



# COMMONWEALTH of VIRGINIA

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July 22, 2014

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The Honorable R. Lee Ware, Jr.  
Member, House of Delegates  
Post Office Box 699  
Powhatan, Virginia 23139

Dear Delegate Ware:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask whether the Powhatan County School Board legally may authorize the former Powhatan County Superintendent of Schools to participate in a Supplemental Retirement Program by working part time at a reduced salary in the retirement program in the position of Associate Superintendent, after which she will receive supplemental retirement compensation for several years. A related question is whether the Powhatan County Board of Supervisors may rescind its prior authorization of funding for the program.

## Response

It is my opinion that the former Superintendent legally may not participate in the Supplemental Retirement Program under the facts you present. It is also my opinion that the Board of Supervisors, in its sound discretion, may modify, discontinue, or elect not to make annual appropriations to the program.

## Background

You relate that, in October 1996, the Powhatan County Board of Supervisors, acting at the request of the School Board, established a trust fund for an Early Retirement Incentive Program for School Division employees, later renamed the Supplemental Retirement Program (the "SRP"). The approval by the Board of Supervisors was made without a public hearing by a 3-2 vote.<sup>1</sup> Prior to this action being taken by the Board of Supervisors, on August 6, 1996, the School Board had adopted plan

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<sup>1</sup> See Board of Supervisors of Powhatan County, Va., Meeting Minutes (Oct. 14, 1996) (recording that "Mrs. McWaters felt it was a fantastic proposal but there was some concern from some of the teachers in relation to the 10 year retirement. Mr. Harrison and Ms. Manning agreed with Mrs. McWaters. Mr. Cosby stated he felt the School Board, as an elected body, was responsible for the adoption and implementation of the trust fund. Dr. Meara stated she would pass the comments of the three Board members on to the School Board. Mr. Burruss made a motion to accept the proposal to establish a trust fund for the early retirement program as outlined in the October 2, 1996 letter from T. J. Bise. All voted AYE except Mrs. McWaters and Ms. Manning who vote NO.").

documents specifying the terms of the SRP, with that action made effective retroactively to July 1, 1996.<sup>2</sup> Official records indicate that, at the time of approving the program's creation, the Board of Supervisors was aware of its general terms, as outlined in narrative form in a letter from the School Board Chairman, but the records fail to disclose that the supervisors either voted to approve the plan documents or voted to endorse the School Board's prior approval of the plan documents.<sup>3</sup>

As set forth in the School Board's plan documents,<sup>4</sup> eligible school division employees<sup>5</sup> may participate in the SRP by working part-time for either one half of the school year or one full school year at reduced salary.<sup>6</sup> One critical requirement for this part-time employment is that it must be "in the same or equivalent position as when the Participant was previously employed by the Employer."<sup>7</sup> Thereafter, the employee receives supplemental retirement compensation for several years, with the amount and length of payment varying depending on which of several options is selected.<sup>8</sup> The plan documents also establish a trust fund to administer the SRP.<sup>9</sup> In addition, on an unknown date, the School Division enacted a personnel regulation providing in relevant part that "eligibility for [SRP] benefits is subject to approval by the Superintendent or designee."<sup>10</sup>

The minutes of the November 13, 2012 School Board meeting recite, "Mrs. Ayers made a motion to approve the SRP Consideration, seconded by Mr. Cole. The vote was Ayers-Aye; Poe-Aye; Cole-Aye, and Jones-Nay. The Motion carried." The minutes do not disclose what was meant by "the SRP Consideration." Nonetheless, a confidential agenda for the "Personnel Docket" of the closed session that occurred earlier during this meeting identifies that item as follows:

**REQUEST APPROVAL FOR SUPPLEMENTAL RETIREMENT PROGRAM**  
**Effective Date: July 1, 2013**

<u>Name</u>	<u>Position</u>
[Name of former Superintendent]	Division Superintendent

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<sup>2</sup> See POWHATAN COUNTY SCHOOL BOARD, EARLY RETIREMENT INCENTIVE PLAN FOR EMPLOYEES OF POWHATAN COUNTY PUBLIC SCHOOLS (hereinafter "1996 Plan"), effective July 1, 1996, cover page and at 51 (Aug. 6, 1996). A current School Board document also recites that the SRP became effective on July 1, 1996, before it was approved by the Board of Supervisors. POWHATAN COUNTY PUBLIC SCHOOLS, "Personnel - Retirement - Early Retirement Incentive Plan" (hereinafter "Personnel Policy"), Section A (stating "The Early Retirement Incentive Plan . . . was initiated July 1, 1996.").

<sup>3</sup> See *supra* note 1.

<sup>4</sup> There have been several changes to the SRP over the years, including its temporary suspension and later partial reactivation, but because none of the changes have a material bearing on the analysis of the legal issues presented, they will not be summarized here.

<sup>5</sup> To be eligible, a School Division employee must be eligible for retirement under the Virginia Retirement System, have at least ten years of service with Powhatan County Public Schools, and be at least age 55. 1996 Plan, *supra* note 2, § 2.02.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, § 3.01.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, § 4.02.

<sup>10</sup> Personnel Policy, *supra* note 2, Section D(1).

Subsequently, the School Board took certain actions to facilitate the former Superintendent's entry into the SRP. Because state law requires a Superintendent to be full-time,<sup>11</sup> while the SRP requires participants to work part-time, the position of part-time Associate Superintendent was created, and the then-Superintendent assumed that position. She then was allowed to complete the requisite part-time work as Associate Superintendent, and her benefits are now scheduled to commence this August.

### Applicable Law and Discussion<sup>12</sup>

State law authorizes local governing bodies to establish retirement plans, including plans that supplement the Virginia Retirement System.<sup>13</sup> It is important to note that the authority to create such plans is granted only to local governing bodies. It is not a power conferred on school boards.<sup>14</sup> This is a legislative power, and the Supreme Court of Virginia has reaffirmed recently that legislative powers of one governmental body may not be delegated to another governmental body.<sup>15</sup> As suggested above, the available records indicate that, while the Board of Supervisors approved a trust fund for the SRP, as the SRP was described in a letter provided by the School Board Chairman, the Board of Supervisors neither adopted plan documents nor approved the plan documents previously approved by the School Board. The plan documents were adopted by the School Board alone.

The SRP was adopted in 1996; thus, eligibility criteria and benefits have been in effect and a matter of public knowledge for approximately eighteen years. In other words, the SRP, as described by the School Board's plan documents, has been in effect for almost two decades, and until recently, the Board of Supervisors has not taken any steps to alter it. Under these circumstances, there is a maxim of construction that a legislative body is presumed to be cognizant of an agency's construction of a statute, and when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.<sup>16</sup> It is therefore my opinion that the Board of Supervisors, which did vote to approve the conceptual terms of the SRP, has acquiesced over time to the terms and conditions set forth in the plan documents implementing those conceptual terms. The plan documents therefore should be viewed as being effective and controlling, as if they formally had been adopted by the Board of Supervisors.

Accordingly, the relevant provision of the 1996 Plan is the requirement that a participant must "provide continued service *in the same or equivalent position*" for the requisite time period.<sup>17</sup> As

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<sup>11</sup> VA. CODE ANN. §§ 22.1-58 (2011); 22.1-62 (2011).

<sup>12</sup> I must note this Opinion is subject to the following qualification: because the facts presented cover a period of almost two decades, some facts that might be relevant simply are not known given the passage of time and the absence of adequate records and documentation; thus, if additional facts later are discovered, the analysis and conclusions herein may no longer be valid.

<sup>13</sup> See VA. CODE ANN. § 15.2-1510 (2012); VA. CODE ANN. §§ 51.1-800 through 51.1-806 (2013) (providing generally for local retirement systems).

<sup>14</sup> See § 22.1-79 (Supp. 2014) (setting forth the powers of school boards, with no power being granted to create retirement systems for school division employees). "School boards . . . constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other . . ." *Kellam v. Sch. Bd.*, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960).

<sup>15</sup> *Marshall v. No. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008).

<sup>16</sup> See, e.g., 2011 Op. Va. Att'y Gen. 351, 353.

<sup>17</sup> Personnel Policy at 2, Section D(2) (emphasis added).

indicated, the former Superintendent did not continue as Superintendent upon entering the SRP. Instead, she entered the SRP in the newly created position of part-time Associate Superintendent.

The qualifications, work conditions, and responsibilities of superintendents are set forth in great detail in state law. They are unique to superintendents and are not necessarily applicable to associate superintendents.<sup>18</sup> The duties of the Associate Superintendent are set forth in a July, 2013 job description of Powhatan County Public Schools that was signed by the former Superintendent. Those duties differ in several material ways from the duties under state law of a Superintendent. For that reason, it is my opinion that the position of Associate Superintendent is not “the same or equivalent position” as the position of Superintendent. Therefore, under the terms of the 1996 Plan, the former Superintendent is not eligible to participate in the SRP.

Moreover, the vote to make the former Superintendent a plan participant was legally defective. The records indicate that there was a closed session discussion of making her a plan participant, but when the vote was taken later in open session, she was not identified by either name or position, and it was not even disclosed that the School Board was voting to admit someone to the SRP, regardless of who that person was, nor did it even disclose that “SRP” was an abbreviation for the Supplemental Retirement Program. The vote was merely “to approve SRP consideration,” which does not identify in any meaningful way the substantive action to be taken.

In order for a public vote to be valid, the subject of the vote must be publicly disclosed. Robert’s Rules of Order provides that, “A motion is a proposal that the assembly take certain action, or that it express itself as holding certain views.”<sup>19</sup> The requirement to specify the subject matter of a vote is particularly true where, as here, the subject has been discussed in a closed meeting. The Virginia Freedom of Information Act provides,

No resolution, ordinance, rule, contract, regulation or motion adopted, passed, or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion *that shall have its substance reasonably identified in the open meeting.*<sup>[20]</sup>

The Supreme Court of Virginia has held that, “[t]he [Freedom of Information] Act specifically mandates a liberal construction in order that public business shall be conducted so far as possible in public.”<sup>21</sup> Because the open meeting vote to admit the former Superintendent to the SRP did not “have its substance

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<sup>18</sup> See, e.g., VA. CODE ANN. §§ 22.1-59 (2011) (minimum qualifications of superintendents to be prescribed by Board of Education); 22.1-60 (2011) (superintendent to be appointed by School Board for term of two to four years); 22.1-60.1 (superintendent to be evaluated annually by school board); 22.1-62 (2011) (superintendent may not be part-time without approval of Board of Education); 22.1-63 (2011) (holders of certain offices ineligible to be superintendents); 22.1-64 (2011) (superintendent to take oath of office); 22.1-65 (2011) (superintendents may be fined for cause); 22.1-67 (2011) (school board to pay travel and office expenses of superintendent; documentation required); 22.1-68 (2011) (superintendent to maintain certain specified records and statistics); 22.1-69 (2011) (superintendent must attend all school board meetings); 22.1-70.1 (2011) (certain annual reports to be made to school board by superintendent); 22.1-70.2 (2011) (superintendent to enforce school board’s computer and internet policies); 22.1-70.3 (2011) (superintendent to identify teacher shortage areas).

<sup>19</sup> Robert’s Rules of Order, Article I, §4.

<sup>20</sup> VA. CODE ANN. § 2.2-3711(B) (Supp. 2014) (emphasis added) .

<sup>21</sup> Marsh v. Richmond Newspapers, Inc., 223 Va. 245, 254 (1982).

reasonably identified” as required by the Virginia Freedom of Information Act, it is my opinion that that vote was legally defective, and therefore null and void.<sup>22</sup>

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With respect to the continuation of and funding for the SRP, I observe that the Constitution of Virginia limits the power of a county to incur future debt.<sup>23</sup> Pursuant to Article VII §10(b), such debt requires statutory authorization and a referendum:

No debt shall be contracted on behalf of any county. . . except by authority conferred by the General Assembly by general law. . . The General Assembly shall not authorize any such debt [with certain exceptions] . . . unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county. . . for approval or rejection by a majority vote of the qualified voters. . . . Such approval shall be a prerequisite to contracting such a debt.<sup>[24]</sup>

A county’s future pension obligations are a future debt. In applying the constitutional restriction to such retirement plans, a prior Opinion of this Office concludes that their funding is subject to annual appropriations. The Opinion explains:

Article VII §10(b) explicitly provides that “[n]o debt shall be contracted by or on behalf of any county except by authority conferred by the General Assembly by general law.” In Virginia, the local school boards have no appropriation power. Furthermore, the General Assembly has explicitly provided that “[n]o school board shall expend or contract to expend in any fiscal year, any sum of money in excess of the funds available for school purposes without the consent of the governing body or bodies appropriating funds to the school board.” See § 22.1-91 of the Code of Virginia. *Thus, the plan must be made subject to annual appropriations by the board of supervisors.*<sup>[25]</sup>

In sum, because the Constitution of Virginia bars counties from incurring future debt without a referendum, the Board of Supervisors cannot be under a legal obligation to provide future appropriations to the SRP.

In addition, the power of a locality to create a retirement plan necessarily implies the power later to amend it, and also to rescind it, unless there is a statutory limitation on those powers. There is no such statutory limitation. Notably, the plan documents for the SRP, as adopted by the School Board in 1996, suggest that benefits are subject to available funding. The documents state that

It is intended that this Plan, together with the Trust Agreement established to carry out the funding of the Plan, *provided that the Employer [(the School Board)] has sufficient*

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<sup>22</sup> Because of the opinion I reach herein, it is not necessary for me to determine whether the School Board even had legal authority to place the former Superintendent in the SRP, since under the SRP that determination is to be made by the Superintendent, unless the Superintendent designates someone else to make the decision. It is not known whether that authority was designated here by the Superintendent to the School Board.

<sup>23</sup> See VA. CONST. art VII, § 10(b).

<sup>24</sup> *Id.*

<sup>25</sup> 1984-85 Op. Va. Att’y Gen. 89, 89-90 (emphasis added) (addressing supplemental retirement system for employees of Albemarle County School Division).

*funds to meet its obligations* hereunder as set forth under applicable law, meet all the requirements of the [Internal Revenue Code]. . . .<sup>[26]</sup>

Moreover, under the 1996 Plan, there is no contractual obligation to continue the SRP, and the right to terminate it is reserved unto the School Board, with the approval of the Board of Supervisors.<sup>27</sup>

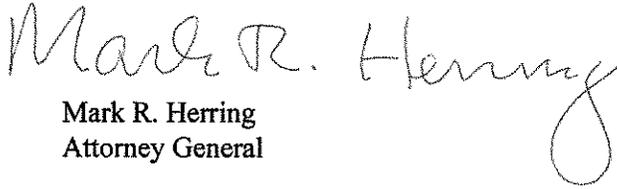
For these reasons, it is my opinion that the Supervisors have the legal authority, in their sound discretion, to modify or to repeal the SRP, or to decide not to appropriate future funding for it. Nonetheless, to the extent there are existing trust funds being held, they may be expended consistently with the trust terms to legal participants in the SRP, as those trust funds will not entail a future appropriation.

### Conclusion

Therefore, for the reasons stated above, it is my opinion that the former Superintendent may not legally participate in the Supplemental Retirement Program under the facts presented here. It is also my opinion that the Board of Supervisors may in its sound discretion elect to modify or to discontinue the program, or not make future appropriations to it.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>26</sup> 1996 Plan at 1(emphasis added).

<sup>27</sup> *Id.*, § 7.02.