

The State of South Carolina



Office of the Attorney General

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April 25, 1989

The Honorable Alfred C. McGinnis, Sr.
Member, House of Representatives
402-A Blatt Building
Columbia, South Carolina 29211

Dear Representative McGinnis:

As you know, your letter dated March 29, 1989, was referred to me for response. By your letter you request an "opinion as to whether the work week for State employees should be 37½ hours, 40 hours, or a combination of 40 and 37½ hours."

S.C. Code Ann. §8-11-230 (1976) creates the State Personnel Division [now known as the Division of Human Resource Management] as a part of the State Budget and Control Board ["Board"] to "be responsive to agency needs for all personnel functions and which shall implement the provisions of [article 3 of Chapter 11] subject to the policies and direction of the Board." Furthermore,

[t]he Budget and Control Board is authorized and directed to:

. . . .

- 6. After coordination with agencies served, develop policies and programs concerning leave with or without pay, hours of work, fringe benefits (except State retirement benefits), employee/management relations, performance appraisals, grievance procedures, employee awards, dual employment, disciplinary action, separations, reductions in force, and other conditions of employment as may be needed. . . . [Emphasis added.]

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S.C. Code Ann. §8-11-230(6) (1976). In addition, the South Carolina General Assembly has enacted, concerning annual leave for State employees, the following:

Leave, as authorized by this article, shall be based upon a five-day workweek except where services are maintained seven days a week; provided, however, that no agency shall schedule a work-week of less than thirty-seven and one-half hours. The State Budget and Control Board, through the State Personnel Division, may establish, by appropriate regulations, procedures for the equitable calculation of leave for those employees who work a different number of days, including permanent part-time employees. [Emphasis added.]

S.C. Code Ann. §8-11-650 (1976). Based upon this statutory authorization, the Board promulgated S.C. Code Ann. R 19-703 (vol. 23A 1976 & 1988 Cum. Supp.) to regulate attendance and leave of the various State agencies. R 19-703.02(A.), (B), & (C) provide:

A. No State agency shall operate on less than a 37.5 hours workweek.¹

B. The workweek for each full-time employee shall be no less than 37.5 hours per week.

C. Additional hours shall be required when the appropriate management official determines that the direct or indirect statutory responsibilities of the agency cannot be accomplished in the normal work hours observed by the agency.

Regulating hours of work and record keeping, R 19-703.03 (A.), (B.) & (C.) provide:

A. The minimum full-time workweek is 37.5 hours.

¹ S.C. Code Ann. §8-11-10 (1976) provides:

The departments of the State government except where seven day per week services are

(Footnote 1 continues on next page.)

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B. Each agency is required to keep an accurate record of all hours worked and all leave taken.² Leave shall be recorded in the appropriate categories and shown as either paid leave or leave without pay.

C. The ultimate responsibility for the accuracy and proper maintenance of attendance and leave records rests with the agency head.

(Footnote 1 continued from previous page.)

maintained, shall remain open from nine A.M. until five P.M. from Monday through Friday, both inclusive, except on holidays fixed by law. On Saturdays such departments may close at one P.M. Skeleton forces may be maintained on Saturday and so staggered that each employee shall work not less than one Saturday out of each month; provided, that the offices of the State Highway Department shall remain open from eight-thirty A.M. until five P.M. from Monday through Friday, both inclusive, except on holidays fixed by law and these offices need not be kept open on Saturdays, except as may be necessary to carry on essential work.

But see S.C. Att'y Gen. Op., No. 3329 (Jun. 12, 1972) ("[B]ecause of the failure of the General Assembly to specifically treat [§8-11-10], it is my opinion that office hours for State employees are now [pursuant to S.C. Code Ann. §8-11-650 (1976)] from 8:30 a.m. until 5:00 p.m., Mondays through Fridays. Exceptions are provided where a seven-day work week exists.").

² Leave for State employees is governed by various statutes and regulations. E.g., S.C. Code Ann. §8-7-10 through §8-7-90 (absences in military service), §8-11-40 through §8-11-55 (sick leave and compensatory time), §8-11-145 (use of sick or annual leave in conjunction with workers' compensation under certain circumstances), §8-11-610 through §8-11-680 (annual leave), §8-11-700 through §8-11-770 (State Employee Leave Transfer Program) (1976); S.C. Code Ann. R 19-703 (vol. 23A 1976 & 1988 Cum. Supp.) (attendance and leave). In addition, the minimum wage and overtime provisions of the Fair Labor Standards Act, 29 U.S.C. §§201-219, made expressly applicable to all state and

(Footnote 2 continues on next page.)

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Consequently, ³ the minimum workweek for a full-time State employee is 37.5 hours.

Your letter further indicates:

It is my understanding that approximately 50% of state employees are now working 37½ hours and approximately 50% working 40 hours per week. It is also my understanding that all state employees are compensated for a 40 hour work week.

It would appear to me that this leaves the state open for a discrimination case.

Based upon the facts you have asked us to assume, ⁴ you appear to be concerned about a potential equal protection challenge in this area. Of course, both the United States Constitution and the South Carolina Constitution contain equal protection clauses. U.S. Const. Amend. 14 and S.C. Const. art. 1, §3. The requirements of equal protection are satisfied if the classification bears a reasonable relation to the purpose sought to be effected, members of the class are treated alike under similar circumstances and conditions, and the classification rests on some reasonable basis. GTE Sprint Communications Corp. v. Pub. Serv. Comm'n of South Carolina, 288 S.C. 174, 341 S.E.2d 126 (1986) (analyzing U.S. Const. Amend. 14 and S.C. Const. art. 1, §3). In Smith v. Smith, 291 S.C. 420, 424, 354 S.E.2d 36, 39 (1987) (citing Gary Concrete Products, Inc. v. Riley, 285 S.C. 498, 331 S.E.2d 335 (1985)), the South Carolina Supreme Court stated:

(Footnote 2 continued from previous page.)

municipal employees in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), set specific compensation requirements when certain employees' workweeks exceed a maximum of forty hours. Cf. S.C. Code Ann. §8-11-55 (1976 & 1988 Cum. Supp.) ("Compensatory time, if granted, must be in accordance with the Federal Fair Labor Standards Act of 1938 as amended.").

³ A workweek that exceeds forty hours for certain employees may trigger application of the Fair Labor Standards Act, supra, concerning compensation for overtime hours. See supra n.2.

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In determining whether a statute violates the equal protection clauses of state and federal constitutions, we must give great deference to the classification passed by the legislature, and the classification will be sustained against constitutional attack if it is not plainly arbitrary and there is "any reasonable hypothesis" to support it.

Obviously, the specific facts and circumstances involved would impact on a judicial analysis of an equal protection challenge based on work hours for State employees. Axiomatically, when the validity of a legislative act is questioned, the court will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity by the court. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). A legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative act unconstitutional. S.C. Att'y Gen. Op. No. 87-62 (Jun. 15, 1987). The South Carolina statutes which govern the minimum number of hours in a work week for full-time State employees would appear to pass constitutional muster if challenged upon equal protection grounds.

⁴ This Office has previously opined:

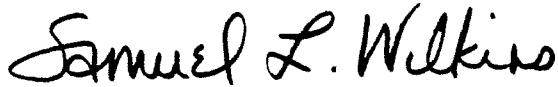
[b]ecause this Office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion, to adjudicate or investigate factual questions. Unlike a fact-finding body such as a legislative committee, an administrative agency or a court, we do not possess the necessary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

S.C. Att'y Gen. Op., Apr. 3, 1989.

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Please contact me if I can answer any further questions concerning this matter.

Sincerely,



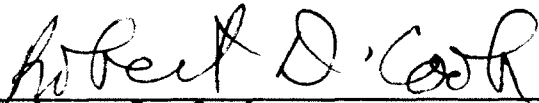
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