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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

August 13, 1997

The Honorable Larry A. Martin
Senator, District No. 2
Box 247
Pickens, South Carolina 29671

Re: Informal Opinion

Dear Senator Martin:

You have asked whether employees of the Pickens County Board of Disabilities and Special Needs are subject to the National Labor Relations Act. It is my opinion that as public employees of a "political subdivision," such employees are not subject to the reach of NLRA or the jurisdiction of the NLRB.

Law / Analysis

The Pickens County Board of Disabilities and Special Needs is apparently created pursuant to S.C. Code Ann. Section 44-20-375 et seq. Section 44-20-375(A) states that "[b]efore July 1, 1992, county boards of disabilities and special needs must be created within a county or within a combination of counties by ordinance of the governing bodies of the counties concerned." The process for appointing board members which existed on January 1, 1991 "must be preserved in the ordinance." Section 44-20-375(D) specifically provides that a "county board of disabilities and special needs is a public entity." Section 44-20-385(1) empowers each county disabilities and special needs board to serve as "... the administrative, planning, coordinating and service delivery body for county disabilities and special needs services funded in whole or in part by state appropriations to the [D]epartment [of Disabilities and Special Needs] or funded from other sources under the department's control." Subsection (5) of Section 44-20-385 authorizes the board to "... employ personnel and expend its budget for the direct delivery of services or contract with

Request Letter

those service vendors necessary to carry out the county mental retardation, related disabilities, head injuries and spinal cord injuries services program who meet specifications prescribed by the department ...." It is my understanding that the employees in question are employed by the Pickens County Board of Disabilities and Special Needs. You note that these employees "... are covered under the South Carolina group health insurance plan and are participants in the state's retirement system."

In Op. Atty. Gen., Op. No. 89-121 (October 30, 1989), we summarized the governing law in this area. We rejected the idea that public employees have a right to unionize, strike or enter into collective bargaining agreements in South Carolina. Our opinion stated that

> [t]he law is well-settled in this State that public employees have no right to strike or to enter into collective bargaining agreements.

We quoted in that opinion from a decision rendered by the Honorable Clarence Singletary in Medical College of South Carolina v. Drug and Hospital Union Local 1199 et al., Charleston County docket number 8117, by Order dated July 7, 1969 as follows:

> [a]t common law, public employees have no right to strike. Chief among the reasons behind the rule precluding public employee's strikes are:
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> > [t]he sovereignty of the public employer; the fact that the government is established by and run for all the people and not for the benefit of any person or group; that the profit system is missing in public employment; that public employees owe undivided allegiance to the public employer; and that the continued operation of public employment is indispensable in the public interest ....
>
> [T]he rule precluding public employees' strikes is the common law rule and the public policy of this State.

* * *

> At common law, public employees have no right to collectively bargain with the public employer. ... The Courts generally hold that in the absence of express constitutional or statutory authorization to do so the public employer lacks the power to bargain or to enter into an enforceable collective agreement.

Our Opinion in 1989 also noted that "[f]ederal law is in accord with the State's law, as well." We expounded upon this statement by noting that

> [f]or example, Section 2(2) of the National Labor Relations Act, as amended, 29 U.S.C. § 152(2), defines "employer" in the context of employee organization and bargaining and specifically excepts "State or political subdivisions thereof" from that definition. Therefore, States and political subdivisions are not subject to the jurisdiction of the National Labor Relations Board. In National Labor Relations Board v. National Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 91 S.Ct. 1746 (1971), the United States Supreme Court held that the utility district, based on a number of factors, was a "political subdivision" of a state and thus not an "employer," even under the National Labor Relations Board test, i.e.,
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> > entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.
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> Id., 402 U.S. at 604-605, 91 S.Ct. 1749. Federal law rather than state law governs the determination of whether an entity is a "political subdivision" of a state and thus not an "employer" subject to the National Labor Relations Act.

Thus, we concluded in the 1989 opinion that "unionization by a labor union such as the Teamsters, collective bargaining, or striking with respect to employees of the South Carolina State Ports Authority would be contrary to public interest and a violation of both

state and federal law." See, also, South Carolina State Ports Authority v. NLRB, 1989 WL 201258 (D.S.C. 1989), revd., on other grounds, 914 F.2d 49 (4th Cir. 1990). The same conclusion is applicable here.

We have recognized that a county mental retardation board is a public entity and a political subdivision for a variety of purposes. In Op. Atty. Gen., September 22, 1988, we stated:

> [c]onsequently, a board properly "established" or "created" under section 44-21-810 et seq. [now § 44-20-375 et seq.] could not alter its nature or its powers under those enabling legislative acts by obtaining a private non-profit corporate charter. It would remain an "administrative planning, coordinating and service body" established by the county. Sections 44-21-830, 835 and 840, with whatever powers granted it by Sections 44-21-810 et seq. and by the county ordinance establishing it, consistent with those sections, and the applicable constitutional and statutory provisions concerning county powers.
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> The Federal District Court of South Carolina, has held that the York County Mental Retardation Board, which was created by county ordinance, but also held a private non-profit corporate charter, is a public agency which is a political subdivision within the meaning of the Fair Labor Standards Act, and that its Board members are government officials entitled to qualified immunity. Hovis v. York County Mental Retardation Board et al., C.A. Nos. 3: 87-322 through 325-16, Orders entered November 5, 1987 at p. 5, and August 10, 1988, at p. 11 note 3, and p. 13 ... .
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> The 1965 Attorney General Opinion No. 1896, at p. 179, discussed the nature of county mental health boards vis à vis tort immunity. Under the predecessor to section 44-15-10 et seq. a county mental health board, like a county mental retardation board,
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> > ... is composed of persons appointed by the Governor, upon recommendation of the

> delegations of the various counties. It is, basically, the administrative agency for community mental health services programs and is eligible to receive grants of public funds from the South Carolina Mental Health Commission. In my opinion, it is clearly a public agency and is, therefore, immune from tort liability. By the provisions of § 32-1034.27 community mental health boards are declared to be "bodies corporate in deed and in law, with all of the powers incident to corporations". This does not, in my opinion, alter the status of the boards as public instrumentalities immune from tort liability.

> Also, the March 9, 1988 letter of Senior Assistant Attorney General Kenneth P. Woodington to Director Purvis W. Collins of the South Carolina Retirement System states, "... [T]his office would advise that the Georgetown County Mental Retardation Board is a political subdivision and an "employer" within the meaning of the Code section 9-1-10(5)" ("the term 'employer' shall also include any county ... or other political subdivision of the State, or any agency or department thereof ...").

Based upon the information which has been provided to me, I am of the opinion that employees of the Pickens County Board of Disabilities and Special Needs are not subject to the National Labor Relations Act or to the National Labor Relations Board. The test for determining a "political subdivision" established in NLRB v. Natl. Gas Util. Dist. is plainly met here, as the Board is created by the state and/or administered by individuals responsible to public officials or the general electorate. Accordingly as we emphasized in the 1989 opinion, discussed herein, "unionization by a labor union such as the Teamsters, collective bargaining, or striking" with respect to such public employees, would be contrary to public interest and a violation of both state and federal law."[1]

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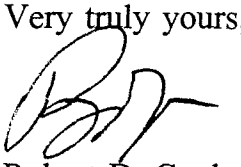
[1] This Office has not had the opportunity to examine in detail the precise manner in which the Pickens County Board was created. Of course, an opinion of this Office cannot

(continued...)

This letter is an informal opinion only. It has been written by a designated Assistant Deputy 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 kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

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[1](...continued)
make factual findings. Op. Atty. Gen., December 12, 1983. Moreover, we must assume the facts concerning the employees' relationship to the Board as has been presented to us. Based upon the information provided to me, however, regardless of how such Board may have been originally created or regardless of the creation of or existence of a private non-profit corporation, the status of the Board is controlled by Section 44-20-375 et seq. and would meet the requirements of exemption under the NLRA.