



ALAN WILSON  
ATTORNEY GENERAL

March 24, 2016

R. Bernard Chapman, Jr.  
Veterans' Trust Fund of South Carolina  
1205 Pendleton Street, Suite 463  
Columbia, SC 29201

Dear Mr. Chapman:

We received your request for an opinion regarding whether the board of trustees of the Veterans' Trust Fund of South Carolina has any personal liability with regard to their service on the board. You ask us to discuss in our opinion whether the board would be protected from personal liability under the doctrine of sovereign immunity. Our analysis of your question follows.

**LAW/ANALYSIS:**

To provide some background, the Veterans' Trust Fund of South Carolina ("VTF") is created by Section 25-21-10 of the South Carolina Code, which provides:

[t]here is established the Veterans' Trust Fund of South Carolina, an eleemosynary corporation, the resources of which must be dedicated to serving the needs of South Carolina's veterans by supporting programs, both public and private, for veterans. The Veterans' Trust Fund may support veteran service programs by direct funding or through donation of property or services. The Veterans' Trust Fund may supplement and augment, but shall not take the place of, services provided by state agencies.

The board of trustees for the Veterans' Trust Fund shall carry out activities necessary to administer the fund including, but not limited to, assessing service needs and gaps, soliciting proposals to address identified needs, and establishing criteria for awarding of grants.

S.C. Code Ann. § 25-21-10 (1976 Code, as amended).

There are two statutes that are pertinent to the VTF board of trustees. Section 25-21-20 establishes the board of trustees and provides for its appointment and its makeup. It provides:

[t]here is created the Board of Trustees for the Veterans' Trust Fund of South Carolina composed of nineteen members. The board shall utilize the staff of the Veterans' Affairs Division in order to carry out its duties,

as provided in Section 25-21-30. One member of the board of trustees must be the Director of the Office of Veterans' Affairs. The Governor, with the advice and consent of the Senate, shall appoint individuals to fill the remaining positions on the board of trustees. Of the eighteen remaining positions filled by gubernatorial appointment, four must be county veterans' affairs officers and five must represent veterans' service organizations. At least eleven of the members of the board of trustees must be United States Armed Forces veterans who were honorably discharged; the remaining members are not required to be veterans; however, if any are veterans, they also must have been honorably discharged from the armed services. The members of the board shall elect officers from among themselves as necessary.

Individuals appointed by the Governor shall serve at the pleasure of the Governor and may be removed by the Governor at any time.

Members of the board who are not full-time employees of the State of South Carolina or any of its political subdivisions may be paid per diem, mileage, and subsistence at rates established by the board, not to exceed standards provided by law for state boards, commissions, and committees. Per diem, mileage, and subsistence may be paid to members of the board only for travel and costs incurred due to meetings of the board.

A complete report of the activities of the Veterans' Trust Fund must be made to the General Assembly annually.

S.C. Code Ann. § 25-21-20 (1976 Code, as amended).

Section 25-21-30 provides for the various duties of the VTF board of trustees and it states:

[t]o fulfill its duties and functions, the board is authorized, but not limited to:

- (1) assess the needs of veterans, establish priorities, and develop goals and objectives for the Veterans' Trust Fund;
- (2) decide how the monies in the fund must be disbursed;
- (3) accept gifts, grants, and bequests from any person, entity, or foundation, either public or private;
- (4) accept appropriations, loans, or grants from any governmental or quasigovernmental source;

- (5) acquire and hold property;
- (6) invest trust monies, including pooled investment funds maintained by the State;
- (7) solicit proposals for programs aimed at meeting identified needs;
- (8) establish rules of procedure for board meetings and any other function of the fund necessary for the orderly conduct of its business;
- (9) enter into contracts for the awarding of grants to public or private, nonprofit organizations; and
- (10) establish criteria for awarding of grants which shall include the consideration of at least:
  - (a) the priority of the service need that the proposal addresses;
  - (b) the quality and soundness of the proposal and its probable effectiveness in accomplishing its objectives;
  - (c) a cost-benefit analysis of the project;
  - (d) the degree of community support for the proposal;
  - (e) the utilization of local resources, including volunteers, when appropriate, and matching or in-kind contributions which may be, but are not, required;
  - (f) the qualifications of employees to be hired under the grant;
  - (g) the experience of the proposed project administrators in providing

ongoing accountability for the  
program.

S.C. Code Ann. § 25-21-30 (1976 Code, as amended).

Although Section 25-21-10 states that VTF is an eleemosynary corporation, we found in a prior opinion that it is also a quasi-governmental entity. In our March 18, 2004 opinion, the issue was whether the VTF board of trustees could disburse trust funds through direct grants to individual veterans.<sup>1</sup> We concluded that public funds would be involved in any grant to individual veterans and explained our reasoning as follows:

Section 25-21-30(4) empowers the Board of the Trust Fund to “accept appropriations, loans or grants from any governmental or quasi governmental source.” Moreover, even though the Veterans’ Trust Fund of South Carolina is an eleemosynary corporation, it is, nevertheless, an agency established by the General Assembly with public functions and duties. Board members include the Director of the Office of Veterans’ Affairs. The Governor, with the advice and consent of the Senate, appoints the other board members. Moreover, it is well-settled that in order to constitute public funds “it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise.” Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967). Thus, it is clear that the Trust Fund, although an eleemosynary corporation, is a quasi-governmental entity and that “public funds” being expended by the Board.

Op. S.C. Atty. Gen., March 18, 2004 (2004 WL 736918).

Because of VTF’s quasi-governmental status, one would expect it and its board members to be entitled to sovereign immunity. However, the South Carolina Tort Claims Act (“Act”), S.C. Code Ann. § 15-78-10 *et seq.* (1976 Code, as amended), waives sovereign immunity under certain circumstances. The Act states that “[t]he State, an agency, a political subdivision, and a governmental entity are liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein.” S.C. Code Ann. § 15-78-40 (1976 Code, as amended). The Act further provides that “the General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter” and that “[t]he remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).” S.C. Code Ann. § 15-78-20 (1976 Code, as amended). Section 15-78-70(b) of the Act declares:

[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee’s conduct was not within the scope of his official duties or

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<sup>1</sup> We determined in that opinion that current law did not authorize grants or payments to individual veterans.

that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-70 (1976 Code, as amended).

We believe that the members of the VTF board of trustees are employees of a governmental entity for purposes of the Act. Section 15-78-30 provides definitions for the Act. Section 15-78-30(d) defines “governmental entity” as “the State and its political subdivisions.” S.C. Code Ann. § 15-78-30(d) (1976 Code, as amended). Pursuant to Section 15-78-30(e), “‘State’ means the State of South Carolina and any of its offices, agencies, authorities, departments, commissions, boards, divisions, instrumentalities, including the South Carolina Protection and Advocacy System for the Handicapped, Inc., and institutions, including state-supported governmental health care facilities, schools, colleges, universities, and technical colleges.” S.C. Code Ann. § 15-78-30(e) (1976 Code, as amended) (emphasis added). Under Section 15-78-30(i), “[s]cope of official duty’ or ‘scope of state employment’ means (1) acting in and about the official business of a governmental entity and (2) performing official duties.” S.C. Code Ann. § 15-78-30(i) (1976 Code, as amended). According to Section 15-78-30(c), “employee” is defined as follows:

[o]n or after January 1, 1989, “employee” means any officer,<sup>2</sup> employee, agent, or court appointed representative of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty including, but not limited to, technical experts whether with or without compensation, but the term does not include an independent contractor doing business with the State or a political subdivision of the State. . . .

S.C. Code Ann. § 15-78-30(c) (1976 Code, as amended) (emphasis added).

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<sup>2</sup> “The term ‘*public officers*’ shall be construed to mean all officers of the State that have heretofore been commissioned and trustees of the various colleges of the State, members of various State boards and other persons whose duties are defined by law. S.C. Code Ann. § 8-1-10 (1976 Code, as amended). In Op. S.C. Atty. Gen., June 17, 2013 (2013 WL 3243063), we stated the following:

[a] public officer is ‘[o]ne who is charged by law with duties involving an exercise of some part of the sovereign power, either great or small, in the performance of which the public is concerned, and which are continuing, and not occasional intermittent, is a public officer.’ Id., 58 S.E.2d at 762-63 [Sanders v. Belue, 78 S.C. 171, 174, 58 S.E.2d 762, 763 (1907)]. Other relevant considerations include: “whether the position was created by the legislature; whether the qualifications for appointment are established; whether the duties, tenure, salary, bond, and oath are prescribed or required; whether the one occupying the position is a representative of the sovereign; among others.” State v. Crenshaw, 274 S.C. 475, 478, 266 S.E.2d 61, 62(1980).

The VTF board of trustees is a State board and its board members are officers and officials appointed by the Governor. The board members perform official duties on behalf of or in the service of VTF. Accordingly, we believe that members of the VTF board of trustees qualify as employees of a governmental entity.

Because members of the VTF board of trustees are employees, it is our opinion that trustees who act within the scope of their official duty are generally exempt from personal liability for torts committed. However, if a board member's actions are not within the scope of his official duties or if they constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude, then the board member is not immune from personal liability.

Additionally, the VTF board of trustees needs to be careful with VTF funds. This Office opined in a 1997 opinion that our Tort Claims Act would most likely not immunize public officials from personal liability for improper expenditure of public funds:

[c]ases in other jurisdictions have held, however, that such Tort Claims provisions do not shield public officials or immunize their wrongful conduct regarding the unlawful expenditure of public funds from personal liability. For example, in Burt v. Blumenauer, 84 Or.App. 144, 733 P.2d 462, the Court of Appeals in Oregon, held that an unlawful expenditure of public funds by public officials was not an action sounding in "tort for purposes of the Oregon Tort Claims Act. The Court concluded that to find otherwise would be to reach an anomalous and absurd result. . .

Moreover, in Stanson v. Lott, 17 Cal.3d 206, 130 Cal.Reptr. 697, 551 P.2d 1 (1976), the California Supreme Court construed a provision similar to our own § 15-78-70. There, the Court concluded:

[a]s noted above, under the tort claims act, a public employee generally must be held the ultimate financial responsibility for his actions in cases of a fraud, corruption or actual malice". ... There can be no question, of course, that the improper expenditure of public funds under similar circumstances would also render a public official personally liable. In light of the considerable authority enjoyed by officials who control public funds, and the important public interest in protecting such moneys from improper use, however, we believe that such officials may properly be held to a higher standard than simply the avoidance of "fraud, corruption or actual malice" in their handling of public funds. We conclude instead that such public officials must use "due care," i.e. reasonable diligence, in authorizing the expenditure of public funds and may be subject to personal liability for improper expenditures made in the absence of such due care.

551 P.2d at 15.

This is similar to the analysis by our Supreme Court in Chandler v. Britton, 197 S.C. 303, 15 S.E.2d 344 (1941) which held that in the absence of a statute to the contrary, a public officer could be personally liable for the loss of public funds where such officer has not “exercised that degree of care and prudence in the management of the funds which a person of ordinary care and prudence would exercise in his own business.” 197 S.C. at 310.

Op. S.C. Atty. Gen., March 3, 1997 (1997 WL 208002).

In our 1997 opinion, we explained a public officer’s responsibility for public funds and described some actions which could impose personal liability:

typically, a public officer responsible for the handling and collection of public funds “is considered a trustee, a bailee, or an insurer with all applicable duties and responsibilities of such funds or property.” Such public funds... are considered trust funds, and he [the public officer] is responsible to the same degree as the trustee of a private fund. It is the policy of the law to hold an official custodian of public funds to strict accountability, and he must exercise ordinary diligence to keep informed of the conditions of funds subject to his disposal. 67 C.J.S., Officers, § 211. Furthermore, a “public officer has no right to give away public funds,” and such officer... must deliver such funds or property to the public official or function for whom or which they were intended. Any public officer who wrongfully withholds or misappropriates public funds, or who pays or authorizes the illegal payment of public funds is personally liable for such misappropriation or illegal payment. Id. at § 212 (emphasis added). See also, Sumter Co. v. Hurst, 189 S.C. 316, 319, 1 S.E.2d 242 (1939) [“when a public officer receives money for the public use, he is a trustee to receive such monies and to pay them to the public official or function for whom or which they were intended.”] And in Joint Consolidated School Dist. No. 2 v. Johnson, 181 P.2d 504, 507 (Kan. 1947), it was stated that the fact that... a public officer entrusted with public funds has no right to give them away is a statement so obviously true and correct as to preclude the necessity for the citation of many authorities. . .

McQuillin, Municipal Corporations, § 12.217, moreover, states that

[a]n officer may pay out public money only in the manner prescribed by law. Money disbursed by the officer in an unlawful manner is paid out at his or her peril. Accordingly, where funds are disbursed illegally by public officers or upon their authority, they are personally liable, e.g. unlawful appropriations in bad

faith; ... payment on warrants in excess of appropriations; ... payments under illegal contracts; ... unauthorized payment to the officer him or herself; ... payment to one owing like sum to the municipality; ... unauthorized refunds; ... allowance of claims known to be illegal; ... and payment of paid warrants ... .

It is also said that “the fact that they [public officers] personally receive none of the money and act in good faith, believing that their conduct is for the best interest ... does not excuse them from liability where, in doing so, they disregard plain statutory and constitutional provisions.” 56 Am.Jur.2d, Municipal Corporations, § 288.

Id.

Members of the VTF board of trustees can be personally liable if they do not exercise ordinary care, prudence, and diligence in managing VTF funds and in keeping informed of the condition of the funds. The board must deliver the VTF funds to where they were intended and can be personally liable if they disregard the law when paying, authorizing payment, or withholding payment of the funds.

**CONCLUSION:**

You ask whether the members of the board of trustees of the Veterans’ Trust Fund of South Carolina have any personal liability with regard to their service on the board. Under the South Carolina Tort Claims Act, members of the VTF board of trustees who act within the scope of their official duty are generally exempt from personal liability for torts committed. However, if a board member’s actions are not within the scope of his official duties or if they constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude, then the board member is not immune from personal liability.

Members of the VTF board of trustees can also be personally liable if they do not exercise ordinary care, prudence, and diligence in managing VTF funds and in keeping informed of the condition of the funds. The board must deliver the VTF funds to where they were intended and can be personally liable if they disregard the law when paying, authorizing payment, or withholding payment of the funds.

Please be aware that this Office can not guarantee that members of the VTF board of trustees will not be subject to personal liability under other legal theories. As we explained in a prior opinion, “general questions regarding the potential liability of a particular entity are too broad and involve various subject areas of the law too complex to address in an opinion of this Office.” Op. S.C. Atty. Gen., June 26, 2013 (2013 WL 3479877) (quoting Op. S.C. Att’y Gen., May 6, 2013 (2013 WL 2121457)). Furthermore, this Office has previously opined:

[w]e do caution that any advice relative to the potential civil liability of a government agency is, of necessity, very general and subjective, since liability considerations most often depend upon the factual vagaries of each incident. Potential liability discussions are never fully exhaustive of the myriad theories of liability that can be crafted. Anyone can file a suit



R. Bernard Chapman, Jr.  
Page 9  
March 24, 2016

if he or she is so motivated, and only a court can ultimately determine liability.

Op. S.C. Atty. Gen., Oct. 20, 2011 (2011 WL 5304077).

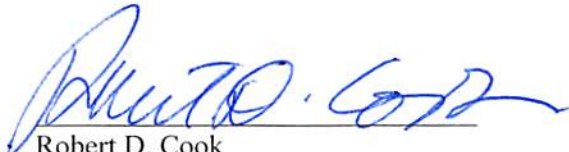
In conclusion, the purpose of this opinion is to serve as a guideline and not as a complete list of how members of the VTF board of trustees could be personally liable.

Sincerely,



Elinor V. Lister  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General