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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In The Supreme Court

CERTIFIED QUESTION

FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF SOUTH CAROLINA

Mary Geiger Lewis, United States District Judge

Appellate Case No. 2024-001240

William M. Luce, on behalf of himself and all similarly situated natural persons, Plaintiff,

v.

Lexington County Health Services District, Inc., Brian D. Smith, in both his official and individual capacities; and Lynn Coggins, in both her official and individual capacities, Defendants.

FINAL BRIEF OF DEFENDANTS

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STATEMENT OF ISSUE

Are the Wages in Controversy, as defined in the Joint Stipulation of Facts, Luce and other Putative Class Members earned during employment with LCHSD [Hospital] "earnable compensation" subject to employer deductions under S.C. Code Ann. § 9-1-1020?

STATEMENT OF THE CASE

On November 4, 2022, William M. Luce, a certified registered nurse anesthetist ("CRNA"), then employed by Lexington County Health Services District, doing business as Lexington Medical Center ("Hospital"), filed a putative class action complaint against Hospital and certain of its managers in the United States District Court for the District of South Carolina. On August 15, 2023, CRNA filed an amended complaint against the above defendants as well as Peggy G. Boykin, executive director of the S.C. Public Employee Benefits Authority ("Benefits Authority"). [R., pp. 7-30] Broadly, CRNA alleges that Hospital made improper deductions to a certain portion of his wages (and those of similarly situated employees), and it has improperly diverted those deductions to the Benefits Authority for the use of the S.C. Retirement System. Specifically, CRNA alleges that Hospital improperly deducted as state retirement contributions 9% of wages that he earned for working weekends, holidays, night-shifts, call, and other shifts. The amended complaint seeks declaratory judgment and injunctive relief, claiming violations of the United States and South Carolina Constitutions and the S.C. Payment of Wages Act, and 42 U.S.C. § 1983.

In their August 29, 2023 answer to the amended complaint, Hospital and its managers denied CRNA's legal claims. [R., pp. 31-49] Defendant Boykin moved to dismiss the claim against her on the grounds of Eleventh Amendment immunity, and on December 20, 2023, District Court Judge Mary Geiger Lewis granted Boykin's motion.

Because CRNA's claims revolve around the interpretation of the South Carolina retirement statutes—in particular, S.C. Code Ann. § 9-1-1020—and present a novel question, on July 12, 2024, the remaining parties jointly moved the District Court to certify to the S.C. Supreme Court the legal issue of the construction of this provision. On July 25, 2024, the District Court granted the motion and issued to this Court a certification order, along with a joint stipulation of facts. [R., pp. 2-6, 50-74] On September 11, 2024, this Court issued an order agreeing to answer the question set out in the Statement of Issue above.

STATEMENT OF FACTS

I. CRNA's Employment and Pay

Hospital employed CRNA, at times relevant to this action, from 2019 to 2023. [R., p. 50] CRNA had retired as a state employee in 2011. [R., p. 53] After retirement, he returned to work. Under the Fair Labor Standards Act (FLSA), employees must be paid overtime for working more than forty hours per workweek unless they are in a class of employees exempt from the overtime requirement. 29 U.S.C. §§ 207(a), 213(a). For example, provisions related to overtime pay do not apply to any employee employed in a "professional capacity." 29 U.S.C. § 213(a)(1). Akin to judges and lawyers, certain classes of medical employees—including physicians, registered nurses, physician assistants, and others—may be classified as exempt from the FLSA's overtime requirements. 29 C.F.R. § 541.301. Certified registered nurse anesthetists fall under the professional exemption of the FLSA. *See, e.g., Cavanaugh v. Southern California Permanente Med. Group, Inc.*, 583 F.Supp.2d 1109, 1132-33, 1139 (C.D. Cal. 2008) (holding that certified registered nurse anesthetist "is a professional" under the federal regulations "and hence exempt from the coverage of the FLSA" and further explaining certified registered nurse anesthetists "have even more years of medical training than registered nurses," who are exempt under 29 C.F.R. § 541.301(e)(2)); *id.* at 1133-34 (quoting U.S. Department of Labor Opinion Letter dated December

29, 1999 ("[W]e conclude that the position of Certified Registered Nurse Anesthetist meets the professional exemption ….")).

Exempt employees, such as certified registered nurse anesthetists, must be compensated on a "salary basis" that meets the minimum threshold. *See* 29 C.F.R. § 541.600(a). They are paid "a predetermined amount," which is "not subject to reduction because of variations in the … quantity of the work performed." 29 C.F.R. § 541.602(a). Thus, "an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." 29 C.F.R. § 541.602(a)(1).

An exempt employee's salary, which must be paid regularly, is "a predetermined amount constituting all *or part* of the employee's compensation." 29 C.F.R. § 541.602(a) (emphasis added). As long as an employer provides the minimum required salary, it may provide an exempt employee with other "compensation without losing the exemption," which "may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis)." 29 C.F.R. § 541.604(a). In other words, even though an employer is required to pay the exempt employee a minimum weekly salary, the employer is not foreclosed from paying additional compensation for work performed. Such a hybrid compensation structure is a common way healthcare entities pay exempt medical employees.[1]

[1] *E.g., Higgins v. Bayada Home Health Care, Inc.*, 2021 WL 4306125 (M.D. Pa. Sept. 22, 2021) (upholding under the FLSA a compensation scheme that paid registered nurses a weekly guaranteed salary and the opportunity to earn additional compensation); *Allen v. Lincare Inc.*, 2018 WL 352362, *9 (E.D. Mich. Jan. 10, 2018) (upholding defendant's policy of "paying additional compensation for on-call work or work in excess of 40-hours per week or eight hours per day" as long as guaranteed "minimum weekly-required amount paid on a salaried basis" to registered nurse); *Anani v. CVS Rx Servs., Inc.*, 788 F.Supp.2d 55 (E.D.N.Y. 2011) (upholding pay structure wherein pharmacist was paid a salary plus premium pay for hours worked beyond the normal workweek); *Cavanaugh*, 583 F.Supp.2d at 1138 (quoting 29 C.F.R. §541.604(a) and recognizing

Consistent with federal law and its own policy, Hospital classified CRNA as an exempt employee.[2] [R., pp. 50-51] As an exempt employee, CRNA received a set biweekly salary. [R., p. 51] For FLSA purposes, this "predetermined amount," *see* 29 C.F.R. § 541.602(a), was reflected on his pay stubs as "Regular Base Pay." [R., pp. 75-78] In addition, the parties have stipulated that "[a]t all times" during CRNA's employment, he earned additional wages for working nights, weekends, holidays, or 24-hour shifts; additional shifts beyond his regularly scheduled shifts; on-call; or call-backs (collectively "Wages in Controversy"). [R., pp. 51-53] According to Hospital policy, "[s]cheduled hours of work" are "dictated by business needs and managerial oversight," and "[e]mployees are expected to report to work at the time and date as scheduled by their immediate supervisor." [R., pp. 50, 70]

CRNA's pay records show Hospital annually paid him the following sums (rounded to the dollar) for his (1) biweekly base salary and (2) Wages in Controversy:

	2019	2020	2021	2022	[4-yr. Total]	[Avg.]
(1) Biweekly	$183,499	$179,950	$173,867	$173,336	$710,652	**$177,663**
(2) Wages in Controversy[3]	$65,630	$59,272	$48,790	$33,960	$207,652	**$51,913**
(3) Gross pay[4]	$274,144	$292,275	$263,783	$254,169	$1,084,371	**$271,093**

that paying certified registered nurse anesthetist "for working additional shifts or overtime on a basis other than a 'base amount' does not adversely impact her exempt status" under the FLSA).

[2] Because CRNA was an exempt employee, he was not entitled to overtime pay. Therefore, CRNA's reference in his brief to section 9-1-10(8)(b) excluding from earnable compensation "any overtime pay not mandated by the employer" is irrelevant to the current dispute. [*See* Final Brief of Plaintiff, p. 9]

[3] Sum of itemized payments on CRNA's pay stubs for "CRNA Premium Pay," "CRNA On Call," "CRNA PM Shift Diff," "CRNA 24 Hour Shift," "RNA Holiday Differential," "CRNA Call Back," and "CRNA Weekend Diff." [R., pp. 75-78]

[4] In addition to the biweekly salary and Wages in Controversy, CRNA's gross pay included other payments (such as paid time off) not relevant to the current dispute because they were not subject to retirement contributions.

[R., pp. 75-78] Thus, CRNA received, on average, over $50,000 annually in Wages in Controversy, that is, nearly 20% of his $271,000 gross annual average compensation consisted of Wages in Controversy.

II. CRNA's Retirement Benefits

Beyond being paid more than a quarter of a million dollars annually by Hospital, CRNA would have, as a state retiree, also drawn his retirement income during the period in question. While the amount of CRNA's retirement income is not specified in the record, the method of its calculation is known. The retirement benefits of a state employee are calculated in part by considering the employee's "average final compensation," which means "the average annual earnable compensation of a member" for either (depending on the employee class) twelve or twenty highest "consecutive quarters" of the member's "creditable service on which regular contributions as a member were made to the system producing the highest such average." S.C. Code Ann. § 9-1-10(4)(a) & (b). In turn, "Earnable compensation" means "the full rate of the compensation that would be payable to a member if the member worked the member's full normal working time …." S.C. Code Ann. § 9-1-10(8)(a).

Under the state retirement statutes, employers are required to deduct from the compensation of each member for each payroll period 9% of the employee's earnable compensation. S.C. Code Ann. §§ 9-1-1020, 9-1-1085. The employer must make a greater contribution based on the employee's compensation; during 2019 to 2023, the employer contribution rate ranged from 15.56% to 18.56%. S.C. Code Ann. § 9-1-1085. As a regional health services district that Lexington County formed under the authority of S.C. Code Ann. § 44-7-2010, Hospital is an employer under the state retirement statutes and must comply with its provisions.

See S.C. Code Ann. § 9-1-10(14); [R., p. 50]. And as a state retiree, CRNA was required to "pay to the system the employee contribution as if [he] were an active contributing member," but, importantly, CRNA did "not accrue additional credit service in the system by reason of the contributions required." S.C. Code Ann. § 9-1-1790(C); *Ahrens v. State*, 392 S.C. 340, 345, 709 S.E.2d 54, 57 (2011).

Hospital withheld from CRNA's wages a retirement contribution of 9% of his biweekly base pay and the Wages in Controversy. [R., pp. 54, 75-78] In this lawsuit, CRNA alleges that he should not have been required to make any retirement contributions from the Wages in Controversy.[5]

As the parties and the District Court recognized, resolution of the current dispute depends on the interpretation of S.C. Code Ann. § 9-1-1020, which provides that in calculating the employee's earnable compensation for purposes of making retirement deductions, certain payments must be excluded: "Payments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base are not compensation for which contributions are deductible." S.C. Code Ann. § 9-1-1020. CRNA's position is that based on this statute, effectively 20% of his total compensation should have been exempt from retirement contributions. Hospital's position is that

[5] Prior to retiring in 2011, CRNA may well have earned pay for working nights, weekends, holidays, 24-hour shifts, and the like, which would have increased his average final compensation (for purposes of calculating his retirement benefits). If that is the case, then having eaten his proverbial cake—by increasing his retirement benefits through those types of compensation—CRNA now wishes to have it too by arguing that he should not be required to make retirement contributions from those same types of compensation as a working retiree.

the work CRNA regularly carried out and was compensated for constituted his regular work time for which retirement contributions were required.

STANDARD OF REVIEW

The S.C. Supreme Court's "standard of review when answering a certified question depends on the context of the case." *Sullivan Management, LLC v. Fireman's Fund Ins. Co.*, 437 S.C. 587, 590, 879 S.E.2d 742, 743 (2022). "In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008).

ARGUMENT

I. Summary of Argument

The plain meaning of the terms "full normal working time" and "regular salary base" under S.C. Code Ann. §§ 9-1-10(8)(a) and 9-1-1020, respectively, are all of an employee's regular working time, which includes all work CRNA performed as an exempt employee. Even if the terms of section 9-1-1020 were ambiguous, its legislative history manifests that by bonus and incentive-type payments, the General Assembly intended to thwart artificial wage-spiking strategies that led to increased retirement benefits without equitable employee contributions, and not the kind of consistent compensation that CRNA received for regular work over four years. Unlike one-time bonuses and incentives the statute was designed to address, the Wages in Controversy were payments for hours regularly and actually worked.

A number of public policy considerations—such as maintaining the fiscal soundness of the state Retirement System, ensuring that hospitals have sufficient nursing staff, affording surgical

patients anesthesia services that are not time-limited, and providing other state employers flexible pay options that may be essential to the discharge of their duties—urge an interpretation of section 9-1-1020 that allows for retirement contributions for the type of work CRNA carried out. Indeed, these considerations are so weighty that Hospital is advancing an interpretation of section 9-1-1020 against its own financial interest. Agreeing with CRNA's position would mean that Hospital would not have to pay the nearly 18% employer retirement contribution for the Wages in Controversy (which was nearly $35,000 for CRNA *alone* during the relevant time period[6])—an amount that becomes staggering when multiplied by Hospital's thousands of current or former exempt employees. [*See* R., p. 25 n.5] Finally, CRNA's interpretation of section 9-1-1020, if adopted by this Court, would lead to absurd results—potentially for himself and others—because it may force the Benefits Authority to recalculate benefits (to exclude past contributions for Wages in Controversy) and, thereby, reduce retirement benefits of possibly thousands of state retirees.

II. Because CRNA "regularly" and "[a]t all times" did work weekends, holidays, nights shifts, and similar shifts, this work was part of his "full normal working time" and "regular salary base" under sections 9-1-10(8)(a) and 9-1-1020 and thus subject to deductions under section 9-1-1020.

Under S.C. Code Ann. § 9-1-10(8)(a), "Earnable compensation" means "the full rate of the compensation that would be payable to a member if the member worked the member's *full normal working time* …." (Emphasis added). In turn, S.C. Code Ann. § 9-1-1020 provides in relevant part: "Payments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the *regular salary base* are not compensation for which contributions are deductible." (Emphasis added). The terms "full normal working time" and "regular salary base" are not defined in the statute. As this Court has explained,

[6] (15.56% x $65,630) + (16.56% x $59,272) + (17.56% x $48,790) + (18.56% x $33,960) = $34,898. *See supra*, Statement of Facts; S.C. Code Ann. § 9-1-1085(A).

"[w]hen faced with an undefined statutory term, the Court must interpret the term in accord with its usual and customary meaning." *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000); *Proveaux v. Medical Univ. of S.C.*, 326 S.C. 28, 31, 482 S.E.2d 774, 776 (1997).

The usual and customary meaning of "full normal working time" is the entirety of an employee's regular working time. Consistently, "regular salary base" is compensation that an employee earns for work he regularly carries out. The facts are undisputed as to what constituted CRNA's regular working time or work he regularly carried out. In the order certifying the current question to this Court, the District Court stated that CRNA "alleges he *regularly* 'agreed to work weekends, holidays, night shifts, 24-hour shifts, call, and other undesirable work." [R., p. 4 (emphasis added)] Consistently, the parties' joint stipulation of facts declares that "[a]t all times" during CRNA's employment, he "earned wages in addition to his biweekly salary when he worked on certain shifts—including nights, weekends, holidays, or 24-hours shifts" and similar work. [R., p. 51] Given that CRNA "regularly" and "[a]t all times" engaged in work that earned him pay beyond his biweekly salary, these were part of his "full normal working time," so they constituted "earnable compensation" and "regular base pay" subject to retirement contributions. *See* S.C. Code Ann. § 9-1-10(8)(a), 9-1-1020.[7] Moreover, "regular work time" for an exempt employee like CRNA constitutes as many hours as are required to get the job done. That is the point of

[7] Hospital's reading of section 9-1-1020 is reinforced by the interpretation of the Benefits Authority, which has concluded that the regular salary base is the employee's "gross pay," that is, all the compensation an employee earns for regular work. *South Carolina Retirement System Member Handbook, Fiscal year 2025*, p. 6 ("Members of the SCRS contribute 9% of their gross pay, tax-deferred, into their SCRS retirement accounts.") (https://www.peba.sc.gov/sites/default/files/scrs_handbook.pdf) ; SC Retirement Systems and State Health Plan website, homepage ("You contribute a tax-deferred 9% of gross pay.") (www.peba.sc.gov/scrs).

classifying employees as exempt—that they are paid "a predetermined amount," which is "not subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 541.602. In accord with federal law, Hospital's policy regarding salaried/exempt employees provides that "[s]alaried employees are expected to complete job assignments regardless of time requirements." [R., p. 57; *see id.*, 50-51]

As discussed earlier, federal law permits employers to pay exempt employees beyond the predetermined salary with other "compensation without losing the exemption," which "may be paid on any basis (e.g., flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis)." 29 C.F.R. § 541.604(a). Similar to hybrid compensation plans used by other healthcare employers when compensating exempt employees, [*see supra*, n.1], Hospital's compensation structure provides CRNA a base salary and additional compensation for work performed. That additional compensation does not vitiate the fact that all the work that CRNA carried out was part of his regular work.[8]

In opposition, CRNA has argued that based on the FLSA, his "regular base pay" was his biweekly pay as an exempt employee and that his Wages in Controversy constituted bonus and incentive-type payments that are not part of his regular salary base. [*See* Final Brief of Plaintiff, p. 11[9]] This argument fails for at least four reasons.

[8] As discussed in section IV.B below, such additional pay is, as a matter of policy, essential to ensure adequate staff in the face of nursing shortages.

[9] In making this argument, CRNA has not accurately represented the record. In his brief, he asserts that "the parties have stipulated his salary is the 'regular base pay' [Hospital] stated on each paystub. (R. p. 51 ¶6)." [Final Brief of Plaintiff, p. 11] By pointing to this one paragraph of the stipulations while ignoring the surrounding ones, CRNA presents a distorted picture. As review of all the relevant stipulations and CRNA's pay stubs makes clear, his compensation as an exempt employee consisted of his regular base pay plus "earned wages … when he worked on certain shifts." [R., p. 51] Because CRNA was an exempt employee, Hospital was required to separately identify his regular base pay that was not subject to deductions based on the quantity or quality of

First, CRNA conflates the FLSA with the retirement statutes: he attempts to transpose onto the state retirement statutes the FLSA's concept of a predetermined base salary, reflected on his pay stubs as "Regular Base Pay." [*See* R., pp. 75-78] In other words, his "Regular Base Pay" reflects Hospital's compliance with the FLSA; CRNA cannot parlay that concept into interpreting section 9-1-1020.

Second, his conflation is compounded by confusion about the FLSA itself. He seems to be unaware that the FLSA specifically allows employers to compensate exempt employees with a base salary plus additional compensation, a common practice in the healthcare industry nationwide. 29 C.F.R. §§ 541.602, 541.604(a); *supra* n.1. The additional compensation does not transform the additional work into something other than hours regularly worked.

Third, as the Benefits Authority itself has recognized in interpreting section 9-1-1020—and as it has communicated to all state employers through its *Covered Employers Procedures Manual*—"*[n]onrecurring* pay increases … are not subject to retirement contributions."[10] CRNA's pay stubs demonstrate that his Wages in Controversy pay was recurring, appearing on every pay stub in the record. [R., pp. 75-78] Therefore, they are not the sort of "[n]on-recurring" payments that are not subject to retirement contributions.

Fourth, section 9-1-1020 does not exclude from retirement contributions all bonus and incentive-type payments. Rather, it specifies that "[p]ayments for … bonus and incentive-type

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work he performed. [R., p. 56 ("An employee may be classified as a salaried exempt employee provided the employee meets 'exempt requirements' under the Fair Labor Standards Act, and *regularly receives* each pay period a predetermined bi-weekly amount.") (Salaried Exempt Employees policy and procedure) (emphasis added)] But his pay stubs also all show the additional compensation he regularly received as part of his CRNA duties.

[10] *Covered Employers Procedures Manual*, p. 29 (emphasis added) (www.peba.sc.gov/sites/default/files/er_manual.pdf).

payments, or any other payments *not considered a part* of the regular salary base are not compensation for which contributions are deductible." (Emphasis added). Again, for CRNA, the Wages in Controversy were not an irregular occurrence that occasionally affected his compensation. Rather, they were a regular part of his compensation. Indeed, the Wages in Controversy constituted nearly 20% of his average annual compensation and remained consistent over the relevant time period. Therefore, it was part of his regular salary base and subject to retirement contributions.

The Court should adopt the plain reading of "regular salary base" to mean the compensation that an employee earns for the work he or she regularly carries out. *See* S.C. Code Ann. §§ 9-1-10(8)(a), 9-1-1020.

III. The history of section 9-1-1020 reveals the legislative intent to prevent state employee wage spiking by excluding from earnable compensation special employee payments, not the types of regular payments CRNA received.

Even if it were assumed that the language of section 9-1-1020 is ambiguous, the legislative intent of this provision must be ascertained by examining the history of the S.C. Retirement System and this particular statute. *See Kennedy v. South Carolina Ret. Sys.*, 345 S.C. 339, 348, 549 S.E.2d 243, 247 (2001) (examining the "history" of the S.C. Retirement System and declaring that "[w]here the language of an act gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the act itself").

The history of the S.C. Retirement System generally, and of section 9-1-1020 specifically, shows that the General Assembly intended to establish an actuarially sound retirement system, a fact CRNA has acknowledged. [*See* Final Brief of Plaintiff, p. 7] The system's fiscal soundness has, in part, depended on each employee's contributions correlating to the retirement benefits that that employee will eventually draw. *Cf. Duvall v. South Carolina Bud. & Cntrl. Bd.*, 377 S.C. 36,

45, 659 S.E.2d 125, 129 (2008) (rejecting an interpretation of the state retirement statute that "would inflate the average of [state employee's] final three years of salary to an amount significantly 'greater than any salary' he earned during one regular year of employment"). Over the years, the Legislature has had to tweak state retirement statutes to maintain this balance, including by attempting to remedy abusive practices, such as the artificial spiking of state employee salaries. At various times, state employees had, under the then-existing law, elevated their salaries immediately before retirement through extraordinary means (such as by working unnecessary, voluntary overtime). Consequently, some employees later obtained retirement payments out of proportion to the contributions they had made to the retirement system during their working years.

The General Assembly's attempts to prevent wage spiking are, in particular, seen in nearly three decades of amendments to section 9-1-1020. In 1985, the General Assembly passed Act No. 201, which added this wording to section 9-1-1020: "Payments for unused sick leave and other single special payments at retirement, except pay for unused annual leave, are not compensation for which contributions are deductible." This amendment sought to prevent state employers and employees from colluding to offer employees special payments at retirement, which would, through such late-hour maneuvers, confer on the employees a retirement benefit windfall.

The 1985 amendment to section 9-1-1020 did not close the door to wage-spiking abuses. The next year, the General Assembly again amended this statute, through 1986 Act No. 529, to expand the kinds of payments that were not considered part of the employee's regular pay: "Payments for unused sick leave, single special payments at retirement, *bonus and incentive-type payments, or any other payments not considered a part of the regular salary base* are not compensation for which contributions are deductible. Contributions are deductible on pay for

unused annual leave." (Emphasis added). The clear intent of the newly added language (emphasized above), as revealed by the wording itself, was to close off gaps of "payments not considered a part of the regular salary base" that had been misused to manipulate higher salaries for state employees. Before this amendment, an employer in the Retirement System could have—rather than waiting right before an employee's retirement to confer a single special payment—masked that special payment by characterizing it as a "bonus" or "incentive" and paid it a year or two before retirement. Such an action would have achieved the same objective of spiking the employee's salary through a special payment at retirement. The 1986 amendment foreclosed such a ploy.

Through 2005 Act No. 14, the General Assembly again amended section 9-1-1020 to prevent other spiking strategies, this time capping termination pay for unused annual leave.

And, finally, through 2012 Act No. 278, the General Assembly effected yet another amendment to section 9-1-1020—to prevent wage spiking by limiting deductible contributions for forty-five days' termination pay for unused annual leave for Class Three employees (i.e., employees with effective membership date after June 20, 2012, *see* S.C. Code Ann. § 9-1-10(18A)).

If the General Assembly's concerns about wage spiking were not clear enough through its several amendments to section 9-1-1020, those concerns were laid bare with its passage of Act 278 in 2012. In the Act's "Findings," the Legislature expressed concerns about "the financial stability and long-term viability of the various [state retirement] systems," which it found were "threatened" by some factors, including the erosion of the system's "funding ratio." 2012 S.C. Acts 278, Sec. 1 (B). The legislative history of Act 278 (H4967) identified the problem of wage spiking: "Anti-spiking measures are applied to those who become members of the system after June 30, 2012, to

disallow eleventh hour raises and other steps taken at the end of service that can distort pension benefits." S.C. House of Representatives Legislative Update, vol. 29, no. 21 (June 26, 2012). The Act even commissioned the Benefits Authority to "conduct a study of the impact of the costs" to the Retirement System of "compensation 'spiking' on the calculation of average final compensation for retirees." 2012 S.C. Act 278, Sec. 72.

As this Court has recognized, "[a] subsequent statutory amendment may be interpreted as clarifying original legislative intent." *Stuckey v. State Budget & Cntrl. Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) (interpreting the state retirement statutes). The statutory development of section 9-1-1020 reveals that the General Assembly has had to repeatedly amend the relevant portion of that statute to cut off new and different wage-spiking strategies. When the totality of that history is considered—as well as the General Assembly's explicit 2012 articulation of its concerns about wage spiking—the purpose of the 1986 amendment to section 9-1-1020 becomes obvious. The wording added in 1986—that "[p]ayments for unused sick leave, single special payments at retirement, bonus and incentive-type payments, or any other payments not considered a part of the regular salary base are not compensation for which contributions are deductible"—was an anti-wage-spiking measure, just like its sister amendments over the years. Thus, the 1986 amendment was intended to prevent the kind of abusive, non-recurring,[11] special wage increases that skewed the employee's compensation for calculating retirement benefits and left the state Retirement System holding the bill for decades to come.

When section 9-1-1020 is construed in light of that legislative intent, it becomes evident that its language was not aimed at the kind of compensation CRNA was receiving. His salary

[11] *See Covered Employers Procedures Manual*, p. 29 (referring to "[n]onrecurring" increases) (www.peba.sc.gov/sites/default/files/er_manual.pdf).

history shows that the wages he earned beyond his base pay did not result in anomalous wage-spiking; rather, they were a consistent part of his compensation, which did not vary much from year to year. This type of regular pay is not what the Legislature had in mind when it excluded bonus or incentive-type payments.

IV. Public policy considerations weigh in favor of an interpretation that allows for deductions to Wages in Controversy.

Among the public policy considerations that support interpreting section 9-1-1020 to permit retirement deductions to Wages in Controversy are: (1) maintaining the fiscal soundness of the state Retirement System, (2) ensuring that hospitals can staff nurses during a nursing shortage, (3) affording surgical patients essential anesthesia services that cannot be time-restricted, and (4) providing flexible pay options on which certain state employers rely.

A. Maintaining the Fiscal Soundness of the State Retirement System

In *Kennedy*, this Court rejected the employees' interpretation of the state retirement statutes because their position would lead to a "dramatic increase in liability [that] might render the System unsound." *Kennedy*, 345 S.C. at 351, 549 S.E.2d at 249. Instead, the Court observed that "[i]t must be assumed the legislature intends to maintain the soundness of the State Retirement System." *Id*.; *Wehle v. South Carolina Ret. Sys.*, 363 S.C. 394, 399, 611 S.E.2d 240, 242 (2005) ("The [Retirement] System is administered under an elaborate statutory and constitutional scheme designed to protect the independence, integrity and actuarial soundness of the funds.") (adopting, in an original jurisdiction case, the recommendations of then-Circuit Court Judge John W. Kittredge serving as referee). Hospital's interpretation of section 9-1-1020 promotes the fiscal soundness of the Retirement System; CRNA's interpretation could wreck it.

Even based on the limited record before this Court, CRNA's interpretation of section 9-1-1020 would harm the actuarial soundness of the state Retirement System. For the four-year period

2019 to 2022, CRNA earned $207,652 that constituted Wages in Controversy. It would not conduce to the fiscal soundness of the Retirement System to shield from retirement contributions over $200,000 in salary for just one employee. Stated differently, as his earlier-cited wage information shows, his position is that the Court should fully exempt some 20% of his gross salary from retirement contributions.

In this putative class action, CRNA alleges that his claims are "typical of the claims of all the members" of the proposed class of registered nurses, advanced practice registered nurses, and other professionals and that the class is "so numerous as to make joinder of all members impracticable"—potentially numbering in the hundreds or thousands. [R., pp. 18, 20] Under CRNA's theory, none of these similarly situated state employees should have paid 9% of their Wages in Controversy to the state Retirement System or should do so in the future. The impact of potentially thousands of (well-paid) state employees not contributing 9% of a substantial portion of their earnings may well undermine the actuarial soundness of the Retirement System. Further, to maintain a solid fiscal footing, the Retirement System requires that CRNA and other working retirees make retirement contributions even though they do not accrue additional service credit. *See* S.C. Code Ann. § 9-1-1790(C); *Ahrens*, 392 S.C. at 345, 709 S.E.2d at 57. CRNA proposes that the retirement contributions of potentially thousands of state employees and retirees be yanked out from the Retirement System.

But the impact of CRNA's theory does not stop there. It would also mean that state employers, such as Hospital, would also not have to pay their corresponding contribution into the state Retirement System and would need to be refunded for their past contributions. For the relevant years, employer annual contributions ranged from 15.56% in 2019 to 18.56% in 2023. S.C. Code Ann. § 9-1-1085. The sum of the employee and employer contributions to the

Retirement System during these years was 24.56% to 27.56% of earnings. CRNA's proposed reading of section 9-1-1020—to wipe away this large percentage of contributions for a substantial portion of his earnings and those of similarly situated employees of Hospital (and potentially other state employers)—could well negatively impact the fiscal soundness of the state Retirement System.

Turning the actuarial soundness rationale on its head, CRNA in effect argues that the Retirement System's actuarial soundness would be served by allowing him and similarly situated employees to *not* make contributions from their earnings into the Retirement System. [*See* Final Brief of Plaintiff, pp. 7-10] Of course, CRNA has it backwards. The Retirement System's financial soundness is promoted by having state employees contribute their fair share. In particular, the General Assembly has concluded that the system requires that working retirees pay into the system but "not accrue additional credit service in the system by reason of the contributions required." S.C. Code Ann. § 9-1-1790(C); *Ahrens*, 392 S.C. at 345, 709 S.E.2d at 57. Removing these contributions would undermine, rather than serve, the actuarial soundness of the Retirement System.

CRNA further argues that the General Assembly's intent in enacting sections 9-1-10 and 9-1-1020 was "to prevent employers from deducting [Retirement System] contributions from any wages exceeding members' base pay for normal work, and thereby avoiding inflation of the retirement benefits [Retirement System] owes members." [Final Brief of Plaintiff, p. 10] CRNA's analysis is superficial. The General Assembly's concern has never been increases in retirement benefits of state employees who have fairly contributed to the Retirement System. Rather, it has been the inflation of those retirement benefits when state employees have *not* fairly and regularly contributed—as has occurred through the ploys of late-hour bonuses and the like. Requiring

CRNA to make retirement contributions from all of his regular compensation—some 20% of which has been from working certain shifts—would be precisely the type of fair bargain the General Assembly envisioned for those in the Retirement System.

Accepting CRNA's invitation to upset the fiscal equilibrium of the Retirement System would have real-world consequences. The retirement benefits of current or future retirees, who are living on fixed incomes or have planned on a certain income after retirement, may well have to be reduced in order to fund CRNA's individual desire to avoid contributions that do not increase his retirement benefits as a working retiree. *See infra*. That may, in turn, open the door to many lawsuits by retirees challenging the reduction of their benefits. Therefore, the Court should reject CRNA's reading of section 9-1-1020.

B. Ensuring Staffing by Nurses During a Nursing Shortage Crisis

Interpreting section 9-1-1020 to treat as earnable compensation wages that nurses receive for working certain shifts, such as weekends, nights, and holidays, serves the public policy of promoting nurse staffing of medical facilities, especially during a nursing shortage crisis. The Court may take judicial notice that the country faces a critical nursing shortage, and South Carolina is among the states worst affected.[12] Because of these nursing shortages, compensation plans (such

[12] HRSA Health Workforce, "Nurse Workforce Projection, 2021-2036 (November 2024) (https://bhw.hrsa.gov/sites/default/files/bureau-health-workforce/data-research/nursing-projections-factsheet.pdf); "Address the Demand for Nurses in South Carolina With an RN to BSN Degree," University of South Carolina—Aiken ("Nationwide, over one million RNs will leave the workforce by 2030 …. Among all states, South Carolina has one of the most significant projected nursing shortages ….") (https://online.usca.edu/degrees/nursing/rn-to-bsn/demand-for-nurses-in-south-carolina/); "South Carolina has a nursing shortage," *The State*, March 31, 2024 ("South Carolina is one of the states with the most significant [nursing] scarcities. It will need an estimated 10,400 nurses to meet the demand through the end of the decade.") (https://www.thestate.com/news/politics-government/article286695655.html).

as those that CRNA financially benefitted from) that pay nurses to work more hours or additional shifts ensure that all shifts are staffed. Medical emergencies do not confine themselves to business hours, and Hospital and other medical facilities cannot turn away patients needing medical care at night, on weekends, and during holidays. Hospital must fill these shifts with nursing staff, so it may initially invite volunteers, but if the shifts are not voluntarily filled, it must require that certain nursing employees work those shifts—appropriately compensating whoever works them.

In addition to helping to ensure the provision of medical services at all hours of the day and year-round, such compensation plans benefit nursing employees by allowing them the opportunity to increase their current compensation and future retirement benefits. Most employees—that is, those who have not yet retired—see such compensation programs as a major benefit because the nearly 18% employer retirement contribution (a rate exponentially higher than what private employers typically contribute, if any, to employee retirement plans) gives them a significant financial return. Without such benefits, it would be challenging to recruit employees to work for the State.

Hospital believes so strongly in the maintenance of such compensation programs that it is supporting an interpretation of section 9-1-1020 contrary to its own financial interest. [*See* R., p. 25 n.5]; S.C. Code Ann. § 9-1-1085. If the Court were to adopt CRNA's interpretation of section 9-1-1020, Hospital would save millions of dollars, as it would no longer have to submit its nearly 18% employer contribution for Wages in Controversy. However, it is willing to forgo that financial benefit because of the importance of such compensation programs to its functioning, to public health, and for the financial well-being of nursing employees.

C. Affording Surgical Patients Essential, Non-Time-Limited Anesthesia Services

Hospital's interpretation of section 9-1-1020 is consistent with the public policy of affording patients medically appropriate care by not artificially restricting, through employment policies, the time that anesthesiologists and certified registered nurse anesthetists can provide anesthesia services to patients. If a surgery takes longer than expected—because, for example, complications arise—those administering anesthesia services to the patient need to provide those services for as long as necessary. If a certified registered nurse anesthetist must work additional hours in such a case, that provider has a professional duty to do so. And in such circumstances, Hospital provides that employee compensation for the additional time worked (part of what constitute the Wages in Controversy). This example illustrates that these additional hours worked are part of the regular work of certified registered nurse anesthetists. It would be contrary to public policy for Hospital or other medical facilities to artificially limit how long such surgeries should take or for certified registered nurse anesthetists to consider such additional hours as something other than their regular work.

The Court may take judicial notice that in recent weeks, the American Association of Nurse Anesthesiology has articulated this precise public policy concern in connection with the decision of an insurance company, Anthem Blue Cross Blue Shield, to limit the number of hours surgical anesthesia services would be covered by its insurance coverage.[13] After the insurance company "reversed its recently announced anesthesia reimbursement policy," the president of the American Association of Nurse Anesthesiology issued this statement: "CRNAs put their patients' well-being

[13] American Society of Anesthesiologists website, "Anthem Blue Cross Blue Shield Won't Pay for the Complete Duration of Anesthesia for Patients' Surgical Procedures." (https://www.asahq.org/about-asa/newsroom/news-releases/2024/11/anthem-blue-cross-blue-shield-will-not-pay-complete-duration-of-anesthesia-for-surgical-procedures).

first … We cannot 'clock out' when an arbitrary time limit hits. We must remain by the patient's side not just throughout the procedure, but before and after to ensure complete recovery."[14] In this case, CRNA's position is, at bottom, that any additional hours of care a patient may require beyond a regular shift are not part of the CRNA's regular work. The Court should reject that position and interpret section 9-1-1020 in a manner that would not undermine this public policy of promoting patient care.

D. Providing Flexible and Necessary Pay Options for Other State Employers

The impact of accepting CRNA's interpretation of section 9-1-1020 is not confined to Hospital and other medical facilities that are a part of the Retirement Systems. Rather, eliminating compensation plans that reward employees for working certain shifts would likely impact other employers in the state Retirement System in unforeseeable ways. One example will suffice.

As the impact of Hurricane Helene recently highlighted, after a storm, utilities (including state-owned utilities) must frequently and immediately respond to restore power to homes and businesses. That response requires that employees work round-the-clock and extra hours to address the urgent needs of consumers. Those employees who put in long hours under difficult conditions should be appropriately paid through compensation plans that offer additional pay beyond what is legally mandated. But under CRNA's theory, employees of any utility company in the Retirement System would be prevented from bolstering their eventual retirement contributions because the additional compensation they received while responding to an emergency would constitute a "bonus" or "incentive-type pay" and that any work that such employees carry out would not be "regular," so it would not be subject to retirement contributions or allow their

[14]https://www.aana.com/news/anthem-anesthesia-reimbursement-changes-highlight-need-for-hhs-to-enforce-aca-provider-non-discrimination-provision/

retirement benefits to be increased. To the contrary, consumers demand and expect such emergency services as a regular part of the work of such utilities. Likewise, patients expect that CRNAs will be available to provide anesthesia services when emergency surgeries are needed.

Because state employers need flexible compensation plans to address their needs, an interpretation of section 9-1-1020 that undermines those plans or makes them undesirable could have negative consequences that cannot be fully anticipated.

V. CRNA's interpretation of section 9-1-1020 would lead to absurd results—for himself and others—inasmuch as it could reduce his and others retirees' retirement benefits and prevent the state from collecting contributions for ordinary work.

As the S.C. Supreme Court has made clear, the interpretation of the state retirement statutes cannot lead to absurd results. *Kennedy*, 345 S.C. at 351, 549 S.E.2d at 249 ("[W]e find the Employees' interpretation of the statute … leads to an absurd result that the Legislature could not have intended."); *Duvall*, 377 S.C. at 45, 659 S.E.2d at 129 (concluding that under *Kennedy*, the plaintiff's interpretation of the state retirement statutes would lead to "an absurd result unintended by the Legislature").

A victory in this case for CRNA would lead to the absurd result of potentially financially harming him and other state retirees. If he is correct that the wages he received for doing extra work should have been excluded from earnable compensation (and if discovery confirms that he did such work before retirement), that means that his current retirement benefits are excessive given they were inflated by those pre-retirement payments. If so, the Benefits Authority may have to recalculate and reduce his retirement benefits (and potentially those of thousands of other retirees) to account for that purported past error and refund Hospital its contributions. *See* S.C. Code Ann. § 9-1-1670(A) ("If a change or error in the records results in a member or beneficiary

receiving from the system more or less than he would have been entitled to receive had the records been correct, the board shall correct the error and, so far as practicable, adjust the payment so that the actuarial equivalent of the benefit to which the member or beneficiary was correctly entitled is paid."); [R., p. 25 n.5 (Amended Complaint alleging that Hospital is "overpaying" its own contribution to the Retirement System)]. Many state retirees, who were formerly nurses and certified registered nurse anesthetists, rely on their current state retirement benefits to subsist. And many state employees have likely made retirement plans (*e.g.,* foregoing IRA contributions or other retirement saving vehicles) based on their anticipated state retirement benefits. A decision by this Court adopting CRNA's interpretation could mean that the retirement benefits of these health care workers would have to be reduced. The Court should decline CRNA's disastrous invitation.

CONCLUSION

For decades, South Carolina's retirement statutes have served the interests of the state, state employees, and state retirees by providing a fiscally sound retirement system—one that calls for individuals to fairly contribute while working and, in turn, fairly receive benefits in retirement. That bargain demands an equitable correlation between contributions and benefits. When at times employees have attempted to abuse that bargain by artificially spiking their wages through various late-hour strategies, the General Assembly has stepped in and shut down those attempts. The evolution of section 9-1-1020 and even the expressed avowals of the General Assembly manifest the intent to prevent such abuses. The 1986 amendment of this provision to exclude from compensation for deductions purposes "bonus and incentive-type payments" was another attempt to halt and prevent such abuses, just like similar amendments to exclude "single special payments at retirement."

Ignoring that history and surgically removing from its context the operative wording, CRNA argues that section 9-1-1020's terms "bonus and incentive-type payments" excuse him from making retirement contributions on compensation he received for night, weekend, holiday, and similar shifts that he regularly worked and that constituted nearly 20% of his compensation. This argument conflicts with the plain meaning of the statute, its legislative history, and the public policies of maintaining the actuarial soundness of the Retirement System, ensuring hospitals can maintain sufficient nurse staffing during a nursing shortage crisis, affording good patient care through surgical services that are not time-restricted, and providing flexible and necessary pay options for other state employers. CRNA's argument could ultimately harm himself and potentially thousands of other state retirees because excluding retirement contributions for such compensation programs may force the Benefits Authority to have to correct and reduce their retirement benefits. The only fair and sensible construction of section 9-1-1020 is to require employee contributions from compensation for all work that employees regularly carry out. The Court is respectfully urged to adopt that fair and sensible construction.

Respectfully submitted,

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December 19, 2024.