

The State of South Carolina

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March 2, 1988

J. Mac Holladay, Director
South Carolina State Development Board
P. O. Box 927
Columbia, South Carolina 29202

Dear Mr. Holladay:

You have requested an opinion from this Office as to whether a Development Board member "employed by the Department of Social Services" and a second Board member "employed by Berkeley County" are eligible to serve on the Development Board in light of S.C. Code Ann. §13-3-50 (1976).

For the reasons set forth herein and based upon the facts presented, we conclude that a Board member employed by the Department of Social Services and a second Board member employed by Berkeley County may not continue to serve as Development Board members because they are engaged in "public employment" as proscribed by S.C. Code Ann. §13-3-50 (1976).

It should be noted that the purpose of an opinion of this Office is not to find facts and therefore we have assumed the validity of all facts given by you. Specifically, we have assumed that one Board member is a permanent employee of the Department of Social Services and that the other is a permanent employee of Berkeley County.

S. C. Code Ann. §13-3-50 provides in pertinent part that:

No member of the Board shall hold any other public office or public employment, except that of notary public. Members of the Board shall be compensated for their services at the regular per diem rate established by the

J. Mac Holladay, Director
Page 2
March 2, 1988

General Assembly for other State boards and shall be reimbursed for actual and necessary expenses incurred in connection with and as a result of their work as members of the Board. Members of the Board may be removed for cause at any time. (emphasis added)

The legislature has in S.C. Code Ann. §13-3-50 (1976) conditioned one's eligibility for service on the Development Board upon their not holding "any other public office" or "public employment."

Therefore if the employees in question, are engaged in public employment they would be ineligible to serve on the Development Board pursuant to S.C. Code Ann. §13-3-50 (1976).

In statutory construction the primary consideration is the intention of the legislature. Citizens and Southern Systems, Inc. v. South Carolina Tax Comm'n, 280 S.C. 138, 311 S.E.2d 717 (1984). When interpreting a statute, legislative intent must prevail if it can be reasonably discovered in the language used, which must be construed in light of the intended purpose of the statutes. Gambrell v. Travelers Ins. Cos., 280 S.C. 69, 310 S.E.2d 814 (1983). However, when a statute is plain and unambiguous, it should be applied literally because the legislative design is unmistakable. Duckworth v. Cameron, 270 S.C. 647, 244 S.E.2d 217 (1978).

Generally, "public employment" means employment by some branch of government or body politic specifically serving needs of the general public. See, Words and Phrases, Public Employment, Vol 35, page 155 (1963). And a public employee is a person in public service under contract who performs duties which are routine, subordinate, advisory or as directed, and who is not invested by law with a portion of the sovereignty of the state and is not authorized to exercise functions of either an executive, legislative or judicial character. 67 C.J.S. Officers §2 (1978)

The language of S.C. Code Ann. §13-3-50 suggests that employment by the Department of Social Services is indeed public employment because it represents employment in a routine or subordinate position in an executive branch of government by an agency authorized to expend public funds and charged with

J. Mac Holladay, Director

Page 3

March 2, 1988

"supervis[ing] and administer[ing] the public welfare activities and functions of the state."^{1/} See, S.C. Code Ann. §43-1-80 et seq. (1976).

Similarly, employment as a county employee would be public employment because "body politic is a term applied to a county" and its employees serve the needs of the general public and expend public funds. See, Blacks Law Dictionary, 159, 6th Edition, 1979.

While we have found no South Carolina cases construing the term "public employment" as used in Code Section 13-3-50, our Supreme Court has said:

One who merely performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers, and though the employment be in or about a public work or business, is a mere employee.

Sanders v. Belue, 78 S.C. 171, 174, 58 S.E. 762, 763 (1907); see also, State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62 (1980).

Cases from other jurisdictions also suggest that the state and county employees involved herein would be considered public employees. In Martin v. Trivitts, 103 A.2d 779, 780, 48 Del. 368 (1954), the Superior Court of Delaware held that a county employee who served as Secretary of the Department of Elections of Sussex County was engaged in public employment. In so holding the court said:

A position, the duties of which are undefined by law and which can be changed at the will

^{1/} We need not reach the question of whether either of the Board members hold a public office in light of our finding that they are engaged in "public employment" since a finding that they are either public officers or engaged in public employment is sufficient to bar them from Board service pursuant to S.C. Code Ann. §13-3-50 (1976).

J. Mac Holladay, Director
Page 4
March 2, 1988

of the superior is not a public office but a mere public employment.^{2/}

Employment by a branch of government has been held to be public employment even if such employment is without compensation:

The term "employment" connotes service of that which engages one's time or attention. It may be with or without compensation. Public employment means employment by some branch of government or body politic as contrasted with private employment (emphasis added).

State ex rel. Cooper v. Roth, 44 N.E.2d 456, 458, 459, 140 Ohio St. 377 (1942).

Though the positions in which these board members are serving as de facto officers would be deemed to be vacant, please be advised that anything they have done as de facto officers in relation to the public or third parties will be considered valid and effectual as those of a de jure officer unless or until a court would declare such acts void or remove them from office.^{3/} See, State ex rel. McLeod v. Court of Probate of Colleton County, 266 S.C. 279, 223 S.E.2d 166 (1976); State ex rel McLeod v. West, 249 S.C. 243, 153 S.E.2d 892 (1967); Kittman v. Ayer, 3 Strob. 92 (S.C. 1848); 67 C.J.S. Officers §276.

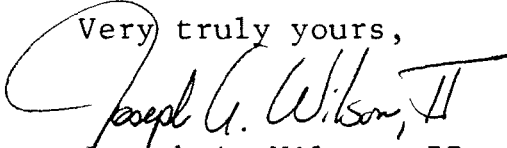
^{2/} Even if the positions in the instant case were considered "public offices" instead of public employment, service on the Development Board would be proscribed by §13-3-50, supra.

^{3/} A de jure officer is "one who is in all respects legally appointed and qualified to exercise the office." 63 Am. Jur.2d Public Officers and Employees §495. A de facto officer is "one who is in possession of an office, in good faith, entered by right, claiming to be entitled thereto, and discharging its duties under color of authority." Heyward v. Long, 178 S.C. 351, 183 S.E. 145, 151 (1936); see also Smith v. City Council of Charleston, 198 S.C. 313, 17 S.E.2d 860 (1942) and Bradford v. Byrnes, 221 S.C. 255, 70 S.E.2d 228 (1952).

J. Mac Holladay, Director
Page 5
March 2, 1988

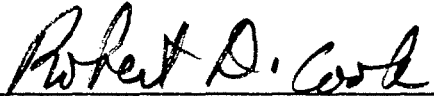
Accordingly, it is our opinion that a permanent employee of a state agency and a permanent employee of county government would be engaged in public employment as contemplated by S.C. Code Ann. §13-3-50 (1976) and would therefore be ineligible to continue serving on the Development Board.4/

With kind regards,

Very truly yours,

Joseph A. Wilson, II
Chief Deputy Attorney General

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REVIEWED AND APPROVED BY:


Robert D. Cook
Executive Assistant for Opinions

4/ Further, our review of the 1978 Acts and Joint Resolutions (Appropriation Act) has revealed no exception to the prohibition of public employment upon Development Board members imposed by S.C. Code Ann. §13-3-50 (1976).