

1982 WL 189299 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

May 20, 1982

**\*1 Re: S.C. Protection and Advocacy System for the Handicapped, Inc.**

Honorable Heyward McDonald  
Gressette Senate Office Building  
Suite 604  
Columbia, South Carolina 29201

Dear Senator McDonald:

This is in response to your letter of April 16, 1982, addressed to Attorney General McLeod in which you asked the opinion of this office as to whether the South Carolina Protection and Advocacy System for the Handicapped, Inc., could be staffed with state employees without itself becoming a state agency. It is this office's opinion that state employees may only staff state-controlled agencies, departments, or instrumentalities.

The South Carolina Protection and Advocacy System for the Handicapped (the System) is an eleemosynary corporation that has been designated by the General Assembly, pursuant to the Developmental Disabled Assistance and Bill of Rights Act, P.L. 94-103 (89 Stat. 486; [42 U.S.C. § 6001 et seq.](#)), to perform protective and advocacy functions on behalf of developmentally disabled persons. [Section 43-33-10, Code of Laws of South Carolina](#), 1976 (Cum.Supp. 1981). State monies are appropriated for the System; however, the fact that the System receives state funds is insufficient, standing alone, to render the System a 'state agency' or its employees 'state employees.' [Compare Kentucky Region Eight etc., et al. v. Commonwealth of Kentucky et al., 507 S.W.2d 489 \(Ky. 1973\)](#) (private, nonprofit corporations organized under state law to administer mental health programs held not state agencies within meaning of state retirement law notwithstanding that corporations received state funds and boards of directors of same were appointed by Governor.). Thus, the question presented is whether a private, nonprofit corporation may be staffed by state employees.

The answer to this question must be negative because, by definition, a state employee is an employee of the State of South Carolina through one of its many alter egos, the various departments, agencies, and instrumentalities of state government. One is not an employee of the State unless the State of South Carolina has the right to prescribe what the employee's job will be and to direct and control the employee in the performance of that job. [See 56 C.J.S. Master and Servant § 2d. \(1\) \(1948\); Anderson v. West, 270 S.C. 184, 241 S.E.2d 551, 553 \(1978\); Employees Retirement System of Georgia v. Baughman et al., 241 Ga. 339, 245 S.E.2d 282 \(1978\)](#). Thus, in order for the System to be staffed with state employees, the State of South Carolina, not the board of directors of the System, would have to have the right to direct and control the employees in the performance of their jobs. The practical effect of such a necessary surrender of authority by the board of directors would be to transform the System into a state agency.

For the foregoing reasons, therefore, it is the opinion of this office that the System cannot be staffed with state employees unless the System becomes a state agency. In this regard, I do not understand [42 U.S.C. § 6012\(a\)](#) to prohibit the required state protection and advocacy system's being vested in a state agency provided the agency is (1) not administered by the State Planning Council and (2) is independent of any agency which provides treatment, services, or habilitation to persons with developmental disabilities.

**\*2** If you have further questions on this matter, please call on us.

Sincerely,

Vance J. Bettis  
Assistant Attorney General

1982 WL 189299 (S.C.A.G.)

---

End of Document

© 2015 Thomson Reuters. No claim to original U.S. Government Works.