ALAN WILSON
ATTORNEY GENERAL

January 10, 2017

The Honorable Curtis M. Loftis
South Carolina State Treasurer
Post Office Box 11778
Columbia, SC 29211

Dear Treasurer Loftis:

You have sought our opinion as to the following:

> Should the calculation of a thirty year amortization schedule for the unfunded liabilities of the South Carolina Retirement System as required by S.C. Code Ann. § 9-l-1085(C)
> 1. Be based on a closed or an open amortization schedule?
> 2. Include contributions rates/values for employer and/or employee contributions, which have not yet been adopted by the PEBA Board or funded by the General Assembly?

By way of background, you note that:

> Experts agree that essentially perpetual open amortization schedules are regarded as unsound. Moreover, recent analysis of South Carolina's own pension systems found that PEBA's consultant's use of an open schedule has contributed to the continuing growth of the pension plans' unfunded liabilities, including a 2016 interest cost to SCRS of $1,256,494,125. In other words, open amortization schedules are far more likely to be "unsound" and result in a "devastating impact on the fiscal integrity of the State Retirement System." Kennedy [v. S.C. Retirement System,] 345 S.C. [339] at 352, 549 S.E.2d [243], at 250.
>
> The question we now raise is whether the General Assembly intended the requirement imposed by S.C. Code Ann. § 9-1-1085(C) to use a thirty year amortization schedule for the unfunded liabilities of the system to be based upon an open amortization schedule, rather than a closed schedule for a fixed 30 year period. We suggest that, given the problematic nature of an open amortization schedule, the use of open amortization is not consistent with the General Assembly's instruction that 2012 Act 278, including S.C. Code Ann. § 9-1 -1085(C), be the "most reliable and efficient means of addressing the long term sustainability issues of the system." 2012 Act No. 278, Findings, Section 1. (B). Similarly, the use of an open amortization schedule violates the General Assembly's instruction that "pension costs should be allocated . . . on an equitable basis over time and not perpetually pushed

> into the future or immediately imposed on current taxpayers." Id. at Section 1. (D). As such, the interpretation of a thirty year amortization schedule as an OPEN amortization schedule must be rejected because such interpretation would "lead to an absurd result that the Legislature could not have intended." Kennedy, 345 S.C. at 351, 549 S.E.2d at 249.

Law/Analysis

I. The calculation of the amortization schedule of the unfunded liabilities of the South Carolina Retirement System should be based on a closed amortization schedule.

With regard to your first question concerning closed and open amortization schedules, the relevant statute is S.C. Code Ann. § 9-1-1085(C),[1] which addresses employer and employee contribution rates and sets forth the requirement for an amortization schedule of "no more than thirty years." This statute provides:

> If the scheduled employer and employee contributions provided in subsection (A), or the rates last adopted by the board pursuant to subsection (B), are insufficient to maintain a thirty year amortization schedule for the unfunded liabilities of the system, then the board shall increase the contribution rate as provided in subsection (A) or as last adopted by the board in equal percentage amounts for employer and employee contributions as necessary to maintain an amortization schedule of no more than thirty years. Such adjustments may be made without regard to the annual limit increase of one-half percent of earnable compensation provided pursuant to subsection (B), but the differential in the employer and employee contribution rates provided in subsection (A) or subsection (B), as applicable, of this section must be maintained at the rate provided in the schedule for the applicable fiscal year.

The term "amortization schedule" is not defined in Title 9 of the South Carolina Code relating to the South Carolina Retirement System, or elsewhere in the South Carolina Code. In general, the term "amortization" is defined to mean the gradual pay off of an obligation by making periodic payments over time, such as is the case with a mortgage. See http://www.merriamwebster.com/dictionarv/amortizing. However, in the opinion of this Office, the term "amortization schedule," as used in S.C. Code Ann. § 9-1-1085, contains an ambiguity because the statutory language does not specify the methodology by which this schedule is to be calculated.

Accordingly, we must look to the rules of statutory construction for guidance as to the precise meaning of this term. "All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." Sonoco Products Co. v. South Carolina Dep't of Revenue, 378 S.C. 385, 391, 662 S.E.2d 599, 602 (2008)

[1] This code section was enacted as 2012 Act No. 278, Pt I, Section 2.B, eff. July 1, 2012.

(citations omitted). "If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory construction and the court has no right to look for or impose another meaning." Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995). However, where an ambiguity prevents the statute from conveying a clear and definite meaning, it is necessary to construe the terms of the statute according to settled rules of construction. Grant v. City of Folly Beach, 346 S.C. 74,79,551 S.E.2d 229,231 (2001) (citations omitted); see also Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956) ("But where the language of the statute gives rise to doubt or uncertainty as to the legislative intent, the search for that intent may range beyond the borders of the statute itself; for it must be gathered from a reading of the statute as a whole in the light of the circumstances and conditions existing at the time of its enactment." An ambiguity arises when the meaning of the language is doubtful or provides "doubleness of meaning." Chapman v. Metropolitan Life Ins. Co., 172 S.C. 250, 173 S.E. 801, 803 (1934); see also Southeastern Fire Ins. Co. v. S.C. Tax Comm'n, 253 S.C. 407, 171 S.E.2d 355 (1969) (language is ambiguous when it is capable of being understood by reasonably well-informed persons in either of two or more senses.).

In order to ascertain the meaning of an ambiguous term, courts must follow the rules of statutory construction, which dictate consideration of the legislative history to effectuate the purpose of the statute. Hyde v. South Carolina Dep't of Mental Health, 314 S.C. 207, 210, 442 S.E.2d 582, 583 (1994) (citations omitted). In construing a statute, courts look to the language as a whole, in light of the statute's manifest purpose. Simmons v. City of Columbia, 280 S.C. 163, 164,311 S.E.2d 732,733 (1984). Furthermore, the Legislature is presumed to intend that its statutes accomplish something. State v. Long, 363 S.C. 360,364,610 S.E.2d 809,812 (2005). When faced with an undefined statutory term, courts consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law. Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 111, 779 (1997).

Mindful of these principles of statutory construction and cognizant that the determination of legislative intent is a matter of law,[2] we begin with the constitutional provisions relating to public pensions. Art. X, § 16 of the South Carolina Constitution provides:

> The governing body of any retirement or pension system in this State funded in whole or in part by public funds shall not pay any increased benefits to members or beneficiaries of such system above the benefit levels in effect on January 1,1979, unless such governing body shall determine that funding for such increase on a sound actuarial basis has been provided or is concurrently provided.
>
> The General Assembly shall annually appropriate funds and prescribe member contributions for any state-operated retirement system which shall insure the

[2] Wehle, 363 S.C. at 403, 611 S.E.2d at 244, citing City of Myrtle Beach v. Juel P. Corp., 344 S.C. 43, 543 S.E.2d 538 (2001); Charleston County Parks and Recreation Comm'n v. Somers, 319 S.C. 65, 459 S.E.2d 841 (1995).

> availability of funds to meet all normal and accrued liability to the system on a sound actuarial basis as determined by the governing body of the system.

(emphasis added.) As this Office has recently opined, "[t]hus, it is clear that the General Assembly possesses the duty under the South Carolina Constitution to preserve the fiscal integrity and soundness of the State Retirement System." See Op. S.C. Atty. Gen., 2016 WL 4698867 (August 29, 2016).

Further, this Office has noted that "[o]ur Supreme Court has recognized that the maintenance of the fiscal integrity and soundness of the South Carolina Retirement Systems is paramount and is strongly in the public interest." Id. Additionally, in Wehle v. South Carolina Retirement System, 363 S.C. 394, 400, 611 S.E.2d 240, 242-3 (2005), Special Referee (now Justice) Kittredge, whose report was adopted by the Court, found that Art. X, § 16 requires that, should it be determined that "any retirement system is not funded on a sound actuarial basis, the General Assembly must provide funding necessary to restore the fiscal integrity of the System." Wehle, 363 S.C. at 399, 611 S.E.2d at 242. Similarly, in Kennedy v. South Carolina Retirement System, 345 S.C. 339, 351, 549 S.E.2d 243,249 (2001), the Court stated: "It must be assumed the legislature intends to maintain the soundness of the State Retirement System," and held that any proposed statutory construction which might "render[] the State Retirement System arbitrarily unsound [or] cause a devastating impact on the fiscal integrity of the State Retirement System" must be rejected because such interpretation would "lead to an absurd result that the Legislature could not have intended." Therefore, it follows that courts would likely conclude that any proposed statutory interpretation that would render the retirement system arbitrarily unsound could not have been intended by the Legislature.

We further note that S.C. Code Ann. § 9-1-1085 was enacted as part of 2012 Act No. 278 for the specific purpose of addressing problems in the public employee retirement systems. In enacting these amendments to the state retirement system, the General Assembly specifically found that:

> The financial stability and long term viability of the [South Carolina public employee retirement] systems are threatened by the following factors:
> • The funding ratio of South Carolina Retirement System has eroded over the past ten years and is currently in the lowest third of the state and local government defined benefit plans in the United States (126 plans as of July 1,2011).[3]
> • Unanticipated negative returns during the recession of 2008-2009 and aggressive investment assumptions which have not materialized.
> • Demographic and economic actuarial assumptions which were overly optimistic.

2012 Act No. 278, Findings, Section 1. (B). The General Assembly further found that

[3] According to testimony recently presented to the Joint Committee on Pension System Review, South Carolina's unfunded pension liability now ranks 43rd of the 50 states. See 2016-10 Pew Presentation: Public pensions: 50-State Overview & South Carolina Comparison at p. 4.

> taken as a whole, the changes made by the [2012] act constitute the most reliable and efficient means of addressing the long term sustainability issues of the system. The changes made by this act are intended to satisfy the principle of intergenerational equity, that is, pension costs should be allocated among employees, employers and taxpayers on an equitable basis over time and not perpetually pushed into the future or immediately imposed on current taxpayers.

Id., Findings, Section 1. (D) (emphasis added). Thus, in enacting the 2012 Act, the Legislature expressly recognized its constitutional duty to preserve the fiscal integrity of the State Retirement System.

Although this Office is unaware of an applicable statute or regulation specifying which sort of amortization schedule is to be used in connection with the South Carolina Retirement System, in your letter, you provide various sources explaining different types of schedules. For example, you cite to an August 24, 2016 issue brief from the Research and Analysis section of the Pew Charitable Trusts[4] entitled "The State Pension Funding Gap: 2014" (Pew Brief). The Pew Brief states in part:

> Public pension plans have three basic ways of setting a payment schedule for their unfunded liabilities: closed amortization, open amortization, and layered amortization. A closed schedule is like a typical mortgage — over a fixed period of time[,] annual payments are set that will pay the debt by the end of the time frame. An open amortization schedule similarly calculates payments based on a set period but annually resets the payment schedule back to year one. An open amortization schedule can lead to a payment plan where the debt never actually gets paid off. . . . A layered amortization schedule records gains and losses for each year and pays them off on a separate closed schedule.

Pew Brief at p. 22 n. 10 (emphasis added).

You also cite other sources which criticize open amortization schedules which reset each year, including a 2013 issue brief by the Center for State and Local Government Excellence, entitled "How Sensitive is Public Pension Funding to Investment Returns" ("CSLGE Public Pension Funding Issue Brief"). The CSLGE brief concludes that:

> [P]ension plan sponsors that pay 100 percent of the annual required contribution (ARC) can expect to reach full funding in a 30-year time frame if plans earn their assumed return. However, if employers reset the amortization period each year, they will not achieve that goal, even if their investment returns are realized.

CSLGE Public Pension Funding Issue Brief at p. 2 (emphasis added).

[4] The Pew Charitable Trusts is an independent, nonprofit global research and public policy organization.

Finally, we understand that on October 25, 2016 the South Carolina General Assembly's Joint Committee on Pension Systems Review heard testimony discussing the adverse effects of an open amortization schedule upon South Carolina's pension funds. According to your letter, testimony presented during the Joint Committee hearing included a presentation by the Reason Foundation's Pension Integrity Project,[5] which determined that one of the primary causes of the unfunded liability is negative amortization:

> • Unfunded liability amortization payments have been less than interest on the so-called pension debt for more than a decade.
> • The current 30-year, open amortization method is what has been the driver of this negative amortization problem.
>
> * * *
>
> • The open amortization method with a long schedule leads to negative amortization that increases unfunded liability in absolute terms and undermines the efforts to improve the funded status.

(quoting Reason Foundation presentation at pp. 6, 8, emphasis in original). You further provide evidence that testimony by the Reason Foundation Pension Integrity Project to the Joint Committee on Pension Systems Review also revealed that the open amortization method creates major solvency problems:

> 1. The open amortization method has undermined South Carolina pension plan solvency by keeping contributions towards the unfunded liability below levels adequate enough fully pay off the unfunded liabilities.
>
> • This method allows the plan to continuously reset the amortization schedule every year, making it unlikely to ever be fully paid off.
>
> * * *
>
> 2. As a result liabilities are allowed to grow in absolute terms leading to negative amortization.

(quoting Reason Foundation presentation at p. 9 (emphasis in original). This presentation also quotes Former GASB[6] Chairman James F. Antonio on open amortization methods:

---

[5] A copy of the Reason Foundation's presentation can be found at the website maintained by Joint Committee on Pension Review:
http://www.scstatehouse.gov/CommitteeInfo/Joint%20Committee%200n%20Pension%20Systems%20Review/l 02516Meeting/Reason%20Foundation-South%20Carolina%20SCRS%20Pension%20Reform%20Analysis%2020160ct25.pdf

[6] GASB is the Governmental Accounting Standards Board, the independent organization recognized by governments, the accounting industry, and capital markets as the official source of generally accepted accounting principles for state and local governments.

> Even though actuaries may consider this to be an amortization method because the unfunded actuarial liability decreases over time as a percentage of payroll, it is not an amortization method in an accounting sense because the liability increases in absolute amount. (1994)

Id.

As discussed supra, the General Assembly is constitutionally obligated to preserve the fiscal integrity and soundness of the State Retirement System. Moreover, its expressed intent in enacting the 2012 amendments was to make changes which would "constitute the most reliable and efficient means of addressing the long term sustainability issues of the [retirement] system." (emphasis added). Therefore, it is the opinion of this Office that any interpretation of the term "amortization schedule" must be consistent with and advance this constitutional duty and expressed legislative intent.

A consideration of the various types of amortization schedules necessitates the conclusion that the South Carolina Legislature intended a closed amortization schedule be utilized for the State Retirement System. A closed amortization schedule is most likely to achieve the constitutionally required actuarial soundness and thus meets the express legislative goal of using "the most reliable and efficient means of addressing long term sustainability issues" of the retirement systems. In contrast, it appears that an open amortization schedule, which continuously resets every year, is inconsistent with stated legislative intent of the 2012 Act "not [to] perpetually push [pension costs] into the future." Thus, in the opinion of this Office, the courts are unlikely to conclude that the Legislature intended to authorize the use of an open amortization schedule, which would actually undermine efforts to reduce the unfunded liabilities and thus could not qualify as "the most reliable and efficient means" to address long-term sustainability issues of the Retirement System. Instead, an open amortization schedule could result in a "devastating impact on the fiscal integrity of the State Retirement System," much like the construction rejected as absurd in Kennedy, 345 S.C. at 352, 549 S.E.2d at 250. Therefore, in our opinion, it is likely that a court would reject an interpretation of S.C. Code Aim. § 9-1-1085(C) as permitting an open amortization schedule because such interpretation would "lead to an absurd result that the Legislature could not have intended." Kennedy, 345 S.C. at 351, 549 S.E.2d at 249. Accordingly, we believe that a court would construe the term "amortization schedule" to mean a closed schedule, under which annual payments are set to pay the unfunded liability by the end of the time frame, which is consistent with expert recommendations concerning best practices to reduce unfunded liabilities.

II. The amortization schedule should not be based upon contribution rates which have not been adopted by the PEBA Board, approved by the SFAA,[7] or funded by the General Assembly.

The second part of your question seeks our opinion regarding those constraints which S.C. Code Ann. § 9-1-1085(C) imposes upon the calculation of the amortization schedule for unfunded liabilities of the South Carolina Retirement System. In your request letter, you note that PEBA has calculated the thirty year amortization schedule for the unfunded liabilities of the pension system assuming future contribution rates in excess of currently approved rates. You also note that these assumed future contribution increases have not yet been presented to the General Assembly for funding consideration. You further provide evidence that the only contribution rates approved by the State Fiscal Accountability Authority as of the date of your opinion request are those for Fiscal Year 2016-2017,[8] and assert that the use of such assumed contribution rates are not contemplated by the enabling legislation and is subject to being manipulated to achieve a desired outcome or result.

S.C. Code Ann. § 9-l-1085(C) provides:

> If the scheduled employer and employee contributions provided in subsection (A), or the rates last adopted by the board pursuant to subsection (B), are insufficient to maintain a thirty year amortization schedule for the unfunded liabilities of the system, then the board shall increase the contribution rate as provided in subsection or as last adopted by the board. . . .

We now consider the practice of calculating an amortization schedule based on contribution rates not yet adopted by PEBA's Board, or approved by the State Fiscal Accountability Authority. Your concern is whether such practice, which assumes commitments of public funds yet to be appropriated by the General Assembly is consistent with this statutory authorization and other South Carolina constitutional and statutory law.

As noted earlier, S.C. Code Ann. § 9-l-1085(C) mandates the calculation of an amortization schedule to address the unfunded liabilities of the public pension system. Such a schedule must necessarily include a factor for future contributions which will be used to fund a public obligation, namely, the future payments under the various state retirement systems. Accordingly, the issues to be determined are (1) what, if any, constraints upon the calculation of "the amortization schedule for the unfunded liabilities of the system" are imposed by this statute or other constitutional and statutory requirements; or (2) in the alternative, if no constraints are imposed (either expressly or impliedly), whether a statutory grant to PEBA of discretion to use

---

[7] S.C. Code Ann. § 9-4-45 requires that all "policy determination" made by the PEBA Board, including any "adjustments in employer and employee contributions" be approved by the State Fiscal Accountability Authority.

[8] We noted that on December 13, 2016 the Fiscal Accountability Authority approved contribution rate increases to 9.16% for employees and 12.06% for employers, effective July 1, 2017.

as yet unapproved and unappropriated public contributions would be consistent with the nondelegation doctrine[9] and/or separation of powers.

First, we look to the language of S.C. Code Ann. 9-1-1085(C) itself. In interpreting a statute, the terms must be construed in context and their meaning determined by looking at the other terms used in the statute. Gilstrap v. South Carolina Budget and Control Board, 310 S.C. 210,216,423 S.E.2d 101, 105 (1992), citing Southern Mutual Church Ins. Co. v. S.C. Windstorm & Hail Underwriting Ass'n, 306 S.C. 339,412 S.E.2d 377 (1991). A provision should be given a reasonable and practical construction consistent with the purpose and policy of the Act. Gilstrap, 310 S.C. at 216, 423 S.E.2d at 105, citing Gardner v. Biggart, 308 S.C. 331, 417 S.E.2d 858 (1992); Laurens County School Districts 55 and 56 v. Cox, 308 S.C. 171,417 S.E.2d 560 (1992). Here, the sentence in § 9-1-1085(C) which mandates the preparation of the amortization schedule begins with a reference to contribution rates then existing at the time of the amortization calculation:

> the scheduled employer and employee contributions provided in subsection (A), or the rates last adopted by the board pursuant to subsection (B).

Section (A) sets forth contribution rates for fiscal years 2012-2013 and 2013-2014 and provides a baseline rate for 2014-2015 and after. Section (B) sets forth a procedure by which rates can be increased from baseline after June 30, 2015. In reading the opening phrase referring to existing contribution rates in conjunction with the subsequent directive to prepare an amortization schedule, the legislative intent is apparent. The statute tasks the Board to use the amortization schedule to determine the continuing adequacy of contribution rates. To perform this task, the amortization schedule must be based upon then existing contribution rates. To construe this section otherwise would contravene the intent of the Legislature.

As stated, the General Assembly emphasized that its intent in enacting the 2012 amendments, including S.C. Code Ann. § 9-1-1085, was to establish "the most reliable and efficient means of addressing the long term sustainability issues of the system, [while] not perpetually push[ing pension costs] into the future." Findings at §1(D). Construing Section (C) to require that any changes to contribution rates be based on an amortization schedule rooted in known payments, namely, the actual contribution rates in effect when the PEBA Board is making the contribution rate recommendation, advances this legislative purpose.

Our Supreme Court has held that the General Assembly is ultimately responsible for the fiscal integrity of the retirement systems. Wehle, 363 S.C. at 399, 611 S.E.2d at 242-43. The U.S. Court of Appeals for the Fourth Circuit has similarly noted that the General Assembly "would be obligated to account for any deficiency by increasing appropriations to the Retirement System or by requiring employers, including the State itself, to increase their contributions" and that insolvency in the retirement system could even harm the State's credit rating. Hutto v. South

[9] See e.g., Gilstrap v. S.C. Budget and Control Board, 310 S.C. 210, 216, 423 S.E.2d 101, 105 (1992), citing Bauer, 271 S.C. at 233, 246 S.E.2d at 876.

Carolina Retirement System, 773 F.3d 536, 544 (2014). In meeting this obligation, the legislature must rely upon "the official valuations prepared in keeping with the authority delegated to the [PEBA] Board and plan actuary." Wehle, 363 S.C. at 399, 611 S.E.2d at 242-43. Accordingly, retirement system obligations must be determined with reference to known factors, namely, previously approved expenditures.

Moreover, the General Assembly could not have intended that S.C. Code § 9-1-1085(C) allow amortization schedules based upon as yet unapproved payments because such an interpretation would violate the separation of powers provision of the State Constitution and the non-delegation doctrine. S.C. Const, art. I, § 8. At its simplest, the constitutional division of powers can be described as "[t]he legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws." State ex rel McLeod v. Yonce, 274 S.C. 81, 84, 261 S.E.2d 303, 305 (1979). In our division of powers, the General Assembly has plenary power over all legislative matters unless limited by some constitutional provision. Clarke v. South Carolina Pub. Serv. Auth., Ill S.C. 427, 438-39, 181 S.E. 481, 486 (1935). Included within the legislative power is the sole prerogative to make policy decisions and to exercise discretion as to what the law will be. State v. Moorer, 152 S.C. 455,479,150 S.E. 269, 277 (1929); Sutton v. Catawba Power Co., 101 S.C. 154, 157, 85 S.E. 409,410(1915). However, the legislature may not delegate its power to make laws, including the appropriation of public funds. State ex rel McLeod v. Mclnnis, 278 S.C. 307, 295 S.E.2d 633 (1982); Bauer v. S.C. State Housing Authority, 271 S.C. 219, 246 S.E.2d 869 (1978); Gregory v. Rollins, 230 S.C. 269, 95 S.E.2d 487 (1956). The executive branch is constitutionally tasked with ensuring "that the laws be faithfully executed." S.C. Const, art. IV, § 15. Of course, executive branch agencies like PEBA may exercise discretion in executing the laws, but only that discretion given by the Legislature. See Moorer, 152 S.C. at 478, 150 S.E. at 277. Thus, while non-legislative bodies may make policy determinations when properly delegated such power by the Legislature, absent such a delegation, policymaking is an intrusion upon the legislative power. Therefore, a statute which effectively gives an administrative body "an absolute, unregulated, and undefined discretion" bestows arbitrary powers and as such, is an unlawful delegation of legislative powers. Gilstrap v. S.C. Budget and Control Board, 310 S.C. 210,216,423 S.E.2d 101,105 (1992), citing Bauer, 271 S.C. at 233,246 S.E.2d at 876 (emphasis in original).

The South Carolina Supreme Court has considered a similar question of statutory interpretation in Gilstrap. There, the Budget and Control Board decided to impose budget cuts based on the rate of growth in each agency's budget rather than across the board proportional cuts based on total appropriations. The Court found that this action exceeded the agency's authority, and, moreover that had the authorizing legislation purported to grant such authority, it would have been an unconstitutional delegation in violation of the separation of powers provision. 310 S.C. at 217,423 S.E.2d at 105. Similarly, in Hampton v. Haley, 403 S.C. 395,743 S.E.2d 258 (2013), the Supreme Court again rejected an unconstitutional exercise of power by the Budget and Control Board, then acting as the predecessor to PEBA in the operation of the state retirement systems. Although the legislature had appropriated sufficient funds to pay premium

increases for state employee health insurance, the Board decided to instead split the premium increase equally between the State and the enrollees. Again, the Court rejected this purported exercise of unbridled power to disregard the General Assembly's appropriation decisions in favor of its own alternative priorities. Id. at 408, 743 S.E.2d at 265. Further, the Court noted that had this been contemplated by the legislation, it would have constituted an impermissible delegation of legislative powers in violation of the separation of powers doctrine. Id.

Our opinions illustrate this same non-delegation principle. For example in Op. S.C. Atty. Gen., 2006 WL 981690 (March 31, 2006), we concluded that "giving the Department of Insurance the authority to make the final determination as to whether to enact the law constitutes a delegation of the Legislature's power to make the laws." Moreover, in Op. S.C. Atty. Gen., 1993 WL 720089 (Op. No. 93-16) (March 15, 1993), we found that "DHEC has exercised 'absolute, unregulated, and undefined discretion in reducing the appropriation to rape crisis centers by more than twenty percent in light of the mandated four percent across-the-board reductions,' thus amounting to an unlawful delegation of legislative powers. . . ."

And, in Op. S.C. Atty. Gen., 2003 WL 22862787 (November 13, 2002), we concluded that "the delegation of discretion to individual members of County Council to determine how [county] . . . funds may be spent in their district constitutes an unlawful delegation of legislative power." In our view, "[r]ather than this being a delegation of mere administrative or ministerial functions, Florence County Council has delegated legislative authority without the necessary governing standards or guidelines to avoid serious constitutional concerns regarding these expenditures."

Here, the General Assembly has tasked PEBA with using the most reliable and efficient means to prepare an amortization schedule and with using that schedule to adopt contribution rates within certain parameters, while not perpetually pushing pension costs into the future. The amortization schedule, once appropriately developed consistent with the statutory mandates, dictates future contribution rates. If there are no constraints on the future contribution rates used in the calculation of that amortization schedule, then the near term contribution rates could be manipulated by assumptions upon which the amortization schedule is based. For example, a projection of large, as yet unadopted and unapproved future increases could be used to create an amortization schedule which could be used to justify inaction in the near term, even though such a result is contrary to legislative intent not to push costs off into the future. In other words, if Section 9-1-1085 is so broad as to allow the incorporation of as yet unapproved future contribution rates into the amortization schedule which forms the basis of those future contribution rates, the effect would be to allow unfettered discretion in setting contribution rates. This would be an unconstitutional delegation of power, in violation of the General Assembly's obligation to "annually appropriate funds and prescribe member contributions for any state-operated retirement system." S.C. Const, art. X, § 16.

Statutes should not be construed to permit unconstitutional exercises of power. For the same reasons that our Supreme Court rejected statutory interpretations which would have granted

executive agencies broad authority to establish what are essentially legislative prerogatives of prioritization and spending in Gilstrap and Hampton, it is our opinion that a court would likely interpret S.C. Code Ann. § 9-1-1085(C) to avoid such an unconstitutional grant of unfettered discretion and, instead, interpret that statute to require the amortization schedule to be based upon "the rates last adopted by the board." Such a requirement would provide an amortization schedule based on accurate information which is necessary for the fulfillment of the General Assembly's constitutional mandate to fund the pension system. Therefore, it is this Office's opinion that the mandated amortization schedule should be based on existing rates and not upon rates that have not yet been adopted by PEBA, approved by the SPAA or appropriated by the Legislature.

Conclusion

The South Carolina Retirement System is "'administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds.'" Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 41, 659 S.E.2d 125, 127 (2006) (quoting Wehle v. S.C. Ret. Sys., 363 S.C. 394, 399, 611 S.E.2d 240, 242 (2005)). As we recently stated in Op. S.C. Atty. Gen., 2016 WL 4698867 (August 29, 2016), Art. X, § 16 of the Constitution requires that the fiscal integrity of the State Retirement System be maintained. There, we observed that "[o]ur Supreme Court has recognized that maintenance of the fiscal integrity and soundness of the South Carolina Retirement System is paramount and is strongly in the public interest." The Court has "noted that Art. X, § 16 [of the State Constitution] required that should it be determined that 'any retirement system is not funded on a sound actuarial basis, the General Assembly must provide funding necessary to restore the fiscal integrity of the Systems.'" Id. (quoting Wehle v. S.C. Retirement System, 363 S.C. at 399, 611 S.E.2d at 242 (2005). As the Court had emphasized, "[i]t must be assumed the legislature intends to maintain the soundness of the Retirement System. . . ." Kennedy v. S.C. Retirement System, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001).

With these fundamental principles in mind, it is the opinion of this Office that the constitutional directive, judicial interpretations, and legislative findings related to S.C. Code Ann. § 9-1-1085 demonstrate that the legislative intent underlying S.C. Code Ann. § 9-1-1085 was to adopt "the most reliable and efficient means" to bring about change in the state retirement system and not to "perpetually push [unfunded liabilities] into the future." S.C. Code Ann. § 9-l-1085(C) requires the use of an otherwise undefined "thirty year amortization schedule." In our opinion, any interpretation of this requirement which would permit use of an open amortization schedule would violate the legislative intent underlying the statute because such open schedule is not a reliable or effective means to reduce the unfunded liability of the South Carolina Retirement System, in part because it would have the effect of perpetually pushing the liability into the future. Instead, in our opinion, an interpretation which requires a closed amortization schedule is consistent with legislative intent because such an interpretation would require payment of the unfunded liability of the State Retirement System over a fixed thirty year period,

which is consistent with S.C. Code Ann. § 9-1-1085, as well as legislative intent to preclude the perpetuation of the unfunded liability into the future.

Similarly, in our opinion, the amortization schedule required by S.C. Code Ann. § 9-1-1085(C) should be calculated based upon the "rates last adopted" as specified in the authorizing legislation without reference to future contribution rates which are as yet unadopted, unapproved and unappropriated. The use of any contribution rates other than those already adopted and approved would be inconsistent with the express language of S.C. Code Ann. § 9-1-1085, as well as the legislative purpose behind the 2012 amendments which were designed to prevent perpetually pushing pension costs into the future. Any contrary interpretation would directly conflict with and thus violate the non-delegation doctrine and the separate of powers provision of the state constitution by placing essentially unfettered policy-setting discretion in the hands of an executive branch agency. As we have emphasized many times, such delegation cannot be done, consistent with our Constitution.

Sincerely,

Robert D. Cook
Solicitor General