. Nor does there appear to be a "pledge of the credit" of the State to any private company which may see fit to utilize the Network. Thus, that part of Art. X, § 11 does not appear implicated either.

Notwithstanding the inapplicability of these prohibitions, still, the proposed transaction must serve a public purpose. It is well recognized that "public funds must be expended only for a public purpose." *Op. S.C. Atty. Gen.*, August 8, 2003 (2003 WL 21998995), citing *Op. S.C. Atty. Gen.*, January 15, 1999. As our Supreme Court recognized in *Mims v. McNair*, 252 S.C. 64, 80, 165 S.E.2d 355, 363 (1969), "[t]here are no restrictions imposed by the Constitution upon the purposes for which the Legislature may levy taxes and expend public funds, except that it be a public purpose." In an opinion dated May 24, 1999 (1999 WL 387069), we stated:

> [a]s you have noted, previous opinions of this Office have stated that furnishing public funds to chambers of commerce may violate constitutional restrictions on use of public funds for private purposes. See *Ops. Atty. Gen.*, (July 27, 1977; May 6, 1975). *Donating waivers of rental fees also could be an impermissible use of public funds or property unless a public interest is sufficiently served by the donation. Nichols v. South Carolina Research Authority*, 290 S.C. 415, 351 S.E.2d 155 (1986); *Ops. Atty. Gen.* (January 15, 1999). The following four prong in *Nichols* [is as follows]: ...
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> > ... first determine the ultimate goal or benefit to the public intended by the project. Second, ... analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, ... analyze and balance the probability that the public interest will be ultimately served and to what degree.
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> Accordingly, to be permissible, the donation would need to demonstrate a sufficient public purpose under such a test. ... [O]nly a court can make such factual determinations.
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> Further, *Nichols* makes clear that
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> ... legislation may subserve a public purpose even though it (1) benefits some more than others and, (2) results in profits to individuals. "Legislation does not have to benefit all of the people in order to serve a public purpose. At the same time legislation is not for a private purpose merely because some individual makes a profit as a result of the enactment." *Anderson v. Baehr,* 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975).

290 S.C. at 426, 351 S.E.2d at 161. (emphasis added).

In addition, we note that *Nichols* recognized that "[i]t is uniformly held by courts throughout the land that the determination of public purpose is one for the legislative branch." According to the *Nichols* Court, public purpose is "'a fluid concept which changes with time,

place, population, economy and countless other circumstances. It is a reflection of *changing* needs of society." *Id.*, quoting *Bauer v, S.C. State Housing Authority*, 271 S.C. 219, 227, 246 S.E.2d 869, 872 (1978) [emphasis in original]. Accordingly, applying its four part test, and deferring to the legislative determination that public funds should be expended for economic development, *Nichols* held that "acts of the General Assembly or its political subdivisions which expend funds for industrial development are constitutional." *Id.* Thus, there is no doubt at this late date that the expenditure of public funds for economic development promotes a public purpose.

Indeed, your letter indicates that the proposed arrangement fosters economic development. You note that

> [t]he State of South Carolina would reap economic benefits from the availability of lower health insurance costs for businesses. This would provide a stimulus to economic development statewide and could generally aid business development.

We see no reason to question that the proposed arrangement would generally foster economic development and thus would serve a public purpose.

However, we have also recognized that a governmental entity "may not transfer [property] to ... a private entity without receiving some benefit that serves ... [its] core function ... ." In that regard, "[a]n outright donation without some benefit received in return furthers no statutorily authorized purpose of the [entity]." *Op. SC Atty. Gen.*, May 30, 2008 (2008 WL 2324818). The law in this area is further summarized in *Nichols v. Patterson*, 678 So.2d 673, 680 (Miss, 1996) as follows:

> [t]he payments were nevertheless gifts to the employees, and no law has been cited, and we think that none can be cited, which vests in the board of trustees of the county hospital the right to make donations of public funds to private individuals. As stated by the Court in *Joint Consolidated School District No. 2 v. Johnson*, 163 Kan. 202, 181 P.2d 504, 509, "that a public officer entrusted with public funds has no right to give them away is a statement so obviously true and correct as to preclude the necessity of citation of many authorities." The Legislature has never authorized, or attempted to authorize, any subordinate state agency to make donations of public funds to employees as Christmas presents. And payments of that kind are so clearly and distinctly payments which the board of trustees in this case could not lawfully make as to bar the members of the board from claiming justification or immunity from liability therefor on the ground that the payments were made "in good faith and honest error."

Thus, a court would likely conclude that the proposed transaction would necessarily need to serve the "corporate" purpose of PEBA as well as the public generally. If there were no benefit to PEBA as an agency or the corporate purposes which that agency serves, any sharing by PEBA of its property with private business could be seen by a court as beyond PEBA's express or implied authority. Instead, the agency could be deemed to the "giving away" its property without any legislative authorization therefor. Thus, while we are aware of no statutory prohibition for PEBA to undertake the proposed arrangement without the receipt, in the words of your letter, "some fair fee," unless PEBA possesses legislative authority, therefore, such transaction may not be within the present corporate purpose of PEBA.

Moreover, it is well recognized that "a state agency may exercise only such authority as is expressly conferred upon it by the General Assembly or which may be reasonably implied from such express authority." *Op. S.C. Atty. Gen.*, May 13, 2005 (2005 WL 1383356), referencing *Op. S.C. Atty. Gen.*, November 29, 1995.

As we recognized in *Op. S.C. Atty. Gen.*, September 25, 1998 (1998 WL 747049),

> [i]t is fundamental black letter law that the authority of a state agency "is limited to that granted by the legislature." *Nucor Steel v. S.C. Public Serv. Comm.* 310 S.C. 539, 426 S.E.2d 319 (1992). An administrative agency "has only such powers as have been conferred by law and must act within the authority granted for that purpose." *Bazzle v Huff*, 462 S.E.2d 273 (S.C. 1995). An administrative agency cannot, of course, change or alter the statute conferring authority upon it. *Fisher v. J. H. Sheridan Co.*, 182 S.C. 316, 189 S.E. 356 (1937).

There is presently no statute expressly or impliedly authorizing PEBA to share its resources with private businesses in the manner in which you describe. In our opinion, in view of the authorities, referenced above, legislative authorization is probably necessary in order to assure that PEBA is acting within the scope of its authority delegated by the General Assembly.

Conclusion

In our opinion, the proposed transaction which you describe in your letter, one in which PEBA would provide access of the SHP Network to private businesses, would not violate Art. X, § 11 of the South Carolina Constitution. As you indicate, there would be no joint ownership of the Network between PEBA and private businesses. Moreover, as we understand the proposal, the credit of the State would not be pledged to private companies. Further, the proposal likely serves a valid public purpose, that of economic development, as recognized in *Nichols*.

We see legal difficulty, however, in the fact that, on its face, the transaction does not necessarily further PEBA's corporate purpose which is, as you note, "to operate the State Health

Plan." Unless PEBA charges a fee or rental for access to the Network, the proposed transaction could be seen by a court as donating the assets of the agency without express or implied legislative authorization to do so. Moreover, as we stated in *Op. S.C. Atty. Gen.,* August 26, 1997 (1997 WL 569120) "in view of the well-recognized principle that a fee must be charged only with clear statutory authority, this is a matter which should be clarified by the Legislature." That same advice would govern here.

Further, an agency, such as PEBA, a creature of statute, possesses only those powers expressly or impliedly bestowed by the General Assembly. Accordingly, we believe the more prudent course, in order to implement the proposal of Network sharing, would be to obtain express legislative authorization therefor. That way, the Legislature could decide, rather than the agency, whether a fee should be assessed, or access to the Network should be provided free of charge. This policy decision is one appropriate for the General Assembly. While the concept you describe has obvious merit, as a means to promote economic development, we believe it is important that the Legislature authorize it specifically and provide the appropriate guidelines therefor. Legislative authorization would ensure not only that the General Assembly finds a public purpose with respect to this project, but also that the project is within the scope of PEBA's responsibility.

Sincerely,

Robert D. Cook
Deputy Attorney General

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