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Mar 10 2025

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON CERTIFIED QUESTION
from the United States District Court
for the District of South Carolina

The Honorable Mary Geiger Lewis
Case No. 3:22-cv-03898-MGL

Appellate Case No. 2024-0001240

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 capacity, and Lynn Coggins in both her official and individual capacity,

Defendants.

AMICUS CURIAE BRIEF

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The South Carolina Public Employee Benefit Authority (PEBA) submits this amicus brief to provide the Court with additional information that may be helpful in answering the certified question presented by the parties to this case.

INTEREST OF AMICUS CURIAE

PEBA is the state agency responsible for the administration and management of the state's retirement systems and employee insurance programs for South Carolina's public workforce. More than 650,000 public employees and their beneficiaries are covered by the state's five defined benefit retirement plans, and approximately 800 state and local governmental employers participate in the plans. In the last fiscal year, PEBA collected over $4 billion in employee and employer contributions and distributed over $4 billion in retirement benefits in administering the plans.

Before the Court is a certified question from the United States District Court for the District of South Carolina, asking whether certain wages earned by Plaintiff William M. Luce ("Luce") as a working retiree employed by Defendant Lexington County Health Services District ("LCHSD") constitute "earnable compensation" subject to retirement contributions. Depending on how the Court answers this question, the Court's decision may have an impact on the state retirement systems and other members and participating employers in the retirement systems who are not parties to this case. As the state agency charged with the administration of those systems, PEBA submits that this brief will provide the Court with useful information that may assist the Court in making a decision.

CERTIFIED QUESTION PRESENTED

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

BACKGROUND

In this matter, Luce, a certified registered nurse anesthetist, sued his former employer, LCHSD, and others[1] alleging that LCHSD improperly withheld retirement contributions from wages he received for working certain shifts at the hospital. R. 50. At the time, Luce was a working retiree, having retired from state employment on or around April 3, 2011. R. 53.

Luce was employed by LCHSD from October 20, 2019, through June 23, 2023. R. 50. At all times during that period of employment, Luce's compensation from LCHSD was paid on a biweekly basis and consisted of a fixed biweekly salary plus hourly wages earned for work performed under certain circumstances, such as being on-call or working nights, weekends, and holidays. R. 51-53. Notably, as a salaried employee, Luce was not eligible to receive overtime pay. R. 50-51.

In bringing this action, Luce contends that the hourly wages he received in addition to his fixed salary ("Wages in Controversy") were not "earnable compensation" for the purposes of the South Carolina Retirement System ("SCRS") and therefore LCHSD should not have withheld retirement contributions from those wages.

LEGAL STANDARD

As this Court has recognized, "[t]he rule of certification is designed for this Court to answer questions of South Carolina law." *Poly-Med, Inc. v. Novus Sci. Pte. Ltd.*, 437 S.C. 343, 346, 878 S.E.2d 896, 897 (2022). "Difficulty arises when intended legal questions are inextricably linked to disputed facts." *Id.* at 346, 878 S.E.2d at 897-98. In those situations, the Court "must answer

[1] In addition to suing LCHSD and two of its employees, Luce later amended his complaint to include Peggy Boykin in her official capacity as executive director of PEBA as a defendant. R. 7. Director Boykin moved to dismiss the complaint on the ground of sovereign immunity. No. 3:22-cv-03898-MGL, ECF No. 29. The district court granted the motion on the briefs. ECF No. 43.

those questions narrowly and recognize that even a slight tilting of the facts can impact the analysis and alter the conclusion." *Donze v. Gen. Motors, LLC*, 420 S.C. 8, 24, 800 S.E.2d 479, 487 (2017) (Kittredge, J., concurring).

DISCUSSION

In this case, the Court is not being asked to interpret an ambiguity in the law or to resolve a conflict between, or fill a gap in, the applicable statutes. Nor is the Court being asked to recognize a new cause of action, adopt a rule of construction, or otherwise decide a question of public policy under South Carolina law. Rather, the Court is being asked to apply the applicable statutory provisions to a particular set of stipulated facts. Accordingly, the posture of this case is similar to a decision on cross-motions for summary judgment.

Because the question presented is inextricably linked to the specific facts of this case,[2] and because the question presented is a matter of application rather than interpretation of the law, PEBA respectfully requests that the Court narrowly answer the question in keeping with the limited nature of the parties' request.

A. Earnable compensation generally

The concept of "earnable compensation" forms a key component of how benefits are accrued, funded, and paid under SCRS. In particular, both member and employer contributions to SCRS are set and calculated as a percentage of the "earnable compensation" paid to members. *See, e.g.*, S.C. Code Ann. §§ 9-1-1020, 9-1-1085(A) (providing that member contributions be deducted from, and made as a percentage of, a member's earnable compensation); §§ 9-1-1050; 9-1-1085(A) (setting employer contributions based upon a percentage of the earnable compensation

[2] Among other things, the fact that portions of the record are sealed demonstrates the case-specific nature of the question presented in this matter.

paid to the members employed by the employer).[3] The SCRS statutes also instruct the system's actuaries to calculate the normal costs and accrued liability contributions of the system as percentages of the earnable compensation payable to the members of the system. §§ 9-1-1060; 9-1-1070.

A member's earnable compensation also forms the basis of the "average final compensation" used to calculate the member's monthly benefit upon retirement. The maximum annual service retirement benefit payable to a member of SCRS who retires after reaching eligibility for an unreduced benefit is equal to 1.82 percent of the member's average final compensation, multiplied by his or her years of creditable service. *See* S.C. Code Ann. §§ 9-1-1550(B)(1) & (C)(1). The "average final compensation" used in that calculation is defined as "the average annual *earnable compensation* of a member during the twelve consecutive quarters of his creditable service on which *regular contributions* as a member were made to the system producing the highest such average." § 9-1-10(4)(a) (emphasis added).

The SCRS statutes define this fundamental concept of "earnable compensation" as "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) (emphasis added). This definition further recognizes that a member's earnable compensation may consist of various types or forms of compensation, providing that "when compensation includes maintenance, fees, and other things of value the board shall fix the value of that part of the compensation not paid in money directly by the employer." *Id.*

[3] Active members are not the only ones who are required to contribute to the system. Working retirees like Luce, who return to covered employment after retirement, as well as their employers, are required to remit contributions to the system at the same level required for active members. *See* S.C. Code Ann. §§ 9-1-1790(B) & (C).

Additionally, section 9-1-1020 further clarifies the compensation that is includable in a member's earnable compensation and upon which contributions are due. That section provides, in relevant part, 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." § 9-1-1020 (emphasis added).

Although these provisions may not use the exact same terminology as LCHSD's compensation policies and practices, or make specific reference to shift differential pay, the plain terms of the provisions are not ambiguous or in conflict. The plain meaning of these terms is sufficient to be applied to resolve Luce's claim.[4] In particular, it is important to recognize that these provisions are necessarily broad. The 800 employers across the state that participate in the retirement systems have different policies and procedures with respect to compensation and are free to enter into various forms of compensation arrangements with their employees.

The statutes governing what constitutes earnable compensation for the purposes of SCRS reflect broader concepts, rather than prescriptive terminology, to account for the varying compensation practices needed across these 800 employers and their thousands of employees. It would be unduly restrictive, and virtually impossible, to expect the statutory language to match the specific terminology used by the compensation practices and policies of a particular participating employer. Rather, the earnable compensation provisions of the Retirement Code are broadly framed to encompass the variety of unique employment arrangements across the system's membership.

[4] The parties to this case recognize that the provisions of sections 9-1-10(8) and 9-1-1020, defining earnable compensation for the purposes of SCRS, are not ambiguous and can be applied upon a plain reading of the language. Pl.'s Br. at 10; Defs.' Br. at 12.

Further, because of the various payment policies and practices across the system, the application of these earnable compensation provisions does not stop with how compensation is labeled on a pay stub. To the contrary, the determination of whether some portion of a member's compensation constitutes earnable compensation is a fact-intensive analysis that looks at the substance or character of the compensation, not just its form. *Cf., e.g., Kilgore Grp., Inc. v. S.C. Emp. Sec. Comm'n*, 313 S.C. 65, 68-69, 437 S.E.2d 48, 49-50 (1993) (holding that while the language of an employment contract has "considerable weight" in applying the four-part test to determine whether a worker is an employee or contractor, "language in the contract merely declaring the relationship is that of an employer/independent contractor is not dispositive"); *Davis v. Satterfield Constr. Co.*, 263 S.C. 356, 362, 210 S.E.2d 596, 599 (1974) (holding that "[t]he nature of a contract . . . is to be determined not by the name which the parties have given it, but by the nature of the obligation which it imposes, because the law regards substance and not form"); *Beard v. S.C. Tax Comm'n*, 230 S.C 357, 368, 95 S.E.2d 628, 634 (1956) (recognizing that, "in determining the tax consequences of the transaction under review, we must be governed by its substance, not its form; for 'the incidence of taxation depends upon the substance of a transaction'").

Accordingly, in answering the certified question, the Court should not restrict its review to how Luce's compensation from LCHSD was labeled on his pay stub or make generalized determinations based upon such labels, but should instead conduct a fact-intensive review into the actual substance of Luce's compensation.

B. Earnable compensation represents a member's rate of pay.

As noted above, earnable compensation for the purposes of SCRS means the "the full rate of the compensation" that a member receives for working his or her "full normal working time."

S.C. Code Ann. § 9-1-10(8)(a). Correspondingly, payments that are *not* part of that regular rate of pay, such as payments for unused sick leave, special payments at retirement, and bonuses, are excluded from the definition of earnable compensation. § 9-1-1020 ("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."). Taken as a whole, these statutes define earnable compensation as a member's regular, normal rate of pay for performing his or her work.

The use of terms such as "regular" and "normal" with regard to this rate of pay reflect concepts of ordinariness, normality, and recurrence in what is considered earnable compensation. In contrast, ad hoc, irregular, or after-the-fact payments, such as bonuses, severance payments, or other "special payments," would not meet the requirements for regularity and normality and would not be considered earnable compensation. *Cf., e.g.*, *Bower v. Contributory Ret. Appeal Bd.*, 471 N.E.2d 1296, 1298 (Mass. 1984) (recognizing that a definition of "regular compensation" for the purposes of the calculation of benefits under a state retirement system "imports the idea of ordinariness or normality as well as the idea of recurrence" and holding that a firefighter's night shift differential pay was includable in the calculation of his benefits because such pay was "regular," "ordinary," and "normal," as opposed to a bonus or other ad hoc extraordinary payment).

Under such a rate-of-pay analysis for earnable compensation, the focus is on whether the payments in question reflect the member's regular rate of pay for performing the work in question, such that the member is incrementally earning and being paid the additional compensation on a recurring basis throughout the period of work performed for that pay; or, in contrast, whether the payments are being awarded and paid on an after-the-fact, ad hoc, or one-time basis in recognition of work already performed.

For example, if an employer is paying a higher hourly rate of pay for certain types of hazardous duty work regularly performed by a member, the member's compensation for performing hazardous duty at that higher hourly rate would generally be considered earnable compensation—the hazardous duty pay is the regular, normal, and recurring rate of pay for performing that portion of the member's work. But if the employer simply pays a member a retroactive bonus at the end of the year for taking on certain hazardous duties during the year, that bonus would generally not be considered earnable compensation; the bonus payment is not the regular, recurring rate of pay earned and paid to the member for performing the work, but an after-the-fact, irregular payment awarded retroactively for work already performed.

Further, this rate-of-pay analysis is consistent with the longstanding manner in which the earnable compensation provisions have been applied to various forms of compensation. Most notably, in an opinion from 1981 issued to the then-director of SCRS, the South Carolina Attorney General's office addressed whether overtime pay, shift differential pay, teacher pay for summer school, and other special pay items would be considered "earnable compensation" for the purposes of SCRS. *See* Op. S.C. Att'y Gen. of Oct. 30, 1981 (issued to Purvis W. Collins), 1981 WL 158034. In the opinion, the Attorney General's Office concluded that overtime pay and summer school pay, although performed on an as-needed or as-available basis, were sufficiently normal and recurrent types of pay for work such that the pay would be earnable compensation, even if the work was not performed constantly or at every available opportunity.[5] *Id.* at *1.

[5] This opinion predated the 2012 amendment to section 9-1-10(8) providing that earnable compensation would no longer include "any overtime pay not mandated by the employer." S.C. Code Ann. § 9-1-10(8)(b). As discussed below, however, the parties agree that Luce is not entitled to overtime pay and therefore this amendment does not apply to the present case.

Similarly, and most instructively for the case at hand, the opinion also concluded that shift differential pay would be considered earnable compensation, recognizing that "[s]hift differential pay, that is, the extra compensation paid to such persons as policemen or hospital workers for working long or undesirable hours, is in any sense of the term 'normal' within the context of the employment from which it arises." *Id.*

Moreover, consistent with the fact-intensive nature of this earnable compensation analysis, the Attorney General's Office explained that, with regard to "other special pay items," it was "not possible to set forth in advance a definition which will provide a reasonable determination of whether such items are includable as earnable compensation." *Id.* While the opinion recognized that, "[o]bviously, bonuses and other such payments made on a one-time basis are special as opposed to normal and should not be included," it ultimately concluded that "[t]he includability of other special pay items will probably have to be determined on the basis of each individual case in which they arise." *Id.* The approach taken by the Attorney General's Office in this 1981 opinion reflects how the definition of earnable compensation has been understood and applied to these forms of compensation for at least the last 43 years.

Accordingly, to the extent that the Court believes that further judicial construction of sections 9-1-10(8) and 9-1-1020 is necessary for the resolution of the certified question, a straightforward rate-of-pay analysis would best reflect the longstanding manner in which those provisions have been applied.

C. It is critical to treat earnable compensation in a consistent manner.

One of PEBA's primary reasons for filing this amicus brief is to highlight the importance of treating members' compensation in a consistent manner over time for the purposes of the South Carolina Retirement System.

As discussed above, a member's earnable compensation is not only the basis upon which both the member and his or her employer remit contributions over the course of the member's career to fund the benefits payable to the member in retirement, but it is also included in the formula used to calculate a member's lifetime monthly benefit after retirement. Consequently, how a member's earnable compensation is defined could easily affect fifty years or more of funds paid into and out of the retirement system. Given these long-term effects, consistent treatment of earnable compensation is critical. A decision that fundamentally changes how earnable compensation is defined could have a number of significant consequences upon the retirement system and its members.

Importantly, a change in the understanding of what constitutes earnable compensation could upset member expectations regarding their accrued benefits. For example, with regard to the issues in the case at hand, there are undoubtedly active members of the retirement systems who have accepted undesirable work schedules or dangerous work duties with the expectation that the accompanying shift differential or hazardous duty pay would be included in the earnable compensation used to calculate their benefits at retirement. A blanket determination that shift differential pay or hazardous duty pay cannot constitute earnable compensation would frustrate those expectations and harm those members.

Further, a general ruling that such shift differential pay or hazardous duty pay does not constitute earnable compensation in all cases would require PEBA to recalculate, and reduce, the retirement benefit for members who had such pay included in the calculation of their average final compensation, which would could cause an unexpected financial hardship for those retirees. Moreover, the need to recalculate benefits for and refund contributions to thousands of members and hundreds of employers would put an enormous administrative burden on PEBA.

Beyond these fiscal impacts, there are also matters of basic fairness at play. As this Court has noted, "[a]bsolute equality of treatment to similarly situated beneficiaries is the hallmark of a qualified defined benefits pension plan." *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 353, 549 S.E.2d 243, 250 (2001). Consequently, any changes in the definition of earnable compensation for the purposes of SCRS must be applied to all members of the retirement system in a consistent manner, regardless of the nature of their employment and regardless of whether they are an active member of the system or a working retiree.

For example, even a prospective application of a change in the definition could result in a windfall to a working retiree who was able to include shift differential pay earned as an active member in the calculation of his retirement benefit, but who is now able to exclude shift differential pay from the contributions he remits as a working retiree—all while current active members would be prohibited from including such pay in their benefits at retirement.

D. This case does not involve payments for unused annual leave or overtime.

The parties' briefs contain discussions related to case law and statutes regarding the inclusion of payments for unused annual leave in the calculation of average final compensation and the exclusion of certain overtime pay from the definition of earnable compensation. But those provisions, related to payments for unused annual leave and overtime pay, are not implicated by the certified question in this matter.

Under the Retirement Code, a Class Two member of SCRS is eligible to include a termination payment for up to forty-five days of unused annual leave in the calculation of the average final compensation used to determine the member's monthly retirement benefit. *See* S.C. Code Ann. § 9-1-10(4)(a). The Code further provides that, because such termination payments for unused annual leave may be included in the average final compensation calculation, those

termination payments are subject to retirement contributions. § 9-1-1020. Importantly, but for the specific provisions allowing for the inclusion of those payments in the average final compensation calculation, lump-sum termination payments for unused annual leave would *not* be considered earnable compensation and would *not* be included in the average final compensation calculation.[6] *See id.* §§ 9-1-10(8)(a); 9-1-1020.

Consequently, while the provisions related to payments for unused annual leave have been subject to significant litigation regarding exactly how those payments are included in the calculation of a member's average final compensation,[7] that litigation has little bearing on whether shift differential pay, hazardous duty pay, or other types of regular compensation would fall within the definition of earnable compensation for the purposes of SCRS.

Similarly, the parties' briefs contain discussions regarding the amendment made to section 9-1-10(8) in 2012 to exclude certain overtime payments from the definition of earnable compensation for the purposes of SCRS. *See* S.C. Code Ann. § 9-1-10(8)(b) ("For work performed by a member after December 31, 2012, earnable compensation does not include any overtime pay not mandated by the employer."). But in the Joint Stipulation of Facts, the parties agree that Luce was classified as an exempt employee for the purposes of the Fair Labor Standards Act and therefore Luce "was not eligible for overtime compensation at any time during Luce's Relevant Employment Period." R. 50-51. Because Luce was not eligible for, and did not receive, any

[6] Notably, the treatment of payments of unused annual leave is found in the statutory definition of "average final compensation," not in the definition of "earnable compensation." *See* §§ 9-1-10(4)(a); 9-1-10(8)(a).

[7] *See, e.g.*, *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 549 S.E.2d 243 (2001); *Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 659 S.E.2d 125 (2008).

overtime pay during the employment in question, the specific statutory exclusion related to certain overtime payments does not apply to the Wages in Controversy in this matter.[8]

CONCLUSION

Because the certified question presented is inextricably linked to the particular facts of this case, and requires the Court to apply rather than interpret the law, PEBA respectfully requests that the Court answer the question by conducting a fact-specific analysis of Luce's compensation from LCHSD that takes into account the longstanding, general principles regarding what constitutes earnable compensation.

Respectfully submitted,

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[8] If anything, the need to enact the 2012 amendment to section 9-1-10(8) regarding overtime pay and the limited scope of the amendment (excluding only non-mandatory overtime pay in SCRS) suggests that, but for that specific exclusion, overtime pay would otherwise generally be considered earnable compensation for the purposes of the retirement systems. *Cf.* Op. S.C. Att'y Gen. of Oct. 30, 1981 (issued to Purvis W. Collins), 1981 WL 158034.