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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

March 15, 2000

The Honorable J. Gary Simrill
Member, House of Representatives
P.O. Box 11867
Columbia, South Carolina 29211

RE: Informal Opinion

Dear Representative Simrill:

Your opinion request has been forwarded to me for reply. In your request letter, you state the following:

I am requesting you look into a matter of great concern to me. My concern involves the Pee Dee Regional Transportation Authority headquartered in Florence, South Carolina. As you are aware, the make-up of the Pee Dee RTA Board of Directors is comprised of locally elected officials as well as appointees from the various Legislative Delegations that are represented by the Pee Dee RTA Transit System. At a recent board meeting, a motion passed to suspend all Legislative Delegation Appointees. The York County Legislative Delegation Appointee, Steve Rast, was suspended as well. It is my opinion that the Board of Directors does not have the authority to suspend Legislative Delegation Appointees, and I am formally requesting your office become involved in this matter.¹

As an initial matter, it is necessary to state the position and policy of this Office concerning factual determinations. We have previously stated:

¹ Counsel for the Pee Dee Regional Transportation Authority has characterized the Legislative Delegation appointees as having been removed from office. Therefore, for purposes of this opinion, I will address your question as one of removal rather than suspension.

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[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine ... factual questions

Op. Atty. Gen. dated April 3, 1989. This policy is particularly appropriate in this case. I have discussed this matter at length with several of the parties involved and there appears to be some debate over how the Legislative Delegation appointees were appointed and whether their appointments were valid. Without a clear understanding of the appointment process, I am unable to make a definitive statement regarding the authority to remove Legislative Delegation appointees. Instead, I can only provide you with a general description of the law in this area and an opinion based solely on this general law.

As a general rule, the power to remove an officer is vested with the authority having the power to make the appointment. Op. Atty. Gen. dated June 30, 1962. When the term of a public officer is not fixed by law, and the removal is not governed by constitutional or statutory provision, the power of removal is incident to the power to appoint. State ex rel. Williamson v. Wannamaker, 213 S.C. 1, 48 S.E.2d 601 (1948). In other words, the appointing power, where the term is not fixed by law, may remove the appointee at pleasure and without notice or opportunity to be heard. Id. If the office has a set term, then there must exist good cause to remove the appointed officer. Id.

The general rule as to a public officer who holds office pursuant to an invalid appointment is stated as follows: when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters such office and performs its duties, he or she will be an officer de facto, notwithstanding that there was a want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner. 63C Am Jur 2d Public Officers and Employees §32 (1997). Actions taken by a de facto officer in relation to the public or third parties will be considered as valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove the de facto officer from office. Ops. Atty. Gen. dated April 8, 1996 and July 13, 1995.

On its face, it would not appear that the Board of Directors of the PDRTA has the authority to remove a Legislative Delegation appointee. If the appointment is valid, general law provides the removal power is vested with the appointive authority, in this case the joint

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delegations of the member counties. If the appointment is invalid, the appointee serves in a de facto capacity until a court removes the individual from office. However, any decision in this matter will turn of the particular facts involved. Factors such as the appointment procedures and whether the power to appoint and remove has been lawfully delegated to another party must be analyzed before making any decision in this case. Therefore, in order to reach a final resolution acceptable to all parties, it may be wise for an appropriate party, such as the Board of Directors, Mr. Rast, or a taxpayer, to seek a declaratory judgment in this matter.

This letter is an informal opinion only. It has been written by a designated assistant attorney general and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With best personal regards, I am

Sincerely yours,

A handwritten signature in dark ink, appearing to read "P. M. Koch", written in a cursive style.

Paul M. Koch

Assistant Attorney General