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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Tanya A. Gee, Circuit Court Judge

Appellate Case No. 2016-000021
Case No. 2015-CP-40-01728

Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated.....Appellants,

v.

South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority.....Respondents.

RECORD ON APPEAL (VOLUME I)

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INDEX

Order of September 28, 2015.....0001

Order of November 2, 2015.....0002

Order of December 7, 2015.....0021

Complaint, filed March 20, 2015.....0022

Respondents' Motion to Dismiss, filed April 23, 2015.....0201

Respondents' Memorandum in Support of Motion to Dismiss, filed September 22, 2015.....0207

Appellants' Memorandum in Opposition to Respondents' Motion to Dismiss, filed September 23, 2015.....0411

Respondents' Reply in Support of Motion to Dismiss, filed September 25, 2015.....0524

Appellants' Motion to Reconsider, filed November 19, 2015.....0532

Respondents' Memorandum in Opposition to Motion to Reconsider, filed December 3, 2015.....0544

Appellants' Notice of Appeal, filed January 6, 2016.....0554

Transcript of September 5, 2012 Hearing, p. 65.....0589

Transcript of September 28, 2015 Hearing.....0591

Letter from Tina Cundari to Judge Tanya Gee dated October 27, 2015.....0626

Certificate of Appellants.....0645

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

RECEIVED
OCT 07 2015
Richard A. Harpootlian, P.A.

CASE NUMBER: 2015CP4001728

Gail M Hutto	S C Retirement System
Debra J Andrews	Police Officers Retirement System
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____ | Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
RICHLAND COUNTY, S.C.
2015 OCT 1 AM 9:20
JEANETTE W. McBRIDE
CLERK OF COURT

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

Motion to Dismiss granted. Formal order to follow.

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Jamya L. Gee Judge Code 2756 Date 9/28/2015

For Clerk of Court Office Use Only

This judgment was entered on the ___ day of ___, 20 ___ and a copy mailed first class or placed in the appropriate attorney's box on this 2 day of Oct, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian James Mixon Griffin Robert E. Stepp

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMEI .N A CIVIL CASE

CASE NUMBER: 2015CP4001728

Gail M Hutto	S C Retirement System
Debra J Andrews	Police Officers Retirement System
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
RICHLAND COUNTY
2015 NOV -3 AM 11:14
JEANETTE W. WALKER
C.C.P. & G.S.

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 3 November 2015 to attorneys of record or to parties (when appearing pro se) as follows:

Richard A. Harpootlian James Mixon Griffin Robert E. Stepp

ATTORNEY(S) FOR THE PLAINTIFF(S) **ATTORNEY(S) FOR THE DEFENDANT(S)**

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

SCRCP Form 4C (10/2011)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated,	)	Civil Action No.: 2015-CP-40-1728
Plaintiffs,	)	**ORDER**
v.	)	
South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority,	)	
Defendants.	)	

2015 NOV -2 P 12:36

This matter came before the Court on a motion to dismiss filed by Defendants pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. A hearing was conducted on September 28, 2015. James M. Griffin of Lewis Babcock & Griffin, LLP, and Christopher P. Kenney of Richard A. Harpootlian, P.A., appeared on behalf of Plaintiffs. Tina Cundari and Roland Franklin of Sowell Gray Stepp & Laffitte, LLC, appeared on behalf of Defendants. Stephen R. Van Camp, General Counsel for the South Carolina Public Employee Benefit Authority, was also present. After considering the motion, memoranda, oral presentations of counsel, matters of public record, and applicable law, the Court grants the motion to dismiss.

FACTS

This case challenges the constitutionality of two state statutes, Sections 9-1-1790(C) and 9-11-90(4)(c), requiring retired members of the state retirement systems who are re-employed in

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positions covered by the retirement system to make the same contributions to the system that a non-retired employee occupying that same position would make. Plaintiffs contend the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution.

The statutes have been the subject of litigation in this state since 2005, the year they were enacted. Effective July 1, 2005, the statutes were enacted as part of the State Retirement Systems Preservation and Investment Reform Act (Act 153). (Compl. ¶ 28.) Just days before the statutes went into effect, a group of plaintiffs represented by the same counsel as Plaintiffs in this case filed a class action alleging that Act 153 was unlawful in several respects, including that it violated the Takings Clause of the state and federal constitutions. *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). The plaintiffs in *Layman* were people who retired and returned to work before July 1, 2005, some of whom participated in the Teacher and Employee Retention Incentive (TERI) program. The South Carolina Supreme Court decided the case in its original jurisdiction.

The supreme court held that Act 153 breached a contract between the State and the TERI participants who retired and returned to work before July 1, 2005. *Id.* at 644, 630 S.E.2d at 272. In doing so, the supreme court stated: "The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants . . . ." *Id.* The supreme court further stated: "[O]ur holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute." *Id.* at 641, 630 S.E.2d at 270.

SCANNED 2 of 18 JMG

As to the remaining, non-TERI working retirees, the supreme court held that the statutes governing the working retirees did not contain the same contractually significant language as the statutes in the TERI program. *Id.* at 643, 630 S.E.2d at 271. Accordingly, the supreme court did not grant any relief to those plaintiffs and instead remanded only the breach of contract claim because the Court found that the record contained evidence that some of the working retirees may have had written contracts detailing the terms of their employment. *Id.* The Court did not remand the constitutional claims, nor did the Court grant relief to the remaining plaintiffs on any other basis. Therefore, following *Layman*, the statutes remained in full force and effect, and the State was permitted to continue collecting contributions from working retirees.

On remand, the working retirees filed amended complaints alleging multiple causes of action, including that the statutes violated the Takings Clause of the state and federal constitutions.[1] Following discovery, the parties filed cross-motions for summary judgment addressing all causes of action. After a hearing, the trial court granted relief to the working retirees on the ground of equitable estoppel. The defendants moved for reconsideration, arguing that the trial court erred in granting relief and failing to dispose of all the issues in the case,

[1] Although this Court must generally limit itself to the facts alleged on the face of a complaint in considering a motion to dismiss, the Court may take judicial notice of matters of public record in considering a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice"); *Sec'y of State for Defence v. Tremble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matters of public record."); *State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that court may take judicial notice of public records). Here, the parties provided the Court with pleadings, motions, memoranda, and orders filed in prior cases, all of which were matters of public record, and all of which the Court is permitted to consider in deciding the motion to dismiss. Additionally, the Court is guided by the doctrine of *stare decisis*, which "enjoys particular efficacy in the context of challenges concerning construction of statutes and determination of legislative intent." *Wehle v. S.C. Retirement Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005).

3 ก็ 18 SCANNED

including the allegation that the statutes are unconstitutional. After a hearing, the trial court issued an order declining to alter or amend the judgment on the equitable estoppel ground, but amending the order to expressly deny relief on all other grounds. The working retirees moved for reconsideration, but the motion was denied.

Both parties appealed the issues they lost at the trial court level, and after briefing and oral argument, the supreme court reversed the trial court on the equitable estoppel ground and affirmed the granting of summary judgment on the constitutional and remaining grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In reaching its decision, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 60. The supreme court further stated: "Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer." *Id.* Accordingly, the supreme court found that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions received from the working retirees. *Id.* at 357, 709 S.E.2d at 63.

In addition to finding that the working retirees did not have a contractual or equitable basis for relief, the supreme court unanimously affirmed the trial court's order granting summary judgment in favor of the defendants on the constitutional grounds. *Id.* at 357, 709 S.E.2d at 63. The opinion twice recites that the supreme court was affirming the grant of summary judgment on the constitutional issues. The first time, the Court explained that the plaintiffs' claims of unconstitutional taking and violations of due process were "founded on the presumption that a contractual right has been unfairly taken away," and because the plaintiffs "did not have a

4 17 18 SCANNED

contractual right to the terms of their employment," the Court affirmed the granting of summary judgment on those issues. *Id.* The second time, the Court stated: "[W]e conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract." *Id.* at 358, 709 S.E.2d at 63.

The plaintiffs petitioned for rehearing, arguing that the cause of action for unconstitutional taking was valid regardless of the existence of a contract and that the plaintiffs had "vested rights or entitlements that are constitutionally protected against a taking." The supreme court denied the petition.

On August 2, 2010, while the *Ahrens* case was pending on appeal, Plaintiffs filed a class action in federal district court alleging that the statutes requiring them to contribute to the retirement system violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.). The defendants moved to dismiss the complaint on multiple grounds, including res judicata, collateral estoppel, sovereign immunity, and lack of a protected property interest. The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014).

After losing the federal court case, Plaintiffs filed the present case. Like the federal court case, this is a putative class action seeking an order declaring that the statutes requiring working retirees to contribute to the retirement system are unconstitutional in violation of the Takings Clause of the Fifth Amendment.[2] (Compl. ¶¶ 47 - 54.) Plaintiffs have sued several of the same

[2] In this case, Plaintiffs do not allege that the statutes violate the Due Process Clause of the Fourteenth Amendment.

5 of 18 Joey
SCANNED

defendants[3] that they sued in the federal court case, and seek the same relief as they did in the federal court case, which is the return of all contributions made to the retirement system since July 1, 2005.[4]

LEGAL STANDARD

A defendant may move to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. "Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

Dismissal may be appropriate when a case presents only questions of law and there are no factual issues requiring further development. *Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) ("Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (same). A motion to dismiss should be granted if the facts and inferences therefrom

[3] In the federal court case, Plaintiffs sued a number of individual defendants, including the governor, the state treasurer, the state comptroller general, the chair of the South Carolina Senate Finance Committee, the chair of the House Ways and Means Committee, and the executive director of the Budget and Control Board, all in their official capacities.

[4] Plaintiffs presumably do not seek the return of contributions that they made before they retired.

SCANNED 6/18

would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court concludes that this case is barred by the doctrines of res judicata and collateral estoppel.

The Court concludes as a matter of law that this case is barred by the doctrine of res judicata and collateral estoppel. The Court finds that this is the fourth time that Plaintiffs or their privies have sued Defendants or their privies over whether the statutes requiring working retirees to contribute to the retirement systems are constitutional. The Court finds that the South Carolina Supreme Court and a South Carolina trial court have decided the issue presented in this case. Accordingly, the Court grants Defendants' motion to dismiss the complaint on the grounds of res judicata and collateral estoppel.

Res Judicata

"Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)). "Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.*

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (internal quotation marks omitted). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been raised in the former suit.*" *Plum Creek Dev. Corp.*, 334 S.C. at 34, 512 S.E.2d at 109 (emphasis added).

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The following elements must be shown in order to establish res judicata: "(1) The parties must be the same or their privies; (2) the subject matter must be the same; (3) while generally the precise point must be ruled [upon], yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but *what might have been decided.*" *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (quoting *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147 (1944) (emphasis added)). "It is apodictic that the doctrine of res judicata has been elongated to include 'privies.'" *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). *See also First Nat. Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945) (applying res judicata to the parties and their privies); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984) (same).

"There is no bright line test which can be applied to determine whether one is in privity with another." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). "The term 'privy', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.* "One in privity is one whose legal interests were litigated in the former proceeding." *Id.* "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Id.*

Further, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings,

8 of 18 jmg

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but also all matters which might have been litigated therein." *Id.* (internal quotations omitted). "For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identity of the subject matter." *Id.*

Here, the Court finds that all three elements of res judicata have been satisfied. First, the parties in this case are identical to or in privity with the parties in the other three cases. This is the fourth time that Plaintiffs or their privies have sued Defendants or their privies regarding the constitutionality of these statutes. The first time was in the *Layman* case filed in 2005. The second time was on remand in the *Ahrens* case. The third time was in the *Hutto* case filed in federal court. The Court finds that in these prior cases, Plaintiffs or their privies sued Defendants or their privies over whether statutes requiring working retirees to contribute to the retirement systems are constitutional. The parties in the prior cases are identically situated to the subject matter of this case. The statutes requiring working retirees to contribute to the retirement system affect all the parties in the same way. Likewise, the Defendants in this case are either the same as or in privity with the defendants in the other cases. All Defendants are required to follow the law as enacted by the General Assembly.

Plaintiffs contend that they are not the same people as the plaintiffs in *Layman* and *Ahrens* and therefore those prior cases are not binding. Although the Court acknowledges that the plaintiffs in *Layman* and *Ahrens* are not the same people as the plaintiffs in this case, the Court finds that the plaintiffs in this case are in privity with the plaintiffs in those cases. The plaintiffs in all three cases are identically situated in relationship to the statutes. The statutes affect all the plaintiffs in the same way. The Court finds that the only difference between the plaintiffs in *Layman* and *Ahrens* and the plaintiffs in this case is that the plaintiffs in *Layman* and *Ahrens* retired and returned to work before July 1, 2005, and some enrolled in the TERI program.

9 of 18 July

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These differences are not legally significant for purposes of determining whether the statutes are constitutional. The statutes make no distinction between people who retired and returned to work before July 1, 2005. Whether someone retired and returned to work before the statutes were enacted makes no difference for purposes of analyzing whether the statutes are constitutional. This is particularly so given that Plaintiffs are attacking the constitutionality of the statutes on their face.

Second, the Court finds that the subject matter of all four cases is the same. In each of the prior cases, the plaintiffs alleged that statutes requiring working retirees to contribute to the retirement system violated the Takings Clause of the Fifth Amendment of the state and federal constitutions. Plaintiffs are making the same allegation here. They allege that Sections 9-1-1790(C) and 9-11-90(4)(c) violate the Takings Clause of the Fifth Amendment of the United States Constitution. This same issue has been raised and litigated in the prior cases.

Third, the Court finds that the issue raised in this case was either decided or might have been decided in the prior cases. In *Layman*, the issue regarding the constitutionality of statutes requiring working retirees to contribute to the retirement system was squarely before the Court, and although the Court did not address the issue, the Court might have done so given that the issue was raised and litigated. In *Ahrens*, the issue was litigated once again, and the issue was expressly decided by the trial court and affirmed by the appellate court. In *Hutto*, the issue was litigated once again, and although the district court dismissed the complaint based on sovereign immunity and the Fourth Circuit affirmed, the federal courts might have decided the issue of whether the statutes are constitutional given that the issue was raised and argued in the district court and again on appeal.

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Finally, contrary to what Plaintiffs argue, the Fourth Circuit did not authorize the present case to be filed. In analyzing whether the Fifth Amendment trumps the Eleventh Amendment, the Fourth Circuit concluded that "[b]ecause the plaintiffs can have their takings claim heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014). The Court finds that this statement was part of the Fourth Circuit's analysis of whether the Fifth Amendment trumped the Eleventh Amendment and was not a directive authorizing the present case to be filed irrespective of any defenses that may be raised by the defendants. The Fourth Circuit recognized that because South Carolina state courts remain open to takings claims, Plaintiffs could have initiated the present case in state court. Instead, Plaintiffs chose to initiate this case in federal court, where the District Court dismissed this case with prejudice and the Fourth Circuit affirmed the dismissal.

In sum, the Court concludes that this case represents precisely what res judicata was designed to prevent—a defendant being sued multiple times for the same cause of action. Plaintiffs have had their day in court, both through the federal court case and through their privies in *Layman* and *Ahrens*. Defendants should not have to continue defending the same statutes on the same grounds, particularly when the South Carolina Supreme Court and a South Carolina trial court have determined that the statutes are constitutional.

Collateral Estoppel

"'Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.'" *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) (quoting *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d

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779, 782 (Ct. App. 2009)). "'The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.'" *Id.* "While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." *Hewins*, 409 S.C. at 106, 760 S.E.2d at 821 (quotations and citation omitted).

Accordingly, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).

The policy reasons for collateral estoppel are similar to those of res judicata. "The public interest demands an end to the litigation of the same issue." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). "Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Id.*

Here, the Court concludes that this case is barred by the doctrine of collateral estoppel. First, as explained above, the issue presented in this case has been actually litigated numerous times. It was litigated in the *Layman* case, the *Ahrens* case, and the federal counterpart of this case. At every stage of the litigation, Plaintiffs or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, the request for relief was denied.

12 of 18 Jpeg

Second, the Court finds that the issue in this case was directly decided in *Ahrens*. The trial court granted summary judgment in favor of the defendants on the constitutional grounds and denied the plaintiffs' motion to reconsider. On appeal, the supreme court unanimously affirmed summary judgment in favor of the defendants' on the constitutional grounds and denied the plaintiffs' petition for rehearing.

Third, the Court finds that a ruling on the issue was necessary to support the judgment in *Ahrens*. The parties in *Ahrens* filed cross-motions for summary judgment addressing all causes of action in the complaint. In ruling on the motions, it was necessary for the trial court to address each cause of action so that no argument was left open on appeal. On appeal, it was necessary for the supreme court to address all rulings made by the trial court, again so that there was no question regarding the validity of the statutes. Further, the Court finds that the supreme court would not have denied relief to the working retirees and at the same time left open the issue of whether the statutes were constitutional. By denying relief to the plaintiffs in *Ahrens*, the supreme court made it clear that the statutes were valid and enforceable in every respect, even as to working retirees who retired and returned to work before the statutes went into effect.

Because the issue presented in this case has been raised, litigated, and decided time and again, the Court concludes that the case is barred by the doctrine of collateral estoppel.

2. The Court concludes that Plaintiffs do not have a protected property interest.

In addition to concluding that this case is barred by the doctrines of res judicata and collateral estoppel, the Court concludes that the complaint fails to state a claim because Plaintiffs do not have a protected property interest entitled to constitutional protection.

"The Takings Clause provides that private property shall not be taken for public use without just compensation." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721

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S.E.2d 423, 427 (2012). Parties claiming a violation of the Takings Clause must "first show they have a legitimate property interest." *Id.* at 283-84, 721 S.E.2d at 427. "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits." *Id.* at 284, 721 S.E.2d at 427.

Here, the Court finds that Plaintiffs have failed to identify any legitimate property interest rooted in state law. There is no statute or case law protecting Plaintiffs from having to contribute to the retirement system as working retirees. Not only does no such authority exist, the South Carolina Supreme Court expressly determined in *Ahrens* that working retirees did not have a constitutionally protected property interest. In *Ahrens*, the plaintiffs argued that they had "vested rights or entitlements that are constitutionally protected against a taking," irrespective of the existence of a contract. But the supreme court rejected this argument by affirming summary judgment on the constitutional grounds and denying the petition for rehearing. Additionally, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 351.

Plaintiffs argue that the source of their property interest can be found in the Internal Revenue Code, and specifically 26 U.S.C. § 401(a), which states that "contributions to a tax qualified trust must be non-forfeitable and cannot be diverted for purposes other than the exclusive use of the employee and his or her beneficiaries." (Compl. ¶¶ 41-42.) The Court concludes that the IRS Code does not provide the source for Plaintiffs' right. First, the language in the Code does not say anything about whether it is permissible for the State to require working retirees to contribute to the retirement system as a term and condition of employment. The

14 of 18 frey
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language cited in the IRS Code relates to how funds are used once they are contributed and not with the contribution of the funds in the first instance. Second, the IRS Code does not provide the necessary state law source of Plaintiffs' right. *See Grimsley*, 396 S.C. at 283-84, 721 S.E.2d at 427 (requiring parties that allege a violation of the takings clause to show they have a legitimate property interest rooted in state law).

Plaintiffs also contend that they have a constitutionally protected property interest in their wages. But the Court finds that this case is not about wages. It is about the terms and conditions of employment. The terms and conditions of employment are a matter of state statutory law, and Plaintiffs are on notice of those terms and conditions prior to returning to work. Further, as the supreme court noted in *Ahrens*, "[b]ecause there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." 392 S.C. at 352, 709 S.E.2d at 60. The Court finds that with no guarantee of being rehired, working retirees do not have any right to any term or condition of their employment.

Accordingly, because Plaintiffs do not have a protected property interest rooted in state law, the Court concludes that Plaintiffs cannot state a claim for relief.

3. The Court concludes that Plaintiffs' claims are time barred.

Finally, the Court concludes that Plaintiffs' claims are barred by the statute of limitations and the doctrine of laches.

"Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." *Anonymous Taxpayer v. S.C. Dept. of Revenue*, 377 S.C. 425, 438, 661 S.E.2d 73, 80 (2008). "A constitutional claim can become time-barred just as any other claim can."

15 of 18 JMC SCANNED

Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands, 461 U.S. 273, 292 (1983). Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property" must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530(4) (2005). Similarly, an action brought upon a liability created by statute must be brought within three years. S.C. Code Ann. § 15-3-530(2). "The limitations period begins to run when a party knows or should know, through the exercise of due diligence, that a cause of action might exist." *Anonymous Taxpayer*, 377 S.C. at 439, 661 S.E.2d at 80.

Additionally, the equitable doctrine of laches bars an action when there has been "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Robinson v. Estate of Harris*, 388 S.C. 645, 656, 698 S.E.2d 229, 236 (2010). "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Id.* at 656-57, 698 S.E.2d at 236. "The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice." *Id.* at 657, 698 S.E.2d at 236.

Here, the Court finds and concludes that the Plaintiffs' claims are are time barred. Plaintiffs have been on notice since at least July 1, 2005, when the statutes were enacted, that they would have to contribute to the retirement system upon their return to work post-retirement. *See Ahrens v. State*, 392 S.C. at 355, 709 S.E.2d at 62 (recognizing "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests"). A case filed on March 20, 2015, challenging the constitutionality of these statutes on

SCANNED

their face is late. Plaintiffs had three years from the date the statutes were enacted to file the present case. Plaintiffs' failure to do so bars the present case.

Even assuming that Plaintiffs did not have standing to bring a claim until they actually retired and returned to work, Plaintiffs should have brought this case within three years of the date they returned to work. Although the complaint does not allege when Plaintiffs retired and returned to work, Plaintiffs presumably retired and returned to work before August 2, 2010, when they filed this same case in federal court. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that they had a claim. Rather than act diligently, Plaintiffs waited almost ten years to file the present case. The prejudice to Defendants as a result of this delay is obvious. Plaintiffs and other working retirees have been permitted to occupy positions covered by the state retirement system with the understanding that a percentage of their salary would be contributed to the retirement system, when those positions could have been filled by non-retired members for all these years. Defendants have relied upon the receipt of contributions from all employees in covered positions and not just non-retired employees.

At the hearing, Plaintiffs argued that the constitutional violation is continuing and that each time funds are contributed to the retirement system, a new limitations period begins. The Court disagrees. The Court finds that a similar argument was made in *Anonymous Taxpayer* and was rejected by the Supreme Court. In that case, the supreme court held that the defendant's failure to impose a pre-Act 189 tax exemption to retirement benefits each year did not amount to

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a continuing breach because the plaintiff was put on notice that he had a cause of action when Act 189 was passed. *Anonymous Taxpayer*, 377 S.C. at 439-40, 661 S.E.2d at 80.

The same reasoning applies here, where Plaintiffs challenge the constitutionality of the statutes on their face. (Mem. in Opp'n to Mot. to Dismiss 18, n.1) (stating "whereas Plaintiffs in this case are challenging the facial validity of the statutory provisions in question (rather than the manner of their application) . . . .") Because Plaintiffs challenge the constitutionality of the statutes on their face, the cause of action for unconstitutional taking accrued the date the statutes were enacted. In other words, the alleged constitutional injury occurred at the time the statutes became the law of this State. Accordingly, Plaintiffs should have filed the present case within three years of July 1, 2005. The Court finds and concludes that a cause of action filed nearly ten years later is late.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss is hereby granted.

IT IS SO ORDERED.

Tanya A. Gee
Presiding Judge

Columbia, South Carolina

November 2, 2015

18 of 18

SCANNED

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

RECEIVED
DEC 14 2015
Richard A. Harpootlian, P.A.

CASE NUMBER: 2015-CP-40-1728

Gail M. Hutto, Debra J. Andrews, et al
PLAINTIFF(S)

SC Retirement Systems, Police Officers Retirement System, et al
DEFENDANT(S)

Consolidated

Submitted by: _____	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

2015 DEC 17 P 2:04
RICHLAND COUNTY
FILED
JEANETTE W. McBRIDE
C.C.P. & G.S.

ORDER INFORMATION

After careful consideration, the Plaintiff's Motion to Reconsider is respectfully denied.

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Tanya A. Gee **Judge Code** 2756 **Date** 12/7/2015

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of _____, 20 ____ and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Dec, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Gail M. Hutto, et al.,)
Plaintiff(s))
)
vs.)
)
S.C. Retirement System, Police Officers)
Retirement System, S.C. Retirement Systems
Group Trust, S.C. Budget and Control Board,
and S.C. Public Employee Benefit Authority,
Defendant(s))

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

-CP- -

2015CP4001728

Submitted By: Richard A. Harpootlian
Address: 1410 Laurel Street
Columbia, South Carolina 29201

SC Bar #: 2725
Telephone #: 803-252-4848
Fax #: 803-252-4810
Other:
E-mail: rah@harpootlianlaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filed out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ Employment (120)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Other (199)

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20___-NI-____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299)

Torts – Personal Injury
- ☐ Assault/Slander/Libel (300)
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Other (399)

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499)

Inmate Petitions
- ☐ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☒ Other (699)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predator (510)

Submitting Party Signature: _____ **Date:** March 19, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA,)
)
COUNTY OF RICHLAND)
)
Gail M. Hutto, et al.)
Plaintiff,)
)
vs.)
)
S.C. Retirement System, Police Officers)
Retirement System, S.C. Retirement
Systems Group Trust, S.C. Budget and
Control Board, and S.C. Public Employee
Benefit Authority,
Defendant.)

IN THE COURT OF COMMON PLEAS

SUMMONS

FILE NO.

2015 MAR 20 PM 1:03

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: March 19, 2015

Plaintiff/Attorney for Plaintiff

Address: Richard A. Harpootlian, PA
1410 Laurel Street
Columbia, South Carolina 29201

SCCA 401 (5/02)

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	) IN THE COURT OF COMMON PLEAS) FOR THE FIFTH JUDICIAL CIRCUIT	
GAIL M. HUTTO, DEBRA J. ANDREWS, ELIZABETH W. HODGE, MARGARET B. LINEBERGER, LYNN R. ROGERS, NANCY G. SULLIVAN, JANE P. TERWILLIGER, JULIAN W. WALLS, and all others similarly situated, Plaintiffs, v. **SOUTH CAROLINA RETIREMENT SYSTEM, POLICE OFFICERS RETIREMENT SYSTEM, SOUTH CAROLINA RETIREMENT SYSTEMS GROUP TRUST, SOUTH CAROLINA BUDGET AND CONTROL BOARD, and SOUTH CAROLINA PUBLIC EMPLOYEE BENEFIT AUTHORITY,** Defendants.	)	**CLASS ACTION COMPLAINT [JURY TRIAL DEMANDED]**

RICHLAND COUNTY
FILED
2015 MAY 20 PM 1:03
CLERK OF COURT

INTRODUCTION

Plaintiffs Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, and Julian W. Walls (collectively, "Plaintiffs") are the employees and former employees of school districts and counties who earned their retirement pension benefits through years of financial contributions, retired after July 1, 2005, began collecting their pensions, and later returned to work as "Working Retirees."

In 2005, the State of South Carolina enacted Act 153, which mandates that Working Retirees' employers deduct earned wages from their paychecks and deposit them into the state's pension trust. Plaintiffs, and the class of working retirees they seek to represent, receive *nothing* in exchange for this appropriation of their wages—no increase in pension benefits, no additional

service credit. In other words, after years of paycheck deductions made to earn vested pension benefits, Plaintiffs wages are now being seized by operation of state law to fund the cost of *someone else's* retirement benefits.

Plaintiffs sought redress for this unconstitutional redistribution of private property in the United States District Court for the District of South Carolina. The District Court held the Eleventh Amendment barred this constitutional takings claim from being heard in federal court and the United States Court of Appeals for the Fourth Circuit agreed, explaining, "Because the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise." Hutto v. S. Carolina Ret. Sys., 773 F.3d 536, 552 (4th Cir. 2014). This action seeks to make good on that promise.

The Fifth Amendment provides that "[n]o person shall be [...] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. By operation of unconstitutional state laws, Defendants South Carolina Retirement Systems, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority (collectively, "Defendants") have collected Working Retirees' wages without paying just compensation. Moreover, the express purpose for seizing these funds is the redistribution of property from one private party to another—an *ultra vires* act that is never sanctioned by the Takings Clause.

This action seeks to end this unconstitutional taking and the return of Working Retirees' property. Plaintiffs seek declaratory and injunctive relief and would respectfully show unto the Court as follows:

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction over this civil action pursuant to Article V, § 11 of the South Carolina Constitution and S.C. Code §§ 15-53-10, et seq.

2. This Court has personal jurisdiction over all of the parties. Plaintiffs are citizens and residents of this State and Defendants are alter egos of the State of South Carolina with their principal place of business in Richland County.

3. Venue is proper pursuant to S.C. Code §§ 15-7-10(4) & 15-7-30(E).

PARTIES

4. Plaintiff Gail M. Hutto is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. After her return to work, a percentage of her gross earnings were garnished and transmitted to the South Carolina Retirement System. Ms. Hutto received nothing in exchange for this seizure of her wages.

5. Plaintiff Debra J. Andrews is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. After her return to work, a percentage of her gross earnings were garnished and transmitted to the South Carolina Retirement System. Ms. Andrews received nothing in exchange for this seizure of her wages.

6. Plaintiff Elizabeth Hodge is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems.

Since her return to work, a percentage of her gross earnings have been garnished and transmitted to the South Carolina Retirement System. Ms. Hodge receives nothing in exchange for this seizure of her wages.

7. Plaintiff Margaret B. Lineberger is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. Since her return to work, a percentage of her gross earnings have been garnished and transmitted to the South Carolina Retirement System. Ms. Lineberger receives nothing in exchange for this seizure of her wages.

8. Plaintiff Lynn R. Rogers is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. After her return to work a percentage of her gross earnings were garnished and transmitted to the South Carolina Retirement System. Ms. Rogers has not received anything in exchange for this seizure of her wages.

9. Plaintiff Nancy G. Sullivan is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. Since her return to work, a percentage of her gross earnings have been garnished and transmitted to the South Carolina Retirement System. Ms. Sullivan receives nothing in exchange for this seizure of her wages.

10. Plaintiff Jane P. Terwilliger is a citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work

on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. After her return to work a percentage of her gross earnings have been garnished and transmitted to the South Carolina Retirement System. Ms. Terwilliger has not received anything in exchange for this seizure of her wages.

11. Plaintiff Julian W. Walls is a citizen and resident of Beaufort County, South Carolina. He is a retired member of the South Carolina Police Officers Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the Police Officers Retirement System. Since his return to work a percentage of his gross earnings have been garnished and transmitted to the Police Officers Retirement System. Mr. Walls has not received anything in exchange for this seizure of his wages.

12. Defendant South Carolina Retirement System (SCRS) is a multi-employer, defined-benefit pension plan with the powers and privileges of a corporation, established by the State of South Carolina to provide retirement and other benefits to employees of public school districts, the State, political subdivisions, and other quasi-governmental entities. See S.C. Code Ann. §§ 9-1-10, et seq. SCRS is one of five pension plans for public employees—SCRS, the Retirement System for Judges and Solicitors of the State of South Carolina, the Retirement System for members of the General Assembly of the State of South Carolina, the National Guard Retirement System, and Defendant Police Officers Retirement System—which collectively are referred to as the "Retirement Systems." See S.C. Code Ann. §§ 9–1–20, 9–8–20, 9–9–20, 9–10–20(A) & 9–11–20(1).

13. Defendant Police Officers Retirement System (PORS) is a multi-employer, defined-benefit pension plan with the powers and privileges of a corporation, established by the State of South Carolina to provide retirement and other benefits to state and local law enforcement

personnel and firefighters. See S.C. Code Ann. §§ 9-11-10, et seq. PORS is also one of the five pension plans within the state Retirement Systems.

14. Defendant South Carolina Retirement Systems Group Trust (the "Trust") holds the assets of the state Retirement Systems, including the funds of the SCRS and PORS. S.C. Code Ann. § 9-16-20 (Supp. 2013).

15. Defendant South Carolina Budget and Control Board (B&CB) is an administrative board of the State with quasi executive and legislative power comprised of the Governor, State Treasurer, Comptroller General, chair of the Senate Finance Committee, and chair of the House Ways and Means Committee, all serving *ex officio*. See S.C. Code Ann. § 1-11-10 (1986). The B&CB was sole trustee of the Retirement Systems until 2012 when it became co-trustee alongside Defendant South Carolina Public Employee Benefit Authority. See S.C. Code Ann. § 9-1-1310 (Supp. 2014).

16. Defendant South Carolina Public Employee Benefit Authority (PEBA) is an administrative agency of the State tasked with administering the Retirement Systems. See S.C. Code Ann. § 9-4-10 (Supp. 2014). The PEBA is also co-trustee of the Retirement Systems. Id. § 9-1-1310.

CLASS ACTION ALLEGATIONS

17. Plaintiffs bring this class action on behalf of themselves and on behalf of all other similarly situated retired contributing members of the SCRS and the PORS pursuant to Rule 23 of the South Carolina Rules of Civil Procedure.

18. The proposed Class is defined as follows:

> All retired members of the South Carolina Retirement System and the Police Officers Retirement System, who returned to covered employment with the South Carolina Retirement Systems on or after July 1, 2005, and who are required to contribute a portion of their gross earnings to either the South Carolina Retirement

System or the Police Officers Retirement System without receiving any additional service credit or interest on their retirement accounts.

19. This action may properly be maintained as a class action under state law and satisfies the numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Rule 23(a) of South Carolina Rule of Civil Procedure.

20. Members of the Class are so numerous as to make joinder of all members impracticable. Plaintiffs are informed and believe that the members of the proposed Class will exceed one thousand persons. Joinder of all of these individuals is impracticable because of the large number of potential class members who are dispersed over a large geographical area, throughout the entire State of South Carolina and beyond its borders.

21. All members of the Class are Working Retirees required to forfeit a percentage of their gross earnings as contributions to either the SCRS or the PORS without receiving any compensation. Common questions of law and fact exist as to all class members, including, but not limited to:

(a) Whether the forfeiture of the Working Retirees' earnings to the Retirement Systems violates the Takings Clause of the Fifth Amendment to the United States Constitution;

(b) Whether South Carolina Code §§ 9-1-1790 and 9-11-90 violate the Fifth Amendment by seizing private property and redistributing it to other private individuals;

(c) Whether South Carolina Code §§ 9-1-1790 and 9-11-90 violate the Fifth Amendment by failing to pay just compensation for property taken by the government;

(d) Whether an injunction should issue to prohibit further enforcement of South Carolina Code §§ 9-1-1790 and 9-11-90; and

(e) Whether Plaintiffs and the Class are entitled to the immediate return of all monies deposited into the Retirement Systems Group Trust since July 1, 2005.

22. Plaintiffs' claims are typical of the claims of all class members. All Plaintiffs and class members are Working Retirees who retired with SCRS or PORS, returned to covered employment on or after July 1, 2005, and were required to forfeit part of their earnings to the Retirement Systems without receiving any compensation. Defendants' policies and practices are identical to all Working Retirees as they arise from the same unconstitutional law. Consequently, all claims are premised on the same legal theories and an adjudication with respect to Plaintiffs' claims will be dispositive of the interests of the members of the Class.

23. Plaintiffs have the requisite personal interest in the outcome of this action such that they will fairly and adequately protect the interests of the Class because Plaintiffs' interests coincide with and not antagonistic to those of the Class and its members.

24. Plaintiffs have retained the undersigned counsel who have substantial experience and success in the prosecution of class actions, retirement benefit litigation, and complex litigation. Plaintiffs' counsel has the resources, expertise, and experience to successfully prosecute this action against Defendants. Counsel is unaware of any conflict among members of the Class or between counsel and members of the Class.

25. The relief sought in this action is declaratory and injunctive relief and, as such, the amount-in-controversy requirement of Rule 23(a)(5) of the South Carolina Rules of Civil Procedure does not apply in this case.

26. The declaratory and injunctive relief sought here will vindicate the rights of the Class if ordered by this Court and is the primary and appropriate relief capable of remedying the unconstitutional seizure of the Class's property. An order striking down the statutes in question and ordering the return of the disputed property from the Trust would require Defendants to take uniform remedial action to end this controversy. Conversely, prosecution of separate actions by

individual class members would create a risk of inconsistent adjudications and may establish incompatible standards of conduct for Defendants.

27. Additionally, the claims of Plaintiffs and the Class raise identical questions of law, set forth above and below, that outweigh any legal or factual issues particular to any class member because the constitutional questions raised here are outcome determinative to all claims. As such, this class action is the most efficient and expeditious means by which to resolve this dispute and is superior to all other methods of doing so, including a multiplicity of individual claims filed in a variety of forums. Conversely, individual suits by each class member to redress this common wrong would be contrary to the spirit and intent of Rule 23.

FACTUAL ALLEGATIONS

28. On June 2, 2005, the South Carolina General Assembly passed the State Retirement System Preservation and Investment Reform Act, Act 153, 2005 S.C. Acts 1697 (the "Act"). The Act was signed by the Governor on June 10, 2005, and took effect on July 1, 2005. Section 7 and 9 of the Act, the sections disputed here, were codified at South Carolina Code §§ 9-1-1790 (SCRS) and 9-11-90 (PORS).

29. South Carolina Code § 9-1-1790(C), concerning SCRS members, provides: "A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required pursuant to this subsection and subsection (B) of this section." S.C. Code Ann. § 9-1-1790(C) (Supp. 2014).

30. South Carolina Code § 9-11-90(4)(c), concerning PORS members, provides: "A retired member shall pay to the system the employee contribution as if the member were an active

contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required pursuant to this item and item (b) of this subsection." S.C. Code Ann. § 9-11-90(4)(c) (Supp. 2014).

31. South Carolina Code § 9-1-1310(C) provides that "[t]he funds and assets of the various state retirement systems are not funds of the State, but are instead held in trust as provided in Section 9-16-20." S.C. Code Ann. § 9-1-1310 (C). The B&CB and PEBA are co-trustees of the Retirement Systems and are responsible for holding these funds in trust. Id. § 9-1-1310(A).

32. Working Retirees do not receive any additional service credit, increased benefit, or interest payment in exchange for their contributions to the Retirement Systems. See PEBA, SCRS Member Handbook, 19 (2010 Ed.) (attached as **Exhibit A**); PEBA, PORS Member Handbook, 10 (2009 Ed.) (attached as **Exhibit B**); B&CB, Form 1114: Notification of Employed Retiree (July 11, 2005) (attached as **Exhibit C**).

33. The SCRS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account. Working retirees will not earn additional service credit or receive interest on their account." See SCRS Member Handbook, at 22.

34. The PORS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account; however, as a retiree you will not earn additional service credit or receive interest on your account." PORS Member Handbook, at 10.

35. In other words, Working Retiree benefits remain fixed based on their past service even though they are required to make contributions to the Retirement Systems. The State has

adopted a schedule that increased these employee contributions from 6.5% to, now, 8% of an employee's gross wages. See S.C. Code Ann. § 9-1-1085 (Supp. 2014).

36. Employers of Working Retirees must notify the Retirement Systems when a retired member is hired by furnishing a B&CB Form 1114 to the Working Retiree, obtaining their signature, and returning it to the Retirement Systems. See Ex. C. The Form 1114 includes and employee certification, which provides:

> I hereby notify you that I am an employee of the state of South Carolina or its political subdivisions, and that I am a retiree of one of the systems covered by the South Carolina Retirement Systems. As a retired member returned to covered employment, I understand that I am required to pay contributions at the same rate as active members. I also understand that I will not accrue any additional service credit. However, the contributions will be credited to my account and upon my death, any remaining contributions that have not been exhausted through benefit payments will be paid to my beneficiary.

Id.; see also SCRS, Cover Employer Procedure Manual, 17 & 60 (Oct. 2008 Ed., Rev. June 11, 2009) (attached as **Exhibit D**); SCRS, Employer Update Newsletter, 7 & 11-12 (July 2009, Vol. 1, Issue 1) (attached as **Exhibit E**).

37. Defendants do not recalculate the retirement benefits of a contributing Working Retiree based on his or her required contributions on or after July 1, 2005. See Exs. A-C. In other words, Working Retirees receive no benefit in exchange for their contributions to the Retirement Systems. Working Retirees receive no additional pension benefits, no additional service credit, and no interest payments on any contribution made as a Working Retiree on or after July 1, 2005.

38. Defendants use the monies seized from Working Retirees to fund the cost of other people's retirement benefits and to the exclusion of the Working Retirees.

39. Post-retirement contributions do not confer any increased benefit on Working Retirees because, by design of the General Assembly, these funds are seized to increase revenue to the Retirement Systems as a whole. See Letter from Kelli Gowder, Manager, SCRS Benefits

Payments Dept., to Gail M. Hutto (Oct. 23, 2009) ("...the contributions help to fund the system...") (attached as **Exhibit F**).

40. Since Working Retirees are vested pension beneficiaries whose retirement benefits are already funded by a combination of employee and employer contributions made over the course of their pre-retirement career, Defendants' seizure of additional funds pays for the cost of other people's retirement.

41. The illegality of this scheme is further underscored by Internal Revenue Code, 26 U.S.C. § 401(a), which governs public pension funds like those at issue here.

42. Under section 401(a), contributions to a tax-qualified trust must be non-forfeitable and cannot be diverted for purposes other than the exclusive use of the employee and his or her beneficiaries. See 26 U.S.C. §§ 401(a)(1) (trust contributions must be for the purpose of distributing to contributing employees), (a)(2) (trust funds must be used for the exclusive benefit of employees), (a)(8) (forfeitures cannot be used to increase the benefit any employee would otherwise receive) & (a)(9) (distributions must be calculated according to each employees' interest in the trust).

43. Here, Working Retirees are forced to make contributions for which they receive no benefit, these contributions are used to subsidize the cost of other system participants, this illegal seizure effectively increases the benefit these other system participants receive by reducing the amount they would otherwise contribute, and results in benefit payments to Working Retirees that are less than what they would be entitled to if the seized funds were included in the calculation of their service credit and required minimum distributions.

44. By comparison, retirees who do not return to covered employment receive a benefit based on *all* of their contributions to the Retirement Systems.

45. Plaintiffs, and the Class they seek to represent, have a property interest in the fruit of their labor and the wages they earn.

46. The laws challenged here unconstitutionally deprive Plaintiffs and the Class of their earnings without paying just compensation and for the express purpose conferring a monetary benefit on other individuals participating in the Retirement Systems.

FIRST CAUSE OF ACTION
(Declaratory Judgment for Violation of the Takings Clause of the Fifth Amendment)

47. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

48. Working Retirees' earnings are private property protected by the United States Constitution from arbitrary and unreasonable seizure by the government. U.S. Const. amend. V.

49. The Constitution requires that any government deprivation of private property occur for a public purpose and that just compensation is paid. Id.

49. By operation of South Carolina Code §§ 9-1-1790(C) and 9-11-90(4)(c), Defendants take money from Working Retirees' gross earnings.

50. The beneficiaries of these seized funds are private individuals, the cost of whose retirement is reduced by the funds taken from Working Retirees.

51. Working Retirees receive no compensation for the seizure of their wages.

52. As set forth above, there exists an actual controversy between Plaintiffs and Defendants as to whether Defendants' confiscation of Working Retirees' wages offends the United States Constitution.

53. Unless the Court issues an appropriate declaration of rights, Defendants will illegally and unjustly continue confiscating money from Working Retirees' earnings and retain those funds already taken.

54. Pursuant to South Carolina Code § 15-53-30, Plaintiffs respectfully seek a judicial declaration that Act 153 violates the Fifth Amendment of the United States Constitution (as made applicable to the states through the Fourteenth Amendment) because it (a) is an unconstitutional redistribution of private property, which is always an *ultra vires* act and never sanctioned by the Takings Clause, and (b) takes private property without paying just compensation in violation of the Constitution.

SECOND CAUSE OF ACTION
(Injunctive Relief)

55. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

56. As a result of the past and ongoing seizure of Working Retirees' earnings, and the transfer of those earnings into Defendants' possession and control, Plaintiffs and the Class have suffered and continue to suffer irreparable and immediate harm and injury to their property and their rights as secured by the Constitution of the United States.

57. Plaintiffs and the Class are entitled to a preliminary and permanent injunction (a) enjoining Defendants from enforcing South Carolina Code §§ 9-1-1790(C) and 9-11-90(4)(c), and (b) compelling the immediate return of all monies wrongfully seized and held by the Defendants since July 1, 2005.

58. Plaintiffs and the Class have no adequate remedy at law because the only remedy for this injustice is its cessation and the return of the funds seized.

59. Because this illegal conduct occurs by operation of state law, Defendants will continue to seize and hold Working Retirees funds until ordered otherwise by this Court.

60. Accordingly, the balance of harms here favors granting injunctive relief which merely seeks the cessation of illegal conduct and returning the funds illegally seized since July 1,

2005. Granting the relief sought here poses no imminent threat to public health, safety, or welfare capable of justifying the status quo.

JURY DEMAND

Plaintiffs respectfully demand a trial by jury on all claims so triable.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray, on behalf of themselves and all other similarly situated Working Retirees, for:

i. An order certifying this action as a class action pursuant to Rule 23 and appointing Plaintiffs as class representatives and the undersigned as class counsel;

ii. A judicial declaration that South Carolina Code §§ 9-1-1790(C) and 9-11-90(4)(c) violate the Takings Clause of the Fifth Amendment to the United States Constitution;

iii. An injunction ordering Defendants to take all steps necessary to cease collections pursuant to and enforcement of South Carolina Code §§ 9-1-1790(C) and 9-11-90(4)(c);

iv. An order requiring Defendants to make a full and complete accounting of all funds seized from Working Retirees and deposited into the Retirement System since July 1, 2005;

v. An injunction ordering Defendants to immediately return all funds seized from Working Retirees and deposited into the Retirement System since July 1, 2005;

vi. That the Court retain jurisdiction over this matter to ensure compliance with its orders; and

vii. Such further relief as the Court may deem just and proper.

[signature page follows]

Respectfully submitted by,

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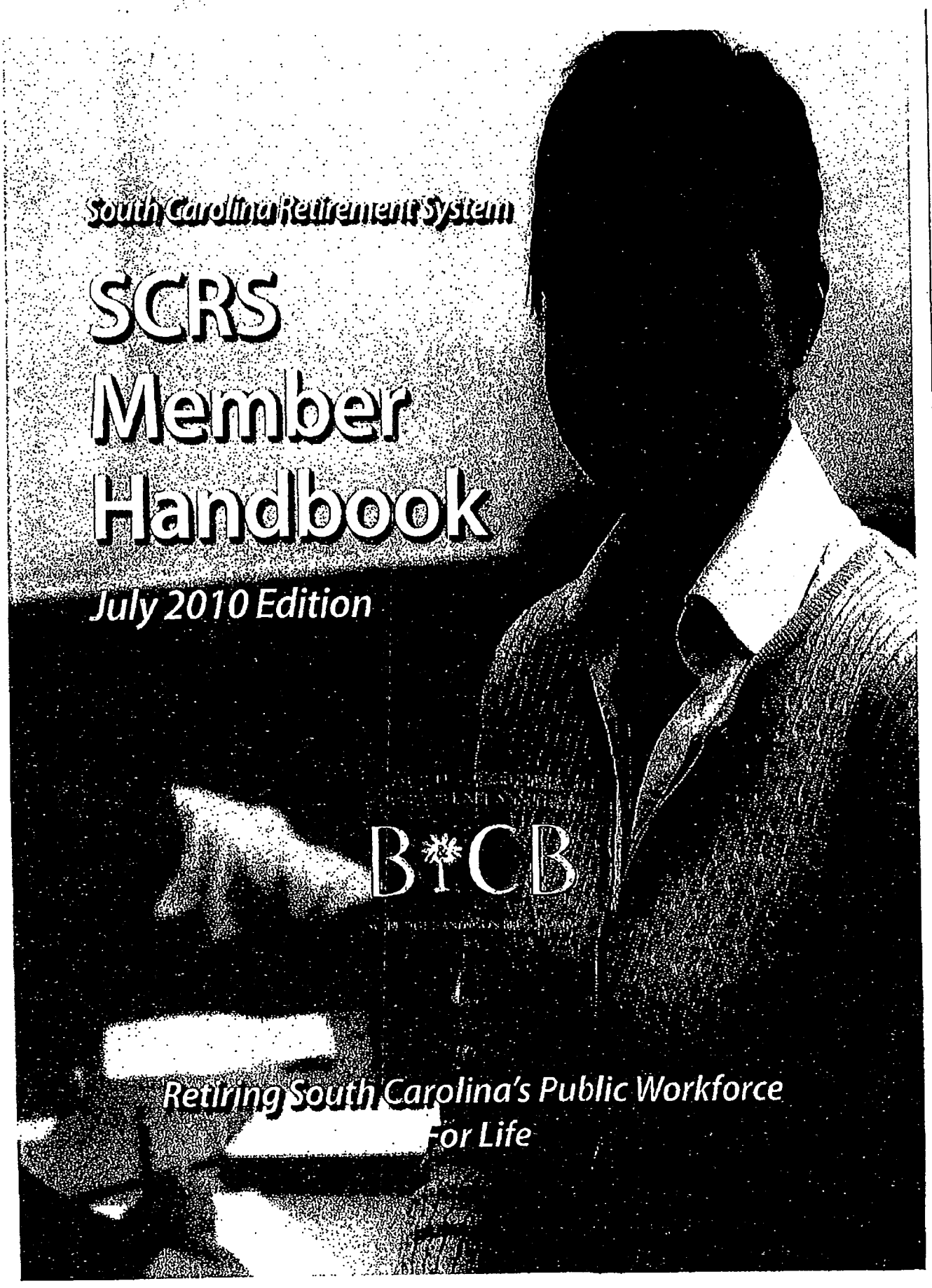
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ATTORNEYS FOR THE PLAINTIFFS

March 19, 2015
Columbia, South Carolina

EXHIBIT A

(SCRS Member Handbook)


South Carolina Retirement System
SCRS
Member
Handbook
July 2010 Edition
BCB
Retiring South Carolina's Public Workforce
For Life

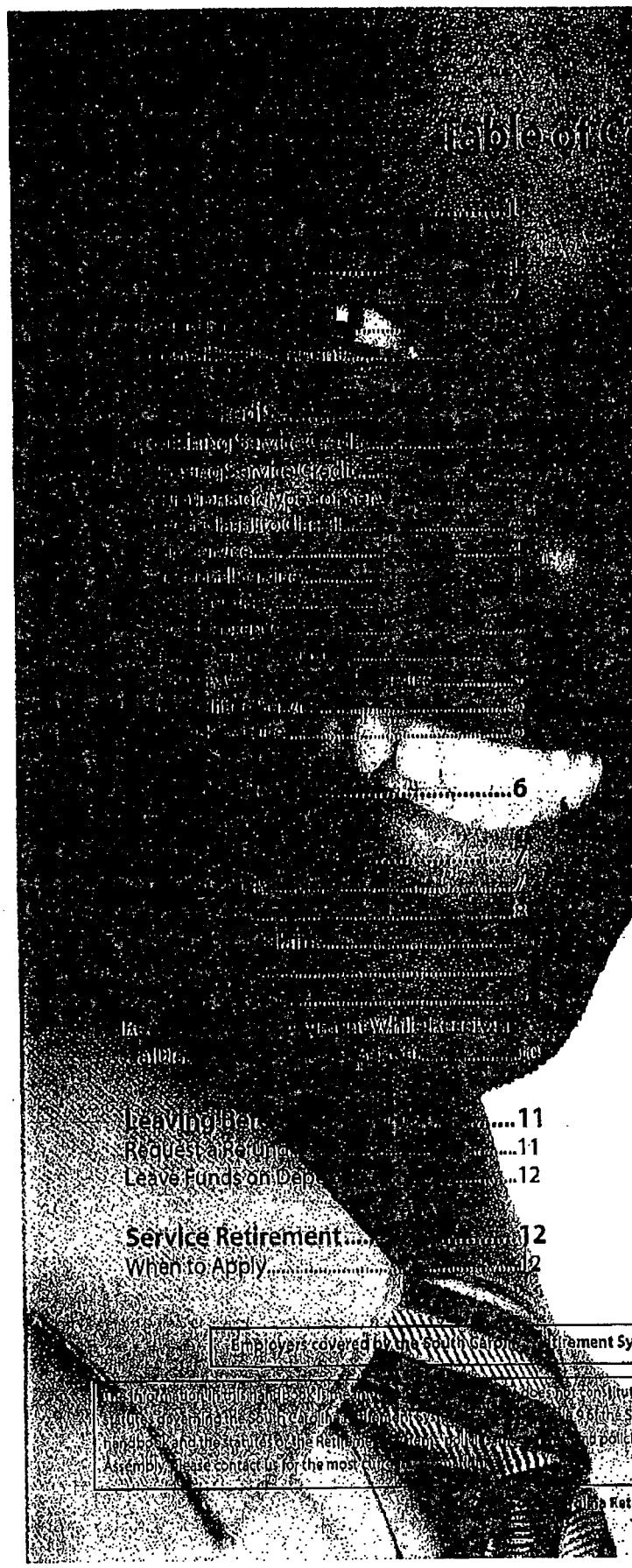


Table of Contents

...13
...Compensation....13
...Benefit Formula....14
...Retirement....15
....15
....15
...Higher Ed Employees....15

...at Retirement....15
...t Plan....15
...t Plan....16
...t Plan....16
...tion B or Option C....16
...centage of Average
...tion at Retirement....17
...unt of Option A Monthly Benefit
....17

...m....18
...Rates....19
...ual Leave and Your AFC....19

...Retirement Information....20
...irement Checks....20
...xes....20
Cost-of-Living Adjustments....20
Retiree Incidental Death Benefit....21
Returning to Covered Employment....21
Working 48 Continuous Months....22
Incidental Death Benefit....22
Working Retiree Contribution Rate....22

Beneficiaries....23
Beneficiary and Payment Plan Changes....23
Pre-Retirement....23
Post Retirement....23

Death after Retirement....13

...6

Leaving Bef...11
Request a Re...11
Leave Funds on Dep...12

Service Retirement....12
When to Apply....12

...Employers covered by the South Carol...irement Systems are not agents of the Retirement Systems.

...information in this handbook does not constitute a binding representation of the South Carolina Retirement Systems. The statutes governing the South Carolina ... are contained in Title 9 of the South Carolina Code of Laws, and should there be any conflict between this handbook and the statutes of the Retire... and policies will prevail. Because state statutes are subject to change by the General Assembly, please contact us for the most ...

...a Retirement Systems

Your Plan at a Glance

Benefits

- Retirement benefit is guaranteed by law and sufficiently funded.
- Retirement benefit is based on a formula (1.82 percent multiplied by years of service multiplied by average final compensation), not on a member's account balance at retirement.
- Automatic annual cost-of-living adjustments (COLAs) for eligible retirees during periods of inflation.
- Plan assumes investment and life expectancy risks.
- Service purchase options
- Disability protection and incidental death benefit.
- Deferred retirement option program - allows you to retire and begin accumulating your benefit on a deferred basis without terminating your employment.

Membership Eligibility

- Employer must be covered by SCRS.
- You must be actively employed by a covered employer and be making employee contributions to SCRS.

Contributions

- You contribute a tax-deferred 6.5 percent of gross pay.
- If you have not retired, your account earns 4 percent interest compounded annually.

Service Purchase

- Members may be eligible to purchase various types of service credit.
- Examples of service that may be purchased include military service, public service and previously withdrawn SCRS service.
- Purchasing service increases your total credited service which may allow you to retire sooner.
- The cost to purchase service varies by type.

Incidental Death Benefit

- After one year of service, beneficiaries of active members and working retirees who die in service are eligible for a payment equal to one year's earnable compensation.
- If your death is a result of a job-related injury, the one-year requirement is waived.
- Beneficiary of a non-working retiree may be eligible for a benefit of $2,000, $4,000 or $6,000 based on the retiree's years of service.
- Check with your employer to see if coverage is provided.

Leaving Before Retirement

If you terminate employment, you can either:

- Request a refund of your contributions and interest; or
- Leave your money in the Retirement Systems where it will earn an annual 4 percent interest.

Retirement Eligibility

- You can retire with unreduced benefits after 28 years of service or at age 65.
- You can retire early (before you reach age 65 or have 28 years of service) and receive a reduced retirement benefit.
- Members eligible for service retirement may choose to participate in the Teacher and Employee Retiree Incentive (TERI) program, which allows you to retire and begin accumulating your benefit on a deferred basis without terminating your employment.

Payment Options

- Three monthly benefit payment options available at retirement.
- Two of the three options provide survivor protection.
- You select the option that best suits your needs.

Annual COLA

- Each July 1, eligible SCRS retirees should receive an automatic COLA equal to the percentage of the annual increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W) as of the previous December 31, up to an increase of 2 percent.
- If the CPI-W is less than 2 percent, the COLA should equal the percentage of the actual increase in the CPI-W.
- COLAs are awarded only during periods of inflation, so no COLA will be awarded if the CPI-W is negative.

Contacting the South Carolina Retirement Systems

Office Hours
8:15 a.m. - 5:00 p.m.

Phone
803-737-6800
800-868-9002 (within SC only)

Mailing Address
P.O. Box 11960
Columbia, SC 29211-1960

www.retirement.sc.gov

Locating the South Carolina Retirement Systems

Location Address
202 Arbor Lake Drive
Columbia, SC 29223

Directions from Downtown Columbia

The Retirement Systems' office is located at 202 Arbor Lake Drive, approximately five miles north of Columbia. To reach our office from downtown Columbia, head north on the Bull Street Extension, which becomes SC-277, and exit right on Fontaine Road. Then turn right on Fontaine Road and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

Directions from the Interstate

From I-20 (Augusta or Florence)
Take Exit 73-A to SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 East (Spartanburg)
Take I-20 East toward Florence and take Exit 73-A to SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 West (Charleston)
Take Exit 116 (I-77 North) toward Charlotte and exit to I-20 toward Augusta (Exit 16). Take Exit 73-A to SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-77 South (Charlotte)
Take Exit 18 to SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

THIS HANDBOOK CONTAINS AN ABBREVIATED DESCRIPTION OF THE RETIREMENT BENEFITS OFFERED BY THE SOUTH CAROLINA RETIREMENT SYSTEM. THE INFORMATION IN THIS HANDBOOK IS MEANT TO SERVE AS A GUIDE FOR OUR MEMBERS AND DOES NOT CONSTITUTE A BINDING REPRESENTATION OF THE SOUTH CAROLINA RETIREMENT SYSTEMS. TITLE 9 OF THE SOUTH CAROLINA CODE OF LAWS CONTAINS A COMPLETE DESCRIPTION OF THE RETIREMENT BENEFITS, THEIR TERMS AND CONDITIONS, AND GOVERNS ALL RETIREMENT BENEFITS OFFERED BY THE STATE. STATE STATUTES ARE SUBJECT TO CHANGE BY THE GENERAL ASSEMBLY. PLEASE CONTACT THE RETIREMENT SYSTEMS FOR THE MOST CURRENT INFORMATION.

THE LANGUAGE USED IN THIS HANDBOOK DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS AND DOES NOT CREATE A CONTRACT BETWEEN THE MEMBER AND THE SOUTH CAROLINA RETIREMENT SYSTEMS. THE SOUTH CAROLINA RETIREMENT SYSTEMS RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS HANDBOOK.

General Information

The South Carolina Retirement System (SCRS) is a defined benefit retirement plan administered by the South Carolina Retirement Systems, a division of the SC Budget and Control Board. This handbook provides a general introduction to SCRS and its benefits.

SCRS provides service and disability retirement, deferred service retirement, and survivor benefits.

If you chose participation in the State Optional Retirement Program (State ORP) defined contribution plan in lieu of SCRS membership, contact your State ORP investment provider for benefits information.

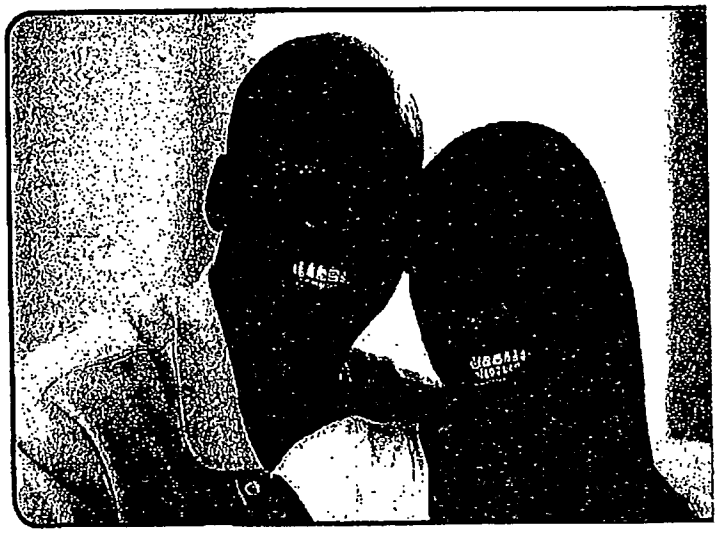
If you have not yet made your decision, please refer to the *Select Your Retirement Plan* guide and the "It's Your Choice: SCRS vs. State ORP" video.

Membership

Membership is comprised of state employees, public and charter school employees, public higher education personnel, and employees of other political subdivisions of government that have joined the Retirement Systems.

Membership is mandatory as a condition of your employment with a participating employer; however, certain types of employment, including student employees, are specifically exempted from membership by statute. Others, such as non-permanent employees, have the option of electing non-membership within 30 days from their date of hire. Your employer should inform you if your employment falls into one of these categories.

Your SCRS membership starts when you earn compensation from a covered employer and make contributions to your SCRS retirement account.





You are considered an active member if you are working for an employer covered by the Retirement Systems, earning service credit, making regular contributions to an SCRS retirement account, and have not retired or terminated from covered employment. You must be an active member to receive most of the benefits described in this handbook.

Active members receive a member statement each year that shows their employee contributions and interest, service credit, and retirement account beneficiaries.

Correlated Systems

SCRS, the Police Officers Retirement System (PORS), and the General Assembly Retirement System (GARS) are correlated systems.

If you have contributions in more than one of these retirement systems, your service credit is maintained separately within each system; however, your service credit is added together to determine your eligibility for retirement benefits.

Contribution Rates

You contribute a tax-deferred 6.5 percent of gross pay into your SCRS retirement account. If you have not retired, your account earns 4 percent interest compounded annually on your balance as of the previous June 30.

Beneficiaries

Active members may designate three types of beneficiaries:

- Primary beneficiaries for your in-service death benefit or refund of contributions. Multiple beneficiaries share equally in survivor monthly benefits;
- Contingent beneficiaries in case of death of the primary beneficiaries. All primary beneficiaries must be deceased before any contingent beneficiaries will be paid; and
- Incidental death benefit beneficiaries.

You may name your estate as a beneficiary; however, monthly benefit payments cannot be paid to an estate.

Active members may change their beneficiaries at any time before retirement.

Active Member Incidental Death Benefit

If, as an active member, you die in service with at least one year of service credit and your employer provides incidental death benefit coverage, a payment equal to your current annual earnable compensation will be paid to your beneficiary or trustee. If your death results from a job-related injury, the one-year requirement is waived.

Amounts paid to your beneficiary are considered taxable benefits; therefore, state and federal taxes will be withheld unless your beneficiary rolls over the money into another qualified retirement plan.

State agencies and public school districts automatically provide incidental death benefit coverage to their employees; however, coverage is optional for other employers. If an employer elects to provide incidental death benefit coverage for its employees, the employer must pay the required contribution rate for the coverage.

Service Credit

Establishing Service Credit

Active members may establish additional service credit for various types of previous employment and leaves of absence, and up to five years of non-qualified service. Generally, a member on leave without pay from a participating employer is not eligible to purchase service credit of any type. Descriptions of these types of service credit follow.

Purchasing Service Credit

You may purchase service credit by a lump-sum payment, an installment service purchase (pre- or post-tax, plus interest), or a tax-deferred rollover from an Individual Retirement Account (IRA), a 401(k) plan, a 401(a) eligible plan, a 403(b) plan, or a 457 plan.

You may purchase each type of service credit once within a fiscal year. If you are purchasing service to meet retirement eligibility, contact the Retirement Systems for more information. Payment for service purchases must be made in full prior to your retirement date or termination from employment.

If you previously purchased periods of part-time credit or previously earned periods of





tions after returning from military leave within a period three times longer than your military leave, but not more than five years.

Leave of Absence

Active members on an employer-approved leave of absence who return to covered employment within four years may purchase service credit for the employer-approved leave period for which they do not already have service credit, up to a maximum of two years per leave of absence.

The leave of absence must be with an employer covered by the Retirement Systems. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.

If you have established State ORP service in SCRS, your career highest fiscal year earnable compensation includes your earnable compensation in either State ORP or SCRS.

Workers' Compensation

You may establish service credit for a period while on leave of absence and receiving workers' compensation benefits. The cost is based on contributions plus interest using your earnable compensation at the time of injury.

You may also arrange in advance with your employer to continue contributing to your account while you are receiving workers' compensation benefits.

Previously Withdrawn SCRS Service

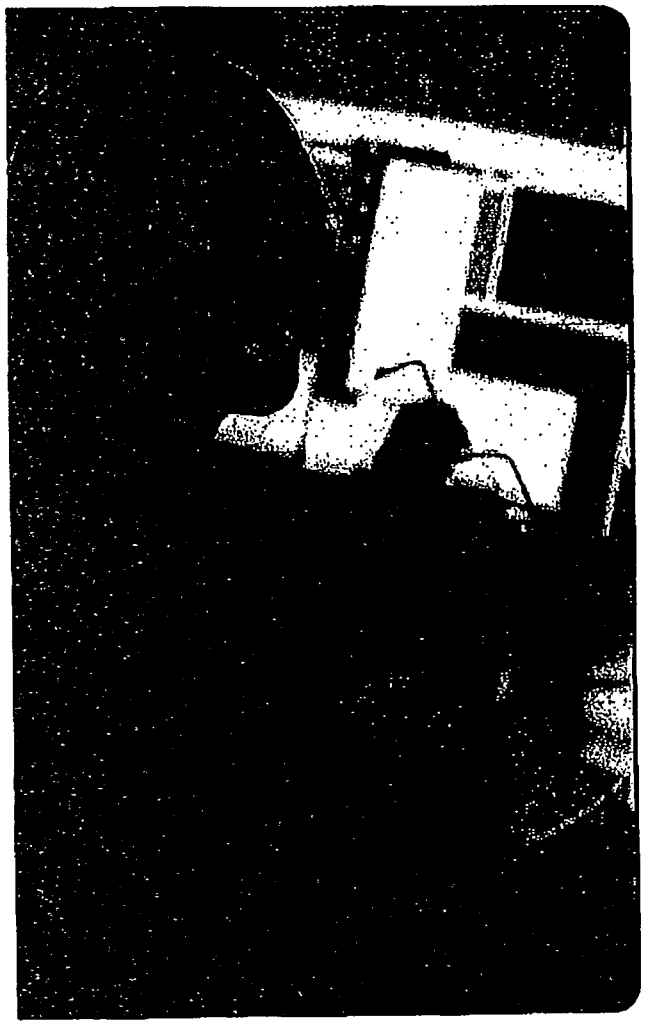
If you left employment and received a refund of your contributions plus interest from the Retirement Systems, you may re-establish this service upon returning to active membership.

You must repay the amount you withdrew plus interest to the date your request is received. Previously withdrawn earned service that is re-established in SCRS is considered earned service for the determination of the SCRS minimum service requirement for benefit eligibility.

Please note that earnings associated with a re-established withdrawal will be considered for possible inclusion in the calculation of a member's average final compensation and any subsequent service purchase calculations.

Non-Qualified Service

Active members who have five or more years of earned service credit may establish up to five years of non-qualified service. The cost is 35 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.



If you have established State ORP service in SCRS, your career highest fiscal year earnable compensation includes your earnable compensation in either State ORP or SCRS.

State ORP Service

Active members may purchase service credit for their years of participation in the State ORP. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation in either SCRS or State ORP, whichever is greater, for each year of service purchased.

You may not purchase service for a period of State ORP participation for which you may receive a retirement benefit from another defined benefit retirement plan. State ORP service that is established in SCRS through the service purchase process is considered earned service for the determination of the SCRS minimum service requirement for benefit eligibility.

Earnable compensation associated with State ORP service purchased in SCRS will be considered for possible inclusion in the calculation of a member's average final compensation and any subsequent service purchase calculations.

In-Service Death

If as an active member you die in service, your designated beneficiary may be entitled to receive the following benefits:

If you are under age 60 and have less than one year of service credit:

- Active member incidental death benefit if your death was job-related; and
- Refund of employee contributions plus interest.

If you are under age 60 and have 1-14 years of service credit:

- Active member incidental death benefit; and
- Refund of employee contributions plus interest.

If you have 15 or more years of service credit, five years of which must be earned service:

- Active member incidental death benefit; and
- Beneficiary's choice of monthly benefit or refund of employee contributions plus interest.

If you are age 60 or older with at least five years of earned service as of your date of death:

- Active member incidental death benefit (must have at least one year of service); and
- Beneficiary's choice of monthly benefit or refund of employee contributions plus interest.

Active member incidental death benefits are paid only if your employer provides incidental death benefit coverage.

Disability Retirement

Who May Apply

You may apply for disability retirement if you become physically or mentally incapable of performing the regular duties of your job and your disability is likely to be permanent. Becoming disabled does not automatically qualify you for disability retirement; you must file an application and go through the review process.

The Retirement Systems must receive your disability retirement application within 90 days of the date of your termination from covered employment.

You must have at least five years of earned service credit toward retirement unless your disability is the result of an injury arising out of and in the course of the performance of your job duties.

You may arrange with your employer to make your Retirement Systems' contributions through your employer if your disability requires you to be placed in an employer-approved leave status while receiving workers' compensation benefits. Doing so will ensure that you continue to earn Retirement Systems service credit during your workers' compensation leave period.

Do not wait to apply for disability benefits until your workers' compensation claim is finalized. Many workers' compensation claims are often settled after covered employment has ended.





If your disability claim is denied, the continuance of paying contributions and earning Retirement Systems service credit may be important to your long-term retirement plans. Retired members who work for a covered employer are not eligible to apply for disability benefits.

How to Apply

If you meet the disability filing criteria, go to our website or contact Customer Services to obtain a disability retirement packet. When you file your disability retirement claim, please complete all of the forms in the disability retirement packet. You do not, however, need to include any medical records from your health care providers.

You should file your application for disability retirement as soon as you become disabled. The Retirement Systems must receive your disability application within 90 days of the date of termination from your covered employment or you will not be eligible to participate in the disability retirement program.

If you do not receive notification in the mail confirming the Retirement Systems' receipt of your application within 10 days after submitting it, please contact Customer Services.

If you are eligible for service retirement when you become disabled, you may apply for service retirement and begin receiving benefits while awaiting determination of your disability claim; however, you will receive only one type of payment, so if your disability claim is approved, the service retirement benefit will cease.

Processing the Claim

Your medical records will be obtained from your health care providers by our disability determination provider and evaluated to determine the severity and limiting effects of your physical or mental impairment. The final determination is made by the Retirement Systems. If your claim is denied, you will have an opportunity to appeal the denial.

Please allow a minimum of three months after all required documentation has been received from you, your employer, and your health care providers for your disability application to be processed.

If you do not receive notification of the Retirement Systems' decision within three months, please contact Customer Services.

Effective Date

If your disability retirement claim is approved, the effective date for benefits will be the 30th day after your application is received by the Retirement Systems or the day after your last day on your employer's payroll, whichever is later.

A disability benefit, once approved, may be discontinued if:

- You regain a certain earning capacity; or
- Medical evidence indicates that you are no longer disabled; or
- Your disability benefits were not approved following a continuing disability review.

Periodic medical reexaminations may be required up to age 65. If the Retirement Systems determines that your disability benefits should cease because of an improvement in your medical condition, your retirement benefits will stop the month of your scheduled continuing disability review or the month of the Retirement Systems' decision, whichever is later.

Benefit Payments

A disability applicant has the same payment options as a service retiree (see Page 15).

Because the Retirement Systems does not determine your disability based on the criteria for a disability that is total and permanent like the Social Security Administration, your disability benefits are considered to be a normal distribution from your retirement account.

Disability benefits paid by SCRS are based on approval for an occupational or job-related disability. Per Internal Revenue Service (IRS) guidelines, all such benefits are reported as normal distributions with a distribution code of 7 on IRS form 1099-R.

For tax information, contact the IRS, the South Carolina Department of Revenue if you live in South Carolina, and/or a tax advisor.



If you also receive benefits from the Social Security Administration that are based on total and permanent disability, such benefits are reported to you with a distribution code of 3 on IRS form 1099-R.

If you are considered to be totally and permanently disabled, benefits paid by the Retirement Systems may be eligible for additional tax credits. Please refer to the instructions for completing IRS Schedule R when preparing your income tax return.

Returning to Employment While Receiving a Disability Retirement Benefit

If you are under age 65 and receiving an SCRS disability benefit, you should report earnings from any gainful (public or private) employment to the Retirement Systems annually because there is an earnings limitation for all employment which is applied on a calendar-year basis.

You may earn the difference between your adjusted average final compensation (AFC) at retirement and your disability retirement benefit without affecting your retirement benefits.

Your AFC may be adjusted each year for inflation for earnings limitation purposes only. This increase generally matches the percentage of the annual increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W).

These adjustments affect the amount you can earn while receiving a disability retirement benefit; however, they do not affect the amount of your benefit.

You will receive a letter each February advising you of how much you can earn and requesting confirmation of your prior year's earnings. You will have to repay any benefits that you received to which you were not entitled.

If you earn more than the difference between your adjusted AFC and your disability benefit amount, your monthly benefit will be reduced or possibly canceled.



If you return to work with an employer covered by the Retirement Systems and your annual earnable compensation is equal to or greater than your adjusted AFC, your disability retirement benefit ceases and you must become an active member of the system.

At age 65, there is no earnings limitation for wages earned from either public or private employment.



Leaving Before Retirement

If you leave your job and terminate all employment covered by the South Carolina Retirement Systems before you are eligible to retire, you have two options concerning your contributions:

- Request a refund of your contributions and interest; or
- Leave your funds in the Retirement Systems. Your account will continue to accrue interest at 4 percent compounded annually.

Request a Refund

To receive a refund of your accumulated contributions and interest, you must complete a *Refund Request* (Form 4101) and return it to the Retirement Systems. You may submit your refund request immediately upon termination; however, by law, there is a minimum 90-day waiting period from your date of termination until a refund can be made.

If you receive a refund, you forfeit your rights to any future service retirement or disability benefit. Employer contributions are not refunded.

If you are working for two or more covered employers and/or contributing to more than one retirement account (i.e., working two jobs and paying into an SCRS and a PORS account), you must stop working in all correlated systems to request a refund from any account.

Instead of having the refund paid directly to you, you may choose to roll over the funds into an IRA, a 401(k) plan, a 401(a) eligible plan, a 403(b) plan, or some 457 plans (the South Carolina Deferred Compensation Program's 457 plan does not accept rollovers from your Retirement Systems account).

The Retirement Systems is required to withhold federal taxes of 20 percent on the taxable portion of any refund that is eligible for a rollover but is not transferred directly into another qualified retirement plan. Other taxes or penalties may apply as well.

Under the federal Pension Protection Act of 2006, the 10 percent withdrawal penalty is waived for public safety members who separate from service after age 50 and military reservists and national guardsmen who are called to active duty for at least 180 days. Be sure to check with an accountant or tax advisor regarding your tax liability.

Leave Funds on Deposit

When you leave your money on deposit with the Retirement Systems, your account continues to accrue interest and you retain your years of service credit, which may be added to any future service you may accrue should you later become employed in a position covered by the Retirement Systems.



You may apply for a refund at a later date or apply for a service retirement benefit upon reaching eligibility. No action is required if you wish to retain your membership and leave your funds on deposit, but it is your responsibility to keep the Retirement Systems informed of your current address as well as any name or beneficiary changes.

Service Retirement

A good way to begin the planning process for retirement is to attend a retirement seminar offered by the Retirement Systems. Sessions are held regionally in the fall. The seminar schedule can be found online at www.retirement.sc.gov/events. You can also register to attend a seminar through this website.

If you are considering retirement, you may conduct a consultation by telephone or in person at our office. Simply contact Customer Services to arrange a consultation.

When to Apply

You must file an application with the Retirement Systems to retire; it is not automatic. We encourage you to file your application as early as six months prior to your desired effective date of retirement but no later than 90 days afterward.

Retirement applications and other forms are available on our website at www.retirement.sc.gov or you may contact Customer Services to obtain these forms.

If you do not receive notification of the Retirement Systems' receipt of your application within 10 days after submitting it, contact Customer Services. Please do not terminate

employment until the Retirement Systems has audited your service credit and you receive official notice of your retirement eligibility. This official notice will be sent to you in the mail and is entitled, "Notification of Retirement Eligibility and Estimated Benefit."

Benefit estimates may be obtained from the Retirement Systems but are projected based on information you provide and information in the Retirement Systems' records. Benefit estimates are subject to change upon an audit of your account after your retirement application is received.

Eligibility

If you meet the following requirements, you are considered eligible to retire (see **Correlated Systems** on Page 2 if you have an account in more than one retirement system):

Normal Retirement (Unreduced Benefit):

- 28 years of service on the date of retirement, five years of which must be earned; or
- Age 65 or older on the date of retirement with five years of earned service.

Early Retirement (Reduced Benefit):

- Age 60 with at least five years of earned service. Your benefit is permanently reduced 5 percent for each year of age less than 65; or
- Age 55 or older with 25 years of service, five years of which must be earned. Your benefit is permanently reduced 4 percent for each year of service less than 28.

Cost-of-living adjustment restrictions apply (see Page 20).

If your membership began before January 1, 2001, the five year minimum earned service requirement may not apply if you had five years of "creditable" service (this includes purchased time) accrued as of December 31, 2000. Or, you may also meet eligibility if you were at least age 60 and a contributing member on December 31, 2000.

Your Average Final Compensation

Your AFC is an important part of the formula used to calculate your retirement benefit. When you retire, your first several benefit checks will be based on information received up to that point and will be considered an estimated amount.

After your employer submits your final earnable compensation information, retirement contributions for your 12 highest consecutive quarters of earnable compensation will be audited. Your AFC may be adjusted after the audit if any of the contributions included in





the AFC calculation were for any payments not considered a part of your regular earnable compensation base. Your AFC will also be adjusted according to statute to include payment for your unused annual leave.

As a result of the information received from your employer and the audit of the contributions for your 12 highest consecutive quarters of earnable compensation, your retirement benefit will be finalized. The final amount may be less than, or more than, your estimated benefit.

Service Retirement Benefit Formula

The four-step formula at right is used to calculate your monthly benefit based on the Option A payment plan described on Page 15.

Step 1 Total your 12 highest consecutive quarters of earnable compensation and divide by 3.[1]

Step 2 Multiply the result of Step 1 by 1.82 percent (.0182) for Class II service or by 1.45 percent (.0145) for Class I service.

Step 3 Multiply the result of Step 2 by years, months, and days of service.[2]

Step 4 Divide the result of Step 3 by 12.

AFC = $25,000

Service Credit = 28 years

$25,000 x 1.82% (.0182) = $455

$455 x 28 = $12,740
(annual retirement benefit)

$12,740 ÷ 12 = $1,061.67
(Option A monthly benefit)

[1]The dollar amount of payment for up to 45 days of unused annual leave paid by your last employer at retirement may be included before averaging your 12 highest consecutive quarters of earnable compensation. The result of Step 1 is your AFC.

[2]Convert months to days and divide the total days by 360 to determine a decimal equivalent for partial years. For example, 25 years, 2 months and 10 days equals 25 years, 70 days (60 + 10). 70 ÷ 360 = .19. This amounts to 25.19 years of service.

Unused Leave At Retirement

Annual Leave

Only an amount up to and including 45 days' pay for unused annual leave from your last termination payment shall be included before averaging your 12 highest consecutive quarters of earnable compensation (see Step 1 of the benefit formula above).

If you are or plan to become a participant in the Teacher and Employee Retention Incentive (TERI) program, please see Pages 18-19 concerning unused annual leave provisions.

Sick Leave

At retirement, you may receive service credit for up to 90 days of unused sick leave from your last employer at no cost to you (see Step 3 of the benefit formula above). This service credit cannot be used to establish retirement eligibility. Sick leave is reported by your employer after retirement. One month of service credit is granted for each 20 days of sick leave.

School District and Higher Education Employees

Adjustments may be required so that you receive credit for three full years of earnings. Such adjustments may include changes in payroll cycles, contract payouts, and any other occurrence that could potentially cause the AFC to include more or less than three full years of earnings.

Payment Options at Retirement

There are three monthly benefit payment options available to you at retirement. Select the option that best suits your needs. Your payment option may not be changed once benefits are first payable.

Option A (Maximum Retiree Only Monthly Benefit)

This option provides the maximum monthly benefit available and will pay you a lifetime benefit based on your average final compensation, years of service, and a multiplier (.0182 for Class II or .0145 for Class I). After your death, the Retirement Systems will return, through a lump-sum payment to your beneficiary or your estate, the remaining balance of any member contributions and interest, and any working retiree contributions not exhausted through receipt of benefits during your retirement.



Option B (100% - 100% Joint Retiree-Survivor Monthly Benefit)

You will receive a reduced (from Option A) monthly benefit for life. After your death, the same benefit (100 percent of your reduced monthly benefit, including granted cost-of-living adjustments) will continue throughout your beneficiary's lifetime. If all of your designated beneficiaries predecease you, your benefit will revert to Option A, including any cost-of-living adjustments granted since your retirement date.

You may select Option B only if your designated beneficiary is your spouse, or you designate multiple beneficiaries or a sole beneficiary who is not your spouse and who is within the 10-year age difference limits allowed by an Internal Revenue Code (IRC)formula. The non-spousal limits do not apply if the non-spousal beneficiary is older than you, or in the case of disability retirement or death benefits.

If, based on the IRC formula, the adjusted age difference for you and a non-spousal beneficiary exceeds the IRC limits, Option B would not be available to you. You would be able to select Option C, however, with no IRC restrictions.

Option C (100% - 50% Joint Retiree-Survivor Monthly Benefit)

You will receive a reduced (from Option A) monthly benefit for life. After your death, one-half of the benefit (50 percent of your reduced monthly benefit, including granted cost-of-living adjustments) will continue throughout your beneficiary's lifetime. If all of your designated beneficiaries predecease you, your benefit will revert to Option A, including any cost-of-living adjustments granted since your retirement date.



If You Choose Option B or Option C

If you choose Option B or Option C and name multiple beneficiaries, after your death your benefit will be divided equally among those beneficiaries. The benefit will not change for the remaining beneficiaries if one beneficiary dies, either before or after the member dies.

If you select Option B or Option C and all of your designated beneficiaries predecease you, your benefit will revert to Option A effective on the date the last beneficiary died. You must notify the Retirement Systems upon the death of a beneficiary.

Approximate Percentage of Average Final Compensation at Retirement

The following chart displays the annual approximate percentage of AFC paid as a monthly benefit based on Option A. Choosing Option B or Option C to provide a future benefit for beneficiaries will reduce the amount of your monthly benefit.

Service and Age	Percentage	Type of Benefit
25 years at age 55	40%	Reduced Early Retirement
26 years at age 55	44%	Reduced Early Retirement
27 years at age 55	47%	Reduced Early Retirement
28 years at any age	51%	Normal Retirement
29 years at any age	53%	Normal Retirement
30 years at any age	55%	Normal Retirement

Approximate Amount of Option A Monthly Benefit at Retirement

The information in the table below is based on Option A. Choosing Option B or Option C to provide a future benefit for beneficiaries (or retiring with SCRS early retirement reductions) will reduce the amount of your monthly benefit.

AFC	Years of Service							Additional Monthly Benefit for Each Additional Year
	5*	10*	15*	20*	25*	28	30	
$20,000	$ 152	$ 303	$ 445	$ 607	$ 758	$ 849	$ 910	$ 30
25,000	190	379	569	758	948	1,062	1,138	38
30,000	228	455	683	910	1,138	1,274	1,365	46
35,000	265	531	796	1,062	1,327	1,486	1,593	53
40,000	303	607	910	1,213	1,517	1,699	1,820	61
45,000	341	683	1,024	1,365	1,706	1,911	2,048	68
50,000	379	758	1,138	1,517	1,896	2,123	2,275	76
55,000	417	834	1,251	1,668	2,085	2,336	2,503	83
60,000	455	910	1,365	1,820	2,275	2,548	2,730	91
65,000	493	986	1,479	1,972	2,465	2,760	2,958	99
70,000	531	1,062	1,593	2,123	2,654	2,973	3,185	106
75,000	569	1,138	1,706	2,275	2,844	3,185	3,413	114
80,000	607	1,213	1,820	2,427	3,033	3,397	3,640	121
85,000	645	1,289	1,934	2,578	3,223	3,610	3,868	129
90,000	683	1,365	2,024	2,730	3,413	3,822	4,095	137
95,000	720	1,441	2,161	2,882	3,602	4,034	4,323	144
100,000	758	1,517	2,275	3,033	3,792	4,247	4,550	152
110,000	834	1,668	2,503	3,337	4,171	4,671	5,005	167

* SCRS early retirement reductions may apply. Early reduction may be due to age 60, age 55 with 25 years of service or less than 28 years.



TERI Program

If you are an active member who is eligible for service retirement based on any of the criteria outlined on Page 12, you may elect to participate in the Teacher and Employee Retention Incentive (TERI) program when you complete your application for service retirement.

TERI participation allows you to retire and begin accumulating your retirement benefit on a deferred basis without terminating your employment. You must enroll at the time of retirement.

TERI participants employed by an agency that adheres to state personnel policies will be exempt from the State Employee Grievance Procedure Act. This means your employment as a TERI participant is at will. If a TERI participant works for an employer that is not governed by state personnel policies, the TERI participant would be subject to his employer's policies regarding employment status and rights.

By participating in TERI, you may defer receipt of your retirement benefit for up to 60 months. Your monthly retirement benefit is accumulated in your TERI account. No interest is paid on the benefits accumulated in your TERI account. Retiree cost-of-living adjustments are applied to a TERI participant's monthly benefit in the same manner in which other retirees receive such adjustments.

You may participate in TERI only once. If you retired previously and received a service or a disability retirement benefit from SCRS, you are not eligible to participate in the TERI program. However, disability retirees who repaid all of the benefits they received and were restored to active membership are eligible to participate in the TERI program. Participants of the TERI program are not eligible for disability retirement benefits.

If you die during your TERI participation period and your employer provides the incidental death benefit, your beneficiary may be entitled to a payment equal to one year's earnable compensation.

If you die while participating in TERI, in addition to any eligible incidental death benefit, the total amount of your benefits accumulated in your TERI account will be distributed to the

beneficiary designated for your retirement benefit.

A designated beneficiary who is a spouse may roll over the taxable portion of the TERI balance into an IRA, a 401(k) plan, a 401(a) eligible plan, a 403(b) plan, or a 457 plan. A non-spousal beneficiary may roll over the taxable portion of the TERI balance into an IRA only.

At the end of your TERI period, you must terminate employment. Confirmation of your actual termination date is required from your employer. You may then receive the balance in your TERI account through either a taxable, single-sum distribution payable directly to you or through a tax-deferred rollover into a qualified retirement plan.

Any distribution paid directly to you is subject to ordinary federal and state income taxes and may be subject to an additional 10 percent federal penalty for early withdrawal. The 10 percent withdrawal penalty is waived for public safety employees age 50 and older, and military reservists and national guardsmen who are called to active duty for at least 180 days.

If you plan to return to work for a covered employer after your TERI period ends, you must consult with your employer regarding your employer's employment severance and return-to-work policy.

You are not guaranteed employment; a covered employer decides whether or not to hire you after your TERI period has ended. Regardless of your TERI retirement date, if you return to work after your TERI participation has ended, you will make employee contributions.

Contribution Rates

During your TERI period you will pay the same pre-tax contribution rate as active members for the duration of your TERI period; however, you will not earn service credit or interest on your account.

Unused Annual Leave and Your AFC

The first several benefits posted to your TERI account will be based on information received up to that point because your account is considered to be estimated.

After your employer submits your final earnable compensation information, retirement contributions for your 12 highest consecutive quarters of earnable compensation will be au-



dited. Your AFC may be adjusted accordingly after the audit to include service credit for up to 90 days of unused sick leave only. Your account will remain in this status for the duration of your TERI period.

Upon termination of employment at the end of your TERI participation, your benefit will be recalculated to include payment for up to 45 days of unused annual leave paid at termination.

Post-Retirement Information

Retirement Checks

Retirement checks are mailed or directly deposited into your bank account on the last business day of each month. We strongly encourage all payees to participate in direct deposit; however, if you do not have a bank account into which benefits may be automatically deposited, you may receive a paper check each month.

If you do not receive your check within five business days, please contact Customer Services. Endorse all checks as drawn. If someone else must endorse your checks, notify the Retirement Systems immediately. It is also very important to notify the Retirement Systems in writing of any change to your home mailing address.

Taxes

The taxable portion of your monthly benefit is subject to federal and state income taxes. Check with an accountant or a tax advisor regarding your tax liability.

Cost-of-Living Adjustments

Each July 1, eligible SCRS retirees should receive an automatic cost-of-living adjustment (COLA) equal to the percentage of the annual increase in the CPI-W as of the previous December 31, up to an increase of 2 percent.



If the CPI-W is less than 2 percent, the COLA should equal the percentage of the actual increase in the CPI-W. COLAs are awarded only during periods of inflation, so no COLA will be awarded if the CPI-W is negative.

If you retire under the early retirement provisions at age 55 with 25 years of service, you are not eligible for COLAs until the second July 1 after you reach age 60 or the second July 1 after the date you would have had 28 years of service credit had you not retired.



Non-Working Retired Member Incidental Death Benefit

As a non-working retiree, if you die and your last employer prior to retirement provides incidental death benefit coverage (see Page 3), a payment based on your service credit will be paid to your beneficiaries as follows:

Years of Service Credit	Benefit
10 to 19 years of service credit	$2,000
20 to 27 years of service credit	$4,000
28 or more years of service credit	$6,000

Returning to Covered Employment

If you return to work after retirement, there is no limit on the dollar amount you may earn as compensation; however, you must first have a complete, bona fide severance or termination of employment. After 15 days of retirement, you may be hired by an employer covered by the Retirement Systems to return to work.

The TERI period counts toward the 15-day break requirement. If you return to covered employment sooner than 15 consecutive calendar days after retirement, your retirement benefit will be suspended while you remain employed by a covered employer. A severance from employment is required at the end of the TERI program before a member may receive his accumulated benefits or return to covered employment.

Any retired member who is employed by an agency that adheres to state personnel policies will be exempt from the State Employee Grievance Procedure Act. This means your employment is at will. If, as a retired member, you return to work for an employer that is not governed by state personnel policies, you would be subject to your employer's policies regarding employment status and rights.

TERI participants employed by an agency that is covered by the State Employee Grievance Procedure Act will be exempt from the requirements of that Act (employment is at will).

If a TERI participant works for an employer that is not governed by state personnel policies, the member would be subject to his employer's policies regarding employment status and rights.

Any member having questions regarding his employment status and rights upon becoming a TERI participant should contact his employer for clarification.



Working 48 Continuous Months

If you return to employment and work 48 continuous months for a covered employer with an annual earnable compensation of at least 75 percent of the AFC used to calculate your retirement benefit, you may elect to cease your retirement benefit and become an active member of the Retirement Systems.

If you become an active member again, you have the option to repay all retirement benefits and make a payment equal to the amount you would have contributed during the period you would have been an active member plus interest to receive service credit for the 48-month period.

When you subsequently retire, your retirement benefit will be calculated as if you were retiring for the first time. TERI participation does not count towards the 48-month period.

Working Retired Member Incidental Death Benefit

If you are a TERI participant or a working retired member and your employer provides incidental death benefit coverage, a payment equal to your current annual earnable compensation will be paid to your beneficiary or trustee.

Working Retired Member Contribution Rate

Retired members who return to covered employment contribute a tax-deferred 6.5 percent of gross pay into their retirement account. Working retirees will not earn additional service credit or receive interest on their account.

Working retirees can be assured of getting back contributions made as a working retiree, however, through either benefit payments to the retiree or benefit payments and/or a refund of contributions to the retiree's surviving beneficiary.



Beneficiary and Payment Option Changes

Retired Member Incidental Death Benefit

You may change your beneficiary for the retired member incidental death benefit at any time regardless of the payment option you selected.

Option A

You may change your beneficiary for retirement benefits at any time. If you have a change in marital status (death of spouse, marriage, divorce), you may also select a new payment option within one year of the qualifying event.

Option B and Option C

If all of your beneficiaries predecease you, your benefit will revert to Option A effective on the date the last beneficiary died. You must notify the Retirement Systems upon the death of a beneficiary. You may then select a new beneficiary under Option A. If you have a change in marital status (death of spouse, marriage, divorce), you may also select a new payment option and designate a new beneficiary within one year of the qualifying event.

Payment Option Change Limitation

Your form of monthly payment may not be changed more than twice regardless of the number of events (death of a designated beneficiary or change in marital status) that occur.

A reversion to Option A after the death of your beneficiary will count as one of the two changes. If a second beneficiary predeceases you after you have again selected Option B or Option C, you will revert automatically to Option A; however, no further form of payment changes will be allowed.

Changes in form of payment occurring before January 1, 2001, are not included in the limitation provision.

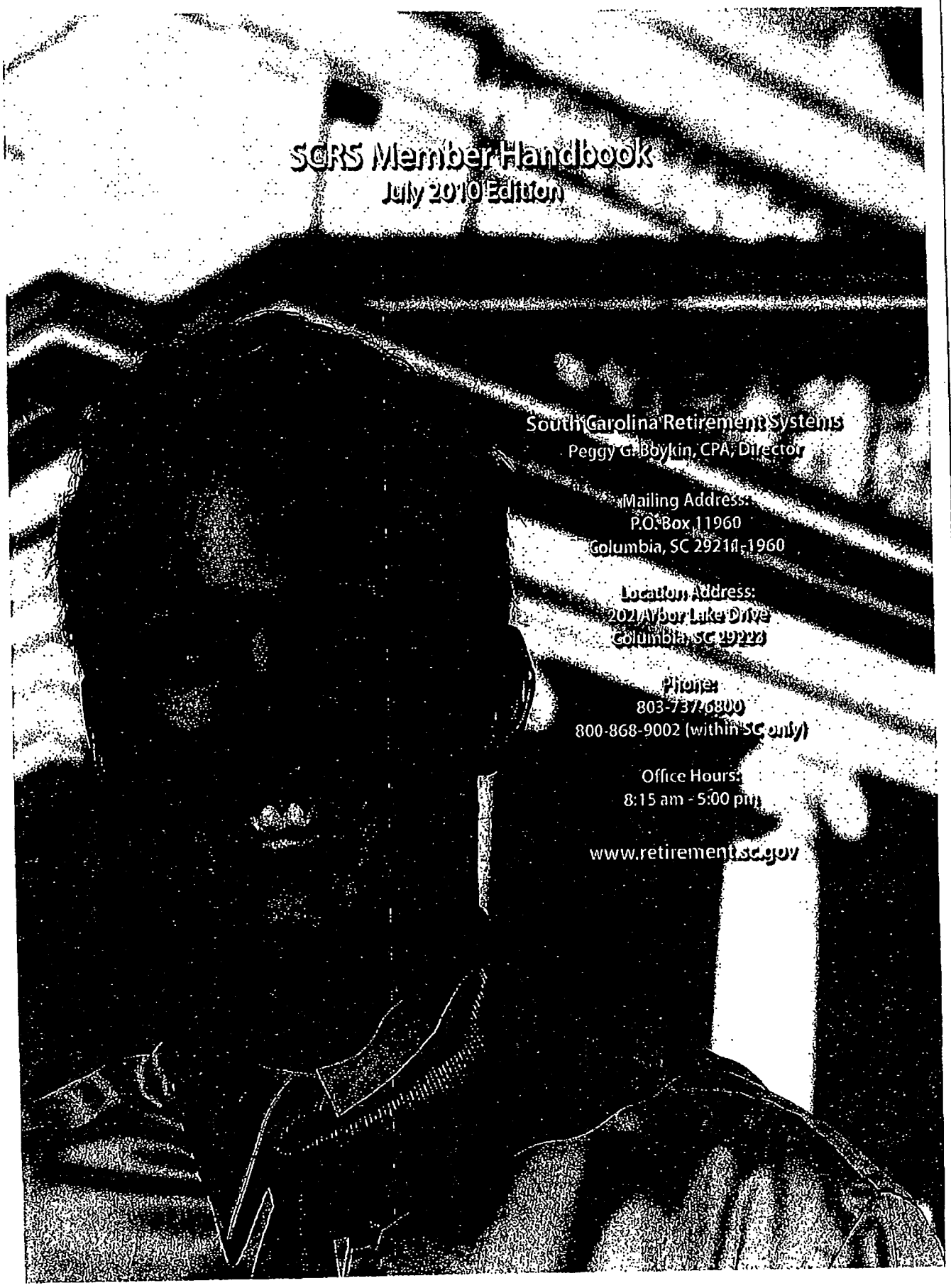

SCRS Member Handbook
July 2010 Edition
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EXHIBIT B

(PORS Member Handbook)

PORS Member Handbook

2009 Edition

Revised September 2009



South Carolina Retirement Systems

A Division of the SC Budget and Control Board

Retiring South Carolina's Public Workforce for Life

Your Plan at a Glance

Benefits

- Retirement benefit is guaranteed by law and pre-funded
- Retirement benefit is based on a formula (2.14 percent multiplied by years of service multiplied by average final compensation), not on a member's account balance at retirement
- Automatic annual cost-of-living adjustments (COLAs) for retirees
- Plan assumes investment and life expectancy risks
- Ability to purchase service
- Disability, life insurance and accidental death protection

Membership Eligibility

- Employer must be covered by PORS
- Certain police officers, firefighters, peace officers, coroners, magistrates and probate judges are eligible for membership
- Unless your position is exempt, you must earn at least $2,000 per year and devote at least 1,600 hours per year to this work

Contributions

- You contribute a tax-deferred 6.5 percent of gross pay
- If you have not retired, your account earns 4 percent interest compounded annually

Service Purchase

- Members may be eligible to purchase various types of service credit
- Examples of service that may be purchased include military service, public service and previously withdrawn service
- Purchasing service increases your total credited service which may allow you to retire sooner
- The cost to purchase service varies by type

Group Life Insurance

- Beneficiaries of active members and working retirees are eligible for a payment equal to a year's earnable compensation after one year of service
- If death is a result of a job-related injury, the one-year requirement is waived
- Non-working retirees are also eligible for coverage of $2,000, $4,000 or $6,000 based on their years of service
- Check with your employer to see if they provide this protection

Accidental Death Program

- Provides a survivor benefit if you die in the line of duty
- Check with your employer to see if they provide this protection

Leaving before Retirement

If you terminate employment, you can either:

- request a refund of your contributions and interest; or
- leave your money in the Retirement Systems where it will earn an annual 4 percent interest

Payment Plans

- Three plans available
- Two of the three plans provide survivor protection
- You select the one that best suits your needs

Annual COLA

- Each July 1, eligible retired members will receive an automatic COLA up to an increase of 2 percent if the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W) as of the previous December 31 is at least 2 percent
- If the CPI-W is less than 2 percent, the COLA will equal the actual increase in the CPI-W
- COLAs are granted only during periods of inflation

Retirement Eligibility

- You can retire after 25 years of service
- You can retire at age 55 or older with at least five years of earned service credit

Table of Contents

General Information 1

Membership 1
Correlated Systems 2
Contribution Rates 2
Active Group Life Insurance Benefit 2
Accidental Death Program 2

Service Credit 2
Establishing Service Credit 2
Purchasing Service Credit 3
Descriptions of Types of Service 3
Convert Class I to Class II 3
Transfer from SCRS to PORS 3
Public Service 3
Educational Service 3
Military Service 3
Leave of Absence 4
Workers' Compensation 4
Previously Withdrawn PORS Service 4
Non-Qualified Service 4
State ORP Service 4

Leaving Before Retirement 4
Request a Refund 4
Leave Funds on Deposit 5

Service Retirement 5
When to Apply 5
Eligibility 6
Your Average Final Compensation 6
Service Retirement Benefit Formula 6
Unused Leave at Retirement 7
Annual Leave 7
Sick Leave 7

Payment Plans at Retirement 7
Option A Payment Plan 7
Option B Payment Plan 7
Option C Payment Plan 7
If You Choose Option B or Option C 7
Approximate Percentage of Average Final Compensation at Retirement 8
Approximate Amount of Option A Monthly Benefit at Retirement 8

Post-Retirement Information 8
Retirement Checks 8
Taxes 9
Cost-of-Living Adjustments 9
Retiree Group Life Insurance 9
Returning to Covered Employment 9
Group Life Insurance 9
Working Retiree Contribution Rates 10

Beneficiaries 10
Pre-Retirement Designations 10
Post-Retirement Beneficiary or Payment Plan Changes 10

In-service Death 10

Death after Retirement 11

Disability Retirement 11
Who May Apply 11
How to Apply 12
Processing the Claim 12
Effective Date 12
Benefit Payments 13
Returning to Employment While Receiving a Disability Retirement Benefit 13

Employers covered by the South Carolina Retirement Systems are not agents of the Retirement Systems.

This page contains no other content.

THIS HANDBOOK CONTAINS AN ABBREVIATED DESCRIPTION OF THE RETIREMENT BENEFITS OFFERED BY THE POLICE OFFICERS RETIREMENT SYSTEM. THE INFORMATION IN THIS HANDBOOK IS MEANT TO SERVE AS A GUIDE FOR OUR MEMBERS AND DOES NOT CONSTITUTE A BINDING REPRESENTATION OF THE SOUTH CAROLINA RETIREMENT SYSTEMS. TITLE 9 OF THE SOUTH CAROLINA CODE OF LAWS CONTAINS A COMPLETE DESCRIPTION OF THE RETIREMENT BENEFITS, THEIR TERMS AND CONDITIONS, AND GOVERNS ALL RETIREMENT BENEFITS OFFERED BY THE STATE. STATE STATUTES ARE SUBJECT TO CHANGE BY THE GENERAL ASSEMBLY. PLEASE CONTACT THE RETIREMENT SYSTEMS FOR THE MOST CURRENT INFORMATION.

THE LANGUAGE USED IN THIS HANDBOOK DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS AND DOES NOT CREATE A CONTRACT BETWEEN THE MEMBER AND THE SOUTH CAROLINA RETIREMENT SYSTEMS. THE SOUTH CAROLINA RETIREMENT SYSTEMS RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS HANDBOOK.

General Information

The South Carolina Police Officers Retirement System (PORS) is a defined benefit retirement plan administered by the South Carolina Retirement Systems, a division of the State Budget and Control Board. This handbook provides a general introduction to PORS and its benefits.

PORS provides service and disability retirement, deferred annuities, and survivor benefits.

Membership

PORS membership includes police officers and firefighters employed by the state, and any participating local subdivision, agency, or department of the state. Police officers, peace officers, firefighters, coroners, magistrates and probate judges are eligible for membership in PORS under the following circumstances:



Police Officers – A police officer is defined as a person who is required by the terms of his or her employment to give his or her time to the preservation of public order; protection of life and property; and the detection of crime in the state. Police officers must also earn at least $2,000 per year and devote at least 1,600 hours per year to this work, unless exempted by statute. Coroners and deputy coroners who meet the above requirements are also considered police officers.

Peace Officers – A peace officer is a person who is employed and certified by the Department of Corrections, the Department of Juvenile Justice, or the Department of Mental Health. Peace officers must also earn at least $2,000 per year and devote at least 1,600 hours per year to this work, unless exempted by statute.

Firefighters – A person who gives his or her time to prevention and control of property destruction by fire. A firefighter must also earn at least $2,000 per year and devote at least 1,600 hours per year to this work, unless exempted by statute.

Magistrates[1] – Effective on and after January 1, 2001, newly hired magistrates are required to participate in PORS for service as a magistrate.

Probate Judges[1] – Probate judges may elect to participate in PORS or they may elect to participate in the South Carolina Retirement System (SCRS).

The State Budget and Control Board makes the final determination whether any person may become a PORS member.

[1] These members are not subject to the 1,600-hour and $2,000 earnings requirement.

A PORS active member is employed by a participating employer, earning service credit, making regular contributions to a PORS retirement account, and is not retired. You must be an active member to receive most of the benefits outlined in this handbook. Active members receive a member statement each year that shows employee contributions and interest, service credit, and retirement account beneficiaries.

Correlated Systems

The South Carolina Retirement System (SCRS), the General Assembly Retirement System (GARS), and PORS are correlated systems. If you have contributions in more than one of these retirement systems, your service credit is maintained separately within each system; however, your service credit is added together to determine your eligibility for retirement benefits.

Contribution Rates

You contribute a tax-deferred 6.5 percent of gross pay into your PORS retirement account. If you have not retired, your account earns 4 percent interest compounded annually on your balance as of the previous June 30th.



Active Group Life Insurance Benefit

State agencies and public school districts are required to provide group life insurance coverage to employees. The coverage is optional for other employers. If an employer provides group life insurance coverage to its employees, the employer must pay the required contribution rate for the coverage.

If your employer is covered and you die in service with at least one full year of membership in the system, a payment equal to your current annual earnable compensation will be paid to your designated beneficiary or trustee. If your death results from a job-related injury, the one-year requirement is waived. Group life insurance benefits are considered life insurance proceeds which are not taxable.

Accidental Death Program

State agencies are required to provide Accidental Death Program coverage to employees. The coverage is optional for other employers. If an employer provides Accidental Death Program coverage to its employees, the employer must pay for this coverage.

This program provides a survivor benefit if you are covered and die as a result of an injury by external accident or violence incurred while undergoing a hazard peculiar to your employment while in the actual performance of duty, without willful negligence on your part.

An accidental death benefit will be made monthly to your surviving spouse for life. If you have no spouse or your spouse dies before your youngest child has attained age 18, the benefit is divided equally among the surviving children, each of whom will continue to receive a benefit until reaching age 18 or upon death, whichever occurs first. If you have no spouse or child under age 18, the benefit will be paid to your surviving father and/or mother for life.

Service Credit

Establishing Service Credit

Active members may establish various types of service credit. Descriptions of these types of service credit follow. Generally, a member on leave without pay from a participating employer is not eligible to purchase service credit of any type.

Purchasing Service Credit

You may purchase service credit by a lump-sum payment, an installment service purchase (pre-tax or after-tax, plus interest), or a tax-deferred rollover from an IRA, a 401(k) plan, a 401(a) plan, a 403(b) plan, or a 457 plan.

You may purchase each type of service credit once within a fiscal year. If you are purchasing service to meet retirement eligibility, contact the Retirement Systems for more information. Payment for service purchases required for eligibility must be remitted in full prior to your retirement date or termination.

If you previously purchased periods of part time credit or previously earned periods of part time credit, you may be eligible to purchase additional service credit at an additional cost. Please contact the Retirement Systems for more information.

Some types of purchased service may not be used in determining insurance eligibility. Contact your employer or health insurance provider for insurance coverage questions. If you are covered by state health insurance, contact the Employee Insurance Program at 803-734-0678 or toll free at 888-260-9430 for eligibility information.

Descriptions of Types of Service

Convert Class I to Class II

If you are a PORS member who still has Class I service, you may convert your Class I service to Class II service by paying 5 percent of your current earnable compensation for each year to be converted, less $16 per month for each month converted.

Transfer from SCRS to PORS

If you are an active member of PORS, you may transfer your **nonconcurrent** SCRS service credit to your PORS account by paying 5 percent of your current earnable compensation for each year transferred. Your SCRS contributions plus interest and nonconcurrent service credit are then transferred to your PORS account. SCRS earned service that is transferred to PORS is considered earned service for the required five years earned service, when applicable. Earnings that are associated with the service that is transferred from SCRS to PORS are not included in the calculation of your average final compensation.

Public Service

You may establish service credit for any period of paid public service for which you do not already have service credit in another defined benefit plan from which you may receive a benefit. Public service constitutes service as an employee of the government of the United States, a state, or political subdivision of the United States. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.

Educational Service (K-12)

You may establish service credit for any period of paid classroom teaching consisting of grades kindergarten through 12 in a public, private, or sectarian school for which you do not already have service credit in another defined benefit plan from which you may receive a benefit. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.

Military Service

You may establish up to six years of service credit for any period of military service for which you do not already have service credit. This includes service in the United States Army, Navy, Marine Corps, Air Force, Coast Guard, Select Reserves, and Army or Air National Guard. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. Your discharge from service must be under conditions other than dishonorable. Under guidelines set forth by the Uniformed Services Employment and

Reemployment Rights Act (USERRA), you may also arrange in advance with your employer to continue contributing to your account while on active duty military leave or make the contributions after returning from military leave within a period three times longer than your military leave, but not more than five years.

Leave of Absence

Active contributing members on an employer-approved leave of absence who return to covered employment within four years may purchase service credit for the employer-approved leave period for which they do not already have service credit, up to a maximum of two years per leave of absence. The leave of absence must be with an employer covered by the Retirement Systems. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.

Workers' Compensation

You may establish service credit for a period while on leave of absence and receiving workers' compensation benefits. The cost is based on contributions plus interest using your earnable compensation at the time of injury. You may also arrange in advance with your employer to continue contributing to your account while you are receiving workers' compensation benefits.

Previously Withdrawn PORS Service

If you left employment and received a refund of your contributions plus interest from the Retirement Systems, you may re-establish this service upon returning to active membership. You must repay the amount you withdrew plus interest to the date your request is received. Previously withdrawn earned service that is re-established in PORS is considered "earned" service towards the five year minimum service criteria for retirement eligibility. Please note that earnings associated with a re-established withdrawal will be considered for possible inclusion in the calculation of a member's average final compensation and any subsequent service purchase calculations.

Non-Qualified Service

Active contributing members who have five or more years of earned service credit may establish up to five years of non-qualified service. The cost is 35 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased.

State Optional Retirement Program (State ORP) Service

Active contributing members may purchase service credit for their years of participation in the State ORP administered by the South Carolina Retirement Systems. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation whichever is greater, for each year of service purchased. You may not purchase service for a period of State ORP participation for which you may receive a retirement benefit from another defined benefit retirement plan. State ORP service that is established in PORS through the service purchase process is considered "earned" service towards the five year minimum service criteria for retirement eligibility.

Leaving before Retirement

If you leave your job and terminate all employment covered by the South Carolina Retirement Systems, you have two options concerning your contributions:

- Request a refund of your contributions and interest; or
- Leave your funds in the Retirement Systems. Your account will continue to accrue interest at 4 percent compounded annually.

Request a Refund

To receive a refund of your accumulated contributions and interest you must complete a refund request form and return it to the Retirement Systems. You may submit your refund request immediately upon termination, however by

law, there is a minimum 90-day waiting period from your date of termination until a refund can be made. If you request a refund, you forfeit your rights to any future service retirement or disability benefit. Employer contributions are not refunded. If you are working for two or more covered employers and/or contributing to more than one retirement account (i.e., working two jobs and paying into an SCRS and a PORS account), you must stop working in all correlated systems to request a refund from any account.

Instead of having the refund paid directly to you, you may choose to roll over the funds into an Individual Retirement Account (IRA), a 401(k) plan, a 401(a) eligible plan, a 403(b) plan, or some 457 plans (the South Carolina Deferred Compensation Program's 457 plan does not accept rollovers from your Retirement Systems account). The Retirement Systems is required to withhold federal taxes of 20 percent on the taxable portion of any refund that is eligible for rollover but not transferred directly into another qualified retirement plan. Other taxes may apply as well. Under the federal Pension Protection Act of 2006 (PPA), the 10 percent withdrawal penalty is waived for public safety members who separate from service after age 50 and military reservists and national guardsmen who are called to active duty for at least 180 days. Check with an accountant or tax advisor regarding your tax liability.

Leave Funds on Deposit



When you leave your money on deposit, your account continues to accrue interest and you retain your years of service credit, which may be added to any future service you may accrue, should you later be employed in a position covered by this Retirement System. You may apply for a refund at a later date or apply for a service retirement benefit upon reaching eligibility. No action is required if you wish to retain your membership and leave the funds on deposit, but it is your responsibility to keep the Retirement Systems informed of any changes to your address, name, or beneficiaries.

Service Retirement

A good way to begin the planning process for retirement is to attend a retirement seminar offered by the Retirement Systems. Sessions are held regionally, generally during the fall months. The seminar schedule can be found on-line at www.retirement.sc.gov/events. You can also register to attend a seminar through this web site.

If you are considering retirement, you may conduct a consultation by telephone or in person at our office. Simply contact Customer Services at 803-737-6800, toll free at 800-868-9002 (within SC only), or www.retirement.sc.gov to arrange a consultation.

When to Apply

You must file an application with the Retirement Systems to retire; it is not automatic. We encourage you to file your application as early as six months prior to your desired effective date of retirement but no later than 90 days afterward.

Retirement applications and other forms are available via our Web site at www.retirement.sc.gov or you may contact Customer Services at 803-737-6800, toll free at 800-868-9002 (within SC only), or www.retirement.sc.gov.

If you do not receive notification in the mail confirming receipt of your application within 10 days after you submit it, please contact us. Do not terminate employment until the Retirement Systems has audited your service credit and you receive official notice of your retirement eligibility. This official notice will be sent to you in the mail and is entitled "Notification of Retirement Eligibility and Estimated Benefit".

Retirement benefit estimates may be obtained from the Retirement Systems but are projected based on information you provide as well as available system information. Benefit estimates are subject to change upon an audit of your account after your application is received.



Eligibility

If you meet the following requirements, you are considered eligible to retire (see *Correlated Systems* on Page 2 if you have an account in more than one retirement system):[2]

Service Retirement:

- 25 years of service on the date of retirement, five years of which must be earned; or
- Age 55 or older on the date of retirement with at least five years of earned service.

Your Average Final Compensation

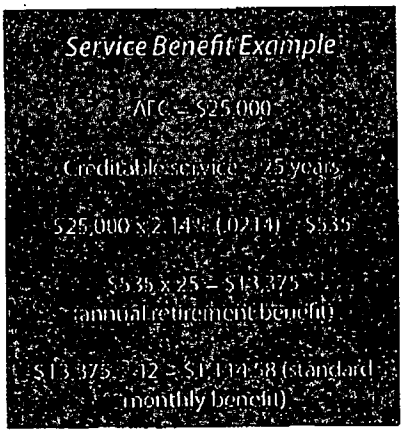
Your average final compensation (AFC) is an important part of the formula used to calculate your retirement benefit. When you retire, your benefit checks will be based on information received up to that point and will be an estimated amount.

After your employer submits your final earnable compensation information, retirement contributions for your 12 highest consecutive quarters of earnable compensation will be audited. Your AFC may be adjusted after the audit if any of the contributions included in the AFC calculation were for any payments not considered a part of your regular earnable compensation base. Your AFC also will be adjusted accordingly to include payment for your unused annual leave according to statute.

As a result of the information received from your employer and the audit of the contributions for your 12 highest consecutive quarters of earnable compensation, your retirement benefit will be finalized. The final amount may be less than, or more than, your estimated benefit.

Service Retirement Benefit Formula

The following four-step formula is used to calculate your standard monthly benefit.



Step 1	Total your 12 highest consecutive quarters of earnable compensation and divide by 3. The dollar amount of payment for up to 45 days of unused annual leave paid by your last employer at retirement may be included before averaging your 12 highest consecutive quarters of earnable compensation. The result of Step 1 is your AFC.
Step 2	Multiply the result of Step 1 by 2.14 percent (.0214) for Class II service. A Class I monthly benefit is computed at $10.97 for each year of Class I service.
Step 3	Multiply the result of Step 2 by years, months, and days of service. Convert months to days and divide the total days by 360 to determine a decimal equivalent for partial years. For example, 25 years, 2 months and 10 days equals 25 years, 70 days (60 + 10). 70 + 360 = .19. This amounts to 25.19 years of service.
Step 4	Divide the result of Step 3 by 12.

2 If your membership began before January 1, 2001, you may also retire if you have 25 years of service credit on the date of retirement, five years of which must be combined creditable service accrued as of December 31, 2000; or if you are age 55 or older on the date of retirement with at least five years of combined creditable service accrued as of December 31, 2000.

Unused Leave at Retirement

Annual Leave

Only an amount up to and including 45 days' pay for unused annual leave from your last termination payment, may be included before averaging your 12 highest consecutive quarters of earnable compensation (see Step 1 of the benefit formula above).

Sick Leave

At retirement, you may receive service credit for up to 90 days of unused sick leave from your last employer at no cost to you (see Step 3 of the benefit formula beginning above). This service credit cannot be used to establish retirement eligibility. Sick leave is reported by your employer after retirement. One month of service credit is granted for each 20 days of sick leave.

Payment Plans at Retirement

There are three monthly benefit payment plans available to you at retirement. Select the one that best suits your needs. Your payment plan may not be changed once benefits are first payable.

Option A (Maximum Retiree Only Monthly Benefit) Payment Plan

This plan will pay you a standard lifetime benefit based on your average final compensation, years of service, and a multiplier (.0214 for Class II or $10.97 for each year of Class I service). Upon your death, the Retirement Systems will return, through a lump-sum payment to your beneficiary or your estate, the remaining balance of any member contributions and interest, including any working retiree contributions, not exhausted through receipt of benefits during your retirement.

Option B (100% - 100% Joint Retiree-Survivor Monthly Benefit) Payment Plan

You will receive a reduced (from Option A) monthly benefit for life. Upon your death, the same benefit (100 percent of your reduced monthly benefit, including granted cost-of-living adjustments) will continue throughout your beneficiary's lifetime. If all of your designated beneficiaries predecease you, your benefit will revert to Option A, including any cost-of-living adjustments granted since your retirement date.

You may select Option B only if your designated beneficiary is your spouse, or you designate multiple beneficiaries or a non-spousal beneficiary who is within the 10 year age difference limits allowed by an Internal Revenue Code formula. The non-spousal limits do not apply if the non-spousal beneficiary is older than you, or in the case of disability retirement or death benefits.

If, based on the IRC formula, the adjusted age difference for you and a non-spousal beneficiary exceeds the IRC limits, the 100 percent survivor option payment plan would not be available to you. You would be able to select the 50 percent survivor option payment plan, however, with no IRC restrictions.

Option C (100% - 50% Joint Retiree-Survivor Monthly Benefit) Payment Plan

You will receive a reduced (from Option A) monthly benefit for life. Upon your death, one-half of the benefit (50 percent of your reduced monthly benefit, including granted cost-of-living increases) will continue throughout your beneficiary's lifetime. If all of your designated beneficiaries predecease you, your benefit will revert to Option A, including any cost-of-living increases granted since your retirement date.

If You Choose Option B or Option C

If you choose Option B or Option C and name multiple beneficiaries, upon your death your benefit will be divided equally among them. The benefit will not change for the remaining beneficiaries if one beneficiary dies, either before or after the member dies. If you select Option B or Option C and all of your designated beneficiaries predecease you, your benefit will revert to Option A effective on the date the last beneficiary died. You must notify the Retirement Systems upon the death of a beneficiary.

Approximate Percentage of Average Final Compensation at Retirement

The information in the following chart is based on the standard benefit payment plan (Option A). Choosing Options B or C to provide a future benefit for beneficiaries will reduce the amount of your monthly benefit.

Years of Service Credit	Percentage
[illegible]	[illegible]
30	64%
[illegible]	[illegible]
40	86%

Approximate Amount of Option A Monthly Benefit at Retirement

The information in the table below is based on the standard benefit payment plan (Option A). Choosing Options B or C to provide a future benefit for beneficiaries will reduce the amount of your monthly benefit.

AFC	Years of Service								Additional Monthly Benefit for Each Additional Year
	5	10	15	20	25	26	28	30	
$20,000	$178	$357	$535	$713	$892	$927	$999	$1,070	$36
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
30,000	268	535	803	1,070	1,338	1,391	1,498	1,605	54
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
40,000	357	713	1,070	1,427	1,783	1,855	1,997	2,140	71
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
50,000	446	892	1,338	1,783	2,229	2,318	2,497	2,675	89
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
60,000	535	1,070	1,605	2,140	2,675	2,782	2,996	3,210	107
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
70,000	624	1,248	1,873	2,497	3,121	3,246	3,495	3,745	125
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
80,000	713	1,427	2,140	2,853	3,567	3,709	3,995	4,280	143
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
90,000	803	1,605	2,408	3,210	4,013	4,173	4,494	4,815	161
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
100,000	892	1,783	2,675	3,567	4,458	4,637	4,993	5,350	178
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Post-Retirement Information

Retirement Checks

Retirement checks are mailed or directly deposited into your bank account on the last business day of each month. We strongly encourage all payees to participate in direct deposit; however, if you do not have a bank account into which benefits may be automatically deposited you may receive a paper check each month. If you do not receive your check within five business days, please contact the Retirement Systems. Endorse all checks as drawn. If someone else must

endorse your checks, notify the Retirement Systems immediately. It is also very important to notify the Retirement Systems in writing of any change of your home mailing address.

Taxes

Your monthly benefit is subject to federal and state income taxes. Check with an accountant or tax advisor regarding your tax liability.

Cost-of-Living Adjustments

Each July 1, eligible PORS retirees will receive an automatic cost-of-living adjustment (COLA) equal to the percentage of the annual increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI-W) as of the previous December 31, up to an increase of 2 percent. If the CPI-W is less than 2 percent, the COLA will be equal to the actual increase in the CPI-W. COLAs are only paid during periods of inflation.

Retiree Group Life Insurance

As a non-working retiree, if you die and your last employer prior to retirement is covered by the group life insurance program (see Page 2), a group life insurance payment based on your service credit will be paid to your beneficiaries as follows:

Years of service credit	Benefit
10 to 19 years of service credit	$2,000
20 to 24 years of service credit	$4,000
25 or more years of service credit	$6,000

Returning to Covered Employment

If you return to work after retirement, there is no limit on the dollar amount that you may earn as compensation; however, you must be retired for at least 15 consecutive calendar days before returning to work for an employer covered by the Retirement Systems. If you return to covered employment sooner than 15 consecutive calendar days after retirement, your retirement benefit will be suspended while you remain employed by a covered employer.

Certain members (elected officials and those designated exemptions approved by the Department of Education) may retire and return to work without a break in service.

Any retired member who is employed by an agency that adheres to state personnel policies will be exempt from the State Employee Grievance Procedure Act (employment is *at will*). If, as a retired member, you return to work for an employer that is **not** governed by state personnel policies, you would be subject to your employer's policies regarding employment status and rights.

If you return to employment and work 48 continuous months for a covered employer with an annual earnable compensation of at least 75 percent of the AFC used to calculate your retirement benefit, you may elect to cease your retirement benefit and become an active member of the Retirement Systems. If you become active again, you have the option to repay all retirement benefits and make a payment equal to the amount you would have contributed during the period you would have been active plus interest to receive service credit for the 48-month period. When you subsequently retire, your retirement benefit will be computed as if you were retiring for the first time.

Group Life Insurance

If you are a retired contributing member and your employer participates in the group life insurance program, a payment equal to your current earnable compensation will be paid to your beneficiary or trustee in lieu of the standard $2,000, $4,000, or $6,000 retired member benefit.

Working Retiree Contribution Rates

Retired members who return to covered employment contribute a tax-deferred 6.5 percent of gross pay into their retirement account; however, as a retiree you will not earn additional service credit or receive interest on your account.

Beneficiaries

Pre-Retirement Designations

Active members may designate three types of beneficiaries:



- Primary beneficiaries for your in-service death benefit or refund of contributions. Multiple beneficiaries share equally in survivor annuities;
- Contingent beneficiaries in case of death of the primary beneficiaries. All primary beneficiaries must be deceased before any contingent beneficiaries are paid; and
- Group life insurance beneficiaries.

You may name your estate as a beneficiary; however, monthly benefit payments cannot be paid to an estate.

Generally, you may change your beneficiaries at any time before retirement.

Post-Retirement Beneficiary or Payment Plan Changes

Retiree Group Life Insurance

You may change your Retiree group life insurance beneficiary at any time regardless of the payment plan you selected.

Option A

You may change your beneficiary for retirement benefits at any time. If you have a change in marital status (death of spouse, marriage, divorce), you may also select a new option within one year of the qualifying event.

Option B and Option C

If all of your beneficiaries predecease you, your benefit will revert to Option A effective on the date the last beneficiary died. You must notify the Retirement Systems upon the death of a beneficiary. You may then select a new beneficiary under Option A. If you have a change in marital status (death of spouse, marriage, divorce), you may also select a new option within one year of the qualifying event.

Payment Plan Changes

After you have begun receiving a benefit, you may not change your payment option unless you experience a qualifying event. Your form of monthly payment may not be changed more than twice, regardless of the number of events (death of a designated beneficiary or change in marital status) that occur. A reversion to Option A upon the death of your beneficiary will count as one of the two changes. If a second beneficiary predeceases you after you have again selected Option B or Option C, you will revert automatically to Option A; however, no further form of payment changes will be allowed. Changes in form of payment occurring before January 1, 2001, are not included in the limitation provision.

In-Service Death

If you are an active contributing member and die in service, your designated beneficiary may be entitled to receive the following benefits:

If you are under age 55 and have less than one year of service credit:

- Accidental death survivor benefit if your death was job-related and under circumstances covered by the Accidental Death Program;
- Active member group life insurance payment if your death was job-related; and
- Refund of employee contributions plus interest or $1,000 (whichever is greater).



If you are under age 55 and have 1-14 years of service credit:

- Accidental death survivor benefit if your death was job-related under circumstances covered by the Accidental Death Program;
- Active member group life insurance payment; and
- Refund of employee contributions plus interest or $1,000 (whichever is greater).

If you have 15 or more years of service credit, five years of which must be earned service:

- Accidental death survivor benefit if your death was job-related under circumstances covered by the Accidental Death Program;
- Active member group life insurance payment; and
- Beneficiary's choice of monthly benefit or refund of employee contributions plus interest or $1,000 (whichever is greater).

If you are age 55 or older with at least five years of earned service as of your date of death:

- Accidental death survivor benefit if your death was job-related under circumstances covered by the Accidental Death Program;
- Active member group life insurance payment (must have at least one year of service); and
- Beneficiary's choice of monthly benefit or refund of employee contributions plus interest or $1,000 (whichever is greater).

Death after Retirement

When you die, survivor benefits will be paid according to the retirement benefit payment plan you elected.

Disability Retirement

Who May Apply

You may apply for disability retirement if you become physically or mentally incapable of performing the regular duties of your job and your disability is likely to be permanent. Becoming disabled does not automatically qualify you for disability retirement; you must file an application and go through the review process.

You must apply for disability retirement **before you leave covered employment.** You must have at least five years of earned service credit toward retirement unless your disability is the result of an injury arising out of and in the course of the performance of your job duties.

You may arrange with your employer to make your Retirement Systems' contributions through your employer if your disability requires you to be placed in an employer-approved leave status while receiving workers' compensation benefits. Doing so will ensure that you continue to earn Retirement Systems' service credit during your workers' compensation leave period.

Be sure to apply for disability benefits while you are still in service with a covered employer. Do not wait to apply for

disability benefits until your workers' compensation claim is finalized. Many workers' compensation claims are often settled after covered employment has ended.

If your disability claim is denied, the continuance of paying contributions and earning Retirement Systems' service credit may be important to your long-term retirement plans. Retired members who work for a covered employer are not eligible to apply for disability benefits.

How to Apply

If you meet the disability filing criteria, go to our Web site or contact Customer Services for a disability retirement packet. When you file your disability retirement claim, please complete all of the forms in the disability retirement packet. You do not, however, need to include any medical records from your health care providers.



You should file your application for disability retirement as soon as you become disabled. You must apply prior to leaving covered employment or you will not be eligible to participate in the disability retirement program.

If you do not receive notification in the mail confirming receipt of your application within 10 days after you submit it, please contact us.

If you are eligible for service retirement when you become disabled, you may apply for service retirement while awaiting determination of your disability claim; however, you will receive only one type of payment (service or disability) if your disability claim is approved.

Processing the Claim

Your medical records will be obtained from your health care providers and evaluated to determine the severity and limiting effects of your physical or mental impairment. The final determination is made by the Retirement Systems. If you are denied, you will have an opportunity to appeal that denial.

Please allow a minimum of three months after all required documentation has been received from you, your employer, and your health care providers for your disability application to be processed. If you have not received our decision within three months, please contact Customer Services at 803-737-6800, toll free at 800-868-9002 (within SC only), or www.retirement.sc.gov.

Effective Date

If your disability retirement claim is approved, the effective date for benefits will be the 30th day after your application is received by the Retirement Systems or the day after your last day on your employer's payroll, whichever is later.

A disability benefit, once approved, may be discontinued if:

- You regain a certain earning capacity; **or**
- Medical evidence indicates that you are no longer disabled; **or**
- The Retirement Systems has scheduled a continuing disability review and does not approve continuing disability retirement payments.

Periodic medical reexaminations may be required up to age 55. If the Retirement Systems determines that your disability benefits should cease because of an improvement in your medical condition, your retirement benefits will stop the month of your scheduled review or the month of the Retirement Systems' decision, whichever is later.

Benefit Payments

A disability applicant may select the same payment plans as a service retiree (see Page 7).

Because the Retirement Systems does not determine your disability based on the criteria for a disability that is total and permanent, like Social Security, **your disability benefits are considered to be a normal distribution from your retirement account.** For tax information, contact the Internal Revenue Service, the South Carolina Department of Revenue if you live in South Carolina, and/or your personal tax advisor.

Benefit Payment Example

AFC at retirement adjusted for inflation:	$ 35,000
Annual disability retirement benefit:	$ 14,950
Disability retiree can earn difference for the calendar year:	$ 20,050

Disability benefits paid under PORS are based on approval for an occupational or job-related disability. Per the Internal Revenue Service (IRS) guidelines, all such benefits are reported as normal distributions with a distribution code of 7 on IRS form 1099-R.

If you also receive benefits from the Social Security Administration that are based on total and permanent disability, such benefits are reported to you with a distribution code of 3 on IRS form 1099-R. If you are considered to be totally and permanently disabled, benefits paid by the Retirement Systems may be eligible for additional tax credits. Please have your tax advisor refer to the instructions for completing IRS Schedule R in preparing your income tax return.

Returning to Employment While Receiving a Disability Retirement Benefit

If you are under age 55 and receiving a PORS disability benefit, you should report earnings from any gainful (public or private) employment to the Retirement Systems annually because there is an earnings limitation for all employment which is applied on a calendar-year basis. You may earn the difference between your adjusted AFC at retirement and your disability retirement benefit without affecting your retirement benefits. At age 55 there is no earnings limitation for service or disability retirees.

Your AFC may be adjusted each year for inflation for earnings limitation purposes only. This increase generally matches the percentage increase of the CPI-W. These adjustments affect the amount you can earn while receiving a disability retirement benefit; however, they do not affect the amount of your benefit. You will receive a letter each January advising you on how much you can earn and requesting confirmation of your prior year earnings. You will have to repay any benefits that you received to which you were not entitled.

If you earn more than the difference between your adjusted AFC and your disability benefit amount, your monthly benefit will be reduced or possibly canceled. If you return to work with an employer covered by the Retirement Systems and your earnable compensation is equal to or greater than your adjusted AFC, your disability retirement benefit ceases and you must become an active member of the system.

Need to Locate Us?

Directions from Downtown Columbia

The Retirement Systems' office is located at 202 Arbor Lake Drive, approximately five miles north of Columbia. If you wish to reach our office from downtown Columbia, head north on the Bull Street Extension, which becomes SC-277, and exit right onto Fontaine Road. Then turn right on Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

Directions from the Interstate

From I-20 (Augusta or Florence)

Take Exit 73-A onto SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 East (Spartanburg)

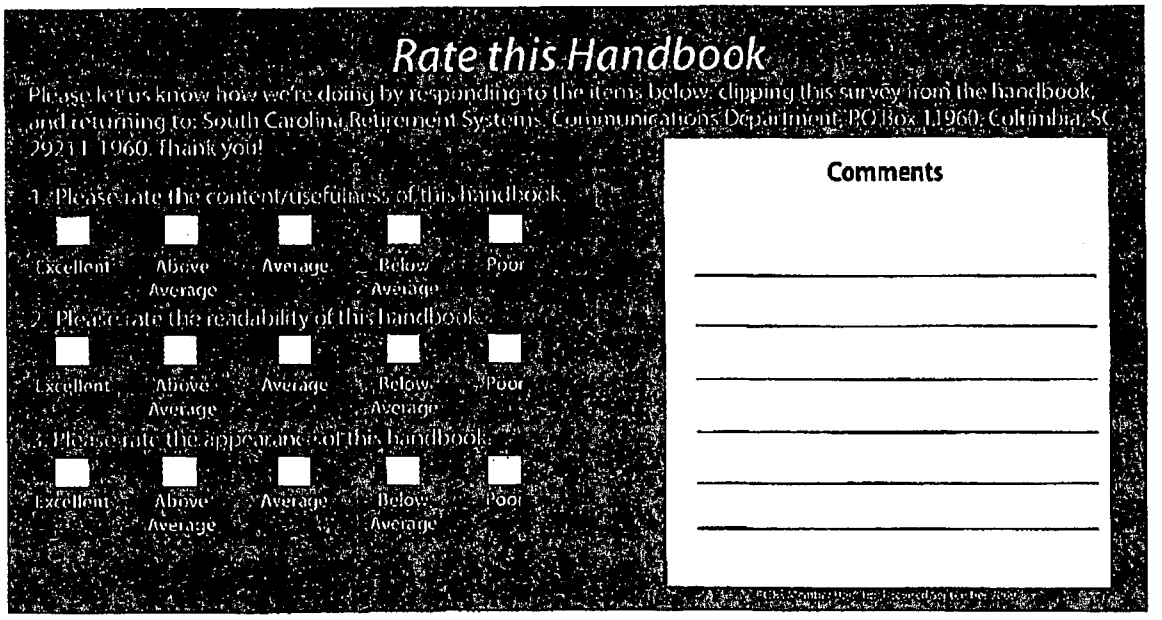
Take I-20 East toward Florence and take Exit 73-A onto SC-277 toward Columbia. Exit at Fontaine Road and turn right. Make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 West (Charleston)

Take Exit 116 (I-77 North) toward Charlotte and exit onto I-20 toward Augusta (Exit 16). Take Exit 73-A onto SC-277 toward Columbia and exit at Fontaine Road. Then turn right onto Fontaine Road, and make another right into the Fontaine Business Center (Arbor lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-77 South (Charlotte)

Take Exit 18 onto SC-277. Exit at Fontaine Road and turn right. Make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.



Notes

PORS MEMBER HANDBOOK

2009 EDITION

Revised September 2009



SOUTH CAROLINA RETIREMENT SYSTEMS
PEGGY G. BOYKIN, C.P.A. DIRECTOR

MAILING ADDRESS
P.O. BOX 11960
COLUMBIA, SC 29211-1960

LOCATION
202 ARBOR LAKE DRIVE
COLUMBIA, SC 29223

PHONE
803.737.6800
800.868.9002 (WITHIN SC ONLY)

OFFICE HOURS
8:15 AM - 5:00 PM

RETIREMENT SECURITY

BCB

EXHIBIT C

(Form 1114)

Form 1114
Revised 07/11/2005
Page 1

Print or type in black ink and sign in blue ink. Please read the instructions on page 2 before completing this form.

NOTIFICATION OF EMPLOYED RETIREE

State Budget and Control Board
South Carolina Retirement Systems
Attention: Enrollment
Box 11960, Columbia, SC 29211-1960

SECTION I — EMPLOYEE INFORMATION

1. Last Name & Suffix (PLEASE PRINT)	2. First/Middle Name (PLEASE PRINT)	3. Social Security Number

4. Address	5. City	6. State	7. ZIP+4

8. Sex ☐ M ☐ F	9. Date of Birth	10. Date Returned To Work	11. Position Title	12. Present Monthly Salary

13. Date of Retirement	14. System Retired Under ☐ SCRS ☐ PORS

SECTION II — EMPLOYEE CERTIFICATION AND SIGNATURE

I hereby notify you that I am an employee of the state of South Carolina or its political subdivisions, and that I am a retiree of one of the systems covered by the South Carolina Retirement Systems. As a retired member returned to covered employment, I understand that I am required to pay contributions at the same rate as active members. I also understand that I will not accrue any additional service credit. However, the contributions will be credited to my account and upon my death, any remaining contributions that have not been exhausted through benefit payments will be paid to my beneficiary.

I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment.

I also certify that the information provided in items 1-14 of Section I of this form are true to the best of my knowledge and belief.

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS AND DOES NOT CREATE A CONTRACT BETWEEN THE MEMBER AND THE SOUTH CAROLINA RETIREMENT SYSTEMS. THE SOUTH CAROLINA RETIREMENT SYSTEMS RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT.

Employee Signature: _____ Date: _____

SECTION III — TO BE COMPLETED BY THE EMPLOYER

The individual must be retired from the South Carolina Retirement Systems (includes SCRS TERI participants) or the Police Officers Retirement System. A retired SCRS or PORS member that returns to covered employment must make the same member contributions as an active employee. The employer must also make the same employer contributions for a retiree that is currently employed as they make for an active employee. The contribution rate should be based on the system in which a member is retired under. For example, a PORS retiree that returns to work under a position that would normally qualify as an SCRS position will contribute at the PORS rate. If a working retiree is receiving annuity benefits from both SCRS and PORS, retiree contributions should be reported based on the system for which an active member in the position would normally contribute.

Please indicate which system the member will be contributing: ☐ SCRS ☐ PORS

I hereby certify that the employee listed in items 1-2 of Section I of this form is a retiree returning to covered employment.

Employer Name: _____ Employer Code: _____

Employer Signature: _____ Date: _____

Title: _____ Work Telephone: _____

Please call SC Retirement Systems Customer Service with any questions: (800) 868-9002 (in state) or (803) 737-6800

INSTRUCTIONS

This form is used to notify the Retirement Systems of a retired member returning to covered employment. The individual must be retired from the South Carolina Retirement Systems (SCRS), which includes participants in the TERI program, or the Police Officers Retirement System (PORS). A retired member that returns to work with a covered employer must make the same member contributions as an active member. The employer must also make the same employer contributions for a retiree that returns to employment as they make for an active employee.

SECTION I- THE EMPLOYEE COMPLETES THIS SECTION
Complete items 1-14 by providing the requested information.

SECTION II- THE EMPLOYEE COMPLETES THIS SECTION
Read carefully the statements in this section, then sign and date the form in the spaces provided. Please note that you are required to make the same member contributions, working as a retired member for a covered employer, as an active member would make. These contributions do not add additional service credit to your retirement account. However, the contributions will be credited to your account and upon your death, any remaining contributions that have not been exhausted through benefit payments will be paid to your beneficiary.

SECTION III- THE EMPLOYER COMPLETES THIS SECTION
Please print the requested information, then sign and date the form. Also, please check the box to indicate which system the retiree and employer will be contributing. Both the member and the employer should contribute at the rate corresponding to the system the member is retired under. If a working retiree is receiving annuity benefits from both SCRS and PORS, retiree contributions should be reported based on the system for which an active member in the position would normally contribute.

Forms not properly completed will be returned to the employer. For more information, please contact Customer Service at (800) 868-9002 (in state), (803) 737-6800, or cs@retirement.sc.gov.

EXHIBIT D

(SCRS Covered Employer Procedures Manual)

The South Carolina Retirement Systems

A division of the South Carolina Budget and Control Board

October 2008
Edition

Revised June 11, 2009

Procedures Manual



SCRS Plan at a Glance

Benefits

- Retirement benefit is guaranteed by law and pre-funded
- Retirement benefit is based on a formula (1.82 percent multiplied by years of service multiplied by average final compensation), not on a member's account balance at retirement
- Automatic annual cost-of-living adjustments (COLAs) for retirees
- Plan assumes investment and life expectancy risks
- Ability to purchase service
- Disability and life insurance protection
- Deferred retirement option program - allows you to retire and begin accumulating your annuity on a deferred basis without quitting work

Membership Eligibility

- Employer must be covered by SCRS
- You must be actively employed by a covered employer and making contributions to SCRS

Contributions

- You contribute a tax-deferred 6.5 percent of gross pay
- If you have not retired, your account earns 4 percent interest compounded annually

Service Purchase

- Members may be eligible to purchase various types of service credit
- Examples of service that may be purchased include military service, public service and previously withdrawn SCRS service
- Purchasing service increases your total credited service which may allow you to retire sooner
- The cost to purchase service varies by type

Group Life Insurance

- Beneficiaries of active members and working retirees are eligible for a payment equal to a year's salary after one year of service
- If death is a result of a job-related injury, the one-year requirement is waived
- Non-working retirees are also eligible for coverage of $2,000, $4,000 or $6,000 based on their years of service
- Check with your employer to see if they provide this protection

Leaving before Retirement

If you terminate employment, you can either:

- request a refund of your contributions and interest; or
- leave your money in the Retirement Systems where it will earn an annual 4 percent interest

Payment Plans

- Three plans available
- Two of the three plans provide survivor protection
- You select the one that best suits your needs

Annual COLA

- Each July 1, eligible retired members will receive an automatic COLA up to an increase of 2 percent
- The COLA is equal to the percentage of the annual increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI) as of the previous December 31

Retirement Eligibility

- You can retire after 28 years of service or at age 65
- You can retire early (before age 65 or 28 years of service) and receive a reduced retirement benefit
- Members eligible for service retirement may choose to participate in the Teacher and Employee Retiree Incentive (TERI) program which allows you to retire and begin accumulating your annuity on a deferred basis without ending your employment

PORS Plan at a Glance

Benefits

- Retirement benefit is guaranteed by law and pre-funded
- Retirement benefit is based on a formula (2.14 percent multiplied by years of service multiplied by average final compensation), not on a member's account balance at retirement
- Automatic annual cost-of-living adjustments (COLAs) for retirees
- Plan assumes investment and life expectancy risks
- Ability to purchase service
- Disability, life insurance and accidental death protection

Membership Eligibility

- Employer must be covered by PORS
- Certain police officers, firefighters, peace officers, coroners, magistrates and probate judges are eligible for membership
- Unless your position is exempt, you must earn at least $2,000 per year and devote at least 1,600 hours per year to this work

Contributions

- You contribute a tax-deferred 6.5 percent of gross pay
- If you have not retired, your account earns 4 percent interest compounded annually

Service Purchase

- Members may be eligible to purchase various types of service credit
- Examples of service that may be purchased include military service, public service and previously withdrawn SCRS service
- Purchasing service increases your total credited service which may allow you to retire sooner
- The cost to purchase service varies by type

Group Life Insurance

- Beneficiaries of active members and working retirees are eligible for a payment equal to a year's salary after one year of service
- If death is a result of a job-related injury, the one-year requirement is waived
- Non-working retirees are also eligible for coverage of $2,000, $4,000 or $6,000 based on their years of service
- Check with your employer to see if they provide this protection

Accidental Death Program

- Provides a survivor benefit if you die in the line of duty
- Check with your employer to see if they provide this protection

Leaving before Retirement

If you terminate employment, you can either:

- request a refund of your contributions and interest; or
- leave your money in the Retirement Systems where it will earn an annual 4 percent interest

Payment Plans

- Three plans available
- Two of the three plans provide survivor protection
- You select the one that best suits your needs

Annual COLA

- Each July 1, eligible retired members will receive an automatic COLA up to an increase of 2 percent
- The COLA is equal to the percentage of the annual increase in the Consumer Price Index for Wage Earners and Clerical Workers (CPI) as of the previous December 31

Retirement Eligibility

- You can retire after 25 years of service
- You can retire at age 55 or older with at least five years of service credit

TABLE OF CONTENTS

Publications *1*

Employer 1

Member 1

Training Resources *1*

About the Manual *1*

Format 1

Sections 2

Revisions 2

Contact Information *2*

Driving Directions *4*

The South Carolina Retirement Systems *4*

Plan Types 5

Defined benefit plan 5

Defined contribution plan 5

Membership in the Retirement Systems *5*

Membership Eligibility 5

SCRS 6

State ORP 7

PORS 8

Enrollment Guidelines and Information *10*

Process for Enrollment 10

Retirement Plan Enrollment (Form 1100) 11

New Hires 11

New Employee Who Is Already a Member 11

Change of Information 12

Required Documents for a Name Change 12

Election of Non-Membership (Form 1104) 12

Active Member Beneficiary Designation (Forms 1102 or 1103) 12

New Hires 12

New Employee Who Is Already a Member 13

Change of Information 13

Beneficiary Types on forms 1102 and 1103 13

Primary Beneficiary 13

Contingent Beneficiary 13

Group Life Insurance Beneficiary 14

State ORP Active Group Life Beneficiary Designation (Form 1106) 14

New Hire 14

New Employee Who Is Already a Member 14
Change of Information 14
A Member's Account *14*
Interest Earned on a Member's Account 14
Obtaining an Account Balance Statement 14
Electronic Employer Services Education 15
Benefit Estimates via EES 15
Reporting Procedures *15*
Member Contributions 15
Employer Contributions 16
Working Retiree Contributions 17
In the event of a contribution rate change 18
Contribution Requirements 18
Contribution Reporting *20*
Monthly Deposit: Months 1 & 2 of the Quarter (Applicable to employers not on the Comptroller General's payroll system) 20
Quarterly Contribution Report Summary: Month 3 of the Quarter *(Applicable to employers not on the Comptroller General's payroll system)* 21
Standard Retirement Quarterly Report *(Applicable to employers not on the Comptroller General's payroll system)* 21
Reporting Using a Flat File 22
Employee Record File Definition for Periodic Report by Magnetic Tape or Diskette 23
Delinquent Reports 26
Late Notice Letters 26
Adjustments to Magnetic Media Reports 26
Supplemental Service Report 26
Descriptions of Leave Types reported on a Supplemental Service Report 27
Supplemental Contribution Report: Corrections to Quarterly Report 29
State ORP Supplemental Service and Contribution Reports 30
Service Credit Reporting *30*
Elected Officials/Appointed Board Members 32
Contract Period Chart 33
Electronic Reporting *33*
Service Credit *34*
Earned Service 34
$524 Monthly Threshold 34
Purchased Service 35

Indexed Service Credit Threshold 35
Public Service 35
Educational Service 35
Military Service 35
Leave of Absence 36
Workers' Compensation 36
Previously Withdrawn Service 36
Special Monthly Contributor (SCRS Only) 36
Non-Qualified Service 37
Transfer to PORS (PORS Only) 37
State ORP Service 37
Convert Class I to Class II (SCRS) 37
Convert Class I to Class II (PORS) 37

How to Obtain a Cost for Purchasing Service **38**

How to Purchase Service **38**
Installment Service Purchase Program 39

How to Participate in the Installment Service Purchase Program **40**

Retirement Annuities ***41***

Service Retirement Eligibility **41**
SCRS 42
PORS 42

Payment Plans at Retirement **42**
Option A (Retiree Only Standard Monthly Annuity Plan) 42
Option B (100%-100% Joint Retiree-Survivor Monthly Annuity Plan) 42
Option C (100%-50% Joint Retiree-Survivor Monthly Annuity Plan) 43

If A Retiree Chooses Option B or Option C and Designates Multiple Beneficiaries **43**

Service Retirement ***43***

Service Retirement Effective Date **43**

How to Apply **44**

Teacher and Employee Retention Incentive Program (TERI): SCRS Only **45**

Correlated Systems (SCRS and PORS) **46**

Unused Leave at Retirement **46**
Annual Leave 46
Sick Leave 46

SCRS Service Retirement Annuity Formula **47**

PORS Service Retirement Annuity Formula **49**

Disability Retirement ***50***

Eligibility **50**

Disability Retirement Effective Date **50**

How to Apply **51**

Service and Disability Filing Requirements ***53***

Employer Responsibilities and Procedures **53**

If a Member's Disability Application Is Denied 53
Average Final Compensation *54*
Instructions for Certification of Final Retirement Deductions (Form 6202) and Certification of Final Retirement Deductions for the Teacher and Employer Retention Incentive Plan (Form 6203) 55
Post-Retirement Information *58*
Retirement Checks 58
Direct Deposit 59
Returning to Covered Employment 59
Service Retiree 59
Working 48 Continuous Months 59
Disability Retiree 59
Working Retiree Contributions 60
Retiree Group Life Insurance 60
Changing Beneficiaries and Options After Retirement 60
Cost-of-Living Adjustments 61
Retiree Group Health and Dental Insurance 61
Taxation of Monthly Benefits 62
Changes to a Retiree's Account 62
Leaving Covered Employment *62*
Suggested Termination Packet 63
Refund vs. Deferred Annuity 63
Refunds 63
Waiting Period 63
Leaving Funds on Deposit 63
Multiple Accounts 64
Rollovers 64
Taxes on a Refund of Contributions 64
How to Apply for a Refund of Contributions 65
After Receipt of a Refund Request 66
Refund Check Schedule 66
Refund Request after a Disability Retirement Denial 66
Qualified Domestic Relations Order (QDRO) for Annuities, Refunds and Death Claims 66
In-Service Death *67*
Refund of Contributions 67
Survivor Annuity 68
Life Insurance Benefits 68
Accidental Death Program (PORS Only) 69
Other Resources *71*

Employers covered by the South Carolina Retirement Systems are not agents of the Retirement Systems.

The information in this handbook is meant to serve as a guide, but does not constitute a binding representation of the South Carolina Retirement Systems. The statutes governing the South Carolina Retirement Systems are found in Title 9 of the South Carolina Code of Laws, and should there be any conflict between this handbook and the statutes or the Retirement Systems' policies, the statutes and policies will prevail. Because state statutes are subject to change by the General Assembly, please contact us for the most current information.

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS AND DOES NOT CREATE A CONTRACT BETWEEN THE MEMBER AND THE SOUTH CAROLINA RETIREMENT SYSTEMS. THE SOUTH CAROLINA RETIREMENT SYSTEMS RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT.

Publications

The following publications are available in paper form from the South Carolina Retirement Systems, and are available for viewing and/or download from our Web site at http://www.retirement.sc.gov/publications/default.htm.

Employer

Covered Employer Procedures Manual

Member

Select Your Retirement Plan brochure
Investing for Your Retirement brochure
SCRS Member Brochure
PORS Member Brochure
SCRS Member Handbook
PORS Member Handbook
Systems Update active member newsletter
Systems Update retired member newsletter
Inactive Member Handbook

Training Resources

The South Carolina Retirement Systems has a Communication and Education Unit to serve your training needs. This unit also schedules periodic member and employer seminars. All scheduled seminars are posted on our Web site at www.retirement.sc.gov/events. You can also register to attend a seminar at this Web site. We also have education staff that will be happy to visit your agency if you require. Please contact Customer Services for further information.

About the Manual

The South Carolina Retirement Systems' *Covered Employer Procedures Manual* is designed to familiarize benefits and payroll personnel of employers covered by the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS) with the Retirement Systems' policies and procedures, and to facilitate the administration of retirement benefits.

Format

The *Covered Employer Procedures Manual* is available as an Adobe Acrobat (PDF) file via email or by download from the Retirement Systems' Web site at http://www.retirement.sc.gov/publications/manual.pdf. A paper copy is also available. The *Covered Employer Procedures Manual* available from our Web site and email can be accessed using Adobe Acrobat Reader software. You may download Adobe Acrobat Reader at no charge from the Retirement Systems' Web site.

Sections

The manual is divided into sections based on related topics and materials that can be identified by section title. The forms referred to throughout the manual are available by contacting Customer Services at (800) 868-9002, (803) 737-6800; by emailing us through the "contact us" link on our Web site; by placing an order using a *Supply Request* (Form 5202) available from the Retirement Systems; or by downloading the forms from the Retirement Systems' Web site at http://www.retirement.sc.gov/forms/default.htm. Employers using the Electronic Employer Services (EES) system may print forms from the EES Web site as well.

Revisions

The Retirement Systems distributes revisions and updates to the manual as necessary. We strongly encourage you to keep this manual current since retirement laws, policies, procedures, and information periodically change.

We also encourage you, as a user of this manual, to make suggestions for its improvement. Please send suggestions to Communications Unit, PO Box 11960, Columbia, SC 29211-1960, or contact Customer Services at (800) 868-9002, (803) 737-6800, or through www.retirement.sc.gov.

Contact Information

Mailing Address

Post Office Box 11960
Columbia, South Carolina 29211-01960

Location Address

Fontaine Business Center
202 Arbor Lake Drive
Columbia, South Carolina 29223

Web Site Address

www.retirement.sc.gov

Electronic Employer Services (EES) Address

https://ees.retirement.sc.gov/ees/logon.jsp

Customer Services Telephone and Fax Numbers

toll-free phone: 800-868-9002 (within SC only)
local phone: (803)737-6800
fax: (803)737-7594

Employer Reporting

We would also like to provide our employers with contact information on the Employer Reporting Representative assignments. Our representatives can assist you with any problems or questions

related to Employer Reporting only. Please refer to the following:

Judy Scott – (803) 737-6949, jscott@retirement.sc.gov
State agencies and higher education employers

City and county government and public school district employers are distributed by county as follows:

Becky Brakefield – (803) 737-6841, rbrakefield@retirement.sc.gov
Abbeville, Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, and Chester

Lynn Johnson – (803) 737-6804, ljohnson@retirement.sc.gov
Chesterfield, Clarendon, Colleton, Darlington, Dillon, Dorchester, Edgefield, Fairfield, Florence, Georgetown, Greenville, and Greenwood

Carla Peek – (803) 737-6901, cpeek@retirement.sc.gov
Hampton, Horry, Jasper, Kershaw, Lancaster, Laurens, Lee, Lexington, Marion, Marlboro, McCormick, Newberry, Oconee, and Orangeburg

Gloria Erd – (803) 737-7755, gerd@retirement.sc.gov
Pickens, Richland, Saluda, Spartanburg, Sumter, Union, Williamsburg, York, and Associations

Office Hours

Our office hours are 8:15 a.m. to 5:00 p.m., Monday through Friday. Please encourage members who plan to visit us for a consultation to arrive prior to 4:00 p.m. since sessions may last up to one hour.

Holiday Schedule

The South Carolina Retirement Systems' office will be closed on the following holidays:
New Year's Day
Martin Luther King, Jr. Day
George Washington's Birthday/President's Day
Confederate Memorial Day
National Memorial Day
Independence Day
Labor Day
Veterans Day
Thanksgiving Day
Day after Thanksgiving
Christmas Day
Day after Christmas

Driving Directions

Directions from Downtown Columbia

The Retirement Systems' office is located at 202 Arbor Lake Drive, approximately five miles north of Columbia. If you wish to reach our office from downtown Columbia, head north on the Bull Street Extension, which becomes SC-277, and exit right onto Fontaine Road. Then turn right on Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

Directions from the Interstate

From I-20 (Augusta or Florence)

Take Exit 73-A onto SC-277 toward Columbia and exit at Fontaine Road. Then turn right on Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 East (Spartanburg)

Take I-20 East toward Florence and take Exit 73-A onto SC-277 toward Columbia. Exit at Fontaine Road and turn right. Make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-26 West (Charleston)

Take Exit 116 (I-77 North) toward Charlotte and exit onto I-20 toward Augusta (Exit 16). Take Exit 73-A onto SC-277 toward Columbia and exit at Fontaine Road. Then turn right onto Fontaine Road, and make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

From I-77 South (Charlotte)

Take Exit 18 onto SC-277. Exit at Fontaine Road and turn right. Make another right into the Fontaine Business Center (Arbor Lake Drive). You will see signs directing you to the Retirement Systems' building and visitors' parking area.

Using Public Transportation

The Central Midlands Regional Transit Authority's Route 23 – State Park has a stop at Farrow and Fontaine roads, which is about one block from Arbor Lake Drive. After exiting the bus, take Fontaine Road toward I-277 and turn left onto Arbor Lake Drive. This is Fontaine Business Park. Take the first right turn. There are two three-story buildings in this area of the office park. The Retirement Systems' building is the one closest to I-277. The front entrance is on the side of the building facing I-277. For more information about CMRTA's routes and schedules, please visit CMRTA's Web site.

The South Carolina Retirement Systems

The South Carolina Retirement Systems administers six separate retirement systems: the South Carolina Retirement System (SCRS); the Police Officers Retirement System (PORS); the General Assembly Retirement System (GARS); the Judges and Solicitors Retirement System (JSRS); the State Optional Retirement Program (State ORP); and the National Guard Retirement System (NGRS).

This manual refers to SCRS, PORS and State ORP procedures. Contact us if you require specific information concerning GARS, JSRS, or NGRS policies and procedures.

Plan Types

The Retirement Systems administers two basic types of retirement plans: defined benefit plans and defined contribution plans.

A **defined benefit plan** provides for a traditional fixed annuity benefit at retirement. Upon retirement, an employee is entitled to a specified monthly pension payment for life, which is calculated based on a formula that includes years of service and compensation. A member's monthly benefit is not limited to or contingent upon the member's account balance, which consists of the member's contributions and the interest earned on those contributions. SCRS, PORS, GARS and JSRS are 401(a) defined benefit plans.

A **defined contribution plan** is a pension plan that provides for an individual account for each participant. Benefits are based solely on the amount of contributions and investment income in the participant's account, rather than a fixed future retirement benefit as provided in a defined benefit plan. The State ORP and South Carolina Deferred Compensation Program's 401(k) and 457 plans are defined contribution plans.

Membership in the Retirement Systems

Membership Eligibility

As a condition of employment, all employees of employers participating in the Retirement Systems, except those specifically exempted by statute, are required to become members of SCRS, PORS, or State ORP. Certain employees who are eligible for membership in SCRS or PORS may choose not join the applicable retirement system for one of the following reasons:

- the nature of their position (for example, if they are temporary employees); or
- they choose not to participate when their employer initially becomes covered under the applicable retirement system.

The decision to not participate in the retirement system is an irrevocable one. Employees may not join the system at a later date unless they terminate employment or transfer from the position that allowed them the option of not participating and are hired or transferred into a position for which membership is mandatory (for example, moving from a temporary position to a full-time position). Further, if an employee does not exercise the option to opt out of the retirement system within the required time, they will automatically become a member of the system as of the date of their initial eligibility to join the system.

The one exception to the rule is if an employee decides to participate in the State ORP rather than becoming an SCRS member. After an employee has been a State ORP participant for one year, they may irrevocably choose to join SCRS during any open enrollment period prior to their fifth anniversary of State ORP participation.

Whether an employee opts out of SCRS as a nonmember or as an ORP participant, if they do not make an election to join SCRS within the required time frame, their employer cannot terminate their employment and then immediately rehire them in the same position strictly for the purpose of allowing them another opportunity to join SCRS.

If the employee declines membership and is later hired in a position requiring membership, the employee must then become a member. The effective date of membership will be the beginning date of employment in the new position. Employers are responsible for changing an employee's membership status. Submit a completed *Retirement Plan Enrollment* (Form 1100) for the employee to the Retirement Systems.

SCRS

SCRS was established July 1, 1945, and is governed by Title 9, Chapter 1 of the S.C. Code of Laws. SCRS is a traditional defined benefit retirement plan for employees of the state and its public school districts, and employees of counties, cities, and other political subdivisions that elect participation in the Retirement Systems. SCRS provides members a guaranteed monthly pension based on a formula that includes the member's average final compensation, years of service, and a benefit multiplier of 1.82 percent. SCRS provides service and disability retirement, deferred annuities, and survivor annuities to eligible members. State agencies and public school districts are required to provide group life insurance coverage to employees. The coverage is optional for other employers.

Employees in the categories listed below have the option of electing non-membership. Submit the employee's completed *Election of Non-Membership* (Form 1104) to the Retirement Systems within 30 days of the employee's date of hire.

School Bus Driver
An employee who works for a public school transportation system.

Earn Compensation Below $100 per Month
An employee who receives $100 or less per month for his work.

Non-Permanent Position
An employee in a non-permanent position who does not have benefits and does not earn annual and sick leave.

Day Laborer
One who is retained on an as-needed basis and compensated for hours worked.

Hospital Worker
An employee who works for a non-state agency hospital in the capacity of a physician, nursing service personnel, technician, housekeeping, dietary, or laundry services.

Elected Official
One who does not serve full-time and earns $9,000 or less annually.

Employer Admission – Existing Employees
Employees who work for an employer on the date of the employer's admission into the Retirement Systems may elect non-membership within six months from the employer's admission date.

The following categories of employees may not join the Retirement Systems:

Independent Contractors
Independent contractors are not considered employees and therefore do not meet eligibility requirements for membership.

Students
A person employed by a school, college, or university at which the person is enrolled as a student, or otherwise regularly attending classes for academic credit, is not eligible to join the Retirement Systems unless the person is employed as a school bus driver and is paid by the same school district in which the person is enrolled in school. In determining student status, the Retirement Systems may employ the Social Security Administration's student services guidelines.

Retired Judge who is a member of the Judges and Solicitors Retirement System (JSRS)
A retired judge who is a JSRS member may elect non-membership in SCRS if they are employed by a public education institution in any capacity.

Retired Members
Retirees do not join SCRS since they are already retired members. A retired member is an employee who is currently receiving a benefit from the Retirement Systems (SCRS, PORS, GARS, JSRS). All SCRS and PORS retirees, including Teacher and Employee Retention Incentive (TERI) program participants who joined TERI after July 1, 2005, who return to work for an employer covered by the Retirement Systems will have the same employer and employee contribution rates as active members deducted from their wages on a pre-tax basis; however, their retirees (including TERI participants) will not earn additional service credit or receive interest on your account. TERI participants who joined TERI prior to July 1, 2005 do not make member contributions for the duration of their TERI employment. Employer contributions are still due on these wages, however. If a pre-July 1, 2005 TERI participant terminates TERI and returns to covered employment as a working retiree, then they must have employer and employee contributions remitted on their behalf. All working retirees and TERI participants must have the *Notification of Employed Retiree* (Form 1114) submitted by the employer to the Retirement Systems. An employee who is receiving a distribution of benefits from a State ORP provider and is employed in a position eligible for membership in SCRS must enroll in either SCRS or ORP, unless a statutory exemption applies.

State ORP

Title 9, Chapter 20 of the S.C. Code of Laws, governs the State ORP. A variant of the current State ORP has been available to certain employees since 1987. State ORP is not available to political subdivisions, PORS, GARS, and JSRS employees. Employees eligible for State ORP membership may choose the State ORP defined contribution plan as an alternative to the traditional SCRS defined benefit plan. If a member joins State ORP, an account is established in the member's name through the investment provider he selects. All state, public school, and higher education employees hired after June 30, 2003, are eligible to choose State ORP. This includes all permanent, full-time employees, temporary and part-time employees, and political appointees. A political appointee is an employee hired by the state on or after January 1, 2003, who is not covered by the State Employee Grievance Procedure but who is eligible to participate in either SCRS or PORS. The following is a summary of the current State ORP investment providers and contact information:

• **AIG Retirement** Mandy Yelton SC District Office Coordinator 3710 Landmark Dr., Suite 104 Columbia, SC 29204 (803) 743-2020 (Office) (803) 782-9061 (Fax) (800) 647-4416 (Toll-free) (888) 568-2542 VALIC by Phone mandy.yelton@aigretirement.com http://www.aigretirement.com/scstateorp	• **The Hartford** Richard Snyder Regional Manager 50 Glenlake Parkway Atlanta, GA 30328 (888) 89SCORP (888) 897-2677 (Office) (770) 671-8503 (Fax) (800) 528-9009 (Service Center) sc.orp@hartfordlife.com http://retire.hartfordlife.com
• **MetLife Resources** Steven M. Shearod, Regional Managing Director 9000 Central Park West, Suite #325 Atlanta, GA 30328 (770) 390-5680 - Office (770) 390-5678 - Fax sshearod1@metlife.com http://www.metlife.csplans.com	• **TIAA-CREF** Chandira T. Hickson Consultant, Institutional Relationships A Registered Representative of TIAA-CREF Individual & Institutional Services LLC, Member FINRA/SIPC TIAA-CREF, Baltimore Office 5801 Smith Avenue Baltimore, MD 21209-3652 Toll Free 866.842.2520 Office (410) 367-6914 Mobile (917) 538-6066 http://www.tiaa-cref.org/scorp

State ORP-eligible employees have an opportunity to select the retirement plan that best meets their specific retirement needs. Eligible employees have 30 days from their date of hire to elect or decline State ORP membership. If an employee filling a permanent position that would otherwise require membership in SCRS does not make a retirement plan selection within 30 days, he will automatically become a member of SCRS. Employees must complete an enrollment form for either plan. Please refer to the *Select Your Retirement Plan* brochure for more information. There is an annual open enrollment period (January 1 – March 1) during which a State ORP member may:

- Change investment providers; or,
- Irrevocably switch to SCRS if the member has between one and five years of State ORP service.

A State ORP member may irrevocably elect SCRS membership in any annual open enrollment period after the first but before the fifth anniversary of his initial enrollment. If a State ORP member does not make the election to transfer to SCRS within the allotted time, he will, by default, continue State ORP membership. If a member joins SCRS during the allotted time, he may purchase all or a portion of State ORP service at any time after joining SCRS. The cost of the service is 16 percent of current earnable compensation or career highest fiscal year earnable compensation in either SCRS or State ORP, whichever is greater, for each year of service purchased.

PORS

PORS was established July 1, 1962, and is governed by Title 9, Chapter 11 of the S.C. Code of Laws. PORS is a traditional defined benefit retirement plan for police officers, and firefighters employed by

the state and employees of counties, cities, and other political subdivisions that elect participation in the Retirement Systems. These employees must meet PORS eligibility requirements. PORS provides members a guaranteed monthly pension based on a formula that includes the member's average final compensation, years of service, and a 2.14 percent benefit multiplier. Police officers, firefighters, magistrates, coroners and probate judges are eligible for membership in PORS under the following circumstances:

Police Officers – A police officer is defined as a person who is required by the terms of his employment to give his time to the preservation of public order; protection of life and property; and the detection of crime in the state. Peace officers employed and certified by the Department of Corrections, the Department of Juvenile Justice, or the Department of Mental Health are also eligible for PORS regardless of whether they meet the three requirements set out above. Police officers must also earn at least $2,000 per year and devote at least 1,600 hours per year to this work, unless exempted by statute.

Firefighters – A firefighter is a person who gives his time to prevention and control of property destruction by fire. A firefighter must also earn at least $2,000 per year and devote at least 1,600 hours per year to this work, unless exempted by statute.

Magistrates – Effective January 1, 2001, magistrates are required to participate in PORS for service as a magistrate.

Probate Judges – Probate judges may elect to participate in PORS or they may elect to participate in SCRS.

Coroners – Coroners and deputy coroners in a full-time position may elect to participate in PORS.

PORS provides service and disability retirement, deferred annuities, and survivor annuities to eligible members. State agencies and school districts are required to provide group life insurance coverage to employees. State agencies are required to provide Accidental Death Program coverage for employees. The coverage is optional for other employers.

Employers may be requested to certify that an employee meets the criteria for PORS membership on the *Employer Certification of Police Officers (PORS) Eligibility* (Form 1107) after the *Enrollment Form* (Form 1100) is recieved. PORS membership will be denied if the criteria outlined above are not met. For assistance in determining employee membership eligibility, submit a written position description to the Enrollment unit for evaluation.

Enrollment Guidelines and Information

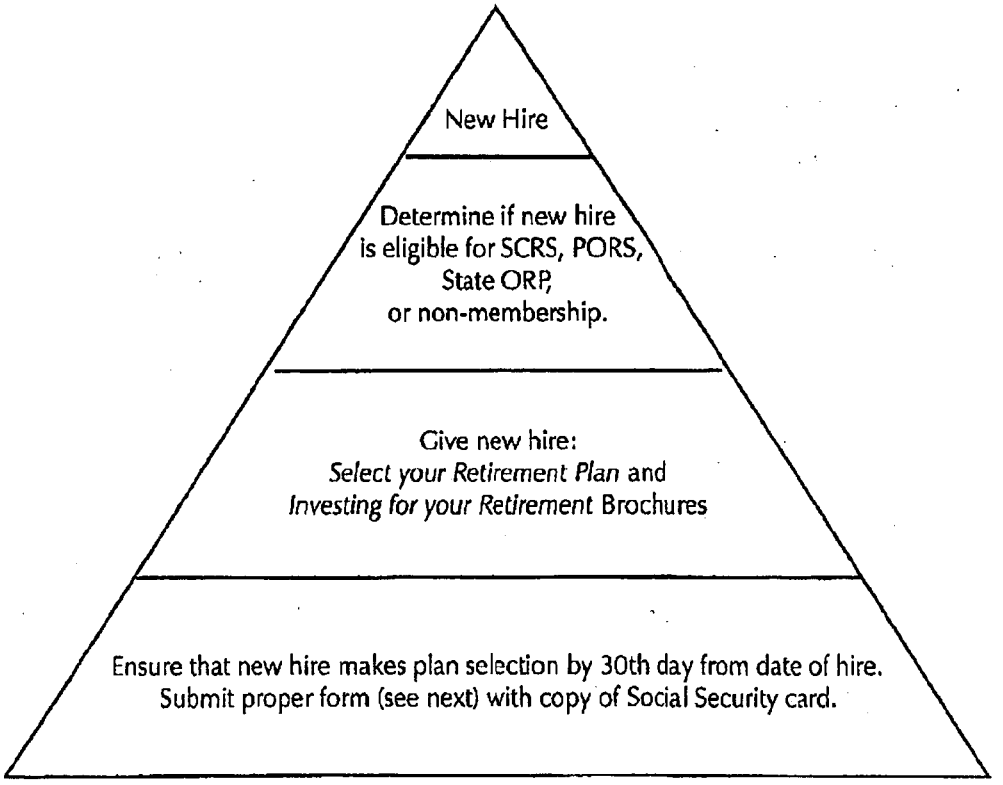
To ensure employees are properly informed about their retirement choices, please provide the following information to all newly hired employees:

- *SCRS Member Handbook* or *PORS Member Handbook*;
- Latest issue of *Systems Update* active member newsletter;
- Our Web site address: www.retirement.sc.gov;
- Customer Services phone numbers: (800) 868-9002 and (803) 737-6800;

If a new employee is eligible for State ORP, please provide the following additional information:

- *Select Your Retirement Plan* brochure;
- *Investing for Your Retirement* brochure.

Process for Enrollment



New hire selects SCRS	New hire eligible for PORS	New hire selects State ORP	New hire declines membership	Retiree returns to covered employment
New hire completes and signs Form 1100 New hire completes and signs Form 1102 or Form 1103	New hire completes and signs Form 1100 New hire completes and signs Form 1102 or Form 1103 Employer completes Form 1107	New hire completes and signs Form 1100 New hire completes and signs Form 1106 New hire completes and mails vendor application form to State ORP vendor	New hire completes and signs Form 1104	Retiree completes and signs *Notification of Employed Retiree* (Form 1114)
Mail Form 1100 & Form 1102 (or Form 1103), and copy of Social Security card to Retirement Systems	Mail Form 1100, 1107 if requested & Form 1102 (or Form 1103), and copy of Social Security card to Retirement Systems	Mail Form 1100 & Form 1106, and copy of Social Security card to Retirement Systems Mail a copy of Form 1100 to the State ORP vendor. If employer is a state agency then also mail a copy to the Comptroller General's office.	Mail Form 1104 and copy of Social Security card to Retirement Systems	Mail Form 1114 and copy of Social Security card to Retirement Systems

Retirement Plan Enrollment (Form 1100)

New Hires

Within 30 days of hire, all new employees must complete either a *Retirement Plan Enrollment* (Form 1100) or an *Election of Non- Membership* (Form 1104). See *Membership Eligibility* starting on Page 4 for more information. **A copy of the employee's Social Security card is required for all newly enrolled members.** The name on the Social Security card must match the name on the *Retirement Plan Enrollment* (Form 1100) and on the quarterly reports submitted to the Retirement Systems. Detailed instructions and conditions are printed on the second page of each form. The Retirement Systems will send a *Rejection Form* (Form 1202) to the employer if critical enrollment data is omitted or incorrect.

New Employee Who Is Already a Member

A *Retirement Plan Enrollment* (Form 1100) must be completed even if a new employee has an active account through previous employment. A *Retirement Plan Enrollment* (Form 1100) must also be completed when a member transfers from one system to another or transfers from one covered employer to another. An employee's effective date of membership coincides with his original date of hire by a covered employer or the mandated April 1 effective date if transferring to SCRS from State ORP.

Change of Information

A member should complete a *Retirement Plan Enrollment* (Form 1100) to make a name, address, date of birth, or Social Security number change. An active or inactive member may make an address change by contacting Customer Services; however, if the member has a refund request on file or is receiving a retirement annuity, the member must request an address change in writing. All written name, address, date of birth, and Social Security number corrections must include the member's Social Security number and original signature.

Required Documents for a Name Change

An active member may update his name by submitting one of the following documents to the Retirement Systems with a completed *Retirement Plan Enrollment* (Form 1100):

- A copy of the member's Social Security card with the correct name;
- A certified copy of the member's divorce decree indicating a legal name change;
- The court order for the member's name change (includes annulment and adoption); or
- A copy of the member's marriage license.

If a member's name has been spelled incorrectly, please contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov.

Election of Non-Membership (Form 1104)

A newly hired employee whose position qualifies for optional membership must complete an *Election of Non-Membership* (Form 1104) within 30 days of his date of hire to decline membership in the Retirement Systems.

Active Member Beneficiary Designation (Forms 1102 or 1103)

Beneficiary forms are binding legal documents; therefore, it is extremely important to complete the forms accurately. If no beneficiary is designated, the member's estate will be added to the account as the default beneficiary. Detailed instructions and conditions are printed on the second page of each form. For assistance in completing the forms, contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. All forms must be signed and notarized. The Retirement Systems will not process beneficiary forms with revisions in the beneficiary or notary sections. Any changes of beneficiary accepted by the Retirement Systems will supersede all previously submitted designations. The Retirement Systems will provide a confirmation notice of beneficiary designations. Members of State ORP do not designate beneficiaries on these forms. See "State ORP Active Group Life Beneficiary Designation (Form 1106)" section on Page 14.

New Hires

At the time of hire, any new employee enrolling in SCRS or PORS should complete a *Beneficiary Designation* (Form 1102) to designate one or more beneficiaries, his estate, or an organization for each benefit provided. Including the Social Security number or the federal tax identification number of all beneficiaries listed on an employee's *Beneficiary Designation* (Form 1102) will help ensure payment of benefits to the appropriate recipient.

Or, the new employee can complete a *Beneficiary/Trustee Designation* (Form 1103). This form is

used to appoint one or more trustees to receive payment on behalf of a beneficiary of either a lump-sum distribution or a monthly survivor annuity following the member's death. A member may direct payment of a benefit to a trust for the benefit of the designated beneficiary by completing a *Beneficiary/Trustee Designation* (Form 1103). Additional beneficiaries who do not require a trustee appointment must also be included on the *Beneficiary/Trustee Designation* (Form 1103).

A trust must be created separately for the *Beneficiary/Trustee Designation* (Form 1103) to be legally binding. Upon the member's death, the trustee then submits the *Certification of Trust* (Form 1113). If a member fails to create a trust prior to his death, the beneficiary or personal representative must complete a *Certification of Nonexistent Trust* (Form 4257) at the time of the member's death. The trustee appointment would be considered void and the Retirement Systems would pay benefits directly to the beneficiaries designated on the *Beneficiary/Trustee Designation* (Form 1103).

New Employee Who Is Already a Member

A newly hired employee who is already a member of SCRS or PORS may choose to complete a new *Beneficiary Designation* (Form 1102) or *Beneficiary/Trustee Designation* (Form 1103). If the employee does not submit a new beneficiary form, the beneficiary designations on file with the Retirement Systems will remain in effect.

Change of Information

A member who is not retired may make beneficiary changes at any time by completing a new *Beneficiary Designation* (Form 1102) or *Beneficiary/Trustee Designation* (Form 1103). Each time beneficiary changes are made on a beneficiary form and submitted to the Retirement Systems, the most recent changes made supersede all previously submitted designations.

Beneficiary Types on forms 1102 and 1103

Primary Beneficiary

A primary beneficiary is the person to whom the Retirement Systems would pay either a lump-sum distribution of the account balance or a monthly survivor annuity following a member's death. A member may also designate his estate, or an organization as beneficiary; however, a monthly survivor annuity cannot be paid to either an estate or an organization. Multiple primary beneficiaries would share equally either a lump-sum distribution or a monthly survivor annuity. A member who belongs to more than one system may designate a primary beneficiary for each of his accounts. A member may designate a given individual as a primary beneficiary or a contingent beneficiary, but not as both.

Contingent Beneficiary

A contingent beneficiary would be entitled to the benefits otherwise payable to a primary beneficiary if all of a member's primary beneficiaries predecease the member. To designate a contingent beneficiary, a member must be actively employed and making regular contributions *(SC Code of Laws Section 9-1-1650)*. A member who belongs to more than one system may designate a contingent beneficiary for each account. A member may designate his estate or an organization as a contingent beneficiary; however, a monthly survivor annuity cannot be paid to either an estate or an organization.

Group Life Insurance Beneficiary

A member's Group Life Insurance beneficiary would be entitled to a benefit equal to the member's current earnable compensation paid following the active member's or retired (but who has returned to covered employment) member's death. A contingent beneficiary may not be named to receive an active membership Group Life Insurance benefit. State ORP participants are eligible for Group Life Insurance provided they work for a covered employer.

State ORP Active Group Life Beneficiary Designation (Form 1106)

Please have the employee contact his investment provider to designate a primary beneficiary

New Hire

A newly hired employee who elects State ORP membership should complete the *State ORP Active Group Life Beneficiary Designation* (Form 1106). A Group Life Insurance beneficiary would be entitled to a Group Life Insurance benefit equal to the member's current annual earnable compensation following the active member's death. A contingent beneficiary may not be named to receive an active membership Group Life Insurance benefit.

New Employee Who Is Already a Member

A newly hired employee who is already a member of State ORP may choose to complete a new *State ORP Active Group Life Beneficiary Designation* (Form 1106). If a new *State ORP Active Group Life Beneficiary Designation* (Form 1106) is not completed, the beneficiary designations on file with the Retirement Systems will remain in effect.

Change of Information

An active State ORP member may make active membership Group Life Insurance beneficiary changes at any time by completing a new *State ORP Active Group Life Beneficiary Designation* (Form 1106). Each time beneficiary changes are made on the *State ORP Active Group Life Beneficiary Designation* (Form 1106) and submitted to the Retirement Systems, the most recent changes made supersede all previously submitted designations.

A Member's Account

Interest Earned on a Member's Account

If a member has not retired, his account earns 4 percent interest compounded annually on the member's account balance as of June 30 of the previous year.

Obtaining an Account Balance Statement

A member may request information about his SCRS and/or PORS account balance by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov, or by submitting a written request that includes the member's signature and Social Security number. Employers may access their employees' Retirement Systems accounts by using the Electronic Employer Services (EES) Web site at https://ees.retirement.sc.gov/ees/logon.jsp. See *Contribution Reporting* on Page 18 for

more information. Customer Services cannot give dollar amounts of annuities, member accounts, refunds, or service credit by telephone; however, requested information can be mailed to the address on file for the member within three business days.

Electronic Employer Services Education

The Retirement Systems' Communication and Education unit provides Electronic Employer Services (EES) training to any Internet capable employer that does not submit its quarterly contributions to the Retirement Systems via paper. The EES system allows employers to access an almost unlimited amount of information about their employees retirement accounts through a specially designed, secure website. **The information provided through the secured EES Web site is available only to authorized users.** Employers participating in the EES program are issued a user identification number (USERID) and a personal identification number (PIN) by the Retirement Systems. The information accessed is considered confidential and, as such, is not to be disclosed to anyone other than the Retirement Systems' member. Only an employee's primary employer can access the employee's detailed information. EES is free and available to all employers. To participate, employers must have Internet access and a browser (Microsoft Internet Explorer, Netscape, etc.). For more information on EES, contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov.

Benefit Estimates via EES

EES benefit estimates, known as READI (Retirement Estimate Access Direct from the Internet), may be used to help a member prepare for retirement. This function, which is accessed through the EES Web site, provides for both an online benefit estimate and a calculation of the average final compensation. READI projects an estimate of a member's retirement benefit. The results are based on estimates calculated from the information provided. The EES Web site is https://ees.retirement.sc.gov/ees/logon.jsp.

Reporting Procedures

Member Contributions

Members of SCRS, State ORP, and PORS are required to contribute a portion of their earnable compensation to their chosen retirement plan. SCRS, State ORP, and Class II PORS members contribute a tax-deferred 6.5 percent of earnable compensation into their retirement account. Class I PORS members contribute $21 per month. Class I PORS coverage is not available to new employers. Members do not pay contributions to participate in the Group Life Insurance or the Accidental Death Programs. Employee contributions must be withheld on wages paid to working retired employees and TERI participants retiring July 1, 2005, and later at the same rate as active employees. No employee contributions are due from TERI participants that began TERI prior to July 1, 2005. Unless a member is purchasing service credit, he may not contribute amounts in excess of the required contribution for his retirement plan.

Retirement Plan	Member Contribution Rate
SCRS	6.5% of earnable compensation
State ORP	6.5% of earnable compensation
PORS Class I	$21 per month
PORS Class II	6.5% of earnable compensation

Employer Contributions

Employer contributions are due on amounts considered earnable compensation for both active members and retirees who have returned to work, including post July 1, 2005, TERI participants. **Employer contributions are due on all wages paid to retired members of SCRS and PORS who return to work.** Employer contributions are not required on active employees who elect not to join the Retirement Systems (i.e. school bus drivers, temporary employees, etc.). See *Membership Eligibility* starting on Page 5 for more information. Employers are required to pay all applicable employer contributions, including the retiree insurance surcharge, Group Life Insurance contributions, and Accidental Death Program contributions, if coverage is provided. State law mandates that the Retirement Systems collect the retiree insurance surcharge from employers. These contributions are transferred directly to the Employee Insurance Program each month and are needed to cover the employer's share of the cost of providing health and dental insurance to retirees. Employer contribution percentages for fiscal year ***2008-2009*** are listed below:

SCRS

Type of Employer	Employer Retirement Contribution	Group Life Contribution	Retiree Insurance Surcharge
State agencies	9.24%	0.15%	3.5%
Public schools	9.24%	0.15%	3.5%
Higher education institutions	9.24%	0.15%	3.5%
Other political subdivisions	9.24%	0.15%	3.5%*

STATE ORP

Type of Employer	Employer Retirement Contribution	Group Life Contribution	Retiree Insurance Surcharge
State agencies	5% to vendor, 4.24% to Retirement Systems	0.15%	3.5%
Public schools	5% to vendor, 4.24% to Retirement Systems	0.15%	3.5%
Higher education institutions	5% to vendor, 4.24% to Retirement Systems	0.15%	3.5%
Other political subdivisions	NA	NA	3.5%*

PORS

Type of Employer	Employer Retirement Contribution	Group Life Contribution	Retiree Insurance Surcharge	Accidental Death Contribution
State agencies	10.65% Class II, 7.8% Class I	0.20%	3.5%	0.20%
Public schools	10.65% Class II, 7.8% Class I	0.20%	3.5%	0.20%
Higher education institutions	10.65% Class II, 7.8% Class I	0.20%	3.5%	0.20%
Other political subdivisions	10.65% Class II, 7.8% Class I	0.20%	3.5%*	0.20%

**contribution due if employer has coverage*

Working Retiree Contributions

SCRS retiree, without PORS account, returning to work in PORS position:

- Retiree and employer pay SCRS rate

PORS retiree, without SCRS account, returning to work in SCRS position:

- Retiree and employer pay PORS rate

If a member is receiving a retirement benefit from both SCRS & PORS, the working retiree will remit contributions to the system into which an active member employed in the position would normally contribute.

Employer contributions are due on all working retirees and TERI members. Contributions are required regardless of whether the retired member is considered a full-time, part-time, temporary, or permanent employee. Employer contributions are all contributions normally paid on behalf of active members including retirement, retiree health insurance surcharge, group life, and PORS accidental death contributions.

In addition to employer contributions, employee contributions are required for wages earned by working retired SCRS and PORS members employed by an employer covered under the Retirement Systems, including members who began participating in the TERI program on or after July 1, 2005. Working retired members must pay employee contributions based on the rate that any other active employee in the position would otherwise contribute to the system, provided the retired member is receiving retirement benefits from that system. As an employer, you may determine the system for which a member is retired by inquiring through EES(www.retirement.sc.gov/ees) .

Employees with a TERI start date **prior** to July 1, 2005, should not make **employee** contributions as long as they are working as a TERI retiree. If the TERI participant ends his TERI participation and returns as a working retiree, employee contributions must be remitted.

Notification of Employed Retiree (Form 1114) Requirement

Employers must notify the Retirement Systems when a retired member is hired. Form 1114, *Notification of Employed Retiree* must be completed for all working retirees. The Retirement System will not post quarterly contributions to retired member accounts without the properly completed form. Please note the following procedural issues:

- For individuals who have recently ended TERI, their return to work (RTW) date should be AFTER the TERI end date.
- For some retirees we have RTW dates on file, but the member has gaps in retiree postings. In other words, there are quarters where no wages were reported after the RTW date on file. Employers should check payroll records for these quarters and if the employee was paid during the missing quarter, send supplements to fill in the gaps. Otherwise, the employer should provide a new Form 1114 denoting the employee's revised RTW date.
- The employee does not have to sign the form.
- Form 1114 is available on our Web site at www.retirement.sc.gov.

In the event of a contribution rate change:

If an increase in the employer contribution rate should occur, apply the increased rate based on the date the wages were paid to the employee.

If an increase in the employee contribution rate should occur, apply the increased rate to when the wages were earned by the employee.

Contribution Requirements

Employee and employer contributions are due on all amounts considered earnable compensation and all payments on up to and including 45 days' termination pay for unused annual leave. The following types of payments are subject to retirement contributions:

Salary or Wages

The gross rate of salary or wages paid by an employer to an actively contributing member is considered earnable compensation. Wage deferrals under various tax-deferred annuities, deferred compensation plans, or flexible benefit (cafeteria) plans do not reduce the wage base for retirement withholding. Retirement contributions are due on true gross wages before reductions for any tax deferrals. Deferred quarterly contributions paid into SCRS, PORS, and State ORP are exempt from federal and state taxes, but are not exempt from FICA/Medicare wages.

Used Sick and Annual Leave

Wages paid to employees who continue on the payroll while using sick and annual leave are considered earnable compensation and are subject to retirement contributions.

Unused Annual Leave

Contributions are deductible on up to and including 45 days termination pay for unused annual leave at retirement for non-TERI participants. If a member terminates employment and receives an annual leave payment as a result on more than one occasion, contributions are deductible on each termination payment of up to and including 45 days of annual leave. However, only an amount up to and including 45 days pay for unused annual leave from the member's last termination payment shall be included in the member's average final compensation calculation. If an employer allows employees to "sell" or "cash-in" annual leave at times other than termination or retirement, contributions should not be withheld from those annual leave payments and these payments are not included in the member's average final compensation.

TERI participants with initial retirement dates on or after July 1, 2005, will not have their unused annual leave included in their annuity calculation. However, their annuity will be recalculated prospectively upon termination of employment at the end of their TERI participation period and may include up to 45 days of unused annual leave paid at termination (end of TERI).

Unused General Leave

Some employers have a single leave account that an employee uses for both annual leave and sick leave, often called "general leave." The retiring member has an option regarding the division of this "general leave" between sick and annual leave, as a member's benefit can change significantly depending on this division. It is the responsibility of the employer and the retiring member to decide how many days of "general leave" will be used as sick leave and annual leave. Upon reaching that

decision, any payment for general leave to be certified as sick leave on *Certification of Final Retirement Deductions* (Forms 6202/3) will not be subject to contributions. Those days to be reported as annual leave (no more than 45) should be paid according to the employer's leave policy and reported with contributions withheld. Any leave reported to the Retirement Systems for benefit purposes must be removed from the employee's accumulated leave balance by the employer.

Overtime and Compensatory Time

Payment for periods in which overtime is worked or earned is considered earnable compensation and is subject to retirement contributions. For retirement benefit purposes, earnings information for both overtime and compensatory time is based on the dates an employee's compensation was **earned**, not on the dates an employee's compensation was **paid**. When compensatory time is paid at a later date, supplemental contribution reports should be filed to reflect the payment in the appropriate quarter and fiscal year.

Other Compensation

When compensation includes maintenance, fees, and other things of value such as on-going housing and automobile allowances, the State Budget and Control Board shall set the value of that part of the compensation not paid in money directly by the employer. Contributions will be due to the Retirement Systems on this non-monetary compensation. Tips are considered a part of the employee's salary and meet the definition of earnable compensation. However, due to the nature of the payment and the administrative difficulty of collecting contributions on a deferred basis, employers may use their discretion in determining whether to report contributions on tips. The decision that is made is binding and must be applied consistently. Both employee and employer contributions on tips must be submitted if a determination is made to consistently report tips.

Contributions are not due on the following types of payments:

Special Payments

Nonrecurring pay increases or single payments made at retirement, bonuses and incentive-type payments, or any other payments not considered part of the regular salary base, whether paid during employment or at retirement, are not subject to contributions.

Lump-Sum Payments for Unused Sick Leave

Lump-sum payments for unused sick leave at termination or retirement are not subject to retirement contributions.

Benefits Received for Long-Term Disability

Benefits received for long-term disability are not subject to retirement contributions.

Member Compensation Limit

A federal limitation on the amount of annual compensation that can be considered in determining defined benefit annuities applies to employees who became members of SCRS or PORS after December 31, 1995. The limitation for calendar year 2008 is $230,000. Compensation in excess of this limitation is not subject to retirement contributions.

Contribution Reporting

Effective July 1, 2008, all covered employers must have access to EES to obtain monthly and quarterly deposit forms. These forms will no longer be mailed to the employer. Please mail completed forms to the Retirement Systems early enough to allow timely remittance of both reports and contributions and to avoid unnecessary interest penalties incurred on deposits received after the due date. In the near future it will be required that the deposit information along with the quarterly detailed records be submitted to the Retirement Systems via EES. This process will improve service to our members and employers and increase the security of transmitted information. Employers may currently sign up for electionic payment options by contacting our cash receipts area at (803)737-6904. Information is reported to the Retirement Systems in the following formats:

Monthly Deposit: Months 1 & 2 of the Quarter
(Applicable to employers not on the Comptroller General's payroll system)

Monthly Deposit (Form 1244 for Class II or Form 1245 for Class I) are used for the first and second months of the quarter. These forms include the employer code, employer name, month ending date, due date, and the correct employer rates for the employer. Since each month's form is bar coded for that particular month, one month's form cannot be substituted for another month. These forms are available via EES, and must be mailed to the Retirement Systems upon completion.

Each monthly report and remittance is due to the Retirement Systems on or before the end of the following month. Refer to the *Due Date Calendar* (Form 1341) for the current fiscal year. (The Retirement Systems mails a *Due Date Calendar* to all covered employers each year. It is also available via the Retirement Systems' Web site.) XXX's in any of the columns (SCRS, PORS, Group Life Insurance, Accidental Death Program) of the *Monthly Deposit* indicate that the employer does not have that coverage.

The net remittance amount is the total of SCRS, PORS, and State ORP amounts due. Employers should mail one check and the *Monthly Deposit* to the Retirement Systems in the **green envelope** provided in the mailing packets sent to employers each year by the Retirement Systems. Do not include any other payments in the calculation of monthly deposit amounts.

The Retirement Systems requires that the *Monthly Deposit* be signed and dated by an employer's authorized reporting official. Always include the official's telephone number at the bottom of the form.

Each employer must remit to the designated State ORP vendor both the State ORP participant's contribution and the employer's contributions, in accordance with the guidelines established by the Internal Revenue Service for payroll tax remittance.

Quarterly Contribution Report Summary: Month 3 of the Quarter

(Applicable to employers not on the Comptroller General's payroll system)

The *Quarterly Contribution Report Summary* (Form 1246 for Class II or Form 1247 for Class I) is used for the third month of the quarter. This form includes the employer code, employer name, quarter ending date, due date, and the correct employer rates for the employer. Since each month's form is bar coded for that particular month, one month's form cannot be substituted for another month. These forms are available via Electronic Employer Services (EES), and must be mailed to the Retirement Systems upon completion.

The *Quarterly Contribution Report Summary* is divided into three sections:

- The first section contains the calculation of employee contributions and any variance between computed contributions and actual contributions withheld (see Page 15 for employee contribution rates);
- The second section contains the calculation of the employer contributions, including employer retirement, Group Life Insurance and Accidental Death Program contributions (see Page 16 for employer contribution rates); and
- The third section includes a reconciliation of the total due for the quarter minus previous monthly payments, and any credits or debit invoices taken resulting in the net remittance.

The *Quarterly Contribution Report Summary* summarizes all quarterly deposits and should match detailed individual records submitted on the *Standard Retirement Quarterly Report* (described in the next section). If any discrepancies exist between the quarterly deposits and the detail records submitted or if detail records must be modified or rejected due to errors on the report, the Retirement Systems will issue a debit or credit invoice along with appropriate documentation to the employer for the applicable quarter. Once reconciliation has been completed and an invoice has been issued to the employer from the Retirement Systems, the employer is responsible for returning contributions to employees if necessary.

The net remittance amount is a total of SCRS, PORS, and State ORP contributions due. Employers should mail one check and the *Quarterly Contribution Report Summary* to the Retirement Systems in the **green envelope** provided by the Retirement Systems in the annual mailing. Do not include any payments for service purchase or Special Monthly Contributor in the calculation of quarterly deposit amounts. The Retirement Systems requires that the *Quarterly Contribution Report Summary* be signed and dated by an employer's authorized reporting official. If an employer is reporting individual member information on paper, the *Standard Retirement Quarterly Report* should be mailed in the same envelope. Electronic reporters should mail the quarterly report data on diskette (in a mailer) or tape separately.

Standard Retirement Quarterly Report

(Applicable to employers not on the Comptroller General's payroll system)

The Retirement Systems offers an electronic reporting tool, Electronic Employer Services Employer Reporting (EESER), a web-based application that enables employers to key and submit quarterly

detail records via the Internet. At this time EESER requires manual user data entry and does not allow data to be downloaded from other automated systems.

Employers with no web access should use the *Standard Retirement Quarterly Report* (Form 1221 for Class II, Form 1222 for Class I) to report individual details and salaries for all active employees and retirees at the end of each quarter. **Employers are encouraged to submit this information via magnetic media or Electronic Employer Services (EES) instead of reporting on paper in this manner.**

The *Standard Retirement Quarterly Report* is due to the Retirement Systems' office according to the dates outlined on the *Due Date Calendar.*

Note: Inactive Employer Accounts

The Retirement Systems requires all employers to submit the *Monthly Deposit* and the *Quarterly Contribution Report Summary* (Form 1246 for Class II or Form 1247 for Class I) when due. If an employer does not have any members on payroll for the applicable reporting period, the employer must submit the *Monthly Deposit* or *Quarterly Contribution Report Summary* and check the "no covered wages" box on the form. This will facilitate processing and alert Employer Services not to call concerning delinquent payments. If an employer anticipates a period of inactivity of more than one quarter, the employer should submit written documentation to inactivate the employer's account. Should an employer later hire employee's eligible for enrollment, the employer must contact the Retirement Systems to reactivate coverage.

Reporting Using a Flat File:

The Retirement Systems accepts electronic data submissions such as diskettes and CD's for quarterly reports that follow the format specified on Pages 23-25.

Diskette (3 ½ inch) 7 Compact Discs – MS-DOS (.txt file)

If data is created on an AS-400 system, the media needs to be converted to a PC-DOS format.

Employers will soon be able to upload their quarterly report (in the same format) over the secure EES Web site. In the interim, diskettes and CD's are acceptable.

Approval and Testing

The Retirement Systems requires that a test diskette or tape be submitted and approved before magnetic media reporting may begin. The Retirement Systems will notify employers after a successful test has been completed.

All test diskette media should be labeled clearly as a test. It is essential that this test include a complete file of contributing members. The test period is necessary to verify that all reporting requirements are met. It also allows employers to continue providing paper reports while the testing is in process. See Pages 23-24 for the record layout. Please have the appropriate personnel review this information and direct any questions to Information Technology at (803) 737-6928.

Cooperation in this endeavor will result in a substantial cost savings to the Retirement Systems, its members, and participating employers.

Procedures

The file transmitted to the Retirement Systems for quarterly payroll information reporting must consist of an employer header record followed by employee detail records. The Record Count on the header record should match the number of detail records for that employer code plus one. The Total Deferred on the header record should equal the total of all detail amounts for that employer code. These figures will be matched to the totals reported on the form accompanying the contribution payment. **These totals must match exactly.** Financial Employer Services will contact employers if a discrepancy is discovered.

Employers should always keep a backup copy of each quarterly report since diskettes are not returned. Diskettes must be mailed in a diskette mailer.

Employee Record File Definition for Periodic Report by Magnetic Tape or Diskette:

Header Record Layout				
Field Name	Length	Alpha/Numeric	Position	Description
Record Identifier	1	A	1	Enter "H" for Header. Identifies the record as an employee report header record.
Transaction Type	2	A	2-3	Enter "CO" for Contribution. Identifies this report as a group of contributions.
Employer Code	5	N	4-8	5-digit employer code number listed with the Retirement Systems. Enter the number without a decimal point. If your organization currently reports under multiple numbers, report all transactions under the SCRS (or primary) number and use the SCRS Account field to differentiate.
Employer Name	40	A	9-48	Employer organization name registered with the Retirement Systems.
Cycle Code	1	A	49	Q=Quarterly, M=Monthly. Identifies the cycle or period of this report.
Begin Period Date	8	N	50-57	Beginning date of the reporting period (yyyymmdd).
End Period Date	8	N	58-65	Ending date of the reporting period (yyyymmdd).

Header Record Layout				
Field Name	Length	Alpha/Numeric	Position	Description
Process Type	1	A	66	D=Detail (E=Exception: for later use)
Record Count	6	N	67-72	Total number of all header and detail records in this report.
Total Deferred	11	N	73-83	Total amount of retirement contributions for this report's active and retiree detail records. Do not use decimals. $11450.75 would be entered 00001145075.
For Future Use	11	A	84-94	Leave blank (reserved for future use).
Date Processed	8	N	95-102	Date employer processed (created) this report (yyyymmdd).
For Future Use	18	A	103-120	Leave blank (reserved for future use).

Detail Record Layout				
Field Name	Length	Alpha/Numeric	Position	Description
Record Identifier	1	A	1	Enter "D" for Detail. Identifies the record as an employee report detail record.
Transaction Type	2	A	2-3	Enter "CO" for Contribution. Identifies this report as a group of contributions.
Employer Code	5	N	4-8	5-digit employer code number listed with the Retirement Systems. Enter the number without a decimal point.
Mailing Location	5	A	9-13	Political Department Code: optional. This is a department code that may be helpful during the distribution of yearly statements for larger employers. Leave blank if not applicable.
SSN	9	N	14-22	Employee's Social Security Number. Numbers only. No dashes.
Employee Name	33	A	23-55	The order of entry is last, first, middle initial, and suffix separated by a single space (e.g., Jones John C Jr). Do not use punctuation in this field.
Begin Period Date	8	N	56-63	Begin date of report for employee if different from begin date on the header record (yyyymmdd).

Detail Record Layout				
Field Name	Length	Alpha/Numeric	Position	Description
End Period Date	8	N	64-71	End date of report for employee if different from end date on the header record (yyyymmdd).
SCRS Account	1	N	72	Indicates the type of retirement system under which the employee is covered (1=SCRS Class 2, 3=PORS Class 1, 4=PORS Class 2, 7=CARS, 8=JSRS, 9=SORP).
Retiree Indicator	1	A	73	"R" if wages are for a Retiree, otherwise blank. Retiree wages should be reported as well as member contributions for the retiree at the same rate as active members.
Period Compensation	9	N	74-82	Enter the gross salary subject to retirement contributions. Do not use decimals or negatives. $1,230.75 would be entered 000123075.
Deferred Contributions	9	N	83-91	Enter the amount of active and retiree retirement contributions for this period. Do not use decimals or negatives. $60.19 would be entered 000006019.
For Future Use	9	A	92-100	Leave blank (reserved for future use).
Contract Length	2	N	101-102	Number of months in a year that equates to full-time employment. Examples: 12 = a typical year-round employee. 10 = teacher paid over 10 months. 9 = teacher paid over nine months. If the employee is scheduled for 9.5 months, **round down** to the nearest full month.
Months Paid Cycle	2	N	103-104	Number of months paid in this period, normally 1, 2 or 3. Example: If payroll is bi-monthly and employee receives one or two paychecks in the quarter, enter "1". If an employee receives three or four paychecks, enter "2".
ORP Vendor Code	2	N	105-106	Indicates the vendor to which the member is contributing for State ORP. 01=TIAA-CREF, 02=AIG VALIC, 05=METLIFE, 06=THE HARTFORD.
For Future Use	14	A	107-120	Leave blank (reserved for future use).

Delinquent Reports

Upon receipt of a delinquent payment, interest will be assessed on the delinquent payment and an invoice will be issued to the employer. If any employer has not provided the Retirement Systems with the required records or full amount of contributions due from members and the employer, the Retirement Systems may request that any funds payable to an employer through the State Treasurer or Comptroller General be withheld until the employer is no longer in default for the payment of contributions or submission of required reports.

Late Notice Letters

A late notice letter is automatically generated from Financial Employer Services if a monthly deposit is not received within seven days after the due date. The "date received" is the date the funds were received by the Retirement Systems, not the postmark date. A late notice is sent within 10 days of quarterly due dates if a deposit is not received, a *Standard Retirement Quarterly Report* (Form 1221 for Class II or Form 1222 for Class I) is not received, or if an unacceptable variance exists between a *Quarterly Contribution Report Summary* (Form 1246 for Class II or Form 1247 for Class I) and a *Standard Retirement Quarterly Report* (Form 1221 for Class II or Form 1222 for Class I).

Adjustments to Magnetic Media Reports

When reporting electronically, if changes need to be made to the current quarterly data after the report has been created, use the *Adjustments to Magnetic Media Reports* (Form 1223) to note the changes. Adjustments to previous quarters must be made on the *Supplemental Contribution Report* (Form 1227) as discussed on Page 29.

Adjustments are for the current quarter only. Employers should complete the heading information with the employer code, employer name, the quarter ending date, contact person, signature, telephone number and date.

- List totals for SCRS wages, SCRS contributions, PORS wages, PORS contributions, SCRS retiree wages and contributions, PORS retiree wages and contributions, and ORP wages from the electronic report on the first line of the form.
- List only those members requiring an adjustment. List each member's name in sequence of last name, first name, and middle initial with no punctuation.
- List members in ascending order by Social Security number. Account numbers are "1" for SCRS and "4" for Class II PORS.
- List members in account order. List SCRS members first, then PORS members.
- Include only the amounts necessary to correct the account balance.
- Add or subtract the transaction amounts from the beginning totals at the top of the form and write the Adjusted Totals for the Quarter at the bottom of the form. These numbers should be brought forward to the *Quarterly Contribution Report Summary* (Form 1246) and will be used to calculate the amounts due for the quarter.

Supplemental Service Report

The *Supplemental Service Report* (Form 1224) is generally used to report contributions and service for employees on an approved leave without pay. These service types include Military Leave,

Workers' Compensation, Charter School Service, Furlough and Special Monthly Contributors (SCRS only). When reporting supplemental service, contributions are to be based on the compensation the member would have earned had they been able to perform their normal job duties for the period in question.

A *Supplemental Service Report* is submitted on a monthly basis. Do not cross fiscal year or quarter dates when completing the form.

Descriptions of Leave Types reported on a Supplemental Service Report:

Military Leave of Absence: status code 59

An active member called to active military duty may arrange with his employer prior to the leave to continue to remit monthly contributions. The contributions are based on the member's salary immediately prior to the leave and must be reported through the employer. Contributions submitted during this leave status are not subject to the insurance surcharge, Group Life Insurance contributions, or Accidental Death Program (PORS only) contributions.

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides guidelines for maintaining an employee's civilian benefits despite the employee's leave for service in the military. Under USERRA, an employee is entitled to receive retirement service credit for a period of military leave if he makes the required employee contributions within a period of not more than three times the length of the person's military service (not to exceed five years) from the date of re-employment. For example, a person on leave for six months would have up to 18 months to remit his employee contributions via the supplemental reporting procedure. See *Supplemental Service Report (Form 1224)* above. No interest is charged if payment is received in full within the specified time limit. After the USERRA designated time limit has expired, a member establishing credit for the permissible period of military leave must do so in accordance with normal service purchase rules.

Workers' Compensation: status code 61

An active member may continue contributions during the period in which he is receiving Workers' Compensation. The cost to establish this service is based on what would have been paid if the member were working full-time, using the member's salary immediately prior to the injury. Contributions submitted during this leave status are not subject to the insurance surcharge, Group Life Insurance contributions, or Accidental Death Program (PORS only) contributions.

Charter School Employment: status code 72

Charter schools established under the South Carolina Charter Schools Act, except for those converted from other schools, are not required to participate in the Retirement Systems. Charter schools may elect to join the Retirement Systems. If a charter school has not elected to participate in the Retirement Systems, SC Code Ann 59-40-130 provides for the continued membership of an employee on leave from a local school district to be employed at a charter school for a period up to five years. If an employee on leave elects to continue contributing to the Retirement Systems during the period of approved leave, the member's compensation and contribution amounts should be submitted monthly via the *Supplemental Service Report* (Form 1224). An employer's Group Life Insurance contributions and retiree health insurance premium surcharge are due on charter school compensation.

Furlough Program: status code 73

The General Appropriations Act authorizes agency heads and school district boards of trustees to implement furlough programs under specific conditions. Employers are required to contribute both the employee and employer contributions to the Retirement Systems to maintain employee retirement benefits during a furlough period. The *Supplemental Service Report* (Form 1224) is used to report members participating in the furlough program. An employer's Group Life Insurance and Accidental Death Program (PORS only) contributions, and retiree health insurance premium surcharge are due on furlough compensation.

Special Monthly Contributor (SCRS Only): status code 34

An active SCRS member who terminates employment with at least 25 years of retirement service credit is eligible to continue contributing both the employee and employer contributions until he reaches 28 years of service credit. However, if the member has previously purchased any mount of nonqualified service then he is not eligible to be a special monthly contributor. The following guidelines apply:

- The member should contact the Retirement Systems to obtain confirmation of total service earned as of the time of termination and provide this information to the employer;
- The member must arrange with his former employer to remit monthly contributions before terminating employment;
- The member's last employer must notify the Retirement Systems of the member's participation in the program, the effective date of termination of active employment (beginning date for buy-in program), and the member's full rate of pay at the time of termination;
- The contributions will increase each year as the salary for the member's former position increases. It is the obligation of the last employer to notify the member of the cost due upon commencement of the program and of any subsequent changes in the applicable salary base or contribution rates (generally annually). An employer is not obligated to bill the employee monthly or perform any collection efforts;
- The monthly remittances are due to the Retirement Systems no later than 30 days after close of the month to be credited;
- The employee is obligated to remit the necessary funds to the employer in sufficient time to be forwarded to the Retirement Systems in accordance with prescribed due dates;
- There is **no** provision for retroactive credit under this program. If remittance for a month is not received by the prescribed due date, then that month **cannot** be credited after the due date;
- The employee is also obligated to submit a retirement application to the Retirement Systems after completion of the Special Monthly Contributor buy-in period. The Retirement Systems will not notify the member upon the attainment of 28 years of service;
- A Special Monthly Contributor does **not** continue eligibility under the active group life insurance program and the member **cannot** purchase other types of service (military, withdrawal, etc.) during the buy-in period; and
- The Special Monthly Contributor buy-in program **does not** qualify for participation in the Installment Service Purchase Program.

Death Benefits for a Special Monthly Contributor

Death Occurs...	Service and/or Age Restrictions	Death Benefit
• within 90 days of receiving regular compensation and earning service credit	• none	• beneficiary's choice of monthly annuity, or refund of contributions and interest, and • group life insurance equal to one year's salary
• more than 90 days after becoming a special monthly contributor	• less than 25 years of service and under age 55, or; • under age 60 regardless of service credit	• refund of contributions and interest • no group life insurance
• more than 90 days after becoming a special monthly contributor	• at least 25 years of service and at least age 55 on date of death, or; • at least age 60 on date of death regardless of service credit	• beneficiary's choice of monthly annuity or refund • no group life insurance

Supplemental Contribution Report: Corrections to Quarterly Report

If corrections are required after a *Standard Retirement Quarterly Report* has been submitted, a *Supplemental Contribution Report* (Form 1227) must be completed to make the corrections. Correct only one fiscal year per form.

All information should be submitted by quarter. Do not cross fiscal year or quarter dates when completing the form. Contributions submitted on the *Supplemental Contribution Report* must be the amount required to bring the salary and contributions to the correct amount for the reporting period. When information was processed for a member incorrectly on the quarterly report, first show a reversal (negative) of this incorrect posting. Then indicate the total correct compensation and contribution amounts on the next line.

Example

Contributions of $250 were withheld from a wage amount of $3846.15 and reported on the *Standard Retirement Quarterly Report* (Form 1221 for Class II or Form 1222 for Class I). The correct wage amount was $3076.92, with contributions of $200. The original entry should be entered on the *Supplemental Contribution Report* (Form 1227) and placed in brackets in the appropriate columns (wages: [$3846.15], contributions: [$250]). The next line will reflect the corrected information: wages $3076.92, contributions $200, contract length, or months paid.

The appropriate employer contribution adjustments also must be submitted on the *Supplemental Contribution Report*. These contributions would include Group Life Insurance and the Accidental Death Program (if applicable). The Retirement Systems requires that the *Supplemental Contribution Report* be signed and dated by an employer's authorized reporting official. If additional contributions

are due to the Retirement Systems, payment must be remitted with the *Supplemental Contribution Report* for processing. If excess funds are due to the employer from the Retirement Systems, the Retirement Systems will issue a credit invoice to the employer when the report is reconciled.

State ORP Supplemental Service and Contribution Reports

Supplemental service and contribution reports for State ORP members should be reported on Forms 1224 and 1227. For employers reporting through the Comptroller General's (CG) Office, the supplemental reports will first need to be submitted to the CG's office. They will forward the reports to the Retirement Systems.

Service Credit Reporting

The procedures listed below apply to current service credit reporting for SCRS and PORS. Service credit is awarded to members based on monthly compensation and dates of employment (taken from reported contract length and months paid information). State ORP members are not awarded service credit, as defined contribution plans are based on contributions only.

1. Detailed member information is reported to the Retirement Systems on a quarterly basis. A contract period and months paid should be reported for each member. The first step in this process is to determine a contract period for each member. A contract period is the number of months per year in which a member is compensated. For example, most state employees have a contract period of "12," which means year-round employment and compensation. If members are compensated during only a portion of the year, however, the contract period should be the number of months in which they are compensated. For example, some school district employees are compensated over nine months rather than 12. They should therefore be reported as a contract period "9." An exception to this is the first year of employment for a school district employee. If a new hire chooses to be compensated over 12 months of the year, but in the first year of employment does not receive a check in every month of the fiscal year (July – June), a contract length other than 12 must be selected in the first year of employment to grant a full year of service credit. The contract period established for the first year of employment should reflect the actual number of months in which the employee will be compensated the first year. The employer must then change the employee to the "12" contract period in subsequent contract years. Please review the Contract Period Chart on Page 33 to determine the appropriate contract period based on the most common payroll cycles. Report whole months only. If an individual works nine and one-half months, **round down** the figure to nine months.

2. Report the number of months paid during a quarter (1, 2, or 3), **rounding partial months up** to the next full month. Do not report partial months. An employee cannot receive more than a three in this field.

3. A monthly salary is inferred by the Retirement Systems based on the number of months paid in the quarter and the quarterly compensation reported.

4. Exceptions are provided for elected officials and appointed members of boards and commissions. Special coding is utilized for these members. See *Elected Officials/Appointed Board Members* on Page 32 for further information.

5. The Retirement Systems will calculate the appropriate service credit based on each employer report. For example, a nine-month employee reaching the earnings threshold would receive one-ninth of a year of service credit for each month (September through May).

Examples

An employee with a nine-month contract period reaching the earnings threshold earns 40 days of service credit each month (360 days ÷ 9 months = 40 days per month) 40 ÷ 30 = 1.33 months x 9 months = 360 days, or 1 year.

An employee with a ten-month contract period reaching the earnings threshold earns 36 days of service credit each month (360 days ÷ 10 months = 36 days per month) 36 ÷ 30 = 1.20 months x by 10 months = 360 days, or 1 year.

An employee with an eleven-month contract period reaching the earnings threshold earns 33 days of service credit each month (rounded) (360 days ÷ 11 months = 33 days per month) 33 ÷ 30 = 1.10 months x 11 months = 360 days or 1 year (rounded).

An employee with a twelve-month contract period reaching the earnings threshold earns 30 days of service credit each month (360 days ÷ 12 months = 30 days per month) 30 ÷ 30 = 1.00 months x 12 months = 360 days, or 1 year.

6. Full time service credit is awarded for a minimum monthly compensation base of $524. This dollar figure is also referred to as the "monthly threshold", and increases as the federal minimum wage increases. The monthly compensation base will increase to $580 effective October 1, 2009. See the following table for the threshold amounts in recent history:

Threshold for Full-Time Service Credit: History	
Effective Date	Amount
10/1/2009	$580
10/1/2008	$524
10/1/2007	$468
7/1/2006	$412
7/1/1996	$350

7. If, in a given month, a person does not reach the threshold, the service credit is prorated.

Example: Service Credit Threshold

If a substitute teacher is paid on a nine-month basis and earns $262 for the month of September, service credit would be calculated as follows:

$262 ÷ $524 = 0.50
0.50 ÷ 9 months = 0.05565 year
0.05565 x 12 months =0.6667 months
0.05565 x 360 days = 20 days

Elected Officials/Appointed Board Members

Individuals elected to public office or appointed to serve on a board or a commission (i.e., mayor, or city or county council member) and paid a salary (not a stipend for meeting attendance) may elect membership but are not required to meet the service credit threshold to receive full service credit. The contract periods shown in the chart below have been assigned for these individuals based on how the member is compensated. If there is a situation other than those addressed below, employers should use "99" on the form and Financial Employer Services will contact the employer. **If the individual meets the $524 per month threshold and is a year-round employee, a "12" should be used as the contract period. See following chart.**

Frequency of Compensation	Contract Period	Months Paid	Service Credited
Annually	13	1	1 year
Monthly	14	1, 2, or 3	1 month for every "month paid"
Quarterly	15	1	3 months
Semi-Annually	16	1	6 months

Employers who do not submit their reports electronically are not required to complete the Begin and End Date fields on the *Standard Retirement Quarterly Report* (Form 1221 for Class II or Form 1222 for Class I). If the fields are left blank for an elected or appointed official, however, the Retirement Systems will calculate the member's service assuming the service was retroactive from the quarter ending date. For example, if a *Standard Retirement Quarterly Report* (Form 1221 for Class II or Form 1222 for Class I) is received for the quarter ending June 30, 2008, and the contract period for the member was a "13," the member would receive credit for the prior fiscal year (July 1, 2007, through June 30, 2008).

See the following page for a Contract Period Chart, which will assist you in the reporting of employees on various contract lengths.

Contract Period Chart

September through May: Contract period is "9." September quarter is "1" for months paid.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1	1										1
1st Quarter Month Paid = "1"		2nd Quarter Month Paid = "3"			3rd Quarter Month Paid = "3"			4th Quarter Month Paid = "2"			

September through June: Contract period is "10" for employees not paid in July and August. September quarter is "1" and June quarter is "3" for months paid. Contract period is "10" when checks for July and August are written in June (distributed in July and August) but SCRS contributions are paid in June. September quarter is "1" and June quarter is "3" for months paid.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1	1										
1st Quarter Month Paid ="1"		2nd Quarter Month Paid = "3"			3rd Quarter Month Paid = "3"			4th Quarter Month Paid = "3"			

August through May: Contract period is "10." September quarter is "2" and June quarter is "2" for months paid.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1											1
1st Quarter Month Paid = "2"		2nd Quarter Month Paid = "3"			3rd Quarter Month Paid = "3"			4th Quarter Month Paid = "2"			

August through June: Contract period is "11." September quarter is "2" and June quarter is "3" for months paid.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1											
1st Quarter Month Paid = "2"		2nd Quarter Month Paid = "3"			3rd Quarter Month Paid = "3"			4th Quarter Month Paid = "3"			

July through June: Contract period is "12." September quarter is "3" and June quarter is "3" for months paid. The exception is new hires at the beginning of a school year who opt for a 12-month payout but are not year-round, 12-month employees. Those individuals would be a "9," "10,", or "11" to get a full year of service credit for the first year. They would be switched to "12" for the next year's contract period.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1st Quarter Month Paid = "3"		2nd Quarter Month Paid = "3"			3rd Quarter Month Paid = "3"			4th Quarter Month Paid = "3"			

20-Day Pay Cycle: These employees are paid every 20 days (example - bus driver) and possibly may not receive a check in December due to the Christmas break, and/or a spring break. To determine an employee's contract period, review your pay cycle and ascertain whether the employee will receive compensation for those months. If not, the contract period could be either a "9" or an "8" to ensure those full-time employees receive correct service credit.

July	Aug	Sept	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	June
1	1	1	1	1	1	1	1	1	1	1	1
1st Quarter			2nd Quarter			3rd Quarter			4th Quarter		

Electronic Reporting

In order to use EESER, employers must have access to our EES web-based application. As an employer, the EES program allows you to access information about your employees' retirement accounts through a secure Web site. A few of the many tools available through EES include:

- Specific account information;
- Retirement benefit estimates;
- Service credit history
- Contribution report error information.
- Online deposit forms

To initiate EES access, please complete Forms 6503, 6504 and 6505 located on our Web site at http://www.retirement.sc.gov/forms/default.htm. Be sure that "EESER Reporting" is checked on Form 6505 for all employees who will be submitting quarterly data via EESER. Upon completion of the application, we will send instructions for EESER to the employees indicated on the application.

References:

For SCRS, S.C. Code Ann. §9-1-1160 (1976) and S.C. Code Ann. §9-1-1170 (1976) require payments of employee and employer retirement and Group Life Insurance contributions on a monthly basis.

For PORS, S.C. Code Ann. §9-11-210 (1976), S.C. Code Ann. §9-11-220 (1976), and S.C. Code Ann. §9-11-230 (1976) require payments of employee and employer retirement, Group Life Insurance, and Accidental Death Program contributions on a monthly basis.

For State ORP, S.C. Code Ann. §9-20-50 (2002) requires payments of employer contributions on a monthly basis.

The S.C. Code Ann. §9-1-1170 and §9-11-230 authorizes the assessment of interest on all delinquent payments.

Service Credit

Earned Service

Earned service is paid employment as an active employee (not retired) during which regular contributions are paid to the Retirement Systems. Members enrolled in the Retirement Systems on or after January 1, 2001, must have five years of earned service to be eligible to receive service or disability retirement annuities, or to qualify a survivor for a monthly annuity after an in-service death. This requirement does not apply to disability retirement eligibility if the disability is the result of a job-related injury.

$524 Monthly Threshold

If an SCRS member or a Class II PORS member earns at least $524 in a month, he will receive a full month of service credit. If an SCRS member or a Class II PORS member earns less than $524 in a month, he will receive a portion of the month's service credit equal to the percentage of $524 he earned in the month. This threshold increases as the federal minimum wage increases. (Note: The monthly compensation base will increase to $580 effective October 1, 2009.) A Class I PORS member will receive a full month of service credit if he contributes at least $21 per month.

The monthly threshold is only a part of the service credit equation. The employee must also be reported correctly with months paid and the correct contract length for the quarter to ensure proper service credit.

Example

A member earns $262 per month. $262 ÷ $524 = 50 percent (a half-month of service credit). Half of a 30 day month = 15 days.

Purchased Service

Active contributing members who have not retired may establish additional service credit for various types of previous employment and leaves of absence, and may establish up to five years of non-qualified service. The cost for purchasing periods of service less than one year will be prorated. A member may not establish service credit for service to the extent that such service purchase would violate Section 415 or any other provision of the Internal Revenue Code. Purchased service credit may not overlap earned service (service for which regular contributions have been paid to the systems) or other purchased service. Military service credit may not overlap with the Retirement Systems earned service (service for which regular contributions were paid to the system) or other purchased service. Descriptions of the types of service follow:

Indexed Service Credit Threshold

On February 1, 2005, the Retirement Systems adopted the indexed service credit threshold to be used in determining a member's purchased service credit. This indexed service credit threshold may be applied to previously purchased periods of part time credit and previously earned periods of part time credit, thereby, possibly allowing an active, contributing member to purchase up to full service credit for the month at an additional cost. The indexed service credit threshold is based on the minimum wage at the time the service was rendered times 80 hours to arrive at a monthly threshold amount. A member may be eligible to purchase a full month of service credit provided his employer verifies he worked the entire month and earned at least the applicable indexed service credit threshold during the month to be established. If the member earned less than the indexed service credit threshold in a month, then he is eligible to purchase a partial month's service credit. Exceptions to the indexed service credit threshold policy are: 1) an elected or appointed public officer; 2) a member who served as a legislative clerk or attaché for the General Assembly; and 3) a nine-month school district employee.

Public Service

A member may establish service credit for any period of paid public service for which they do not already have service credit in another defined benefit plan. This is service as an employee of the government of the United States, a state, or a political subdivision of the United States. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. If a member has established State ORP service in SCRS, the member's career highest earnable compensation includes his earnable compensation in either State ORP or SCRS.

Educational Service

A member may establish service credit for any period of paid classroom teaching consisting of grades kindergarten through 12 in a public, a private, or a sectarian school for which they do not already have service credit in another defined benefit plan. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. If a member has established State ORP service in SCRS, the member's career highest earnable compensation includes his earnable compensation in either State ORP or SCRS.

Military Service

A member may establish up to six years of credit for any period of military service for which they do not already have service credit with the Retirement Systems. This includes service in the United

States Army, Navy, Marine Corps, Air Force, Coast Guard, Select Reserves, and Army National Guard or Air National Guard. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. If a member has established State ORP service in SCRS, the member's career highest earnable compensation includes his earnable compensation in either State ORP or SCRS. A member's discharge from service must be under conditions other than dishonorable. Under guidelines set forth by the USERRA, a member may either arrange in advance with their employer to continue contributing to their account while on active duty military leave, or make contributions upon return to covered employment during a period not to exceed three times the length of military service or five years, whichever is less. Military service credit may not overlap earned service (service for which regular contributions were paid to the system) or other purchased service.

Leave of Absence

An active contributing member on an employer-approved leave of absence who returns to covered employment within four years may purchase service credit for the employer-approved leave period for which they do not already have service credit, up to a maximum of two years per leave of absence. The leave of absence must be with an employer participating in the Retirement Systems. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. If a member has established State ORP service in SCRS, the member's career highest earnable compensation includes his earnable compensation in either State ORP or SCRS.

Workers' Compensation

A member may establish service credit for a leave-of-absence period during which the member is receiving Workers' Compensation benefits. The cost is based on contributions plus interest using the member's earnable compensation at the time of injury. A member may also arrange in advance with his employer to continue contributing while the member is receiving Workers' Compensation benefits. Employers should encourage members who are applying for disability retirement to do so as soon as possible and prior to being terminated from payroll.

Previously Withdrawn Service

A member who left employment and received a refund of member contributions plus interest may re-establish this service upon returning to active membership. The member must repay the amount withdrawn plus interest to the date the member's request is received. Previously withdrawn earned service that is re-established in SCRS through the service purchase process is considered earned service for the determination of the minimum service requirement for benefit eligibility. Please note that earnings associated with re-established withdrawn earned service will be considered for possible inclusion in the calculation of a member's average final compensation and any subsequent service purchase costs.

Special Monthly Contributor (SCRS Only)

An SCRS member who has at least 25 years of service may elect to receive up to three additional years of service credit by paying the employee and employer contributions based on the earnable compensation amount in effect during those years. Contributions under this program begin at the time of termination from covered employment and are remitted to the Retirement Systems on a monthly basis through the employer. Contributions for periods of less than one month will be prorated.

A Special Monthly Contributor cannot purchase additional service unless he returns to covered employment. If a Special Monthly Contributor returns to covered employment and purchases non-qualified service, the purchased special contributor and non-qualified years cannot exceed five years of service credit per Internal Revenue Service (IRS) restrictions. If you have purchased **any** period of non-qualified service (one day to five years maximum), then you cannot become a special monthly contributor.

Non-Qualified Service

An active contributing member who has five or more years of earned service credit may establish up to five years of non-qualified service. The cost is 35 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year purchased. If a member has established State ORP service in SCRS, the member's career highest earnable compensation includes his earnable compensation in either State ORP or SCRS. If a Special Monthly Contributor returns to covered employment and purchases non-qualified service, the purchased special contributor and non-qualified years cannot exceed five years of service credit per IRS restrictions.

Transfer to PORS (PORS Only)

A current member of PORS may transfer non-concurrent (not earned at the same time) SCRS service credit to his PORS account by paying 5 percent of his current earnable compensation for each year transferred. The member's SCRS contributions plus interest are then permanently transferred to the member's PORS account.

State ORP Service

An active contributing member may purchase service credit for his years of participation in the State ORP. The cost is 16 percent of current earnable compensation or career highest fiscal year earnable compensation, whichever is greater, for each year of service purchased. A member's career highest earnable compensation includes the earnable compensation the member received while participating in the State ORP. A member may not purchase service for a period of State ORP service for which he may receive a retirement benefit from another defined benefit retirement plan. A service purchase which violates section 415 or any other Internal Revenue Code is not permitted. State ORP service that is established in SCRS through the service purchase process is considered earned service for the determination of the SCRS minimum service requirement for benefit eligibility. Salaries associated with State ORP service purchased in SCRS will be considered for possible inclusion in the calculation of a member's average final compensation.

Convert Class I to Class II (SCRS)

A Class II SCRS member who still has Class I service may convert the Class I service to Class II service by paying 2.5 percent of his current earnable compensation or the average of the 12 highest consecutive quarters of earnable compensation, whichever is greater, for each year of service converted.

Convert Class I to Class II (PORS)

A Class II PORS member who still has Class I service may convert the Class I service to Class II service by paying 5 percent of his current earnable compensation for each year of service converted, less $16 per month for each month converted. PORS Class I service earned prior to July 1, 1974, has an employer match of 1.5 percent of the member's earnable compensation multiplied by the years and

months of service to be converted. PORS Class I service earned after July 1, 1974, has an employer match of 2.5 percent of the member's earnable compensation multiplied by the years and months of service converted.

How to Obtain a Cost for Purchasing Service

If a member wishes to obtain a cost to establish service credit or to obtain an updated cost on a previously calculated service purchase, the member must complete a *Request for Service Purchase Cost* (Form 2101). The member should include the supporting documents requested on the *Request for Service Purchase Cost* when submitting the form to the Retirement Systems. Employers are encouraged to maintain a supply of these forms. Forms are available on the Retirement Systems' Web site at www.retirement.sc.gov and through the EES Web site (for employers with EES access) at https://ees.retirement.sc.gov/ees/logon.jsp. A member may also submit a service purchase request by contacting Customer Services at (800) 868-9002 or (803) 737-6800. Once the Retirement Systems receives a member's *Request for Service Purchase Cost*, additional forms, if necessary for the type of service for which a cost is being calculated, may be sent to the member or employer for completion. A member has 90 days to submit all the necessary documentation to the Retirement Systems. Once all the information is received, the member should receive a *Member Service Payment Invoice* within 30 days. Payment invoices are valid for six months.

All member service calculations are audited after receipt of the member's payment and, as a result of the audit, are subject to revisions in both the period of service to be credited and the cost of the service. If a member has purchased service for retirement eligibility, he should not leave employment until the service purchase audit is complete. If the retirement eligibility date cannot be established without the service purchase, the retirement date will be no earlier than the date of payment. Service purchase payments received after a retirement date will not be retroactive to the member's date of retirement. A service purchase invoice will not be provided to a member who has retired under a system in which he rhas returned to covered employment.

How to Purchase Service

Members may purchase service credit by a lump-sum payment, an installment service purchase (pre-tax or after-tax, plus interest), or a tax-deferred rollover from the South Carolina Deferred Compensation Program's 401(k) and 457 plans, or from a 403(b) plan, another qualified retirement plan, or an Individual Retirement Account (IRA). The cost for purchasing periods of less than one year will be prorated.

Active contributing members who are not retired who wish to purchase additional service credit will have the option to do so by making payroll-deducted installment payments on a tax-deferred basis. Members will continue to pay interest on the unpaid balance at the rate of prime plus 2 percent each year; however, because of the tax savings, this program enhancement may reduce the cost of installment service purchases by about 20 percent.

Active contributing members who are not retired may purchase each type of service credit once within a fiscal year. If a member is purchasing service to meet retirement eligibility, the member should contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov for more information. **A member must remit payment for service purchases in full prior to the member's retirement date or termination from employment.**

Installment Service Purchase Program

The installment service purchase program is available to active members who are not retired who wish to purchase additional service credit without remitting a lump-sum payment. When a member elects to participate in this program, the Retirement Systems credits the member's account for the total cost of the service and the total service credit being purchased. The member's employer then payroll deducts the payments each pay period from the member's salary.

Members may choose to participate in our pre-tax or after-tax installment program. The pre-tax installment program has more restrictions than after-tax. For members to be able to participate in this expanded program, employers must complete an initial resolution with the Retirement Systems, which permits the employer "pick-up" of the employee deductions and provides details on procedures and restrictions. This tax-deferred program also requires a binding, irrevocable authorization between the member and the Retirement Systems that sets forth the payment term and deduction amount. One distinct difference in the pre-tax and after-tax program is that with the pre-tax program, once deductions are initiated, the member cannot decrease the payroll deduction amount, except in the event of an unforeseeable emergency as defined by section 457 of the Internal Revenue Code, until the amount is paid in full or the member terminates employment. The member will also not be allowed to make principal payments on tax-deferred accounts.

A member must pay his installment purchase in full prior to the member's anticipated retirement date or termination. Service will be prorated if the full balance is not received. For more information about installment service purchases, contact Customer Services at (800) 868-9002, (803) 737-6800, or the Service Accounting Department at (803) 737-6905.

Interest Rate

A fixed rate of interest applies to the unpaid balance of an installment service purchase for the duration of the installment. The Service Accounting Department adjusts the interest rate for new participants in this program every July 1 to the prime rate plus 2 percent. The current interest rate is 7 percent for new installment accounts activated July 1, 2008, through June 30, 2009. The interest rate is fixed for the term and does not change for members already purchasing service through the installment service purchase program.

Eligibility Criteria

Requirements for participating in the installment service purchase program are as follows:

1. The individual must be an active contributing member (not retired);
2. The total cost of service must be at least $500 or the period of service being established must be at least six months; and
3. The maximum installment payment period is two years for each year of service purchased.

How to Participate in the Installment Service Purchase Program

1. A member must complete and return a *Request for Service Purchase Cost* (Form 2101). The Service Department will verify the additional service and provide the member with a *Member Service Payment Invoice.*
2. After receiving a *Member Service Payment Invoice,* the member should complete the bottom section indicating the installment type, payment amount required (amount due), down payment amount (optional), amount to be financed (member payment less down payment), number of months to be financed, and pay frequency (number of checks received per year). The member should then return the invoice to the Service Accounting Department.
3. After processing, the Service Accounting Department will return to the member a *Payroll Withholding Authorization* (Form 3216). The member should verify all information, sign the form, and return it to the Service Accounting Department with any optional down payment.
4. Upon receipt of all signed documents, the Service Accounting Department activates the installment service purchase and initiates the payroll deduction.

Employers on the Comptroller General's Payroll System

If a member's employer is on the Comptroller General's payroll system, the Service Accounting Department submits a completed *Comptroller General Withholding Deduction* (Form 3318) directly to the Comptroller General's office. This form authorizes and initiates the payroll deduction. The Comptroller General's Office then submits remittances for each payroll directly to the Retirement Systems.

Employers Not on the Comptroller General's Payroll System

If a member works for an employer not on the Comptroller General's payroll system, the employer is responsible for withholding the payroll deduction. The following reporting procedures apply:

1. Installment payments do not affect current monthly or quarterly contribution procedures. A separate remittance is required. Checks should be made payable to the South Carolina Retirement Systems. Only one check is required for all systems.
2. The employer must attach a completed (Form 3229) *Installment Service Purchase Remittance* report with each check.

Payments on an Installment Service Purchase

1. Payments are due to the Retirement Systems five days after each payday. Late remittance of payments results in the continued accrual of interest on a member's account until the date payment is received.
2. If a member terminates employment, retires, or dies prior to paying the installment purchase in full, the member or the beneficiary has the option to pay the remaining balance in full to obtain full service credit, or to take the prorated portion of the original service and contributions based on principal payments already made.
3. A member may make additional payments at any time and apply them directly to the principal of the installment note (non-deferred only). A member may pay a non-deferred installment note in full ahead of time by calling and getting a payoff for the date by which the member wants to pay the installment in full. There is no penalty for early payment in full of a note.
4. A member with funds in the South Carolina Deferred Compensation Program's 401(k) or 457 plans, a 403(b) plan, another qualified retirement plan, or an IRA, may rollover funds at any time

on non-deferred installments to:

- Use as a down payment when establishing the installment note;
- Use as a principal payment after the note is established; or
- Satisfy the installment note.

This can only be done as a principal payment prior to establishment of a deferred note.

When the Installment Purchase Nears Maturity

The employer will be notified of the final installment payment and due date. After receipt of the final payment, the Service Accounting Department will notify both the member and the employer that the installment purchase is complete. Once the employer receives notification that the installment purchase is paid in full, the employer **should not** remit any additional payments. Any remittances received after a note is paid in full will be refunded directly to the member for non-deferred or refunded to the employer for deferred funds.

Retirement Annuities

When a member becomes eligible to retire, he is then entitled to receive a monthly annuity for life. All members electing to retire (including TERI participants) must complete a retirement application on which they elect a payment plan and designate beneficiaries. Through selection of certain payment plans, a member may provide a continuing monthly annuity to a beneficiary after his death. If a non-retired, contributing member becomes unable to perform his current job duties and requirements, the member may apply for disability retirement if he is in service and under age 65 at the date of retirement (SCRS) or under age 55 at the date of retirement (PORS). All disability retirement applications are subject to a detailed evaluation and review for approval. This section describes eligibility criteria and the procedures to apply for service retirement and disability retirement annuities. Please encourage members to take personal responsibility for educating themselves about retirement by attending an employer or Retirement Systems' sponsored seminar, visiting the Retirement Systems, emailing Customer Services, or contacting our Customer Services Call Center for additional information.

Service Retirement Eligibility

Minimum Service Requirement

Members of SCRS and PORS who joined after December 31, 2000, must have five years of earned service (paid employment as an employee during which regular contributions are paid to the system) to be eligible to receive service or disability retirement annuities, receive a supplemental minimum payment (SCRS only), or to qualify a survivor for a monthly annuity after an in-service death. This requirement does not apply to disability retirement eligibility if the disability is the result of a job-related injury.

SCRS

Normal Retirement (Unreduced Benefits)

Five years of earned service and:

- Age 65; or
- 28 years of service credit.

Early Retirement (Reduced Benefits)

- Age 60 and five years of earned service. Benefits are permanently reduced 5 percent for each year of age less than 65; or
- Age 55 or older with 25 years or more of service credit, five years of which must be earned service. Benefits are permanently reduced 4 percent for each year of service credit less than 28.

If a member is eligible for early retirement, the Retirement Systems will apply the reduction (age or service) most beneficial to the member. Reductions are prorated to the month and day.

PORS

- 25 years of service credit regardless of age, five years of which must be earned service; or
- Age 55 or older with at least five years of earned service.

Payment Plans at Retirement

Three monthly payment plans are available to members at retirement. A member should select the payment plan that best suits his needs. A retired member may not change this selection after benefit payments have begun unless the retiree's marital status changes (death of spouse, divorce, marriage). The retiree should notify the Retirement Systems immediately by contacting Customer Services at (800) 868-9002 or (803) 737-6800 for more information. A retired member may not change his form of monthly payment more than twice, regardless of the number of events (death of a designated beneficiary or change in marital status) that occur. See *Changing Beneficiaries and Options after Retirement* on Page 60 for more information. All payment plans require a copy of the member's birth certificate (originals will not be returned). Members selecting a joint retiree-survivor plan (Option B or Option C) must submit a copy of each beneficiary's birth certificate. Members may select only one payment plan. To retire, members, including members electing TERI participation, must complete an application for retirement benefits to elect a payment plan and designate beneficiaries. The member must submit the completed application to the Retirement Systems. The three payment plan options available to retiring members follow:

Option A (Retiree Only Standard Monthly Annuity Plan)

This plan will pay a retiree a lifetime annuity based on his average final compensation, years of service, and a multiplier. (Further explanations of the annuity formulas for SCRS and PORS begin on Page 47). Upon the retiree's death, the Retirement Systems will return, through a lump-sum payment to the retiree's beneficiary or estate, any member contributions and interest not paid to the retiree in benefits during his retirement. Option A pays the maximum monthly benefit a retiree can receive.

Option B (100%-100% Joint Retiree-Survivor Monthly Annuity Plan)

You will receive a reduced (from Option A) monthly annuity for life. Upon your death, the same annuity (100 percent of your reduced monthly annuity, including granted cost-of-living adjustments)

will continue throughout your beneficiary's lifetime. If your designated beneficiary predeceases you, your annuity will revert to Option A, including any cost-of-living adjustments granted since your retirement date. You may select Option B only if your designated beneficiary is your spouse, you designate multiple beneficiaries, or a non-spousal beneficiary is within the 10 year age difference limits allowed by an Internal Revenue Code (IRC) formula. The non-spousal limits do not apply if the non-spousal beneficiary is older than you, or in the case of disability retirement or death benefits. If, based on the IRC formula, the adjusted age difference for you and a non-spousal beneficiary exceeds the IRC limits, the 100 percent survivor option payment plan would not be available to you. You would be able to select the 50 percent survivor option payment plan, however, with no IRC restrictions.

Option C (100%-50% Joint Retiree-Survivor Monthly Annuity Plan)

A retiree will receive a reduced (from Option A) monthly annuity for life. The reduction from Option A is based on the age of the member and the average age of the member's beneficiaries on the date the member retired. Upon the retiree's death, one-half of the annuity (50 percent of the retiree's reduced monthly annuity, including granted cost-of-living increases) will continue throughout the surviving beneficiary's lifetime. If a retiree's designated beneficiary predeceases the retiree, the retiree's annuity will revert to Option A, including any cost-of-living increases granted since the retiree's retirement date.

If a Retiree Chooses Option B or Option C and Designates Multiple Beneficiaries

If a retiree chooses a joint retiree-survivor plan (Option B or Option C) and designates multiple beneficiaries, the retiree's annuity will be divided equally among the designated beneficiaries. The annuity will not change for the remaining beneficiaries if one beneficiary dies, either before or after the retiree dies. If a retiree selects Option B or Option C and all of the retiree's designated beneficiaries predecease the retiree, the retiree's annuity will revert to Option A effective on the date the last beneficiary died. A retiree must notify the Retirement Systems upon the death of a beneficiary. To do so, the retiree may contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov.

Minimum Service Retirement Annuity (SCRS Only)

If an SCRS member has at least 20 years of service credit (the member must have five years of earned service if enrolled after December 31, 2000) and has an Average Final Compensation (AFC) of at least $1,500, a supplement to the service retirement annuity will be paid to the retiree only. The state of South Carolina pays a supplement to bring the service retirement annuity to $80 a month and the Retirement Systems pays the remainder to bring the service retirement annuity to $150 a month, plus $1 per month for each completed year of service in excess of 20 years. If the member's AFC is at least $1,500, the Retirement Systems' portion of the supplement is reduced by 5 percent for each year of age under age 65 (maximum 25 percent reduction) if the member does not have 35 years of service or is under age 65. If the member's AFC is less than $1,500, the annuity will be supplemented to $80 a month, plus $1 per month for each completed year of service in excess of 20 years. **The beneficiary of a deceased retiree who received the minimum annuity is not eligible to receive the supplement under a joint retiree-survivor plan (Option B or Option C).**

Service Retirement

Service Retirement Effective Date

To retire, a member, including members electing TERI participation, must file an application for retirement benefits with the Retirement Systems, on which the member must select a payment plan and designate retirement beneficiaries. Retirement is not automatic. A member may file his service retirement application as early as six months prior to his desired effective date of retirement but no later than 90 days afterward. Before an effective date of retirement can be established, however, the member must be removed from his employer's payroll. Filing as early as six months prior to retirement will allow adequate processing time. For deferred annuities, a member eligible for service retirement can have his effective date of retirement established no earlier than 90 days prior to the date the Retirement Systems receives the application, regardless of when the member may have met the eligibility criteria. Retirement is considered to be in effect and the payment plan may not be changed once benefit payments have begun unless a retiree experiences a qualifying event (death of spouse, marriage, or divorce). Employers should keep a small supply of current retirement applications on hand for members. You may also obtain current retirement applications from the Retirement Systems by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov, or via download from the Retirement Systems' Web site at www.retirement.sc.gov.

Advise members not to terminate their employment until the Retirement Systems has audited their service credit and they receive official notice of their retirement eligibility.

How to Apply

A member may make an appointment with a retirement consultant by contacting Customer Services at (800) 868-9002, (803) 737-6800, or a member may walk into our office without an appointment. Visitor load is very heavy during Christmas and spring breaks, so members without an appointment should allow for a longer wait. During this session, the retirement consultant will review the member's Retirement Systems records, determine any service credit that might be established, and explain the available payment plans. Members are encouraged to arrive at the Retirement Systems no later than 4 p.m. since a consultation may last up to one hour. For retirement planning purposes, an on-line calculator for estimating annuity payments is available on the Retirement Systems' Web site at www.retirement.sc.gov. Or, a member may contact Customer Services at (800) 868-9002, (803) 737-6800, or through the "contact us" link on our Web site to request for an estimate. Benefit estimates do not guarantee retirement eligibility, service credit, or AFC.

A member may apply for service retirement by completing an *SCRS Application for Service Retirement Benefits* (Form 6101S) or a *PORS Application for Service Retirement Benefits* (Form 6101P). Other forms, such as the *Certification of Last Day Paid* (Form 6201) and the *Pension Withholding Certificate/ Automatic Deposit* (Form 7202), are also a part of the retirement packet and should be completed and submitted together when possible. **A retiring member is encouraged to have his annuity check electronically deposited directly into the member's bank account by completing the appropriate section on the *Pension Withholding Certificate/Automatic Deposit* (Form 7202).** The member should include a copy of the his birth certificate, drivers license or state-issued identification card with the application, and if selecting a joint retiree-survivor plan, a copy of the birth certificates for each of the member's beneficiaries. Annuity benefits are payable on the last business day of the

month in which the member retires provided all of the necessary documents have been processed with the Retirement Systems. The goal of the Customer Annuity Claims Unit is to process all workable retirement applications so that a retired member will receive an estimated annuity check 30 days from his date of retirement and a finalized annuity check as soon as possible thereafter. Once a retiree's *Certification of Final Retirement Deductions* (Form 6202/6203) is received from his employer's payroll department and processed, the retiree's account can be finalized. However, a delay may occur if information is needed from the member or the employer or if the retirement application is not received in a timely manner (at least three months in advance) or is received during peak periods. Adjustments (AFC, annual leave payments, sick leave credit, final contributions, and service credit) are made retroactively to the date of retirement. **To place retiring members on payroll in a timely manner, it is important that the application is complete when submitted, including copies of birth certificates, drivers license and the *Certification of Last Day Paid* (Form 6201) from the employer. Employers should attach the *Certification of Last Day Paid* (Form 6201) to the application or fax to the Customer Services Annuity Claims Unit at (803) 737-7752.**

Teacher and Employee Retention Incentive (TERI) Program: SCRS Only

Active members of SCRS who are eligible for service retirement may elect participation in the TERI program. TERI allows a member to retire and begin accumulating a retirement annuity on a deferred basis without terminating employment for up to 60 months. To participate, SCRS members must submit a retirement application to the Retirement Systems, select a payment plan, designate beneficiaries, and elect TERI participation. By participating in TERI, a member may defer receipt of his retirement annuity for up to five years. The Retirement Systems defers a TERI participant's monthly retirement annuity into the participant's TERI account. Upon termination of employment at the end of the member's TERI period, the member will receive the balance in the TERI account in either a single-sum distribution paid directly to the member or through a rollover into a qualified retirement plan. **Any distribution paid directly to the member is subject to federal and state income taxes, and may be subject to an additional 10 percent federal early withdrawal penalty.**

Any applicable approved retiree cost-of-living increases apply to a TERI participant's monthly annuity as well. The Retirement Systems **does not pay interest** on the annuity benefits accumulated in a member's TERI account. For members retiring after July 1, 2005, employers must deduct retirement contributions on wages a member earns from TERI employment. TERI participants do not earn additional service credit, are not eligible to purchase service, and are not eligible for disability retirement; however, are covered under the active membership Group Life Insurance program. A retiring member may participate in TERI only once.

The 15 day break-in-service requirement is not applicable if the retiree has been a TERI participant for at least 15 days. A TERI participant's date of retirement is the starting date of his TERI period.

If a TERI participant dies, the total amount of his annuity accumulated in his retirement account will be distributed to the designated retirement beneficiary in addition to any other death benefits to which he may be entitled. A surviving spouse who is designated as beneficiary may elect to roll over the TERI balance into another qualified retirement plan.

If the employee terminates the program prior than the originally scheduled date, call or e-mail our office to inform us of the early termination date. The employer or the retiree may contact us with this information. The member will then be mailed the *TERI Payout Election* (Form 7500) and the *Pension Withholding Certificate/Automatic Deposit Authorization* (Form 7202). Employer forms will be distributed no earlier than one month prior to the termination date. For post-July 1, 2005, TERI participants, you will be mailed form 6210 for completion. For pre-July 1, 2005, TERI participants, you will be mailed Form 7510 for completion. These forms are mailed from the Retirement Systems no earlier than one month prior to the termination date.

Correlated Systems (SCRS and PORS)

SCRS and PORS are correlated systems. As such, the systems have a complementary relationship as defined by statute. If a member has service credit in more than one of these retirement systems, the member's service credit is maintained separately within each system; however, the member's service credit is added together to determine eligibility for retirement annuities. The 12 highest consecutive quarters of earnable compensation from which authorized retirement contributions are withheld are typically used to calculate SCRS and PORS retirement annuities unless the service is concurrent (earned at the same time). CARS is also a correlated system in which a member's years of service may be used to determine the member's retirement eligibility, but may not be used to calculate the member's average final compensation (AFC). Contact Customer Services at (800) 868-9002, (803)737-6800, or www.retirement.sc.gov for more information. **A member cannot receive a retirement annuity from one system while actively contributing to another unless statute specifically states otherwise.** In addition, the member must meet the eligibility criteria of each system to receive a retirement annuity from each system. Members must apply for benefits under each system and will receive separate benefits from each system. If the Retirement Systems approves a member's disability retirement application, the member's disability annuity is paid from the active correlated system and an unreduced service annuity is paid from the inactive system.

Example of Correlated Service Retirement Eligibility

An individual is age 53 and has 15 years of service credit in SCRS and 10 years in PORS. The member's total years of service credit equal 25 at age 53. This member is qualified to retire in PORS and may begin receiving a PORS retirement annuity based on 10 years of service if the member terminates from all covered employment. The member will have to wait two additional years (age 55) before meeting SCRS eligibility (age 55/25 years) to start receiving an SCRS annuity that will be based on 15 years of service with applicable early retirement reductions.

Unused Leave at Retirement

Annual Leave

The dollar amount of termination pay for up to 45 days of unused annual leave paid at retirement by a member's last employer is included before averaging the member's 12 highest consecutive quarters of earnable compensation. The employer pays and reports this leave amount when a member retires. If an eligible member is participating in the TERI program with a date of retirement on or after July 1, 2005, the payment of unused annual leave for retirement purposes is postponed until the end of the member's TERI program participation.

Sick Leave

At retirement, a member may receive service credit for up to 90 days of unused sick leave from the member's last employer (see Step 3 on Page 46). By statute, the Retirement Systems grants one month of service credit for each 20 days of unused sick leave. Sick leave cannot be used to meet eligibility for retirement and generally is not included in estimated annuity amounts. The employer reports a member's sick leave when the member retires on *Certification of Final Retirement Deductions)* (Form 6202) or *Certification of Final Retirement Deductions for the Teacher and Employee Retention Incentive Plan* (Form 6203). **If a member is participating in the TERI program, the amount of unused sick leave used for retirement purposes will reduce the balance of sick leave available to the member through the member's TERI employer.**

A member's first few retirement checks are generally based on an estimated benefit. When a member's benefit is finalized, the annuity is adjusted to include annual leave payments, sick leave credit, and final account contributions. Adjustments to AFC or service credit may be necessary as well. The finalized annuity is adjusted retroactively to the member's date of retirement and a special retroactive check is issued to the member.

TERI Participants With Retirement Dates On or After July 1, 2005

During the member's TERI deferral period, his unused annual leave will not be included in the annuity calculation. However, his annuity will be recalculated prospectively upon termination of employment at the end of their TERI period and may include up to 45 days of unused annual leave paid at termination (end of TERI). The annual leave payment made to TERI program participants upon their termination from employment should be certified on the *Certification of TERI Annual Leave Payment* (Form 6210). This form is generated by SCRS, and will be mailed to the employer prior to the anticipated end date of TERI program participation.

SCRS Service Retirement Annuity Formula

The Retirement Systems uses the following four-step formula to calculate an SCRS member's standard monthly annuity (Option A).

Step 1 Total the member's 12 highest consecutive quarters of earnable compensation and divide by 3. Quarters are broken down as follows: January-March, April-June, July-September, and October-December. The result of Step 1 is the member's AFC.

The dollar amount of termination pay for up to 45 days of unused annual leave paid at retirement by a member's last employer is included before averaging the member's 12 highest consecutive quarters of earnable compensation. (See example below). For TERI participants who retired on or after July 1, 2005, 1/3 of the annual leave payment is added to the AFC calculation used while the member was participating in the program at the conclusion of the TERI period. The new AFC value is used for annuity payments once the member is out of TERI-deferral status.

Step 2 Multiply the result of Step 1 by 1.82% (0.0182) for Class II service or by 1.45% (0.0145) for Class I service.

Step 3 Multiply the result of Step 2 by the member's years, months, and days of creditable service.

Convert months to days and divide the total days by 360 to determine a decimal equivalent for partial years. For example, 25 years, 2 months and 10 days equals 25 years, 70 days (60 + 10)0.70 ÷ 360 = 0.19. This amounts to 25.19 years of service.

At retirement, a member may receive service credit for up to 90 days of unused sick leave, which equates to four months and fifteen days of service credit. One month of service credit is granted for each 20 days of unused sick leave. Sick leave is not included in estimated annuity amounts and cannot be used to meet eligibility for retirement.

Step 4 Divide the result of Step 3 by 12 to arrive at the member's standard monthly annuity. If a member retires early based on the member's age or years of creditable service, the member's annuity will be reduced.

Example without Annual Leave

12 highest consecutive quarters of salary = $90,000
Annual leave payment = $0
AFC = ($90,000 ÷ 3) or $30,000
Creditable retirement service = 28 years
$30,000 x 1.82% (0.0182) = $546
$546 x 28 = $15,288 annual retirement annuity
$15,288 ÷12 = $1,274 standard monthly annuity (Option A)

Example with Annual Leave

12 highest consecutive quarters of salary = $90,000
Annual leave payment = $5,200
Salary + annual leave payment = $95,200
AFC including annual leave payment = ($95,200 ÷ 3) or $31,733
Creditable retirement service = 28 years
$31,733 x 1.82% (0.0182) = $578
$578 x 28 = $16,184 annual retirement annuity
$16,184 ÷ 12 = $1,349 standard monthly annuity (Option A)

The Retirement Systems applies any applicable early retirement reductions to the standard monthly annuity (Option A). If a member selects Option B or Option C, further reductions to the standard monthly annuity are made based on the member's age and the member's beneficiary's age as of the member's date of retirement. If a member is eligible for early retirement, the Retirement Systems will apply the reduction (age or service) most beneficial to the member. Reductions are prorated to the month and day.

Reduction Example

Member is 60 years old and has 25 years of service

Age Reduction

(Annuity is permanently reduced 5 percent for each year of age less than 65).
Option A = $1,274.00 monthly annuity
5% per year x 5 years = 25%
25% reduction ($1,274 x 25% = $318.50)

$1,274 - $318.50 = $955.50 reduced monthly annuity

Service Reduction

(Annuity is permanently reduced 4 percent for each year of service credit less than 28).
Option A = $1,274.00 monthly annuity
4% per year x 3 years = 12%
12% reduction ($1,274 x 12% = $152.88)
$1,274 - $152.88 = $1,121.12 reduced monthly annuity

In this example, since the lesser reduction is the service reduction, the service reduction would be applied rather than the higher age reduction.

PORS Service Retirement Annuity Formula

Class I

The monthly annuity is determined by multiplying the years of Class I service by $10.97. Class I PORS annuities are not based on AFC. Members may convert Class I service to Class II service by submitting a service purchase request and making the appropriate payment. See Convert Class I to Class II (PORS) on Page 37 for further details.

Example

25.50 years service x $10.97 = $279.74 monthly annuity

Class II

The Retirement Systems uses the following four-step formula to calculate a PORS member's standard monthly annuity (Option A).

Step 1 Total the member's 12 highest consecutive quarters of earnable compensation and divide by 3. Quarters are broken down as follows: January-March, April-June, July-September, and October-December. The result of Step 1 is the member's AFC.

The dollar amount of termination pay for up to 45 days of unused annual leave that is paid at retirement by a member's last employer is included before averaging the member's 12 highest consecutive quarters of earnable compensation.

Step 2 Multiply the result of Step 1 by 2.14% (0.0214).

Step 3 Multiply the result of Step 2 by the member's years, months, and days of creditable service.

Convert months to days and divide the total days by 360 to determine a decimal equivalent for partial years. For example, 25 years, 2 months and 10 days equals 25 years, 70 days (60 + 10) 0.70 ÷ 360 = 0.19. This amounts to 25.19 years of service.

At retirement, a member may receive credit for up to 90 days of unused sick leave, which equates to four months and fifteen days of service credit. The Retirement Systems grants one month of service credit for each 20 days of unused sick leave. Sick leave is not included in estimated benefits and cannot be used to meet eligibility for retirement.

Step 4 Divide the result of Step 3 by 12 to arrive at the member's standard monthly annuity (Option A).

Example without Annual Leave

12 highest consecutive quarters of salary = $90,000
Annual leave payment = $0
AFC = ($90,000 ÷ 3) or $30,000 Creditable retirement service = 25 years
$30,000 x 2.14% (0.0214) = $642
$642 x 25 = $16,050 annual retirement annuity
$16,050 ÷ 12 = $1,337.50 standard monthly annuity (Option A)

Example with Annual Leave

12 highest consecutive quarters of salary = $90,000
Annual leave payment = $5,200
Salary + annual leave payment = $95,200
AFC including annual leave payment = ($95,200 ÷ 3) or $31,733
Creditable retirement service = 25 years
$31,733 x 2.14% (0.0214) = $679
$679 x 25 = $16,975 annual retirement annuity
$16,975 ÷12 = $1,415 standard monthly annuity (Option A)

Disability Retirement

Eligibility

The Retirement Systems evaluates an applicant for occupational disability which is a mental or physical incapacity that is likely to be permanent and renders a member unable to perform his current job duties. Members must be in service to be eligible to apply for a disability retirement annuity. . Disability retirement benefits are subject to income taxes.

Active members in service with at least five years of service credit who have a disability that is likely to be permanent may apply for a disability retirement annuity. The five years must be earned service if the member was enrolled after December 31, 2000. The five-year requirement is waived if the member can substantiate that the disability is the result of a job-related injury. Employers must provide an acceptable first report of injury if the disability resulted from a job-related injury.

Disability Retirement Effective Date

The member may choose any effective date as long as the member has received disability approval from the Retirement Systems, is terminated from the covered employer on date of retirement, has met the retirement eligibility requirements, the disability application has been on file for 30 days, and the date does not extend past the life of the application (nine months). If the member designates the effective date to be the day following the last day on the payroll, the Customer Services Annuity Claims Unit can determine the earliest effective date from the *Certification of Last Day Paid* (Form 6201). Retirement is considered to be in effect and the payment plan may not be changed once

benefit payments have begun unless the retiree experiences a qualifying event (death of spouse, marriage, or divorce).

How to Apply

A member may apply for disability retirement by completing an *SCRS Application for Disability Retirement* (Form 6151S) or a *PORS Application for Disability Retirement* (Form 6151P). **A member should file an application for disability retirement as soon as he becomes disabled and before he is terminated.** If the application is approved, the disability retirement effective date will be no earlier than 30 days after receipt of the application by the Retirement Systems, or the day after terminating employment, whichever is later. If a member recovers and returns to work, the disability application must be canceled in writing.

Members also eligible for service retirement should apply for service retirement at the same time they apply for disability retirement so they can begin receiving an annuity while their disability decision is pending. If a member's disability retirement is approved, the benefit will automatically convert to a disability retirement annuity if it is most beneficial for the member, and if the beneficiaries and payment plans are the same on both applications.

The employer may submit a disability application for the member in the event that the member is initially unable to complete the application. The employer cannot select a payment plan or designate beneficiaries on behalf of the member. For urgent cases, the member or employer may fax the disability application to the Customer Services Annuity Claims Unit at (803) 737-7752. This will begin the required 30-day waiting period only. A properly signed application from the member selecting a payment plan and designating beneficiaries must still be submitted as soon as possible for further processing.

By statute, the earliest retirement date is 30 days after the Retirement Systems receives the application, and the latest is nine months. A member approved for disability must terminate employment and begin receiving disability payments within nine months after submitting the application, or the application will expire and the member will have to reapply for benefits, have his medical condition evaluated, and establish another 30-day waiting period. This may mean returning to a covered employer's payroll to qualify for filing of an application.

Disability annuities are calculated with projected service as if the member had worked to age 65 (SCRS) or age 55 (PORS). SCRS disability annuities have an applicable statutory reduction. The minimum disability retirement allowance payable under Option A for SCRS or for PORS is 15 percent of the retiree's AFC (divided by 12 and paid monthly). If a member selects joint retiree-survivor payment plans Option B or Option C, the member will receive a reduced (from Option A) monthly annuity.

Employees considering applying for disability annuity benefits should be aware that even though disability retirements may be approved for annuity benefits without scheduled medical reviews, they may have continuing disability reviews (CDRs) until age 65 (SCRS) or age 55 (PORS) and are subject to denial at that time. All applications are evaluated by our Disability Determination Service Provider and require the following addendum forms to be completed by the member:

- *Authorization for Release of Information to Disability Determination Service* (Form 6255): one form for each medical source; and

- *Member's Disability Report* (Form 6251).

A member must be retired (terminated from all covered employment) and begin disability benefits (if approved) not more than nine months following the date the application was filed; otherwise, the application is closed and the member must submit a new application (which requires a 30-day waiting period and an evaluation) to begin the process anew.

When a disability application is received, if the employer has not submitted the *Employer's Disability Employment Status Report* (Form 6253) and the *Employer's Description of Disability Applicant's Job* (Form 6254) to the Retirement Systems, those forms will be mailed to the employer for completion. These forms should be mailed directly to the Customer Claims' Annuity Claims Unit and must be received before a member's file can be forwarded to the service provider for evaluation. If available, a detailed position description should be attached to the employment status report. A member must be in service when the disability application is filed. When completing the *Employer's Description of Disability Applicant's Job* (Form 6254) it is important that the employer accurately indicate the requirements of the position with particular emphasis on physical and mental requirements. Typically, a member will be in one of the following categories when he applies for disability retirement since the disability must be likely to be permanent:

- Sick leave;
- Annual leave;
- Leave without pay;
- Reduced hours;
- Working in subsidized employment (on payroll, performing light duties or in a reduced capacity); or
- Workers' Compensation.

A member can receive Workers' Compensation and receive a disability annuity from the Retirement Systems if the member is approved for disability and has been terminated from all covered employment. Members receiving Workers' Compensation should apply for disability retirement as soon as possible, if applicable, but no later than prior to termination. **A member does not have to wait for his Workers' Compensation case to be settled to apply for disability retirement.**

When all forms are received from the member and the employer, the file will be forwarded to our Disability Determination Service Provider for collection of medical evidence and a recommendation to the Retirement Systems. The member will receive a letter from the Retirement System either approving or denying the disability claim as soon as a decision is reached. If the disability is denied, the member may appeal the decision within one year of the first denial by completing the *Administrative Appeal Disability Report* (Form 6291) that will be sent to the member via certified mail. It is important that a member keep his address current with the Retirement Systems. Depending on the case, this review may require a hearing with a Vocational Consultant. Hearings usually are scheduled within 30-45 days and generally are held at the Retirement Systems. If a member chooses to file an appeal, **he is strongly encouraged to file the appeal as soon as a denial is received. Appeal rights are forfeited if an appeal is not filed (received by the Retirement Systems) within the one year period. Please remind employees retiring on disability to file their applications, and appeals if applicable, as soon as possible.**

Service and Disability Filing Requirements

The member must provide copies of his drivers license, proof of birth (birth certificate) and proofs of birth for the member's beneficiaries if the member plans to elect one of the joint retiree-survivor options. Social Security numbers and dates of birth for all beneficiaries must also be provided. If the member cannot provide public birth certificates, the member should contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. When submitting any form (birth certificates, power of attorney, etc.) to the Retirement Systems, make certain the forms (including beneficiary forms) contain the member's name and Social Security number.

Employer Responsibilities and Procedures

Employer Certification

All covered employers that the active member worked for during the year prior to the application date should complete The *Certification of Last Day Paid* (Form 6201). The *Certification of Last Day Paid* (Form 6201) is needed as soon as a service retirement application is submitted; preferably, attached to the application. For disability retirement applications, the *Employer's Disability Employment Status Report* (Form 6253) and the *Employer's Description of Disability Applicant's Job* (Form 6254) should be submitted as soon as possible. Upon receipt of a service retirement application or an approval of disability retirement benefits, a *Certification of Final Retirement Deductions* (Form 6202; 6203 for TERI participants) will be sent to the member's primary employer and any other employers for which the member worked in the last two quarters of employment. This form requests the following information:

- Earnings, contributions, months paid, and contract length for the final two quarterly reports;
- Payment for unused annual leave (and the number of days) and number of unused sick leave days;
- Last day member earned compensation, date of termination and date of final paycheck;
- Current annual rate of pay and the number of normal paychecks per year;
- Contract details; and
- earnings in addition to base salary for the last four years of employment, including the reason for the additional payment(s).

It is important to submit both the *Certification of Last Day Paid* (Form 6201) and a *Certification of Final Retirement Deductions* (Form 6202; 6203 for TERI participants) to the Retirement Systems as soon as possible. Attach the *Certification of Last Day Paid* (Form 6201) to the retirement application, along with copies of birth certificates for the member and his beneficiaries so the member's benefit payment can be calculated and paid during the month in which his retirement is effective. If necessary, the *Certification of Last Day Paid* (Form 6201) can be faxed to the Customer Claims' Annuity Claims Unit at (803) 737-7752. The member will receive an estimated monthly benefit that **will not** include annual or sick leave. After the *Certification of Final Retirement Deductions* (Form 6202/6203) is received and processed, the Customer Claims' Annuity Claims Unit will finalize the retiree's benefit. Benefits owed, if any, will be paid retroactively to the date of retirement.

If a Member's Disability Application Is Denied

South Carolina Retirement Systems Claims Procedure Act

The South Carolina Retirement Systems Claims Procedure Act provides remedies available in a dispute or controversy between the Retirement Systems and a member or a designated beneficiary

of a member of any of the retirement systems established in Title 9 of the SC Code of Laws. In accordance with the Act, the State Budget and Control Board enacted the South Carolina Retirement Systems Claims Procedure 2005, to implement the Act.

The Act sets a one-year statute of limitations, limits retroactive relief to one year, and prohibits class action lawsuits. The Board's claims procedure provides that the administrative decisions of the Retirement Systems are reviewed *de novo* by the Administrative Law Court. *De novo* means that the Administrative Law Judge will conduct a trial with witness testimony and evidence rather than a mere review of the agency record. The Circuit Court, the Court of Appeals, and ultimately, the South Carolina Supreme Court, may review the Administrative Law Court's decision. The claims procedure provides an efficient and less costly mechanism for resolving disputes while still affording members due process. The Claims Procedures Act and Board claims procedure also provide a process for appeal and review of disability retirement decisions. An outline of the procedures for appealing both administrative and disability retirement decisions follows:

Appeals Procedures Outline

Disability Retirement Decisions	Administrative Decisions
Initial review by Disability Determination Provider and Retirement Systems of member's application for disability retirement benefits ↓ If disability claim is denied, member may file an appeal with the Director within one year from receipt of denial ↓ Director forwards claim to Vocational Consultant appointed by the Director for review, conference, and recommendation	Claimant makes written appeal to Director of Retirement Systems within one year of administrative decision ↓ Claimant is afforded opportunity to present claim in writing to Director for review
Director makes Final Agency Determination Director's decision is final decision of Retirement Systems and State Budget and Control Board ↓ If denied, claimant files request for contested case hearing with Administrative Law Court within 30 calendar days after receipt of Retirement Systems' final decision to seek review of Retirement Systems' Final Agency Determination ↓ If denied, Circuit Court, Court of Appeals, and ultimately, South Carolina Supreme Court, may review the Administrative Law Court's decision.	

Average Final Compensation

The retirement annuity is based on average final compensation (AFC), years of service credit, and a multiplier (0.0182 for SCRS Class II or .0145 for SCRS Class I or 0.0214 for PORS Class II). A member's AFC is the 12 highest consecutive quarters of earnable compensation divided by three. The dollar amount of up to 45 days of unused annual leave paid at retirement may be included before

averaging the member's 12 highest consecutive quarters of earnable compensation. Contributions are to be remitted on up to 45 days of annual leave for each annual leave termination payment. For PORS Class I benefits, AFC is not applicable because the PORS Class I monthly benefit is calculated by multiplying the years of Class 1 service by $10.97.

The following payments are not included in the AFC calculation at retirement:

- Payment for unused annual leave in excess of 45 days;
- Payments for annual leave at times other than termination;
- Payment for unused sick leave;
- One-time bonus payments;
- Special or incentive-type payments;
- Compensatory time or overtime not earned during the AFC period;
- Any other payment not considered a part of the regular salary base;
- Lump sum merit payments;
- Payment for annual leave at the beginning of TERI for participants retiring on or after July 1, 2005.

For more information or answers to questions concerning treatment of payments in excess of base wages, contact the Financial Employer Services' AFC Unit. Your request should be written, with an attached copy of the employer policy regarding the questionable pay element. These documents can be mailed to the attention of the AFC manager, or faxed to (803) 737-6933.

Earnable compensation is a rate of compensation earned for working one's full normal time, not an amount paid on a cash basis. In most instances, especially when an employee works and is paid equally over the entire year, cash basis payments serve as a reasonable approximation of this rate of earnings over the 12 quarters used to calculate an AFC. In cases in which there are significant variances between the time compensation is earned and the time compensation is paid, appropriate adjustments are required upon finalization of a retirement account to ensure the inclusion of 12 full quarters of earnings. This adjustment is typically made when a contracted school district or higher education employee retires before the completion of the contract period and receives a payout of his contract. Benefit estimates, therefore, are an approximation of the AFC as reported by the employer. The AFC and years of service are adjusted upon retirement when finalized account information has been received from the employer.

Instructions for *Certification of Final Retirement Deductions* (Form 6202) and *Certification of Final Retirement Deductions for the Teacher and Employer Retention Incentive Plan* (Form 6203)

Forms 6202 and 6203 are required for all retiring members of SCRS and PORS. These forms request specific information that allows the Retirement Systems to calculate a member's AFC, and as a result, the final benefit prior to the arrival of the quarterly report. When the information provided is complete and accurate, these forms accelerate the process of finalizing benefits to your employees. What follows is an explanation of what should be listed on the form and why the information being requested is needed.

Please note that the paragraph at the top of either form indicates that the amounts certified should not be estimated. This means that this form should not be filled out until you as the employer have verified that the employee in question has received his final check. We use the quarterly information provided on this form to establish the member's average final compensation (upon which benefits are based, in part) long before the quarterly report arrives. Failure to accurately certify the final quarters can result in benefit overpayments, which must then be recouped from your employee. In some cases, we may not be able to begin paying benefits until any discrepancy between the certified and reported information is resolved.

We also ask that you not deviate from your regular pay schedule in paying out a member's final compensation. For example, if a member is planning to retire effective July 1st, and his final paycheck would not be payable until July 7, do not pay the member his final wages in advance (in June). Pay the member in July, as this is the normal pay cycle. Paying the final check early creates more work for the employer and the Retirement Systems. The additional check inflates the quarter and necessitates manual adjustments on our end. It could affect a member's total service credit and eligibility.

Section 1: Final Two Quarters of Active Employment (as they will appear on the Quarterly Reports)

It is not uncommon for a member to retire and expect benefit payments before the last two quarters of compensation have been reported. To wait for the final quarter can result in a member receiving estimated benefits for as long as four months after the retirement date, which is counter-productive when attempting to establish a monthly budget in today's economy. This may be especially problematic if the estimate changes significantly. Therefore we ask for timely submission of this information, with accurate figures.

Next to Last Quarter

This represents the next to the last quarter of earnings, and is generally a full quarter. If a member's final paycheck is scheduled for payment in July, your next to last quarter is that ending 6/30, with the final quarter being 9/30, as the September quarter includes the month of July. As mentioned above, do not modify your regular pay cycle to give the member an inflated June quarter – pay it in July, if the final check would have normally fallen in that month. The dollar figure for wages and contributions listed should match the entry on the quarterly report.

Last Quarter

This quarter is that within which your employee received his final payments for wages and annual leave (if applicable; TERI participants retiring on or after July 1, 2005 have their annual leave payment postponed until the end of the TERI program period, resulting in form 6203's lack of room for annual leave certification). Form 6202 is intended for a regular, non-TERI retiree, and includes a line for the annual leave payment in addition to those supplied for wages and the total of the final quarter. Annual leave should not be included in the compensation figure requested in the first of those three lines, but should be listed as a separate item on the second line. The third line requests the total of the final quarter only. Do not include the next to the last quarter's figure in the total of the final quarter.

Contributions for both SCRS and PORS are withheld at a rate of 6.5 percent of the wage amount. Should you discover that contributions were not withheld from either wages or annual leave in error, please take the necessary steps to rectify that situation prior to submitting the certification form and quarterly report, as failure to do so could be detrimental to your employee. The dollar figure for wages, annual leave (if applicable) and contributions should match the transaction on the quarterly report.

We request that you certify the number of annual leave days as opposed to the number of hours. If a member must charge seven and a half hours in order to miss one day of work with compensation, the number of annual leave days paid should be based on seven and a half hours of leave. If the member works a 12-hour day and must charge 12 hours to receive compensation for a day missed, 12 hours of paid annual leave at termination equal one day of annual leave. Upon payment of the annual leave balance, the total paid and certified must come off your books. Once the member receives credit for that time in the AFC calculation, it can no longer be available for use.

Section 2: Accrued Sick Leave

As the form indicates, a member may receive credit for up to 90 days of unused sick leave at retirement. A member receives an additional month of service credit for every 20 days of sick leave certified, meaning that 90 days of certified sick leave convert to four and one-half months of service credit. This service credit is not used to establish eligibility based on years of service, but is included for the calculation of the member's benefit. If it is the policy of the employer to pay the member for sick leave at the time of retirement, contributions should not be withheld from the sick leave payment.

The same rule regarding annual leave above applies to sick leave as pertains to certification of days as opposed to hours. If a member must charge eight hours of leave to miss one day of work, the number of sick leave days would be the total hours on file to be certified, divided by eight.

Once sick leave is certified to the Retirement Systems, it must be removed from your records. This is pertinent to TERI participants. Sick leave certified at the beginning of the TERI program participation period cannot be used by that retiree during the TERI program. If the member is getting service credit for that time from SCRS in the calculation of the deferred annuity, it can no longer be charged in lieu of coming into work, as the member has already received service credit. Some employers have developed a document that is beneficial for inclusion in a retiring member's personnel file, that asks the member to indicate how much of their sick leave balance should be certified at retirement.

Section 3: Payroll Information

Section 3 on Form 6203 requests six pieces of information: the last day of active employment; the date of termination; the date of the final paycheck; the budgeted annual salary; the number of paychecks per year; and, the reason why the last day of active employment and the date of termination are different (if they are). Form 6202 additionally requests an hourly rate of pay, and the number of hours in a shift for a non-TERI retiree, which further enables us to verify the annual leave payment certified under Section 2.

A regular retiree must terminate employment before he is considered "retired," and therefore the date of termination is used to establish the date of retirement (the retirement date generally being the day after the termination date). The budgeted annual salary is used to establish the member's daily rate of pay in order to verify the annual leave days and payment amount. If the employer pays annual leave at a rate different from the normal daily rate of pay indicated by the budgeted salary, this should be noted on the form. We also use the budgeted salary and the number of checks per year in the calculation of the average final compensation, as a starting point. Again, this information should be accurate.

Section 4: Additional Earnings Information

This section requests three data items: whether or not the employee finished their contract prior to their retirement date (if applicable – a large number of employees do not work under contract); how many days of the contract were actively worked prior to the date of retirement, if the answer to the first question was no; and, specific earnings information for the last four years.

At one time, Section 4 pertained only to school district and higher education employees. However, that has been changed and all employers must fill out Section 4, or submit with the form a document supplying the information requested. "Date Effective" refers to the date upon which a member experienced an increase or decrease in budgeted salary. "Contract Days" will be 260 for a year-round employee; if the member was working under contract, please indicate the number of days of work covered by the contract. "Budgeted Salary" is the salary upon which the member received base pay during the year. The "Additional Payments" column should be filled in with the dollar figures of any pay not considered base salary that the member received within the year, and the next column, "Reason for Additional Payment(s)," should be filled in with the reason for the different payment amounts listed under the previous column.

When a member has more than one change to budgeted salary in a year, each modification to salary should be listed. In doing so, the additional pay information should only be that paid during the time frame the member received that budgeted salary. We use the budgeted salary and additional pay information to ensure that the member has not contributed upon payments that are not actually allowed in the AFC calculation, per statute. If you are concerned that a pay element should not be included in the calculation, please submit a written request for review along with a copy of the employer's policy regarding that pay element. The request should be addressed to the attention of the AFC manager, and may be mailed or faxed to (803) 737-6933.

The AFC unit will also accept computer-generated payroll history reports in lieu of population of section 4. If you plan on submitting a report instead of filling out that section of the form, the report should include the following information: the pay period begin and end dates, the pay check date, the check amount, and the breakdown for each check, distinguishing how much of the dollar figure was paid for salary, overtime, shift differential, etc. The report should cover the most recent four years of employment.

Post-Retirement Information

Retirement Checks

Retirement checks are deposited directly into a member's bank account or mailed the last business

day of every month. If a member's check has not arrived by the fifth business day, the member should notify the Retirement Systems by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. Members should endorse all non-direct deposit checks as drawn. If someone else must endorse a member's check, notify Benefits Payroll or Customer Services immediately. Legal documentation (power of attorney, etc.) must be provided and should contain the member's name and Social Security number. **Retirees should notify the Retirement Systems in writing of any change in their mailing address.**

Direct Deposit

Direct deposit participation is strongly encouraged by the Retirement Systems. However, if a retiree does not have a bank account into which benefits may be automatically deposited, then they can receive a paper check each month. It takes about two months to initiate a direct deposit request. Check stubs are mailed only twice a year (January and July) to retirees with direct deposit, as well as any time the net check amount changes.

Returning to Covered Employment

Service Retiree

SCRS and PORS members who have been retired for at least 15 consecutive calendar days may return to work for an employer covered by the Retirement Systems and with no earnings limitation. If a member returns to covered employment sooner than 15 consecutive calendar days after retirement, his retirement annuity will be discontinued while he remains employed by a covered employer. TERI participation satisfied the 15 day requirement.

Working 48 Continuous Months

If a retiree returns to employment and works 48 continuous months for a covered employer with an annual salary of at least 75 percent of the AFC used to calculate his retirement annuity, the retiree may elect to cease his retirement allowance and become an active member of the Retirement Systems. If a member becomes active again, the member has the option to repay all retirement annuity benefits and make a payment equal to the amount the member would have contributed during the period had he been active plus interest to receive service credit for the 48-month period. When the member subsequently retires, the retirement annuity will be computed as if the member were retiring for the first time. TERI participation does not count towards the 48 month period.

Disability Retiree

If a disability retiree under age 65 (SCRS) or under age 55 (PORS) chooses to work, an annual earnings limitation applies on all employment, public and private. Disability earnings are monitored on a calendar year basis and each year the Retirement Systems provides written notification to the member of the calculated amount for that year. Annual earnings from public or private employment cannot exceed the difference between the AFC, adjusted for inflation, and the projected disability retirement annuity for the year. If a disability retiree's earnings exceed the annual limit, his disability retirement annuity will be reduced by the amount in excess of the earnings limitation. If a disability retiree returns to work for a participating employer and his earnings equal or exceed the retiree's adjusted AFC, then the retiree once again becomes a contributing member of the Retirement Systems.

Disability retirees are required by law to repay any overpayment of disability retirement annuities; therefore, the Retirement Systems should be notified immediately if the retiree returns to work and

expects to exceed the earnings limitation during the year. Contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov immediately if this occurs.

Working Retiree Contributions

A service retiree (TERI or non-TERI) or a disability retiree must complete a *Notification of Employed Retiree* (Form 1114) upon returning to work for an employer covered by the Retirement Systems. All retired members must make member contributions to the system at the same rate as an active employee. The only exception is a TERI participant that entered the plan prior to July 1, 2005. If the participant terminates TERI and returns as a working retiree, then he also must make member contributions.

Retiree Group Life Insurance

Upon the death of a retiree who is no longer employed and whose most recent employer before retirement has Group Life Insurance coverage, the Retirement Systems will pay a benefit based on the retiree's service credit to the retiree's beneficiaries as follows:

SCRS	Benefit	PORS
10 to 19 years of service	$2,000	10 to 19 years of service
20 to 27 years of service	$4,000	20 to 24 years of service
28 or more years of service	$6,000	25 or more years of service

If a retiree has service in more than one correlated system (SCRS, PORS, and/or GARS) and his most recent employer in each correlated system has Group Life Insurance coverage, combined service in each system will be considered when determining the Group Life Insurance benefit. The maximum benefit paid will never exceed $6,000. The beneficiary of a retired State ORP participant is not eligible for Retiree Group Life Insurance benefits.

Working retired contributing members of SCRS and PORS are eligible for an increased group life insurance benefit payment equal to their one-year's annual salary in lieu of the standard $2,000, $4,000 or $6,000 retired member benefit.

Retiree Group Life Insurance beneficiaries are designated on the *Application for Service Retirement Benefits* (Form 6101) or the *Application for Disability Retirement Benefits* (Form 6151). A retiree may choose different beneficiaries for the retiree group life insurance benefit and retirement annuities. A retiree may elect to have beneficiary payments paid through a trust. One or more trustees may be appointed for the designated beneficiaries. A completed *Certification of Trust* (Form 1113) must be provided with the retirement application.

Changing Beneficiaries and Options After Retirement

Retiree Group Life Insurance

A retiree may change his retiree group life insurance beneficiary at any time regardless of the payment plan selected. The retiree may request a *Retired Member Change of Beneficiary Form* (Form 7201) by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. Forms are also available on the Retirement System's Web site at www.retirement.sc.gov/forms.html.

Option A (Retiree Only Standard Monthly Annuity Plan)

A retiree may change his Option A retirement annuity beneficiary at any time. If a retiree has a change in marital status, he may also select a new payment plan within one year of the change in martial status.

Option B and Option C (Joint Retiree-Survivor Monthly Annuity Plans)

If all of a retiree's beneficiaries predecease the retiree, the retiree's annuity will revert to Option A effective on the date the last beneficiary died. The retiree must notify the Retirement Systems upon the death of a beneficiary by contacting Customer Services at (800) 868-9002 or (803) 737-6800. The retiree may then select a new beneficiary under Option A. If the retiree has a change in marital status, he may select a new payment plan within one year of the change in marital status.

Change in Marital Status

If a retiree's spouse dies, or if a retiree marries or divorces, the retiree may revoke his current payment plan and select a new payment plan beneficiary within one year of the change in marital status. Changes are effective the first of the month in which the form is received. Estimates of adjusted annuity benefits under a new payment plan must be obtained from the Retirement Systems before submitting a *Retired Member Change of Beneficiary Form* (Form 7201) to change a payment method.

Number of Changes

A retiree's form of monthly payment may not be changed more than twice, regardless of the number of changes prior to January 1, 2001, and the number of events (death of a designated beneficiary or change in marital status) that occur. A reversion to Option A upon the death of a retiree's beneficiary will count as one of the two changes. If a second beneficiary predeceases the retiree after the retiree has again selected Option B or Option C, the retiree's payment plan will revert automatically to Option A; however, no further form of payment changes will be allowed.

Cost-of-Living Adjustments

Eligible annuity recipients of the SCRS and PORS will receive an automatic annual cost-of-living adjustment (COLA) of up to 2 percent each July 1. If, however, the Consumer Price Index (CPI) for Wage Earners and Clerical Workers as of the previous December 31 is less than 2 percent, the automatic COLA would equal the increase in the CPI. If the CPI increases by more than 2 percent, the State Budget and Control Board may increase the COLA beyond the automatic annual 2 percent up to the total percentage increase in CPI or 4 percent, whichever is less. However, the increase beyond the automatic 2 percent may only be granted when certain conditions are met.

If an SCRS member retires early (at age 55 with at least 25 years of service), the member is not eligible for COLAs until the second July 1st after the member reaches age 60 or the second July 1st after the date the member would have attained 28 years of service credit had the member not retired.

Retiree Group Health and Dental Insurance

If a member is a state employee covered by state health insurance, information concerning eligibility rules for health and dental benefits at retirement should be directed to the Employee Insurance Program at (888) 260-9430 or (803) 734-0678. Otherwise, the member should contact his employer.

Taxation of Monthly Benefits

Monthly retirement benefits, regardless of whether they are service retirement or disability retirement are subject to federal and state taxes, but there is a South Carolina state income tax deduction for retirement income based on age. The Internal Revenue Service (IRS) requires federal withholding of married with three exemptions unless a retiree specifies otherwise. If a retiree does not have taxes withheld from his retirement check, the retiree may need to file estimated taxes each quarter. Please encourage retirees to check with an accountant or tax advisor regarding their tax liability. Retirees may also contact the South Carolina Department of Revenue at (800) 763-1295 or at (803) 898-5280 regarding SC state tax issues.

In accordance with the IRS guidelines, Retirement Systems disability benefits are reported annually on the tax form1099-R as normal distributions for income tax purposes. The code "7" in box 7 of a1099-R form means that the disability retiree is not subject to the 10 percent tax penalty for early withdrawal because the retiree receives the retirement benefits via a monthly annuity. According to the Internal Revenue Code, the Retirement Systems is prohibited from entering a code "3" in box 7 because the disability program administered by the Retirement Systems is an occupational or job related disability program rather than a total and permanent disability program as described in section 72(m)(7) of the Internal Revenue Code. Disability benefits should be included as ordinary income for tax purposes.

Although the 1099-R which disability retirees receive from the Retirement Systems correctly contains a code "7" in box 7, the retiree may also receive monthly benefits from the Social Security Administration and be considered totally and permanently disabled for Social Security purposes. If the retiree is considered totally and permanently disabled for Social Security purposes, he may qualify for the Credit for the Elderly or the Disabled. Please refer the retiree to Schedule R if they need assitance in this regard on their tax return.

Tax laws are complex and change frequently; therefore, retirees should consult a tax advisor if they have questions regarding their individual federal or state tax return.

Changes to a Retiree's Account

If a retiree or payee wishes to change a name, address, amount of taxes withheld, or direct deposit accounts, the retiree or payee should write to Benefits Payroll or contact Customer Services at (800) 868-9002, (803) 737-6800, or visit our Web site at www.retirement.sc.gov to receive the appropriate forms. The request should include the payee's Social Security number and signature, former and current names, and/or address.

Leaving Covered Employment

If a member terminates all employment covered by the Retirement Systems before he is eligible to retire, there are two options concerning the contributions in the members account:

- request a refund of the member contributions and interest; or
- leave the funds in the Retirement Systems. The members account will continue to accrue interest at 4 percent compounded annually.

Suggested Termination Packet

Please advise terminating employees seeking retirement or desiring to purchase service that they must apply for disability retirement or make a request to purchase service prior to leaving covered employment. Members leaving funds on deposit should notify Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov of any address change and should keep beneficiaries current with the Retirement Systems. Please distribute the applicable information to terminating employees:

- *State ORP Termination Notice* (Form 1162)
- Appropriate application (disability or refund application, etc.)

Refund vs. Deferred Annuity

A member must terminate all covered employment to receive a refund or a deferred annuity. Employers should inform any member who is terminating employment with at least five years of earned service and seeking a refund of contributions of the member's option to leave funds on deposit and later apply for retirement. It is, however, the member's responsibility to contact the Retirement Systems and file an application prior to retirement. See Page 41 for retirement eligibility criteria. Employers should remind any member leaving funds on deposit to keep his address and beneficiaries current by writing the Retirement Systems or by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. Member statements are mailed annually to all active members and any inactive members for whom we have a valid address. Please advise members leaving employment to contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov to request a member statement or to update an address.

Refunds

Members who terminate employment may request a refund of their member contributions plus interest, but they forfeit their rights to any future service retirement or disability benefits. A refund of member contributions and interest cancels all service credit in the member's account. Members are not required to withdraw their contributions and interest at termination. Employer contributions are not refunded. **Employees cannot take loans or hardship withdrawals from their Retirement Systems account(s). There are no exceptions.** Contributions made by retired members who return to work are non-refundable unless the member dies prior to receiving benefit payments equal to or greater than their total contributions plus interest.

Waiting Period

By law, there is a minimum 90-day waiting period from a member's date of termination until a refund can be made; however, the Retirement Systems has up to six months to issue a refund. If a member returns to covered employment before the refund is paid, the refund request will be canceled. Therefore, employers should submit all enrollment forms in a timely manner.

Leaving Funds on Deposit

A member can decide to leave their funds on deposit for as long as the Internal Revenue Code (IRC) allows. The IRC indicates that a distribution must occur no later than April 1 of the calendar year in which he attains age 70 ½ or in which he retires, if later.

Multiple Accounts

If a member works for two or more covered employers, or contributes to one or more retirement accounts (i.e., working two jobs and paying into an SCRS and a PORS account), the member must stop working in all systems and all positions to request a refund from any account.

Rollovers

The taxable portion of a lump-sum distribution (refund) may be eligible for a tax-deferred rollover to an IRA, a 401(k) plan, a 401(a) plan, a 403(b) plan, a ROTH or some 457 plans (the South Carolina Deferred Compensation Program's 457 plan does not accept rollovers). Members should check with the receiving plan administrator to determine if it will allow such a rollover. Members or QDRO alternate payees may elect to roll over all or any part of the taxable portion of the member's contributions plus interest. The payment received from the Retirement Systems is classified as a Qualified Total Distribution under Internal Revenue Code Section 401(a) and will be reported to the Internal Revenue Service (IRS) on Form 1099-R. For death claim rollovers, please see *In-Service Death Refund of Contributions* on Page 68.

Taxes on a Refund of Contributions

A member's account may include both pre-tax and after-tax contributions. Contributions made after June 30, 1982, (federal) or after January 1, 1985 (state), and all interest earned, plus any rollovers to purchase service, are considered pre-tax (deferred contributions) and are taxable when paid to the member. Service purchased by personal check or through the after-tax Installment Service Purchase Program is nontaxable when subsequently refunded to the member.

For a member or a Qualified Domestic Relations Order (QDRO) alternate payee, the IRS requires the Retirement Systems to withhold federal taxes of **20 percent** on any portion of the taxable refund not transferred directly into another qualified retirement plan. Other taxes may apply as well. Members should check with an accountant or tax advisor regarding their tax liability.

If a member under age 59½ does not take advantage of a rollover, the member's lump-sum distribution is subject to regular income tax in the year the payment is received. The IRS could assess an additional 10 percent penalty when the member submits his income tax return. This 10 percent tax penalty does not apply to distributions due to:

- Death of the member;
- Disability of the member;
- Separation from service in or after the year in which the member reaches age 55;
- Public safety employee who separates from employment in or after the year in which the employee reaches age 50; or
- Distribution paid to an alternate payee pursuant to a QDRO

Section 828 of the Pension Protection Act of 2006 (PPA) provdies for the waiver of the 10 percent early withdrawal penalty if a qualified public safety employee receives a distribution from a qualified retirement plan after separation from service in or after the year in which the employee reached age 50. A qualified public safety employee is an employee of a state or political subdivision who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such state or political subdivision. Membership in the PORS, in itself, is not

sufficient to qualify an employee for the waiver of the early withdrawal penalty--the employee must be a qualified public safety employee as defined in Section 828 of the Pension Protection Act. The employer provides the certification of an employees job description as meeting the criteria defined by the PPA on *Employer Certification: Qualified Public Safety Employee* (Form 7507). This form is mailed to the employer by the Retirement Systems for completion after a Refund Request is received from the member.

How to Apply for a Refund of Contributions

Member Instructions

A member must complete a *Refund Request* (Form 4101). The member must indicate if he wants to receive a lump-sum payment, a direct rollover or a partial rollover by checking the appropriate box on the form. If a member elects to receive a direct or partial rollover, the rollover section must be completed in full. The member must sign the form after completion and attach a copy of his current driver's license or special identification card issued by the member's state department of transportation or public safety. If a member cannot sign his name, an "X" may be used; however, a witness is required to sign attesting the member's mark. **This form must be notarized.** If a member has contributions in more than one retirement account, the member must complete a *Refund Request* (Form 4101) for each account from which a withdrawal is requested.

Employer Instructions

Upon receipt of a *Refund Request* (Form 4101) from a member, the Retirement Systems will send the member's employer a *Certification of Final Retirement Deductions* (Form 4201). There are two versions of this form. The version an employer receives depends on whether the member's retirement account is active or inactive at the time of application. Both versions show the member's contributions and wages/leave payment from the most recent Quarterly Report.

If completing a *Certification of Final Retirement Deductions* (Form 4201) for a member with an inactive retirement account, the employer should simply select the item that most appropriately describes the employer's current employment information about the member. If employment records can be located, the employer should also certify the member's termination date.

If completing a *Certification of Final Retirement Deductions* (Form 4201) for a member with an active retirement account, the employer should report the date the member's final check was issued, the last day the member earned compensation, the member's termination date (if later than the last day the member earned compensation), and any contributions and wages/leave payments for any quarters of the member's employment subsequent to the most recent Quarterly Report. *Do not estimate* or project contributions on this form, as the Retirement Systems will refund the member's contributions based on the information provided.

The employer must sign the *Certification of Final Retirement Deductions* (Form 4201). The individual completing the *Certification of Final Retirement Deductions* (Form 4201) for the employer must be authorized and the individual's name must be kept current with the Retirement Systems. If the authorized individual's name changes, it is the employer's responsibility to notify the Customer Claims' Refund Claims Unit in writing. **Please return the completed *Certification of Final Retirement Deductions* (Form 4201) by mail or fax (803) 737-7752 to the Retirement Systems no later than**

10 business days after the member's last paycheck. Do not wait before submitting since doing so may needlessly delay the member's refund.

After Receipt of a Refund Request

After all refund information from the member and the employer is received by the Retirement Systems, an acknowledgment letter will be sent to the member indicating the amount of the refund and the date on which the check is expected to be prepared and mailed.

Refund Check Schedule

Refund checks are scheduled to be issued every Friday and will be mailed unless a member arranges in advance with the Retirement Systems to pick up the check. Wire transfers of refund checks are not permitted. The refund is scheduled for payment on the first Friday after the 90-day waiting period if all member and employer information received is correct and the member does not return to covered employment prior to receiving the refund check; however, by law, the Retirement Systems has up to six months to issue a refund to a former employee.

The Retirement Systems will issue the refund to the individual unless the individual is eligible for and has requested that the funds be rolled over into another qualified retirement plan. Rollover checks will be mailed directly to the financial institution. Once issued, refund checks may be picked up in person with proper identification (current driver's license or picture ID) provided the member has made advanced arrangements with the Retirement Systems by contacting Customer Services at (800) 868-9002, (803) 737-6800, or by writing to Benefits Payroll. Checks may be picked up on Fridays and cannot be picked up prior to 2 p.m. Because of possible check printing problems or other unforeseen circumstances, the Retirement Systems is unable to guarantee that a member's refund check will be available as planned. If the member's address changes during the 90-day waiting period, the member must send written notification of the address change, including his Social Security number and signature, to the Retirement Systems' Customer Claims' Refund Claims Unit.

Refund Request after a Disability Retirement Denial

A member who has a disability retirement application on file and has requested, or is going to request, a refund must submit a signed written statement whenever the following circumstances apply:

- The member's disability retirement claim was denied;
- The member does not wish to appeal the denial of his disability retirement claim but time remains in the period of time in which the member could appeal; and
- The member now wishes to receive a refund in lieu of disability retirement.

The member's signed written statement should contain explicit language stating that he has decided not to appeal the denial of his disability retirement claim and now wishes to receive a refund; thereby forfeiting all rights to a future annuity benefit.

Qualified Domestic Relations Order (QDRO) for Annuities, Refunds and Death Claims

A Qualified Domestic Relations Order (QDRO) is a court order creating or recognizing a spouse's or a former spouse's right to a portion of a member's retirement annuity. This individual cannot receive

his share of benefits until the member retires, withdraws his contributions, or dies. A divorce decree that assigns a portion of a member's retirement annuity to an ex-spouse is not necessarily a valid QDRO. The Retirement Systems has guidelines available to aid in the drafting of QDROs. Direct payment to a QDRO alternate payee by the Retirement Systems is not possible unless the court enters an order that the Retirement Systems determines is acceptable under its guidelines pursuant to S.C. Code Ann. §9-18-10 *et seq.* The taxable portion of a lump-sum distribution paid to a QDRO alternate payee (former spouse) may be eligible for a tax-deferred rollover to an Individual Retirement Account (IRA), a 401(k) plan, another 401(a) plan, a 403(b) plan and some 457 plans. Check with the receiving plan administrator to determine if it will allow such a rollover. The Internal Revenue Service (IRS) requires that the Retirement Systems withhold federal taxes of 20 percent on any portion of the taxable lump-sum distribution not transferred directly into another qualified retirement plan. Alternate payees under a QDRO are not subject to the 10 percent penalty for early withdrawal. A QDRO model order is available on the Retirement Systems' Web site at www.retirement.sc.gov/docs/pubs/index.html, or by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov. Member statements and benefits estimates are available by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov.

In-Service Death

Eligibility criteria and additional information are provided below to assist in determining eligibility for these benefits and explaining them to members. If a member dies while actively employed or not more than 90 days from the last day he earned regular compensation and earned regular service credit, the following benefits may be available to the designated active member beneficiary:

- Refund of contributions (member contributions and interest);
- Monthly annuity (survivor annuity);
- Active Member Group Life Insurance payment (equivalent of one year's salary);
- Accidental Death Program benefit (PORS only).

If a member who has filed for disability retirement dies and his disability claim has been on file for 30 days and is approved, the Retirement Systems will also offer the member's beneficiaries a disability retirement annuity and a retiree Group Life Insurance benefit, if eligible. If, however, the member's primary beneficiaries for retirement are NOT the same as the active member primary beneficiaries, AND the retiree Group Life Insurance beneficiaries are NOT the same as the active member Group Life Insurance beneficiaries, the Retirement Systems will be unable to offer the beneficiaries a disability retirement annuity. If the retirement and active member beneficiaries differ and the member's death occurs while he is still in service, the claim will be processed as an in-service death and the active member beneficiaries will receive only active member benefits. Members are encouraged to update their active member beneficiaries when filing for retirement annuities.

Refund of Contributions

The beneficiary designated on the SCRS or PORS member's Retirement Systems record is eligible to receive a refund of the member's contributions plus interest (or $1,000, whichever is greater, for PORS members) in a lump-sum payment. If multiple beneficiaries are designated, payment will be divided equally among the surviving beneficiaries.

If the beneficiary is the deceased member's spouse, the pre-tax portion of the payout is eligible

for rollover to another eligible retirement plan (such as another 401(a) qualified plan, IRA, 401(k) qualified plan, a 403(a) or 403(b) annuity plan, or a 457 governmental plan. The Internal Revenue Service requires the Retirement Systems to automatically withhold federal taxes of 20 percent of the pre-tax portion of a payout that is not processed as a rollover.

If the beneficiary is not the deceased member's spouse, the pre-tax portion of the payout is eligible for rollover to a traditional IRA only. Non-spousal beneficiaries may elect to have federal taxes withheld at 10 percent or more, or none, on the taxable portion paid directly to the beneficiary.

Survivor Annuity

A member's designated beneficiaries may choose to receive a lifetime monthly annuity in lieu of a lump-sum refund of the member's contributions plus interest if the member met any of the requirements below at the time of his death. Monthly survivor annuities cannot be paid to an estate. An Accidental Death Program annuity (PORS only) may be available to certain beneficiaries of a PORS member who dies in the line of duty. State agencies are required to provide Accidental Death Program coverage to their PORS employees. This coverage is optional for other employers. See *Accidental Death Program* on Page 69 for more information.

Survivor Annuity Eligibility Requirements

- Age 60 or older with five years of earned service (SCRS) or age 55 or older (PORS) with five years of earned service; or
- 15 or more years of service, five years of which must be earned service.

The designated beneficiaries will receive a monthly survivor annuity for life based on Option B (see *Payment Plans* on Page 42). A monthly benefit cannot be paid to an estate or an organization. If multiple beneficiaries are named, all surviving beneficiaries must agree on the choice of a refund or a survivor annuity before any payments can be made. Payments will be divided equally among the beneficiaries. If one of the surviving beneficiaries dies once payments begin, the benefit amount each surviving beneficiary receives remains the same. The amount of the total benefit will be reduced by the deceased beneficiary's share. If a trustee has been appointed for a designated beneficiary, the monthly annuity will be paid to the trustee until the termination of the trust or the beneficiary's death, whichever occurs first. After the termination of the trust, the monthly annuity will be paid directly to the beneficiary for the rest of his life. See *Beneficiary Designation (Form 1103)* on Page 12 for more information.

Life Insurance Benefits

Group Life Insurance

The Retirement Systems administers a Group Life Insurance program that provides benefits to both active and retired members. State agencies and public school districts are required to provide Group Life Insurance to SCRS, PORS, and State ORP members. The coverage is optional for other employers. If coverage is optional for an employer, the employer may elect Group Life Insurance effective the first July 1 following the date its application for coverage was received. An employer may not revoke this coverage once it has begun. If an employer provides Group Life Insurance to its employees, the employer must pay for this coverage. Premiums are waived for the first year for non-state agencies. Group Life Insurance benefits are considered insurance proceeds and are not reported as taxable income.

Active Membership Group Life Insurance

If the member's death is the result of a job-related injury, the one-year service requirement is waived. A member is considered to be in service on the date of his death if the member was not retired, was employed in a continuous regular pay status, and was earning regular or unreduced wages and regular or unreduced retirement service credit within 90 days of the date of death. The member can be either physically working on that day or taking continuous accrued annual leave or sick leave while receiving a full salary.

Group Life Insurance benefits are considered insurance proceeds and are not taxable as income to the recipient. Insurance proceeds are included in the member's total estate in determining estate taxes. This coverage is required for state agencies and public schools, but is optional for other employers.

Effective July 1, 2005, working retired contributing members of SCRS and PORS are eligible for an increased group life insurance benefit payment equal to their one-year's annual salary in lieu of the standard $2,000, $4,000 or $6,000 retired member benefit.

Accidental Death Program (PORS Only)

The Retirement Systems administers an Accidental Death Program for PORS members. State agencies are required to provide Accidental Death Program (ADP) coverage to their PORS employees. This coverage is optional for other employers. An employer may elect this coverage effective the first July 1 following the date the employer's application is received. An employer may not revoke this coverage once coverage has begun. If an employer provides ADP coverage to its employees, the employer must pay for this coverage. Premiums are 0.20 percent of covered payroll. Premiums are waived for the first year for non-state agencies.

ADP Benefit

This program provides a death benefit if a covered PORS member dies as a result of an injury by external accident or violence incurred while undergoing a hazard particular to the member's employment while in the actual performance of duty, without willful negligence on the part of the member. Payment will be made monthly to the member's surviving spouse for life. If the member has no spouse or the spouse dies before the youngest child of the covered member has attained age 18, the annuity is divided among surviving children until each child attains age 18 or dies, whichever occurs first. If the member has no spouse or child under age 18, the benefit will be paid to the member's surviving father and/or mother for life.

The ADP monthly pension is calculated as follows: 50 percent of the member's annual compensation at death divided by 12, which equates to the monthly payments. Cost-of-living adjustments may be applied to these monthly pension benefits based on the Consumer Price Index and in the same manner as provided under a retirement annuity. The ADP annuity is considered insurance proceeds and is not taxable as income to the recipient. Insurance proceeds are included in the member's total estate in determining estate taxes.

What to Do When an Active Member Dies In Service

The employer should contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov immediately in the event of a member's death so that the necessary information can be provided to the beneficiary. An *Application for Death Benefits* (Form 4152) and the *Certification*

of Final Retirement Deductions (Form 6202; 6203 for TERI participants) will be sent to the employer after the Customer Claims' Death Claims Unit is notified of the death. The employer must complete the *Application for Death Benefits* (Form 4152) and the *Certification of Final Retirement Deductions* (Form 6202) and return the forms as soon as possible. When the completed application is received, the Customer Claims' Death Claims Unit will notify the beneficiary of the payment options available. The beneficiary should submit a certified true copy of the member's death certificate and will be asked to complete the following forms:

- *Application for Death Benefits* (Form 4151);
- *Pension Withholding Certificate/Automatic Deposit Authorization* (Form 7202) if the beneficiary is receiving a monthly benefit;
- *Notice of Withholding* (Form 4251) if the beneficiary (non-spouse) is receiving a refund of member contributions; or
- *Death Claims Payout Election* (Form 4255) if the spouse is receiving a refund of member contributions.

Payment Schedule

Once all documents are received, payments for an in-service death are mailed as follows:

- **Refund of contributions** - checks are mailed on Fridays.
- **Monthly annuity (if eligible)** - checks are mailed the last business day of each month (i.e., a check for June would be mailed the last business day of June).
- **Active Member Group Life Insurance payment (if eligible)** - checks are mailed on Fridays.
- **Accidental Death Program benefit (PORS only)** - checks are mailed the last business day of each month.

It is the goal of the Customer Claims' Death Claims Unit to pay all death claims within 30 days after all paperwork is received from each beneficiary and the employer. Anyone can notify the Retirement Systems of a member's death by contacting Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov, or by writing to the Customer Claims' Death Claims Unit.

Other Resources:

Employee Insurance Program (EIP)

Write: **South Carolina Budget and Control Board**
Employee Insurance Program
1201 Main Street, Suite 300
Columbia, South Carolina 29201

Telephone : Columbia area 803-734-0678
Outside Columbia area 888-260-9430 (toll-free)

May be able to provide assistance with:
State Health Plan
State Dental Plan
State Dental Plus
CIGNA HealthCare
BlueChoice HealthPlan, formerly Companion HealthCare
State Health Plan/MUSC Option
MoneyPlu$

South Carolina Deferred Compensation Program

Write: **South Carolina Deferred Compensation Program**
c/o ING
P.O. Box 5162
Boston, Massachusetts 02206-5162

Telephone: Columbia area (803)754-7997
Outside Columbia Area 1-866-826-7283 (toll-free)
(Press "0" when you hear the prompts to speak to a representative)

State sponsored plan provides:
401(k)
457
Roth 401(k)

ORP Providers

• **VALIC Retirement** Mandy Yelton SC District Office Coordinator 3710 Landmark Dr., Suite 104 Columbia, SC 29204 (803) 743-2020 (Office) (803) 782-9061 (Fax) (800) 647-4416 (Toll-free) (888) 568-2542 VALIC by Phone mandy.yelton@valic.com http://www.valic.com/scstateorp	• **The Hartford** Richard Snyder Regional Manager 50 Glenlake Parkway Atlanta, GA 30328 (888) 89SCORP (888) 897-2677 (Office) (770) 671-8503 (Fax) (800) 528-9009 (Service Center) sc.orp@hartfordlife.com http://retire.hartfordlife.com
• **MetLife Resources** Steven M. Shearod, Regional Managing Director 9000 Central Park West, Suite #325 Atlanta, GA 30328 (770) 390-5680 - Office (770) 390-5678 - Fax sshearod1@metlife.com http://www.metlife.csplans.com	• **TIAA-CREF** Chandira T. Hickson Consultant, Institutional Relationships A Registered Representative of TIAA-CREF Individual & Institutional Services LLC, Member FINRA/SIPC TIAA-CREF, Baltimore Office 5801 Smith Avenue Baltimore, MD 21209-3652 Toll Free 866.842.2520 Office (410) 367-6914 Mobile (917) 538-6066 http://www.tiaa-cref.org/scorp

Glossary

Annuity A series of periodic payments for a fixed future period or for life; payable monthly. See Deferred Annuity.

Average Final Compensation (AFC) AFC is the 12 highest consecutive quarters of a member's earnable compensation divided by three. The dollar amount of up to 45 days of unused annual leave paid at retirement may be included before averaging the member's 12 highest consecutive quarters of earnable compensation. Elected officials may use 36 consecutive months in place of the 12 highest consecutive quarters.

Beneficiary or Beneficiary Payee A person who is designated to receive, or is receiving, a retirement annuity or other benefit provided by the South Carolina Retirement Systems.

Claims Procedure Act Effective July 1, 2003, The South Carolina Retirement Systems Claim Procedure Act provides remedies available in a dispute or controversy between the Retirement Systems and a member or a designated beneficiary of a member of any of the retirement systems established in Title 9 of the SC Code of Laws. The new claims procedure sets a one-year statute of limitations, limits retroactive relief to one year, and prohibits class action lawsuits. It also provides an appeals process for members whose disability retirement applications or continuing disability reviews have been denied.

Contingent Beneficiary A person who will receive a refund or annuity benefit if a primary beneficiary of an active member dies or otherwise loses rights as a beneficiary. Contingent beneficiaries may be designated for active member survivor benefits; however, they may not been designated for active or retired Group Life Insurance benefits or retirement annuities.

Correlated Systems SCRS and PORS are correlated systems. If a member has contributions in more than one of these retirement systems, the member's service credit is maintained separately within each system; however, the member's service credit is added together to determine the member's eligibility for a retirement annuity within each respective system. The 12 highest consecutive quarters of earnable compensation in SCRS or PORS typically are used to calculate a member's SCRS and PORS retirement annuity unless the service is concurrent (earned at the same time). GARS is also a correlated system in which the member's years of service may be used to determine retirement eligibility, but not the AFC. Contact Customer Services at (800) 868-9002, (803) 737-6800, or www.retirement.sc.gov for more information.

Cost-of-living Adjustment An adjustment of a salary or a retirement annuity intended to help offset the effects of inflation. Commonly referred to as COLA. COLAs are not guaranteed.

Deferred Annuity An annuity for which one does not become eligible until some future date. Application must be made with the Retirement Systems to receive benefits.

Defined Benefit Plan A retirement plan through which employers and employees contribute to a fund for which a clearly defined and guaranteed level of benefit will be paid to retirees. Promises specified annuity benefits, typically in the form of a monthly retirement pension based on levels of compensation and years of service. Contributions are actuarially calculated to provide annuity benefits. These annuity benefits are paid for a retiree's lifetime. SCRS and PORS are defined benefit plans.

Defined Contribution Plan A retirement plan through which employers and/or employees contribute to a fund for which only the contribution is defined and benefits will cease when contributions are exhausted. The level of retirement annuity may rise or fall based on investment performance. The State ORP and the South Carolina Deferred Compensation Program's 401(k) and 457 plans are defined contribution plans.

Direct Rollover The taxable portion of a retirement plan distribution (refund) may be eligible for a tax-deferred rollover to an IRA, a 401(k) plan, a 401(a) plan, a 403(b) plan, or a 457 plan. Check with the receiving plan administrator to determine if it will allow such a rollover. Surviving spouses have the same rollover choices as members. Members or alternate QDRO payees may elect to roll over all or any part of the taxable portion of the member's contributions plus interest. The payment received from the Retirement Systems is classified as a Qualified Total Distribution under Internal Revenue Code Section 401(a) and will be reported to the IRS on Form 1099-R.

Disability Determination Provider This provider evaluates the Retirement Systems' disability claims and submits a recommendation to the Retirement Systems' Medical Board. Inquiries should be directed to the Retirement Systems' Customer Services Department.

Disability Retirement A retirement annuity under a defined benefit plan for active contributing members of the Retirement Systems who become disabled and whose disability is likely to be permanent. A member must apply while in service with a covered employer and must be approved for disability retirement benefits by the Retirement Systems.

Earnable Compensation A rate of compensation purely for working one's full normal time, not amounts paid on a cash basis. When compensation includes maintenance, fees, and other things of value, the State Budget and Control Board shall establish the monetary value of such compensation.

Earned Service Paid employment as an active employee during which regular contributions are paid to the Retirement Systems. Members enrolled after December 31, 2000, must have five years of earned service to be eligible to receive a service retirement annuity or a disability retirement annuity, to qualify a survivor for a monthly annuity after an in-service death, or to receive a supplemental minimum benefit under SCRS.

FICA Federal Insurance Contributions Act (Social Security and/or Medicare).

Lump-Sum Distribution A onetime, total distribution of a member's contributions and interest from a qualified plan. Refund payments are considered lump-sum distributions.

Member A member is an employee of a public or governmental entity who participates jointly with his employer in one of the S.C. Retirement Systems' plans by contributing a set percentage of his or her wages towards the member's pension plan. Because of these retirement contributions, the member earns service credit that may entitle him or her to a defined benefit retirement annuity (if eligible). Contributing members also may purchase service credit towards retirement. If retirement eligibility is not met, a member may withdraw his or her member's contributions and interest (canceling all service credit) from the pension plan upon termination of employment.

Members may be active, as above, or inactive. An inactive member is no longer employed by a public or governmental entity that participates in one of the Retirement Systems' plans and does not contribute a set percentage of his wages into a pension plan. An inactive member may not purchase service credit or apply for disability retirement; however, an inactive member who has not withdrawn his contributions and interest from the pension plan may apply for a deferred annuity (if eligible) upon reaching retirement eligibility.

Non-Member A non-member is an employee of a public or governmental entity that participates in one of the South Carolina Retirement Systems' plans, but either elects not to or is not required to contribute a set percentage of his or her wages into a pension plan. A non-member does not earn service credit and is not entitled to a defined benefit retirement annuity unless he is already receiving an annuity due to past participation.

Option A One of the three payment plans available to retiring members.

Option B One of the three payment plans available to retiring members.

Option C One of the three payment plans available to retiring members.

Payment Plan A method of payment through which a member receives his retirement annuity and, depending on the plan chosen, may provide a survivor benefit to his designated beneficiary. The member selects a payment plan at retirement. SCRS and PORS retiring members may choose payment plans Options A, B, or C.

Pension Plan A defined benefit retirement annuity plan under one of the following: the South Carolina Retirement System; the Police Officers Retirement System; the General Assembly Retirement System; or the Judges and Solicitors' Retirement System.

Police Officers Retirement System (PORS) The name of the retirement system covering police officers, firefighters, peace officers, probate judges, and magistrates.

Pre-tax Any type of contribution or compensation deducted from gross pay before earnings are taxed. Commonly referred to as deferred.

Qualified Domestic Relations Order (QDRO) A court order that recognizes or creates a spouse's or a former spouse's right to a portion of a member's retirement annuity. Commonly referred to as QDRO. This individual cannot receive his or her share of the member's retirement annuity until the member retires, withdraws the contributions, or dies. A divorce decree that assigns this portion to an ex-spouse is not necessarily a valid QDRO. Direct payment by the Retirement Systems is not possible unless the court enters an order that the Retirement Systems determines is acceptable under its guidelines pursuant to S.C. Code Ann. 9-18-10 (supp. 2000).

Qualified Plan The South Carolina Retirement Systems' retirement plans are qualified plans under section 401(a) of the Internal Revenue Code. The term also refers to other retirement plans that are qualified by the IRS.

Refund A lump-sum distribution of employee contributions and interest, which cancels all service credit and benefit rights. A refund is payable to a member after a minimum 90-day separation from service or to a beneficiary upon a member's death.

Retirement Annuity A monthly annuity payable to a member or his designated beneficiary.

Retirement Systems This is the informal name used by the South Carolina Retirement Systems.

Rollover A tax-deferred transfer of funds from one qualified retirement plan to another (see Direct Rollover).

Service Credit A member's earned retirement beneficiaries. service, prior service, and/or purchased service.

Single-Sum Distribution Non-periodic distribution from a qualified retirement plan received before an annuity start date. TERI payouts are considered single-sum distributions.

South Carolina Retirement System (SCRS) This is the name of the retirement system covering state employees, public school employees, public higher education personnel, and employees of other political subdivisions.

South Carolina Retirement Systems This is the name commonly used to refer to the five retirement systems administered by the Retirement Division of the South Carolina Budget and Control Board.

State Optional Retirement Program A defined contribution retirement plan offered as an alternative to SCRS. The State Optional Retirement Program (State ORP) is available to all state, public school, and higher education employees hired after June 30, 2003. This includes all permanent full-time employees, temporary and part-time employees and political appointees.

Tax-Deferred Any type of contribution, compensation, or investment that is not taxed until the member receives the funds according to the program's guidelines.

Teacher and Employee Retention Incentive (TERI) Program (SCRS Only) Active SCRS members eligible for service retirement may participate in the TERI program, which allows an SCRS member to retire and begin accumulating his or her retirement annuity on a deferred basis without terminating employment. SCRS members must file a retirement application to elect TERI participation, select a payment plan, and designate

Workers' Compensation A program through which an employee may receive compensation in the event of an accidental, employment-related injury. An active member may continue contributions during the period in which he or she is receiving Workers' Compensation. An active member may also establish service credit for a leave-of-absence period during which the member is receiving Workers' Compensation benefits. The cost is based on contributions plus interest using the member's earnable compensation at the time of the injury. Employers should encourage members who are applying for disability retirement to do so as soon as possible and before being terminated from payroll.

Index

Symbols

401(k) 5, 38
457 5, 38

A

About the Manual 1
Accidental Death program 15
Accidental Death Program 16, 20, 21, 27, 28, 29, 34, 67, 68, 69, 70
Active Member Group Life Insurance 67, 70
Active Membership Group Life Insurance 68
Adjustments to Magnetic Reports (Form 1223) 26
Administrative Decisions 54
ADP Benefit 69
AFC 43, 44, 45, 47, 48, 49, 50, 51, 55, 59, 60
After Receipt of a Refund Request 66
A Member's Account 14
Annual Leave 46
Annuity 71
Appeals Procedures Outline 54
Application for Death Benefits 69
Application for Death Benefits (Form 4151) 70
Application for Disability Retirement Benefits 11
Application for Service Retirement Benefits 60
Average Final Compensation 71

B

Beneficiary 71
Beneficiary Designation (Form 1102) 14
Beneficiary Payee 71
Benefit Estimates Via EES 15

C

Certification of Final Retirement Deductions 45, 53, 69, 65
Certification of Last Day Paid 44, 50, 53
Certification of Nonexistent Trust (Form 4257) 13
Certification of Trust (Form 1113) 60
Change in Marital Status 61
Change of Information 12, 13, 14
Changes to a Retiree's Account 62
Changes to Electronic Reporting 26
Changing Beneficiaries and Options After Retirement 60
Charter School Employment 27
Claims Procedure Act 71
Class I 47
Class II 47
COLA 61
Comptroller General Withholding Deduction Form 40
Contact Information 2
Contingent Beneficiary 13, 71
Convert Class I to Class II (PORS) 37

Correlated Systems 61, 71
Cost-of-living Adjustment 71

D

Death Claims Payout Election (Form 4255) 70
Deferred Annuity 71
Defined Benefit Plan 72
Defined Contribution Plan 72
Direct Deposit 4
Directions from Downtown Columbia 11
Directions from the Interstate 50
Direct Rollover 72
Disability Determination Provider 72
Disability Retiree 50
Disability Retirement 50, 72

E

Earnable Compensation 72
Earned Service 34, 72
Educational Service 35
EES 15
EESER 22
Elected Officials/Appointed Board Members 32
Election of Non-Membership (Form 1104) 6
Electronic Reporting 33
Eligibility Criteria 39
Employee Insurance Program 61
Employees not eligible for coverage 11
Employer Code 16
Employer's Description of Disability Applicant's Job 52, 53
Employer's Disability Employment Status Report 40
Employers Not on the Comptroller General's Payroll 40
Enrollment Guidelines and Information 46

F

FICA 72

G

GARS 4, 5, 7, 46, 60
General Assembly Retirement System (GARS) 4
Glossary 71
Group Life Insurance 14
Group Life Insurance Beneficiary 5

H

How to Apply for a Refund of Contributions 65
How to Apply for Disability Retirement 51
How to Apply for Service Retirement 44
How to Find Us 4
How to Obtain a Cost for Purchasing Service 38
How to Participate in the Installment Service Purchase Program 40
How to Purchase Service 38

I

If a Member's Application Is Denied 53
Inactive Employer Accounts 22
In-Service Death 67
Installment Service Purchase Program 39, 64
Interest Earned on a Member's Account 14
Interest Rate 39
Investing for Your Retirement 1

J

JSRS 4, 5, 7
Judges and Solicitors Retirement System (JSRS) 4

L

Late Notice Letters 26
Leave of Absence 36
Location Address 2
Lump-Sum Distribution 72
Lump-Sum Payments for Unused Sick Leave 19

M

Mailing Address 2
Member Contributions 51
Member's Disability Report 52
Member Service Payment Invoice 5
Membership Eligibility 27
Military Leave of Absence 35
Military Service 41
Minimum Service Requirement 43
Minimum Service Retirement Annuity (SCRS Only) 70
Monthly Annuity 22
Monthly Deposit 20
Multiple Accounts 43

N

New Employee Who Is Already a Member 11, 13, 14
New hire declines membership 11
New hire eligible for PORS 11
New Hires 11, 12
New hire selects SCRS 11
New hire selectsState ORP 11
Non-Member 73
Non-Qualified Service 37
Notice of Withholding (Form 4251) 70

O

Obtaining an Account Balance Statement 14
Office Hours 3
Option A 42, 43, 42, 43, 47, 48, 49, 50, 51, 61, 73
Option B 42, 43, 48, 51, 61, 68, 73
Option B and Option C 61
Option C 42, 43, 48, 51, 61, 73
Other Compensation 19
Overtime and Compensatory Time 19

P

Payment Plan 73
Payment Plans at Retirement 42
Payment Schedule 70
Payments on an Installment Service Purchase 40
Payroll Withholding Authorization (Form 3216) 40
Pension Plan 73
Pension Withholding Certificate/Automatic Deposit Authorization 44
Plan Types 1
Police Officers Retirement System (PORS) 51, 73
PORS 44
PORS Application for Disability Retirement 49
PORS Application for Service Retirement Benefits 49
PORS Class I 1
PORS Class II 49
PORS Member Handbook 50
PORS Service Retirement Annuity Formula Example with Annual Leave 58
Post-Retirement Information 13
Pre-tax 73

Q

QDRO 64, 67
Qualified Domestic Relations Order (QDRO) 66
Qualified Plan 74
Quarterly Contribution Report Summary 21

R

Record Count 23
Refund 74
Refund Check Schedule 66
Refund Request 65
Refund Request after a Disability Retirement Denial 66
Rejection Form (Form 1202) 15
Reporting Procedures 39
Request for Service Purchase Cost 40
Required Documents for a Name Change 60
Retired Member Change of Beneficiary Form 61
Retiree Group Health and Dental Insurance 60
Retirement Annuity 74
Retirement Checks 6
Retirement Plan Enrollment (Form 1100) 4
Retirement Systems 59, 74
Returning to Covered Employment 2
Rollover 74

S

Salary or Wages 18
SC Department of Revenue 62
School Bus Driver 6
SCRS 1, 4, 5, 7, 8, 12, 14, 15, 16, 18, 28, 21, 26, 35, 11, 35, 36, 11, 36, 35, 7, 19, 20, 7, 6, 26, 21, 26, 7, 26, 28, 26, 13, 26, 30, 26, 34, 26, 34, 26, 36, 26, 34, 20, 34, 35, 36, 37, 41, 42, 41, 42, 41, 42, 43, 44, 45, 46, 45, 46, 47, 50, 51, 54, 59, 60, 61, 63, 64, 67, 68, 67, 68
SCRS Application for Disability Retirement 51
SCRS Application for Service Retirement Benefits 44

SCRS Class I 55
SCRS Early Retirement 42
SCRS Member Handbook 1
SCRS Normal Retirement 42
SCRS Retirement Annuity Formula Age Reduction 48
SCRS Retirement Annuity Formula Example with Annual Leave 48
SCRS Retirement Annuity Formula Example without Annual Leave 48
SCRS Retirement Annuity Formula Reduction Example 48
SCRS Retirement Annuity Formula Service Reduction 49
SCRS Service Retirement Annuity Formula 47
Select Your Retirement Plan 1
Service and Disability Filing Requirements 53
Service Credit 30, 34, 74
Service Retiree 59
Service Retirement 44
Service Retirement Effective Date 44
Service Retirement Eligibility 41
Sick Leave 47
Single-Sum Distribution 74
South Carolina Deferred Compensation Program 5
South Carolina Retirement Systems 4, 74
South Carolina Retirement Systems Claims Procedure 53
South Carolina Retirement System (SCRS) 74
Special Monthly Contributor (SCRS Only) 36
Special Payments 19
Standard Retirement Quarterly Report 21
State Optional Retirement Program (State ORP) 4
State ORP Active Group Life Beneficiary Designation 14
State ORP Service 37
State ORP Termination Notice 63
Supplemental Contribution Report 29
Supplemental Service Report 27
Supply Request Form 2
Survivor Annuity Eligibility Requirements 68

T

Taxation of Monthly Benefits 62
Tax-Deferred 74
Taxes on a Refund of Contributions 64
Teacher and Employee Retention Incentive (TERI) Program 74
Telephone and Fax Numbers 2
Termination Packet 63
Total Deferred 23
Transfer from SCRS (PORS Only) 1

U

Uniformed Services Employment and Reemployment Rights Act 27, 36
Unused Annual Leave 18
Unused General Leave 18
Unused Leave at Retirement 46

W

Web Site Address 2
What to Do When an Active Member Dies In Service 69
When the Installment Purchase Nears Maturity 41
Workers' Compensation 27, 36, 75

EXHIBIT E

(Employer Update, July 2009)

SOUTH CAROLINA RETIREMENT SYSTEMS

July 2009 Volume 1, Issue 1

- New Contribution Reporting Methods Using EES
- Obtaining Access to EES
- FY 2010 Employer Contribution Rates
- Prepare for July 2010 PORS Employer Contribution Rate Increase
- Using EES to Key Retiree Return to Work Dates
- FY 2010 State ORP Contribution Rates
- FY 2010 Employee Contribution Rates
- Service Credit Earnings Threshold to Increase October 1, 2009

>> Miss something? View our previous issues by clicking here.

New Contribution Reporting Methods Using EES

The Retirement Systems' Electronic Employer Services (EES) website (www.retirement.sc.gov/ees) gives employers a secure

method of doing business with the Retirement Systems. We are continually updating and improving functionality. Be sure to watch the website for new features. Access to EES is required for each employer as deposit forms and quarterly detail reports must be submitted utilizing this secure website.

Deposit Forms for Fiscal Year 2009-2010

Deposit forms are now available on EES. The green envelopes that you will use to return your printed PDF deposit forms and remittances were enclosed with the paper copy of this update mailed to employers in July 2009. Each month and at quarter end, employers will complete bar coded deposit forms via EES using the "Employer Reporting" link. Employers click on the "Deposit Form" button for the appropriate month, enter salary and contribution amounts, and the calculations are performed by the program.

Employers create and print the deposit form in PDF format and send the form inwith the monthly or quarterly remittance. The PDF print versions of the forms are bar coded with your employer code and other remittance information. In an attempt to avoid errors and assist in the posting of your deposits, we ask that you please submit the correct form for the designated month. Mail your forms to our office using the enclosed envelopes. Call our Cash Receipts area at 803-737-6904 if you would rather send your deposits electronically via our automated deposit program.

Financial Identity Fraud and Identity Theft Protection Act Was Effective July 1, 2009

To comply with the Financial Identity Fraud and Identity Theft Protection Act and to further protect the privacy of our members, the Retirement Systems has created an option for employers to upload their quarterly data. All employers who normally mail their quarterly detail reports on diskette, CD, or other electronic media are required to upload their reports on the EES website. The process is simple and secure. An instructional video is available on the EES website. If you do not already have access to EES, complete a series of three EES access forms available on our website. Employers with a small number of employees may continue to utilize the EES-Employer Reporting (EES-ER) system for reporting their quarterly detail. Contact your Employer Reporting representative to find out if this is an option for your organization.

Report Error Corrections

Employers can view error transactions on the EES website by clicking on "Employer Transaction Error List." Details of each transaction can be determined by clicking on the "Trans Code" on the left side of the screen. The "Help" screen provides an explanation of each error description. By reviewing errors, employers will know the types of action required to clear the record for successful posting.

Retiree Return to Work Dates

Employers may now enter Retiree return to work dates using the "Employed Retirees – Return to Work Date Entry" link. Return to work dates can be keyed in lieu of submitting a *Notification of Employed Retiree* (Form 1114). The only exceptions are if the person is a disability retiree (the system will let you know when you attempt to key a date for a disability retiree) or if the name entered does not match a retiree's name on our file.

In these two situations, Form 1114 must be completed and sent to the Retirement Systems. An instructional video is available on our EES website.

Furlough Uploads

The General Appropriations Act of 2009-2010 authorized school district, higher education, and state agencies to nstitute a furlough program. State agencies and their departments are responsible for payments of benefits that require employer and employee contributions if coverage would otherwise be interrupted. Employers are not required to submit employee or employer contributions on retirees (or Teacher and Employee Retention Incentive program participants) participating in a furlough. Employers may now upload their furlough supplements using the "Upload Furlough Supplement Data" link on EES. The data can be in Excel or text format. Detailed instructions regarding format requirements and an instructional video are available on our website.

Return to Top Menu.

Obtaining Access to EES

Employers should keep employee access up to date – when an employee terminates, notify the Retirement Systems so access can be terminated. If an employee needs access to EES as a part of his job function, he should complete Form 6505 to get a user identification (USERID) and a personal identification number (PIN). Any employers who do not have access to EES should complete thefollowing EES access forms available on our website and return them to the Retirement Systems. A USERID and a PIN will be mailed under separate cover.

Form 6503 – Someone who has the authority to sign contracts should complete this document.

Form 6504 – The person who signs the Form 6503 also signs this form appointing a designated person to act as the "Authorizing Contact" in the EES system. This person will be responsible for granting access to the EES system to other employees. This should be someone who knows when employees terminate, retire, change jobs, etc.

Form 6505 – This form should be completed by the "Authorizing Contact" and the designated person who will be using the EES system. A USERID and a PIN will be sent to this individual so he can log into the secure website.

Employer Contribution Rates for Fiscal Year 2010

Beginning July 1, 2009, the employer contribution base rate for the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS) will remain as follows:

SCRS	9.24%
PORS	10.65%
State ORP	4.24%

**State Optional Retirement Program (State ORP)*
***Plus 5 percent to the member's State ORP account*

Summary of Fiscal Year 2010 Employer Contribution Rates

Type of Employer	Employer Retirement Contribution	Insurance Surcharge	Employer Rate Plus Surcharge	Group Life Contribution	Accidental Death
SCRS	9.24%	3.50%	12.74%	0.15%	N/A
PORS Cl. II	10.65%	3.50%	14.15%	0.20%	0.20%
State ORP	4.24%	3.50%	7.74%	0.15%	N/A
SCRS	9.24%	N/A	9.24%	0.15%	N/A
PORS Cl. I	7.80%	N/A	7.80%	0.20%	0.20%
PORS Cl. II	10.65%	N/A	10.65%	0.20%	0.20%
SCRS	9.24%	3.50%	12.74%	0.15%	N/A
PORS Cl. II	10.65%	3.50%	14.15%	0.20%	0.20%

Return to Top Menu.

PORS Rate Increase

The PORS rate will increase by 0.48 percent July 1, 2010. The new rate is applicable to all PORS wages paid July 1, 2010, and after. This rate increase is a result of Act 311, passed in 2008 by the South Carolina General Assembly, which provided for a guaranteed cost-of-living adjustment for PORS retirees. The rate increase was slated to begin July 1, 2009, but a proviso passed by the General Assembly in May 2009 delayed the increase until July 1, 2010.

Insurance Surcharge

To help fund the cost of providing health and dental insurance to retirees covered by the state health and dental plans, the state Appropriations Bill requires the Retirement Systems to collect and forward to the SC Budget and Control Board's Employee Insurance Program a surcharge on a monthly basis. The insurance surcharge for fiscal year 2009-2010 remains at 3.5 percent. See the chart above which summarizes the fiscal year 2010 contribution rates.

Return to Top Menu.

Use EES to Key Retiree Return to Work Dates

Employers must notify the Retirement Systems when a retired member is hired. Employers may now enter the date a retiree returned to work on the EES website. A *Notification of Employed Retiree* (Form 1114) must be completed for disability retirees who return to work. The Retirement Systems will not post quarterly contributions to retired member accounts without a return to work date. Please note the following procedural issues:

For individuals who have recently ended the Teacher and Employee Retention Incentive (TERI) program and returned to work, their return to work date should be after the TERI end date.

The Retirement Systems has return to work dates on file for some retirees; however, there may be gaps in retiree postings. This means there are quarters in which no wages were reported after the return to work date on file. Employers should check payroll records for these quarters and if the employee was paid during the missing quarter, send supplements to fill in the gaps. Otherwise, provide the retiree's revised return to work date.

For disability retirees, Form 1114 is available on our website at www.retirement.sc.gov/forms.

Return to Top Menu.

State Optional Retirement Program (Applicable to State

Agencies, Higher Education Institutions, and School Districts)

Newly hired employees of eligible employers (state agencies, school districts, and higher education institutions) may elect to participate in the State ORP. Employers are required to include detailed wage information for State ORP participants on their quarterly reports. The employer contribution rate for State ORP is 9.24 percent; however, the employer submits only 4.24 percent to the Retirement Systems. The employer remits the remaining 5 percent to the State ORP vendor chosen by the participant to be allocated to the participant's account.

Employers are required to pay the insurance surcharge of 3.5 percent for State ORP participants. Also, State ORP participants are covered under the group life insurance program; therefore, the associated SCRS group life contribution of 0.15 percent must be remitted to the Retirement Systems as part of the employer contribution. Chart A shows the contribution amounts due to the State ORP account and to the Retirement Systems for members of State ORP.

A.

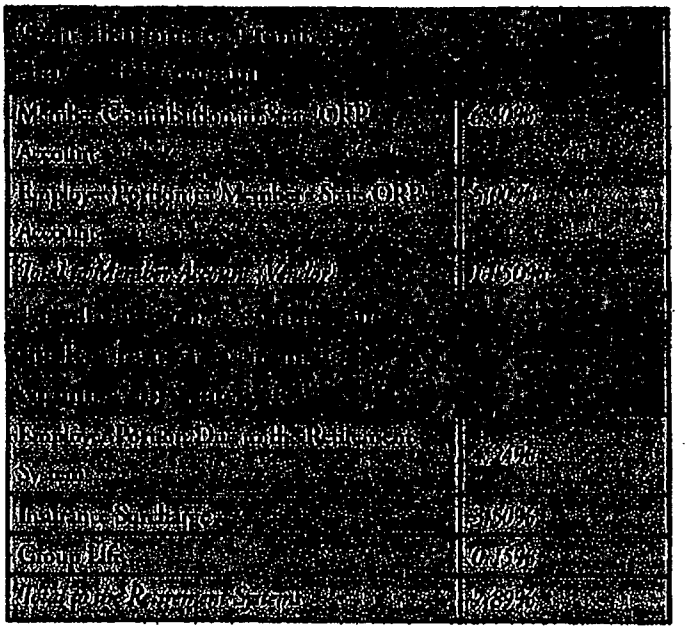
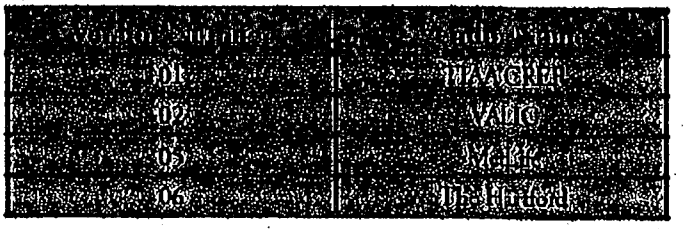


Chart B shows the State ORP vendors that provide services and investment options to State ORP participants. The corresponding vendor number should be included in position 105-106 on each detail record of the quarterly report.

B.



Return to Top Menu.

Employee Contribution Rates

SCRS, PORS Class II, and State ORP employee contributions are 6.50 percent of compensation. Employee contributions apply to active employees, SCRS and PORS working retirees, and TERI participants who began their TERI participation on or after July 1, 2005. See below for a summary of employee contribution rates:

System	Employee Contribution Rate
SCRS & State ORP	6.50% of compensation
PORS Class I	$21 per month
PORS Class II	6.50% of compensation

Employer and Employee Contributions on Retiree Wages

Employer contributions are due on all working retirees and TERI participants. Contributions are required whether the retired member is considered a full-time, part-time, temporary, or permanent employee. Employer contributions include all contributions normally paid on behalf of active members including retirement, retiree health insurance surcharge, group life, and PORS accidental death contributions.

In addition to employer contributions, employee contributions are required for wages earned by working retired SCRS and PORS members employed by an employer covered by the Retirement Systems, including members who began participating in the TERI program on or after July 1, 2005. Working retired members must pay employee contributions

based on the rate that any other active employee in the position would otherwise contribute to the system, provided the retired member is receiving retirement benefits from that system. As an employer, you may determine the system from which a member is retired by inquiring through EES (www.retirement.sc.gov/ees).

Employees with a TERI start date prior to July 1, 2005, should not make employee contributions as long as they are working as a TERI retiree. If the TERI participant ends his TERI participation and returns to covered employment as a working retiree, employee contributions must be remitted.

Employers failing to properly report contributions on working retired members will be subject to interest assessments and other statutorily prescribed penalties. In addition, any employer failing to properly report members' earnings and the corresponding contributions may have the amount deducted from any funds payableto the employer by the state.

Return to Top Menu.

Interest Assessments

The Due Date Calendar mailed to covered employers in July 2009 contains due dates for retirement contributions during fiscal year 2009-2010. Interest penalties will be assessed on all deposits received by the Retirement Systems after the due date.

Service Credit Earnings Threshold

The Retirement Systems indexes the required monetary earnings for service credit according to increases in the minimum wage. As a result, effective October 1, 2009, the monetary earnings threshold for a full month of service credit will increase from $524 per month to $580 per month. All other service credit earnings rules remain the same.

Reporting Contract Length

Contract length is one of the variables used by the Retirement Systems to calculate service credit. Most employees work 12 months out of the year and are paid 12 months out of the year. They should be reported on the quarterly report with a contract length of 12. The SC Code of Laws Section 9-1-840 provides that the service rendered for the regular school year in any district should be equivalent to one year of service credit. This also applies to employees in academic positions at institutions of higher education. There are a very few exceptions to the service credit threshold rule. Elected or appointed officials, volunteer firefighters and bar examiners who are paid a salary, not a per diem, should be credited with full service for each month served. Employers should refer to the Covered Employer Procedures Manual to determine the contract length that should be used on quarterly reports for these employees.

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR

ENTITLEMENTS AND DOES NOT CREATE A CONTRACT BETWEEN THE MEMBER AND THE SOUTH CAROLINA RETIREMENT SYSTEMS. THE SOUTH CAROLINA RETIREMENT SYSTEMS RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT.

If you have any questions or need additional information, please contact Customer Services at **803-737-6800**, toll free at **800-868-9002 (within SC only)**, or at www.retirement.sc.gov.

Return to Top Menu.

EXHIBIT F

(October 23, 2009 Correspondence from SCRS)

Mark Sanford, Chairman
Governor

Converse A. Chellis, III, CPA
State Treasurer

Richard Eckstrom, CPA
Comptroller General

State Budget and Control Board
South Carolina Retirement Systems

Peggy G. Boykin, CPA
Director

Retiring South Carolina's Public Workforce For Life

Hugh K. Leatherman, Sr.
Chairman,
Senate Finance Committee

Daniel T. Cooper
Chairman,
Ways and Means Committee

Frank W. Fusco
Executive Director

October 23, 2009

Ms. Gail M. Hutto
[redacted]

Re: SSN [redacted]

Dear Ms. Hutto:

The following information is provided in response to your recent correspondence.

You retired from the South Carolina Retirement System (SCRS) effective July 1, 2002 and are no longer considered an active participant. Subsequent to your retirement, you returned to work for a covered employer. As a working retiree, you earn wages from employment and also receive your monthly retirement benefit. During retirement, you may continue to receive your annuity benefit and have no limit on the amount of wages you may earn from employment.

As a working retiree, you are however, required to pay to the system the same employee contribution as if you were an active contributing member, if employed by an employer participating in the system. Although you do not accrue additional service credit in the system and are not entitled to a recalculation of benefits, the contributions help to fund the system, in particular securing any future cost of living adjustments.

I hope the explanation provided will help you to better understand issues related to your retirement benefits. If you have additional questions or need further assistance, please contact Customer Service at (803) 737-6800 or 1-800-868-9002 (in-state only).

Sincerely,

Kelli Gowder

Kelli Gowder
Manager, Benefits Payments Department

Location Address:
202 Arbor Lake Drive

(800) 868-9002 (in SC only)
(803) 737-6800

Mailing Address:
Post Office Box 11960
Columbia, South Carolina 29211-1960

RICHARD A. HARPOOTLIAN, P.A.
Hand Delivered 1:43 pm
Received on 4/23/15

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE [X] COURT OF COMMON PLEAS [ ] FAMILY COURT
Gail M. Hutto, et al., [ ] Plaintiffs, vs. The South Carolina Retirement System, et al., [X] Defendants, Check box above indicating submitting party	)	Civil Action No. 2015-CP-40-1728 **MOTION AND ORDER INFORMATION FORM AND COVER SHEET**

name, SC Bar no. and address of plaintiff's attorney	name, SC Bar no. and address of defendant's attorney
Richard A. Harpootlian, Esquire Christopher P. Kenney, Esquire Richard A. Harpootlian, P.A. Post Office Box 1090 Columbia, SC 29202 Phone: 803-252-4848 Email: raharpootlian.com; cpk@harpootlian.com James M. Griffin, Esquire Margaret N. Fox, Esquire Lewis, Babcock & Griffin, LLP P.O. Box 11208 Columbia, SC 29211 Phone: 803-771-8000 Email: jmg@lbglegal.com; mnf@lbglegal.com	Robert E. Stepp (SC Bar No.: 5335) Tina M. Cundari (SC Bar No.: 71951) Sowell Gray Stepp & Laffitte, LLC Post Office Box 11449 Columbia, SC 29211 Phone: 803-929-1400, Email: rstepp@sowellgray.com; tcundari@sowellgray.com

2015 APR 23 AM 9:18
JEANNETTE W. McBRIDE
C.C.P. & G.S.
RICHLAND COUNTY FILED

[X] **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
[ ] **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
[ ] **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss
Estimated Time Needed: 30 minutes Court Reporter Needed: YES [X] NO [ ]

SECTION II: Motion Type

[ ] Written motion attached
[ ] Form Motion:
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for [ ] Plaintiff [ ] Defendant — Date Submitted

SECTION III: Motion Fee

[X] PAID – AMOUNT: $25.00

(check reason)
[ ] **EXEMPT:** [ ] Rule to Show Cause in Child or Spousal Support
[ ] Domestic Abuse or Abuse and Neglect
[ ] Indigent Status [ ] State Agency v. Indigent Party
[ ] Sexually Violent Predator Act [ ] Post Conviction Relief
[ ] Motion for Stay in Bankruptcy
[ ] Motion for Publication [ ] Motion for Execution (Rule 69, SCRCP)
[ ] Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
[ ] Other:

JUDGE'S SECTION [ ] Motion Fee to be paid upon filing of the attached order. [ ] Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

DATE FILED

Collected by: _____
(print name)

[ ] MOTION FEE COLLECTED: _____
[ ] CONTESTED – AMOUNT DUE: _____

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated,	)	Civil Action No. 2015-CP-40-1728
Plaintiffs,	)	**MOTION TO DISMISS**
v.	)	
South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority,	)	
Defendants.	)	

RICHLAND COUNTY
FILED
2015 APR 23 AM 9:18
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

Defendants move to dismiss the complaint with prejudice pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The grounds for this motion are as follows:

1. The complaint should be dismissed because Plaintiffs do not have a legitimate property interest in the funds they seek to recover and therefore cannot state a claim for relief under the takings clause of the United States Constitution. *See Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 721 S.E.2d 423 (2012) (requiring parties that allege a violation of the takings clause to show they have a legitimate property interest rooted in state law). The South Carolina Supreme Court has already determined that Plaintiffs and others similarly situated do not have a constitutionally protected property interest in the funds in question and that the laws being challenged are valid and enforceable in every respect. *See Ahrens v. State*,

392 S.C. 340, 709 S.E.2d 54 (2011) (affirming the grant of summary judgment on the constitutional grounds).

2. The complaint should be dismissed under the doctrines of res judicata and collateral estoppel because this is the very same case that has been litigated in the state courts of South Carolina since 2005 and ultimately decided by the South Carolina Supreme Court in 2011 in the case of *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). *See Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (outlining the elements of res judicata); *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (S.C. 1986) (setting forth the doctrine of collateral estoppel). Additionally, this case is barred by the doctrine of res judicata because this is the same case regarding the same subject matter as the case filed in federal court, and the issue regarding the constitutionality of the statutes was raised in the former suit.

3. The complaint should be dismissed because the claims are barred by the statute of limitations or the doctrine of laches. The claims relate to a law that was passed in 2005. A lawsuit filed in 2015 is late. *See* S.C. Code Ann. § 15-3-530(4) (2005) (providing that "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property" must be brought within three years of the alleged taking); *Robinson v. Estate of Harris*, 388 S.C. 645, 698 S.E.2d 229 (2010) (defining laches as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done").

4. The complaint should be dismissed because Plaintiffs have failed to exhaust their remedies under the South Carolina Retirement Claims Procedures Act, which provides the exclusive remedy for claims between retirees and the retirement system. S.C. Code Ann. § 9-21-

30 (Supp. 2014) (providing that "[a] claim presenting a dispute or controversy arising pursuant to or by virtue of [Title 9 of the South Carolina Code] *must* be resolved in accordance with the procedures and provisions provided in [Chapter 21]") (emphasis added). *Cf. Evans v. State*, 344 S.C. 60, 67, 543 S.E.2d 547, 551 (2001) (holding that state retirees were required to pursue administrative procedures before bringing their constitutional claims to circuit court).

This motion is based upon the pleadings, documents of record, and the law of this State. This motion is also based upon a memorandum of law and supporting materials to be filed prior to a hearing.

SOWELL GRAY STEPP & LAFFITTE, LLC

By: _____

Robert E. Stepp (SC Bar No.: 5335)
Tina M. Cundari (SC Bar No.: 71951)
1310 Gadsden Street
Columbia, South Carolina 29201
(803) 929-1400
rstepp@sowellgray.com
tcundari@sowellgray.com

Attorneys for Defendants

Columbia, South Carolina
April 23, 2015

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority, certify that I have served all counsel in this action with a copy of the document specified below by hand delivery of the same, to the following addresses:

Document: Motion to Dismiss

Counsel Served: Richard A. Harpootlian, Esquire
Christopher P. Kenney, Esquire
Richard A. Harpootlian, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
Post Office Box 1090
Columbia, South Carolina 29202

James M. Griffin, Esquire
Margaret N. Fox, Esquire
Lewis Babcock & Griffin, LLP
1513 Hampton Street
Columbia, South Carolina 29201
Post Office Box 11208
Columbia, South Carolina 29211

Counsel for Plaintiffs

RICHLAND COUNTY
FILED
2015 APR 23 AM 9:18
JEANNETTE W. McBRIDE
C.C.P. & G.S.

Valerie N. Hampton

Columbia, South Carolina
April 23, 2015

SOWELL SG GRAY

TINA M. CUNDARI
Direct Dial 803 231.7834
Direct Fax 803 231.7863
Email tcundari@sowellgray.com

September 22, 2015

RICHARD A. HARPOOTLIAN, P.A.
Hand Delivered 3:44 pm
Received on 9/22/15

BY HAND DELIVERY
The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, SC 29201

RE: Gail M. Hutto et al. v. The South Carolina Retirement System et al.
Civil Action No.: 2015-CP-40-1728
SGS&L File No.: 5832/1504

Dear Ms. McBride:

Enclosed for filing are the original and one copy of Defendants' Memorandum in Support of Motion to Dismiss in the above-referenced matter. Please file the original and return the filed-stamped copy to our office via our courier.

A copy is being delivered to The Honorable Tanya Gee in anticipation of the hearing scheduled for Monday, September 28, at 2:00 p.m.

Thank you for your assistance.

Sincerely,

Tina Cundari

Enclosures

cc: By Hand Delivery
The Honorable Tanya A. Gee
Richard A. Harpootlian, Esq. (also by email)
Christopher P. Kenney, Esq. (also by email)
James M. Griffin, Esq. (also by email)
Margaret N. Fox, Esq. (also by email)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated,	)	Civil Action No. 2015-CP-40-1728
Plaintiffs,	)	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**
v.	)	
South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority,	)	
Defendants.	)	

RICHLAND COUNTY FILED
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The complaint should be dismissed for three reasons. First, this case is barred by the doctrines of res judicata and collateral estoppel. This is the fourth time that Plaintiffs or their privies have filed a lawsuit against Defendants or their privies challenging the constitutionality of statutes requiring working retirees to contribute a portion of their salary to the retirement system. It is time for this repeat litigation to end, particularly given that the South Carolina Supreme Court and a South Carolina trial court have expressly determined that the statutes are constitutional. *See Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011) (affirming summary judgment in favor of the defendants on the constitutional grounds). (Ex. A.) Second, Plaintiffs do not have a property interest worthy of constitutional protection, and therefore cannot state a claim for relief. Third, the claims are barred by the statute of limitations and the doctrine of

laches. The statutes being challenged were enacted in 2005. A lawsuit filed ten years later is late. For these reasons, the motion to dismiss should be granted.

BACKGROUND

This case challenges the constitutionality of two state statutes, Sections 9-1-1790(C) and 9-11-90(4)(c), requiring retired members of the state retirement systems who are re-employed in a position covered by the retirement systems to make the same contributions to the systems that a non-retired employee occupying that position would make. Plaintiffs contend the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution because the statutes effect a taking of private property without giving Plaintiffs anything in return. (Compl. pp. 1-2.)

The statutes were enacted on July 1, 2005, as part of the State Retirement Systems Preservation and Investment Reform Act (Act 153). Shortly before the statutes went into effect, a group of plaintiffs represented by the same counsel as Plaintiffs in this case filed a class action alleging that Act 153 was unlawful in several respects, including that it violated the Takings Clause of the state and federal constitutions. *Layman v. State*, 368 S.C. 631, 635-36, 630 S.E.2d 265, 267 (2006). (Ex. B.) The plaintiffs in *Layman* were people who retired and returned to work before July 1, 2005, some of whom participated in the Teacher and Employee Retention Incentive (TERI) program. The case was decided in the original jurisdiction of the South Carolina Supreme Court.

The supreme court held that that Act 153 breached a contract between the State and the TERI participants who retired and returned to work before July 1, 2005, and ordered the State to return all contributions received from those plaintiffs. In doing so, however, the supreme court declared that "[t]he new TERI program as adopted by the legislature in Act 153 *continues to be*

valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants . . . ." *Id.* (emphasis added).

As to the remaining plaintiffs in *Layman*, the supreme court remanded the breach of contract claim only. *Id.* at 643, 630 S.E.2d at 271. The Court did so because the record contained evidence that some of the working retirees may have written contracts detailing the terms of their employment. *Id.* The Court did not remand the constitutional claims, however, nor did the Court grant the plaintiffs relief on any other ground. Accordingly, following *Layman*, the statutes remained in full force and effect, and the State was permitted to continue collecting contributions from working retirees.

Although the remand in *Layman* was for the breach of contract claims only, the plaintiffs filed amended complaints alleging multiple causes of action, including that the statutes violated the Takings Clause of the United States and South Carolina Constitutions. (Exs. C, D.) Following discovery, the parties filed cross-motions for summary judgment addressing all causes of action. After a hearing, the trial court granted relief to the working retirees on the ground of equitable estoppel. (Ex. E.) The defendants moved for reconsideration, arguing that the trial court erred in granting relief and failed to dispose of all the issues in the case, including the allegation that the statutes are unconstitutional. (Ex. F.) After a hearing, the trial court issued an order declining to alter or amend the judgment on the equitable estoppel ground, but amended the order to expressly deny relief on all other grounds. (Ex. G.) The working retirees moved for reconsideration (Ex. H), but the trial court denied the motion. (Ex. I.)

Both parties appealed the issues they lost to the South Carolina Supreme Court, and after briefing and oral argument, the supreme court reversed the trial court on the equitable estoppel

ground, and affirmed the granting of summary judgment on the constitutional and remaining grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). (Ex. A.) In reaching its decision, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 351. The supreme court further stated: "Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." *Id.* Accordingly, the supreme court found that the statutes were valid and enforceable in every respect, and the State was not required to return the contributions received from the working retirees. *Id.* at 357, 709 S.E.2d at 63.

In addition to finding that the working retirees did not have a contractual or equitable basis for relief, the supreme court affirmed the trial court's order granting summary judgment in favor of the defendants on the constitutional grounds. *Id.* at 357, 709 S.E.2d at 63. Two separate times in the opinion the supreme court stated that it affirmed the granting of summary judgment on the constitutional issues. The first time, the Court explained that the plaintiffs' claims of unconstitutional taking and violations of due process were "founded on the presumption that a contractual right has been unfairly taken away." *Id.* Accordingly, because the Court found that the plaintiffs "did not have a contractual right to the terms of their employment," it affirmed the circuit court's grant of summary judgment on those issues. *Id.* The Court stated: "We affirm the circuit court's grant of summary judgment in favor of the defendants on those issues." *Id.* The second time, the Court stated: "[W]e conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract." *Id.* at 358, 709 S.E.2d at 63.

The plaintiffs petitioned for rehearing, arguing that they had "vested rights or entitlements that are constitutionally protected against a taking." (Ex. J, pp. 4, 5.) The supreme court denied the petition. (Ex. K.)

On August 2, 2010, while the *Ahrens* case was pending on appeal, Plaintiffs filed a class action in federal district court alleging that the statutes requiring them to contribute to the retirement system violated the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Hutto v. S.C. Ret. Sys.*, Case No. 4:10-cv-02018-JMC (D.S.C.). (Ex. L.) The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014). (Ex. M.)

After losing the federal court case, Plaintiffs filed the present case. Plaintiffs once again allege that the statutes are unconstitutional, except this time Plaintiffs allege only that the statutes violate the Takings Clause of the Fifth Amendment. Plaintiffs have sued several of the same defendants as they did in the federal court case, but have dropped their claims against the individual defendants.[1] Plaintiffs seek the same relief in this case as they did the federal court case, which is the return of all contributions made to the retirement system since July 1, 2005.[2] (Compl. p. 15.)

[1] In the federal court case, Plaintiffs sued a number of individual defendants, including the governor, the state treasurer, the state comptroller general, the chair of the South Carolina Senate Finance Committee, the chair of the House Ways and Means Committee, and the executive director of the Budget & Control Board, all in their official capacities.

[2] Plaintiffs presumably do not seek contributions made before they retired.

STANDARD

A defendant may move to dismiss a complaint for "failure to state facts sufficient to constitute a cause of action." Rule 12(b)(6), SCRCP. "The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014).

"Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." *Baird v. Charleston Cnty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). Nonetheless, federal courts have held that when ruling on a motion to dismiss, a court may take judicial notice of matters of public record. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court can "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice"); *Sec'y of State for Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) ("In reviewing the dismissal of a complaint under Rule 12(b)(6), we may properly take judicial notice of matter of public record."). *See also State v. Little*, 227 S.C. 60, 69, 86 S.E.2d 875, 879 (1955) (noting that court may take judicial notice of public records).

Dismissal may be appropriate when a case presents only questions of law and there are no factual issues requiring further development. *See Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office*, 346 S.C. 158, 165, 551 S.E.2d 263, 267 (2001). *See also Madison v. Am. Home Prods. Corp.*, 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004) ("Where, however, the dispute is not as to the underlying facts but as to the interpretation of the

law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel issues on a motion to dismiss."); *Evans v. State*, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001) (same).

ARGUMENT

1. This case is barred by the doctrines of res judicata and collateral estoppel.

This case is barred by the doctrines of res judicata and collateral estoppel because this is the fourth time that Plaintiffs or their privies have sued these defendants or their privies over whether the statutes requiring working retirees to contribute to the retirement system are constitutional, and the South Carolina Supreme Court and a South Carolina trial court have expressly ruled that the statutes are constitutional.

Res Judicata

"Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies." *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (quoting J. Flanagan, *South Carolina Civil Procedure* p. 642 (1996)). "Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." *Id.*

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012) (internal quotation marks omitted). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues *which might have been raised in the former suit.*" *Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (emphasis added).

The following elements must be shown in order to establish res judicata: "(1) The parties must be the same or their privies; (2) the subject matter must be the same; (3) while generally the precise point must be ruled [upon], yet where the parties are the same or are in privity the judgment is an absolute bar not only of what was decided but *what might have been decided.*" *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (quoting *Bagwell v. Hinton*, 205 S.C. 377, 32 S.E.2d 147 (1944) (emphasis added)). "It is apodictic that the doctrine of res judicata has been elongated to include 'privies.'" *Pye v. Aycock*, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997). *See also First Nat. Bank v. U.S. Fid. & Guar. Co.*, 207 S.C. 15, 35 S.E.2d 47 (1945) (applying res judicata to the parties and their privies); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984) (same).

Further, "[a] dismissal 'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication." *Nunnery*, 289 S.C. at 209, 345 S.E.2d at 743. "Where an action has been so dismissed, the judgment operates, in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matters which might have been litigated therein." *Id.* (internal quotations omitted). "For a judgment to bar the maintenance of a subsequent action, there must be identity of the cause of action as well as identify of the subject matter." *Id.*

Collateral Estoppel

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821

(2014). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* "'While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue.'" *Id.*

Accordingly, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986).

"There is no bright line test which can be applied to determine whether one is in privity with another." *Id.* "The term 'privy', when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right." *Id.* "One in privity is one whose legal interests were litigated in the former proceeding." *Id.* "'Privity' as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship to the subject matter of the litigation." *Id.*

The policy reasons for collateral estoppel are similar to those of res judicata. "The public interest demands an end to the litigation of the same issue." *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 252, 481 S.E.2d 706, 708 (1997). "Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Id.*

a. This case is barred by the doctrine of res judicata.

This is the fourth time that Plaintiffs or their privies have sued Defendants or their privies over whether sections 9-1-1790(C) and 9-11-90(4)(c) are constitutional. The first time was in 2005 when a group of working retirees just like the plaintiffs in this case filed a class action against the South Carolina Retirement System, the South Carolina Police Officers Retirement System, and the State of South Carolina. *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). The only difference between the plaintiffs in *Layman* and the plaintiffs in this case is that the plaintiffs in *Layman* retired and returned to work before July 1, 2005, and some of them were enrolled in the TERI program. Nonetheless, the subject matter of *Layman* was identical to the subject matter in this case, and the law had the same effect on the plaintiffs in *Layman* as it did on the plaintiffs in this case.

Like the plaintiffs in this case, the plaintiffs in *Layman* sought an order declaring that the statutes were unconstitutional and violated the Takings Clause of the South Carolina and United States Constitutions. Indeed, as stated by the Supreme Court, one of the issues on appeal was whether "the enactment of Act 153 constitute[s] an unconstitutional taking under either the State or Federal Constitution." 368 S.C. at 637, 630 S.E.2d at 268. Although the supreme court did not directly address the constitutional questions presented, the Court *might have done so*, given that the issue was squarely before the Court.

The second time Plaintiffs or their privies sued Defendants or their privies over the constitutionality of the statutes was on remand in *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In that case, the working retirees filed amended complaints alleging numerous causes of action, including that the statutes violated the Takings Clause of the United States Constitution. (Exs. C, D.) After discovery and a hearing, the trial court granted relief to the plaintiffs on the

ground of equitable estoppel, but denied relief on all other grounds, including the constitutional ones. (Exs. E, G.) The plaintiffs filed a motion to reconsider, which the trial court denied. (Ex. H, I.) On appeal, the South Carolina Supreme Court reversed the granting of relief on the equitable estoppel ground and affirmed the granting of summary judgment in favor of the defendants on the constitutional grounds. *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). (Ex. A.) The plaintiffs petitioned for rehearing, and the supreme court denied the petition. (Exs. J, K.)

The third time Defendants or their privies were sued over the constitutionality of the statutes when Plaintiffs themselves filed a case in federal court in 2010, while the *Ahrens* case was pending on appeal. (Ex. L.) The district court dismissed the complaint on the ground of sovereign immunity, and the Fourth Circuit affirmed. (Ex. M.) In affirming the dismissal of the complaint, the Fourth Circuit determined that sovereign immunity is "akin to an affirmative defense, which the defendant bears the burden of demonstrating." *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014).

The present case represents the fourth time that Plaintiffs or their privies have asserted these same causes of action against these same defendants or their privies. This case represents what res judicata was designed to prevent – a defendant being sued multiple times for the same cause of action. Plaintiffs have had their day in court, both through the federal court case and through their privies in *Layman* and *Ahrens*. Plaintiffs are identically situated to the plaintiffs in *Layman* and *Ahrens* in relation to the statutes. The statutes make no distinction between people who retired and returned to work before July 1, 2005. The date someone retires and returns to work makes no difference for purposes of deciding whether the statutes are constitutional. Likewise, the defendants in this case are either the same as or in privity with the defendants in

the other cases. All defendants are required to follow the law as enacted by the General Assembly.

Further, the subject matter of this case is identical to the subject matter of the other cases. All four cases challenge the constitutionality of sections 9-1-1790(C) and 9-11-90(4)(c) and allege that the statutes violate the Takings Clause of the Fifth Amendment of the United States Constitution.

Finally, the issue raised in this case was either decided or might have been decided in the other three cases. In all three cases, the issue of whether the statutes were constitutional was squarely before the court, and each time the plaintiffs lost. In *Layman*, the supreme court granted relief to the TERI participants only, and remanded the working retirees' breach of contract claim only. In *Ahrens*, the trial court expressly granted summary judgment in favor of the defendants on the constitutional grounds, and denied the plaintiffs' motion to reconsider. (Exs. G, I.) On appeal, the supreme court affirmed the granting of summary judgment, and denied the petition for rehearing. (Exs. A, K.) In *Hutto*, the district court dismissed the complaint with prejudice and the Fourth Circuit affirmed. (Ex. M.)

It is time for this repeat litigation to end. Defendants should not have to continue defending the same statutes on the same grounds, particularly when the South Carolina Supreme Court and a South Carolina trial court have determined that the statutes are constitutional.

b. This case is barred by the doctrine of collateral estoppel.

Similarly, this case is barred by the doctrine of collateral estoppel. First, as explained above, the issue presented in this case has been actually litigated numerous times. It was litigated in the *Layman* case, the *Ahrens* case, and the federal counterpart of this case. At every

stage of the litigation, Plaintiffs or their privies argued that the statutes were unconstitutional, and at every stage of the litigation, their request for relief was denied.

Second, the issue was directly decided in *Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011). In *Ahrens*, the trial court granted summary judgment in favor of the defendants on the constitutional grounds and denied the plaintiffs' motion to reconsider. (Exs. G, I.) On appeal, the South Carolina Supreme Court affirmed the trial court's decision, and denied the plaintiffs' petition for rehearing. (Exs. A, K.)

Third, a ruling on the issue was necessary to support the judgment in *Ahrens*. The parties in *Ahrens* filed cross-motions for summary judgment addressing all causes of action in the complaint. In ruling on the motion, it was necessary for the trial court to address each cause of action so that no argument was left open on appeal. On appeal, it was necessary for the supreme court to address all rulings made by the trial court, again so that no issue would be left open for debate. Further, the supreme court would not have denied relief to the working retirees and at the same time left open the issue of whether the statutes were constitutional. By denying relief to the plaintiffs in *Ahrens*, the supreme court made it clear that the statutes were valid and enforceable in every respect, even as to working retirees who retired and returned to work before the statutes went into effect.

Because the issue presented in this case has been raised, litigated, and decided time and again, the case is barred by the doctrine of collateral estoppel.

2. Plaintiffs do not have a protected property interest.

Another reason to dismiss the complaint is that Plaintiffs do not have a protected property interest worthy of constitutional protection.

"The Takings Clause provides that private property shall not be taken for public use without just compensation." *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 283, 721 S.E.2d 423, 427 (2012). Parties claiming a violation of the Takings Clause must "first show they have a legitimate property interest." *Id.* at 283-84, 721 S.E.2d at 427. "Property interests 'are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims or entitlement to those benefits." *Id.* at 284, 721 S.E.2d at 427.

Here, Plaintiffs cannot point to any state law protecting them from having to make contributions to the retirement system as working retirees. To the contrary, in the *Ahrens* case, the supreme court found that the statutory scheme governing the employment of working retirees is "void of [an] express guarantee that retirement contributions would not be required." *Id.* at 352, 709 S.E.2d at 351. The supreme court further stated: "Because there is no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retirees statutes as providing a mere option to retirees, rather than an offer." *Id.* With no guaranty of being rehired, working retirees do not have any right to any term or condition of their employment.

Further, when the plaintiffs in *Ahrens* petitioned for rehearing, they specifically argued that they had "vested rights or entitlements that are constitutionally protected against a taking." (Ex. J, pp. 4, 5.) The supreme court denied the petition. (Ex. K.)

Because Plaintiffs do not have a protected property interest, Plaintiffs cannot state a claim for relief.

3. The claims are time barred.

Another reason the complaint should be dismissed is because the claims are barred by the statute of limitations and the doctrine of laches.

"A constitutional claim can become time-barred just as any other claim can." *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 292 (1983). Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property" must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530(4) (2005). Additionally, the doctrine of laches bars an action when there has been "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Robinson v. Estate of Harris*, 388 S.C. 645, 698 S.E.2d 229 (2010).

Here, the claims are time barred under both the statute of limitations and the doctrine of laches. The present case was filed on March 20, 2015, nearly ten years after the statutes went into effect. As citizens and members of the state retirement systems, Plaintiffs were on notice as of at least July 1, 2005, of the change in the law. *See Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54 (2011) (recognizing "the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests"). Accordingly, Plaintiffs should have filed the present case within three years of that date. Instead, Plaintiffs waited until 2015, which is seven years too late.

Even assuming that Plaintiffs did not have standing to bring a claim until they actually retired and returned to work, Plaintiffs should have brought this case within three years of that date. Although the complaint does not allege when Plaintiffs retired and returned to work,

Plaintiffs presumably did so before August 2, 2010, when they filed this same case in federal court. A complaint filed on March 20, 2015, nearly five years later, is late.

Moreover, under the doctrine of laches, ten years is an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Plaintiffs knew or should have known since at least July 1, 2005, that if they returned to work for the state after retirement, they would have to contribute a portion of their salary to the retirement system. This is especially true given that Plaintiffs are long-time employees of entities covered by the state retirement system and are represented by the same counsel as the plaintiffs in *Layman* and *Ahrens*. Plaintiffs could have and should have acted sooner than ten years after the law went into effect.

For these reasons, the claims are barred by the three-year statute of limitations and the doctrine of laches.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be granted.

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CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Defendants, certify that I have served all counsel in this action with a copy of the document specified below by hand delivery of the same, to the following addresses:

Document: Memorandum in Support of Motion to Dismiss

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RICHLAND COUNTY
FILED
2015 SEP 22 PM 3:31
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September 22, 2015

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Declined to Extend by Bishop v. City of Columbia, S.C.App., January 23, 2013

392 S.C. 340
Supreme Court of South Carolina.

Nancy S. AHRENS, Ann Mercer, and Gary M. McCombs, on behalf of themselves and all others similarly situated, Respondents/Appellants,
v.
The STATE of South Carolina and the South Carolina Retirement System, Appellants/Respondents.
and
James B. Arnold, Jr., Cynthia A. Thompkins–Hart, Nelson E. Brown, William M. Tisdale, Jr., Bobby Pack, Mitch Anderson, Lorenza Cobb, Ivan Holden, Phillip White, Jamie Harrelson, Dan Furr, Ann U. Mercer, Sharon C. Fulton, Johnnie R. Deas, Katie Daniels and Barbara Durfey, Panda J. Duncan, Janet Klee, John Locklair, Carol Ann Williamson and Leon Bellamy, Individually and as Class Representatives, Respondents/Appellants,
v.
The South Carolina Police Officers Retirement System, The South Carolina Retirement System, and the State of South Carolina, Appellants/Respondents.

No. 26966. | Heard Nov. 3, 2010. | Decided May 2, 2011. | Rehearing Denied May 26, 2011.

Synopsis
Background: Working retirees who elected to return to work for State following retirement brought class action against State, South Carolina Retirement System, and South Carolina Police Officers Retirement System (hereafter "State") alleging breach of contract, and sought temporary restraining order to enjoin State from collecting contributions to their respective Retirement Systems. The Circuit Court, Richland and Georgetown Counties, John L. Breeden, J., 2005 WL 6068066, issued restraining order. Retirees petitioned for original jurisdiction. The Supreme Court, 368 S.C. 631, 630 S.E.2d 265, determined that working retiree statute did not create contract between State and working retirees but remanded for case-by-case determination as to whether any actions of State with regard to individual retirees amounted to breach of contract. On remand, the Circuit Court, James C. Williams, Jr., J., ruled that forms signed by working retirees upon their return to work did not create contract right to exemption from requirement to make contributions to Retirement Systems. Retirees appealed.

Holdings: The Supreme Court, Toal, C.J., held that:

[1] forms signed by working retirees indicating that they would not be required to make contributions to Police Officers Retirement System did not create contract between State and retiree that was breached by State when it amended working retiree statute by requiring working retirees to make contributions to Retirement System, and

[2] State was not estopped from amending working retirement statute by requiring working retirees to make contributions to Police Officers Retirement System.

Affirmed in part, reversed in part.

Hearn, J., filed dissenting opinion.

West Headnotes (18)

[1] **Action**
Nature of action

An action seeking damages for breach of contract is an action at law.

2 Cases that cite this headnote

[2] **Estoppel**
Nature and Application of Estoppel in Pais

The doctrine of estoppel is equitable in nature.

1 Cases that cite this headnote

[3] **Appeal and Error**
⇐Trial in Equitable Actions

When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.

Cases that cite this headnote

[4] **Appeal and Error**
⇐Burden of showing error
Appeal and Error
⇐Authority to find facts

In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence; however, the appellant is not relieved of its burden of convincing the appellate court the circuit judge committed error in his findings.

Cases that cite this headnote

[5] **Appeal and Error**
⇐Sufficiency of findings of fact

When an appellate court chooses to find facts in accordance with its own view of the evidence on appeal from an action in equity, the court must state distinctly its findings of fact and the reason for its decision.

Cases that cite this headnote

[6] **Appeal and Error**
⇐Trial by Court in General

In an action at law tried by a judge, an appellate court's scope of review extends merely to the correction of errors of law.

Cases that cite this headnote

[7] **Municipal Corporations**
⇐Contributions or assessments

"Election of Non-Membership" forms signed by retirees who elected to return to work following retirement, which provided that working retiree took "this action under the provisions of the Retirement Act with full knowledge that [retiree] would not be credited with retirement service for this period of employment since [retiree] elected nonmembership, and as such, [retiree] will not be making retirement contributions," did not "fill up the details" of working retiree statutes, so as to create binding contract between State and working retirees that State subsequently breached by amending statute to require working retirees to contribute to Police Officers Retirement System without accruing additional service credit; retirees were under no obligation to return to work but had option of doing so, subject to State's discretion to rehire them, and statute did not contain explicit guarantee that retirement contributions would not be required. Code 1976, §§ 9–1–1790(A), 9–11–60.

3 Cases that cite this headnote

[8] **Administrative Law and Procedure**
⇐Statutory limitation

While the Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority to make rules and regulations, an agency may not make rules that conflict with, or change in any way, the statute conferring such authority.

1 Cases that cite this headnote

[9] **Administrative Law and Procedure**
⇐Powers in General

An administrative agency does not have the power to convert a right that is merely statutory into a contractual right.

1 Cases that cite this headnote

[10] **Statutes**
⇐Creation of contractual or other rights

Ordinarily, statutes do not create contractual rights.

Cases that cite this headnote

[11] **Statutes**
⇐Creation of contractual or other rights

In South Carolina, the legislature may only create contractual rights in a statute through the express language of the statute.

Cases that cite this headnote

[12] **Estoppel**
⇐Particular state officers, agencies or proceedings
Municipal Corporations
⇐Contributions or assessments

State was not estopped from requiring working retirees from making contributions to Police Officers Retirement System based on representations by its agents to retirees that they would not be required to make such contributions upon their return to work; although System provided forms which indicated that working retirees would not make contributions to System, terms of participation in working retiree program derived from retirement statute, which was subject to amendment, working retirees did not justifiably rely on representations, in that retirees were presumed to know law, and any reliance on such representations did not cause prejudicial change in working retirees' position, in that monetary benefit of having five years' additional service credit by not retiring was minimal compared to effect of simultaneously receiving salary and retirement benefits as member of working retiree program. Code 1976, § 9–11–90(4)(a).

2 Cases that cite this headnote

[13] **Estoppel**
⇐Estoppel Against Public, Government, or Public Officers

Generally, estoppel will not lie against a governmental body for the unauthorized acts of its officers and agents.

1 Cases that cite this headnote

[14] **Estoppel**
⇐Contracts

When agents or officers of a governmental body act within the proper scope of their authority, the government cannot escape liability on a contract within its power to make.

1 Cases that cite this headnote

[15] **Estoppel**
⇐Estoppel Against Public, Government, or Public Officers

The government may be estopped in matters that do not affect the exercise of its police power or the application of public policy.

Cases that cite this headnote

[16] **Officers and Public Employees**

⇦Authority and Powers

A public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril.

1 Cases that cite this headnote

[17] **Estoppel**
⇦Estoppel Against Public, Government, or Public Officers

To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position.

2 Cases that cite this headnote

[18] **Appeal and Error**
⇦Defects, objections, and amendments

Working retirees failed to preserve for appellate review claim for quantum meruit with respect to challenge to State's amendment of working retiree statute by requiring working retirees to make contributions to Police Officers Retirement System without accruing additional service credit, where they did not argue claim in brief.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

Chief Justice TOAL.

*344 In 2006, this Court decided *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006), remanding to the circuit court the issue of whether a contract existed between the South Carolina Retirement System (SCRS) and certain retirees.[1] This case is an appeal from the circuit court's decision on remand. In this case, the South Carolina Police Officers Retirement System (PORS), the SCRS, and the State of South Carolina (collectively, the State) appeal the circuit court's order that the State is estopped from collecting retirement contributions from the certified class of " old working retirees" (Retirees), and that the State must return the contributions withheld from those Retirees since July 1, 2005. The State additionally appeals *345 the circuit judge's certification of the class of Retirees. Finally, the State argues that Retirees failed to exhaust administrative remedies. The Retirees appeal the circuit court's holding that no contract existed between the State and the Retirees to prevent the State from changing the terms of sections 9–1–1790(A) and 9–11–90(4)(a) of the South Carolina Code (the Working Retirees statutes) after the employees' retirement. Retirees additionally appeal the circuit court's grant of summary judgment on the constitutional issues raised. This Court consolidated for review the cases brought against the PORS[2] and the SCRS[3] (together, the Retirement Systems), and is reviewing the circuit court order pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL BACKGROUND

This case involves the State's working retiree program, and the propriety of its withholding retirement contributions from eligible Retirement Systems members who returned to covered employment with the State prior to July 1, 2005. Prior to this date, the old working retiree program allowed employees to retire and then, after a 60 day break for SCRS members, and a 15 day break for PORS members, those employees could be re-hired at an employer's **57 discretion and receive both retirement

benefits and a salary up to $50,000 per year, without being required to contribute to the Retirement Systems. S.C.Code Ann. §§ 9–1–1790(A) (Supp.2001) & 9–11–90(4)(a) (Supp.2002). In 2005, the State Retirement System Preservation and Investment Reform Act (Act 153) amended these statutes to require that retired members pay the employee contribution as if they were active members, but without accruing additional service credit. 2005 S.C. Acts 153. In filing these actions, the Retirees' chief contention is that it is unlawful for the State to change the terms of the old working retiree program after the Retirees irreversibly retired, and with the understanding that contributions to the Retirement Systems would not be required.

***346** This Court first considered the issue in *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). In that case, participants in the Teacher and Employee Retention Incentive Program (TERI), along with the *Ahrens* plaintiffs,[4] brought an action contesting the contribution requirement created by Act 153. As to the TERI program, this Court ruled in favor of the plaintiffs, finding that "the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute," and therefore, "[w]hen the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created by the relevant statutes." *Id.* at 639–40, 630 S.E.2d at 269. As to the old working retirees statute, this Court found the statute

> does not use the same contractually significant language as utilized in the old TERI statute. As a result, we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees prohibiting the State from altering the statute exempting old working retirees from further contributions to the retirement system.
> *Id.* at 643, 630 S.E.2d at 272.

Still, the Court found evidence in the record that some working retirees may have had written contracts detailing the terms of the program, while others who did not have signed documents may have relied on statements made by the State when deciding whether to retire and enter the working retiree program. *Id.* Therefore, this Court remanded that issue to the circuit court for a "case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract." *Id.* at 643, 630 S.E.2d at 272–73.

On remand, the circuit court considered whether Election of Non–Membership forms signed by employees electing to enter the working retiree program created a contract between the State and Retirees. The circuit court found they did not. However, the court provided the Retirees equitable relief, ruling the State is estopped from changing the terms of the ***347** working retirees program for those employees who retired prior to July 1, 2005, and further ordering the State to return funds previously withheld.[5] The circuit court also ordered that notice be given to the certified class of *Ahrens* and *Arnold* plaintiffs that a judgment has been made in favor of the class.[6] This appeal follows.

ISSUES

I. Did the circuit court err in holding that no contract exists between the Retirees and the State?

****58** II. Did the circuit court err in ruling that the State is estopped from requiring Retirees to contribute to the Retirement Systems?

III. Did the circuit court err in certifying the class of Retirees?

IV. Did the circuit court err in granting summary judgment in favor of the State on the Retirees' causes of action for unconstitutional taking, violation of due process, impairment of contract, and quantum meruit?

V. Did the circuit court err in denying the State's motion to dismiss based on the State's claim that Retirees failed to exhaust their administrative remedies under the Claims Procedure Act before bringing the dispute to the circuit court?

STANDARD OF REVIEW

[1] [2] [3] [4] [5] [6] An action seeking damages for breach of contract is an action at law. ***348** *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). However, the doctrine of estoppel is equitable in nature. *Knight v. Stroud*, 212 S.C. 39, 42–43, 46 S.E.2d 169, 170 (1948). When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997). In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Inlet Harbour, v. S.C.*

Dep't of Parks, Rec. & Tourism, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). However, the appellant is not relieved of its burden of convincing the appellate court the circuit judge committed error in his findings. *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). When an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002). In an action at law tried by a judge, an appellate court's scope of review extends merely to the correction of errors of law. *Temple v. Tec–Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009).

ANALYSIS

I. Whether a Contract Exists Between the State and Retirees

[7] Retirees argue that where the statute did not create a contract, the Retirement Systems had the authority to "fill up the details" by requiring Retirees sign forms stating they would not be required to pay into the Retirement Systems, and in doing so, these forms created a contract between the State and Retirees, which was then breached when the State began requiring these contributions. We disagree.

[8] [9] This Court has often described a state agency's rulemaking power as its authority to "fill up the details" of the laws promulgated by the General Assembly. *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355, 126 S.E.2d 15, 19–20 (1962); *S.C. Hwy. Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). While "[t]he Legislature has the right to vest in the administrative officers and bodies of the state a large ***349** measure of discretionary authority ... to make rules and regulations," an agency may not make rules that "conflict with, or ... change in any way the statute conferring such authority." *Fisher v. J.H. Sheridan Co., Inc.*, 182 S.C. 316, 326, 189 S.E. 356, 360 (1936). Accordingly, an agency does not have the power to convert a right that is merely statutory into a contractual right. *McKinney v. S.C. Police Officers Ret. Sys.*, 311 S.C. 372, 375, 429 S.E.2d 797, 798 (1993).

Therefore, to fully address Retirees' argument that the Retirement Systems created a contract by filling up the details of the statute, it is necessary to examine this Court's basis in *Layman* for determining that the legislature intended to create a contractual right in the TERI statute, but did not intend the same when drafting the Working Retirees statutes.

[10] [11] Ordinarily, statutes do not create contractual rights. *Layman*, 368 S.C. at 637, 630 S.E.2d at 268. In South Carolina, the legislature may only create contractual rights ****59** in a statute through the express language of the statute. *Id.* at 638, 630 S.E.2d at 268. This Court found in *Layman* that the old TERI statute outlined the rights and responsibilities of each party. *Id.* at 639, 630 S.E.2d at 269. In exchange for the right to lock in a retirement benefit based on the average final compensation of the member, "a program participant *shall agree* to continue employment with an employer participating in the system for a program period, not to exceed five years." S.C.Code Ann. § 9–1–2210(A) (Supp.2001) (emphasis added). During this term of employment, the receipt of retirement benefits was deferred, and placed in a non-interest bearing trust account. *Id.* § 9–1–2210(B). A program participant was not required to make any further retirement contributions, accrued no service credit, and was not eligible to receive certain employment benefits. *Id.* § 9–1–2210(D). This Court found the following terms used in the old TERI statute as "indicative of a contract: 'A ... member who is *eligible* [to retire under TERI] ... and *complies* with the *requirements* of this article .... *shall agree* to continue employment....' " *Layman*, 368 S.C. at 639, 630 S.E.2d at 269 *(quoting* S.C.Code Ann. § 9–1–2210(A)) (emphasis added).

In contrast, this Court found that the General Assembly did not outline the rights and responsibilities of each party in the ***350** SCRS statute. *See* S.C.Code Ann. § 9–1–1790(A) (Supp.2001). The SCRS statute provided that sixty days after a state employee officially retires, he "*may* return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system." *Id.* (emphasis added). Under this statute, an employee's decision to return to work after retiring was optional, as was an employer's decision to re-hire that employee. The question of whether the PORS statute created a contractual right was not before this Court in *Layman*. However, because the language of the PORS statute is largely similar to the SCRS statute,[7] we find our analysis of the SCRS statute in *Layman* to be binding precedent with regard to the PORS statute.

With this in mind, we disagree with Retirees' contention that the Retirement Systems filled up the details and created binding contracts between the State and Retirees through the use of signed forms. The various forms that were required to be signed by employees wishing to enter the old working retirees program contained substantially

the same language:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements not to become a member of the South Carolina Retirement System or the Police Officers Retirement System, and I hereby exercise my option to become a non-member.
>
> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected nonmembership and, as such, will not be making retirement contributions.

Retirees argue that the language of these forms is contractual in nature and is similar to the language used in the TERI statute. However, we believe the language used in the form supports the contrary. The form states that the authority to enter the working retiree program is derived from "the provisions ***351** of the Retirement Act"—the statute that this Court held in *Layman* did not create a contractual right. *See Layman*, 368 S.C. at 643, 630 S.E.2d at 271.

Even assuming these forms, on their own, were binding contracts, we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature. In *McKinney v. South Carolina Police Officers Retirement System*, this Court decided this exact issue. 311 S.C. 372, 429 S.E.2d 797 (1993). In that case, the PORS terminated the plaintiff's retirement ****60** benefits, finding that the plaintiff did not establish twenty-five years of creditable service as required by the statute. On appeal, the plaintiff argued that certain correspondence from the Retirement Systems created a binding contract entitling the plaintiff to benefits not authorized by the statute. *Id.* This Court found that the source of the plaintiff's right "is the statutes, not a contract," and that neither the plaintiff nor the PORS "have the authority to convert a statutory right into a contractual one." *Id.* at 375, 429 S.E.2d at 798. Despite the dissent's contention that the facts of *McKinney* do not apply here, we believe the important premise that an agency cannot convert a statutory right to a contractual right maintains in this case. Any other holding would permit an executive agency to usurp the essentially legislative function of amending laws by binding the legislature through contract where it had no intention of being bound. We cannot support such a result.

Additionally, in stating there is no basis for treating the TERI statute and the Working Retirees statutes differently, the dissent overlooks important distinctions that weighed heavily on our determination in *Layman* that the TERI statute created a contract and the SCRS statute did not. Employees who retired under TERI were *required*, as a condition of their retirement, to continue employment with an employer participating in the TERI system for the program period. S.C.Code Ann. § 9–1–2210(A) (Supp.2001). Importantly, state employees who retired under the Working Retirees statutes were not bound by this same obligation. Under those statutes, when an eligible employee retired, that employee had the option of returning to employment after having retired for sixty days or fifteen days (depending on the statute), and even their return was conditioned on whether an ***352** employer in the system chose to hire that employee. *Id.* § 9–1–1790(A) (Supp.2001) & 9–11–90(4)(a) (Supp. 2002). The dissent claims that the Working Retirees statutes constituted a valid offer to eligible participants that was then accepted by the signing of Election of Non–Membership forms. We respectfully disagree. Because there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer. Additionally, the TERI statute specifically provided in its text that " a program participant makes no further employee contributions into the system." *Id.* § 9–1–2210(D). The Working Retirees statutes are void of this express guarantee that retirement contributions would not be required. With an absence of consideration in the Working Retirees statutes, these statutes provide no framework to which a contractual right can attach. *See Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996) ("South Carolina law is clear that public employees generally have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment.").

II. Estoppel

[12] The State argues that the circuit court erred in holding that the Retirement Systems were estopped from applying Act 153 to Retirees because, under these circumstances, estoppel cannot lie against the State, and because the Retirees failed to establish the elements of equitable estoppel. We agree.

A. Estoppel Against the State

[13] [14] [15] Generally, "estoppel will not lie against a governmental body for the unauthorized acts of its

officers and agents." *Townes Assoc., Ltd. v. City of Greenville,* 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976). However, under certain circumstances, the State can be subject to the estoppel doctrine. *Id.* When agents or officers of a governmental body act within the proper scope of their authority, the government "cannot escape liability on a contract within its power to make." *Id.* Additionally, the government may be estopped in matters that do not affect the exercise of its police power or ***353** the application of public policy. *Grant v. City of Folly Beach,* 346 S.C. 74, 81, 551 S.E.2d 229, 232 (2001).

[16] In determining whether an agent of the State acted within its authority, the law is clear that "[a] public officer derives his ****61** authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril." *Baker v. State Highway Dep't,* 166 S.C. 481, 490, 165 S.E. 197, 201 (1932), *rev'd on other grounds by McCall by Andrews v. Batson,* 285 S.C. 243, 329 S.E.2d 741 (1985).

The record is replete with testimony that Retirement Systems agents told Retirees that upon entering the working retiree program, they would not be required to make contributions to the system. These agents were, no doubt, representing the law as it stood at the time. However, even if this Court found that the Retirement Systems and its agents made representations that caused the Retirees to prejudicially rely, because this Court has ruled that the Working Retiree statute did not create a binding contractual right, estoppel cannot lie against the state, as these representations were made outside of the agency's authority. Therefore, we reverse the circuit court's estoppel holding.

B. The Elements of Estoppel

[17] Although the issue of estoppel may be disposed of under the State's first argument, for purposes of clarifying the necessary elements to prove estoppel against the government, we address this issue and find that Retirees failed to sufficiently prove these elements. "To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Grant,* 346 S.C. at 80–81, 551 S.E.2d at 232. In concluding that the State was estopped from requiring retirement contributions from Retirees, the circuit court judge applied a six element test derived from *Brading v. County of Georgetown,* 327 S.C. 107, 114, 490 S.E.2d 4, 7 (1997). Because the *Grant* elements have ***354** been specifically applied by this Court to claims against the government, we believe it is the appropriate test in this case.

As to the first element, it is uncontested that the Retirement Systems provided forms, brochures and, in some cases, made oral statements representing that when the Retirees returned to work, they would not be required to make retirement contributions. However, it is difficult for Retirees to claim they did not know, or had no means of knowing that these terms would ever change.

The form signed by many of the Retirees required them to attest their understanding that the terms of the working retiree program derived from the Retirement Act. Since the Retirement Act was enacted, the SCRS statute has been amended 29 times and the PORS statute 27 times. In fact, several Retirees testified that they were at least aware that laws could change, and nearly all of the Retirees whose testimony is included in the record stated that they never specifically asked a Retirement Systems agent if the law regarding contribution requirements could ever change.[8] While the majority of amendments to the Retirement Act have afforded working retirees more favorable terms, we do not believe this means that more favorable terms should be legally expected.

In further support that Retirees had knowledge that the terms of the Working Retirees statutes could change, the Retirement Systems regularly published a pamphlet containing an overview of retirement benefits with the following disclaimer:

> The information contained in this brochure is meant to serve as a guide, but does not constitute a binding representation of the South Carolina Retirement Systems. The statutes governing the South Carolina Retirement Systems are found in Title 9 of the South Carolina Code of Law, and should there be any conflict between this brochure and the statutes, the statutes will prevail. Because state statutes ***355** are subject to change by the South Carolina General ****62** Assembly, please contact us for the most current information.

Finally, even if the Retirees were not aware that the terms of the Working Retiree statutes could change, "citizens

are presumed to know the law and are charged with exercising 'reasonable care to protect their interests.' " *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct.App.2008) *(quoting Smothers v. U.S. Fidelity & Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct.App.1996)).

Second, Retirees did not prove justifiable reliance on representations made by the Retirement Systems. The testimony among the named plaintiffs is varied with regard to whether or not they would have retired had they known they would be required to make retirement contributions without accruing additional service credit. For many of the named plaintiffs, the motivating factor for retiring was the promise of receiving two sources of income, and they stated they would have retired nevertheless. Still, others avidly contended that if they had known contributions would be required, they would not have retired when they did.[9] The presence of reliance in these latter cases, however, is not dispositive unless that reliance was justified. Recognizing the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests, we find that any reliance created by the representations of the Retirement Systems was not justified, especially in light of the disclaimers included in the Retirement Systems' distributed material, and the Retirees' knowledge that laws are subject to change.

Lastly, we find that any reliance created by the forms, brochures, or statements of the Retirement Systems and its agents did not cause a prejudicial change in position. We sympathize with Retirees' argument that if they had continued working as non-retired employees, the contributions made to the Retirement Systems would have increased the retirement benefits they would eventually receive. However, a comparison of the two options, either entering the working retiree program or continuing with employment, reveals that the monetary ***356** benefit of having five years additional service credit is minimal when compared to the effect of simultaneously receiving a salary and a retirement allowance. Therefore, we find that any change in position caused by the alleged misrepresentation was not prejudicial to the Retirees.

The amount of retirement allowance that an SCRS retiree receives is set by statute at "one and eighty-two hundredths percent of his average final compensation, multiplied by the number of years of his credible service." S.C.Code Ann. § 9–1–1550(B)(1) (Supp.2009).[10] To demonstrate this point, assume that Employee A and Employee B both work for the State making $40,000 per year and with 28 years of service credit. If Employee A becomes a working retiree, during the five year period of the program he would receive $101,920 in retirement benefits,[11] in addition to his salary. In the five years after Employee A discontinues working he will receive another $101,920 in retirement allowances for a ten year total of $203,840 in retirement benefits. Under the second scenario, Employee B does not retire and accrues five additional years of service credit and merit pay increases of two percent per year. With 32 years of service credit and an AFC of $44,163, Employee B will receive $128,603 in retirement allowances in the five years following retirement,[12] as compared to the $203,840 that Employee A has received in retirement benefits up to the same point in ****63** time.[13] In fact, it would take twenty-five years for Employee B to receive a higher lifetime retirement benefit than Employee A. In our opinion, a prejudice ***357** that takes twenty-five years to occur, if at all, does not merit an estoppel holding.

Therefore, we do not believe the Retirees adequately proved the elements of estoppel. Consistent with our holding with regard to estoppel against the state, we reverse the circuit court's estoppel order and find that the State is not required to return contributions previously deducted.

III. Certifying the Class

The State argues that the circuit court erred in certifying the class of Retirees for three reasons: (1) this Court decertified the class definition that the circuit judge ultimately certified, (2) on the merits, the prerequisites of a class action have not been satisfied, and (3) class treatment is not appropriate for claims based on estoppel. Because we conclude that the named plaintiffs have neither a contractual nor an equitable remedy, we decline to address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

IV. Summary Judgment on Additional Causes of Action

Retirees argue that the circuit court erred in granting summary judgment to the State on the issues of unconstitutional taking, violation of due process, impairment of contract, and quantum meruit. Claims of unconstitutional taking, violation of due process, and impairment of contract are founded on the presumption

that a contractual right has been unfairly taken away. Because we find that the Retirees did not have a contractual right to the terms of their employment, we find it unnecessary to address these constitutional issues. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

[18] Further, Retirees raised the issue of quantum meruit, but failed to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *State v. Hiott*, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981).

Therefore, we affirm the circuit court's grant of summary judgment on these issues.

***358 V. Exhaustion of Remedies**

The State argues that the circuit court lacked the statutory authority to hear Retirees' claims because the Claims Procedures Act, S.C.Code Ann. § 9–21–10 *et seq.* (Supp.2009), provides the "exclusive remedy for dispute or controversy between the retirement systems and a member ... arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina, 1976." S.C.Code Ann. § 9–21–30. Because we rule in favor of the State on both issues of contract and estoppel, we presume that the State will withdraw this issue.

CONCLUSION

We hold that a contract did not exist between the State and Retirees, neither by way of forms signed nor representations made. Accordingly, we conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract. Additionally, we find the circuit court's estoppel holding to be in error.

AFFIRMED IN PART; REVERSED IN PART.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur.

HEARN, J., dissenting in a separate opinion.

Justice HEARN.

I concur in the majority's resolution of the issues of estoppel, class certification, summary judgment as to the additional causes of action, and exhaustion of remedies. However, I part company with the majority on whether a contract existed and respectfully ****64** dissent. In my view, the old working retirees statutes, together with the mandatory forms signed by the working retirees, created a binding contract between the State and the working retirees which could not be unilaterally rescinded by the State with the passage of Act 153.

In its simplest terms, a contract is formed when a legitimate offer is accepted, accompanied by a valuable consideration. Here, the original working retiree statutes permitted participants to retire, return to work for the State, and continue to ***359** receive their retirement. The only retirement contributions required were those by the employer: "An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member...." S.C.Code Ann. § 9–1–1790(B) (as amended through 2004); *see also id.* § 9–11–90.

The old working retirees statutes thus constituted an offer to eligible program participants to retire, be re-hired, and receive their retirement benefits without contributing any further payments into the retirement system. While this Court in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), quite rightly found the old working retirees statutes did not in and of themselves establish a contract, they most certainly constituted a legally significant offer to those qualified for the program.

In order to return to work and accept the offer contained in the old working retirees statutes, participants were required to sign a form stating their election of non-membership in the retirement system. The Participating Employer Procedures Manual, published by the South Carolina Retirement Systems, states that "[a] service retiree (TERI or non-TERI) ... must complete an Election of Non–Membership (Form 1104) upon returning to work for an employer covered by the Retirement Systems." This mandatory form, entitled "ELECTION OF NON–MEMBERSHIP," stated: "I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected non-membership and, as such, will not be making contributions."

When signed by the participant and his employer, this mandatory form constituted the participant's acceptance

of the State's offer of re-employment contained in the working retirees statutes. The benefits flowing to the State from being able to re-hire experienced workers without having them accrue additional retirement benefits and the detriment to the participants in foregoing further retirement benefits from the State clearly satisfied the requirement of consideration for the formation of a binding contract.[4] *See McLeod v. Sandy Island Corp.*, 265 S.C. 1, 13, 216 S.E.2d 746, 751 (1975) (citing *Furman University v. Waller*, 124 S.C. 68, 117 S.E. 356 (1923)) ("A valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.").

There is nothing in the form which the working retirees had to execute prior to re-hiring that indicates their election of non-membership in the retirement system was anything other than permanent. Indeed, Peggy Boykin, head of the South Carolina Retirement Systems, testified that if "[the working retirees] retired prior to July 1, 2005, they did not have to make any contributions." The old adage that the proof is in the pudding hits the bulls-eye here, given the undisputed fact that not one of the working retirees who executed the form and returned to work prior to the passage of Act 153 had any monies taken out of their paychecks. All parties—the working retirees, their State employers, and the State retirement system—all recognized that a legally binding contract existed.

As this Court correctly stated in *Layman*: "Once the bargain is formed, and the obligations **65 set, a contract may only be altered by mutual agreement and for further consideration." 368 S.C. at 640, 630 S.E.2d at 269. Consistent with *Layman*, I would hold that the State may not unilaterally alter its agreement with the working retirees by forcing them to contribute to the retirement system. With all due respect to the majority, I cannot, in good conscience, treat the working retirees differently than this Court treated the TERI participants in *Layman*.

Nor do I agree with the majority's reliance on *McKinney v. South Carolina Police Officers Retirement System*, 311 S.C. 372, 429 S.E.2d 797 (1993), for the proposition that no viable contract could be formed through execution of the forms here. *McKinney* held that certain correspondence from the state retirement system could not create a binding contract with the plaintiff for benefits not authorized by the statute. *361 *Id.* at 375, 429 S.E.2d at 798. That is a totally different situation than what is presented here where the retirement system generated forms to carry out the intent and purpose of the original statutes, and the participants were required to execute those forms prior to being rehired. While I agree with the reasoning expressed in *McKinney* that mere letters from the retirement system could not provide benefits not authorized by statute, I am at a loss to see its application to the facts of this case.

Consistent with the principles enunciated in *Layman*, I would hold that the State created a binding contract with the working retirees through its unambiguous statutory scheme and the participants' execution of mandatory forms which could not be altered unilaterally by the State to the detriment of the working retirees.

All Citations

392 S.C. 340, 709 S.E.2d 54

Footnotes

1 Nancy Ahrens, Ann Mercer, and Gary McCombs, on behalf of themselves and all others similarly situated.

2 *Arnold v. S.C. Police Officers Ret. Sys.*, No. 05–CP–22–756 (Ct. Comm. Pl., filed June 25, 2009).

3 *Ahrens v. State of S.C. & S.C. Retirement Sys.*, No. 05–CP–40–2785 (Ct. Comm. Pl., filed June 25, 2009).

4 The *Arnold* plaintiffs initiated a separate lawsuit challenging the contribution requirement.

5 Having found for the plaintiffs with an estoppel order, the circuit court declined to reach the additional issues raised. Both the *Ahrens* and *Arnold* plaintiffs argued that the State's action in withholding retirement contributions was: (1) an unlawful taking, (2) impairment of contract, and (3) a violation of due process. In raising these issues, both sets of plaintiffs requested injunctive relief. The *Arnold* plaintiffs additionally argued quantum meruit.

6 By order dated Nov. 17, 2008, Judge Williams certified the *Ahrens* class as the following: "[a]ll persons currently employed by the State of South Carolina or its agencies or political subdivisions who retired and returned to work prior to July 1, 2005 ("Working Retirees"). Excluded from the classes are persons who are participants in the TERI program." In an order dated Nov. 11, 2008, Judge Williams certified the *Arnold* class with a similar class definition.

7 Section 9–11–90(4)(a) provides, in pertinent part, "a retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system ... without affecting the monthly retirement allowance he is receiving from this system."

8 The record does not include the testimony of all 23 named plaintiffs. The burden of proving the elements of estoppel, however, lies with its proponent. Retirees have not submitted any information that precludes the finding that Retirees had knowledge, or the means to gain knowledge, that the provisions of the Retirement Act were subject to change.

9 Nancy S. Ahrens, Ann Mercer, James B. Arnold, Jamie Harrelson, Johnnie R. Deas, Dan Furr, and Marion E. White, Jr. all testified to this effect.

10 The PORS uses a different calculation; however, plugging the PORS denominator for a Class Two employee into the following scenario yields similar results. *See* S.C.Code Ann. § 9–11–60(2)(a)–(c) (Supp.2009).

11 We assume that the Average Final Compensation (AFC) of Employee A is $40,000, and we arrive at this five year retirement allowance total as follows: 28 year service credit x .0182 (statutory multiplier) x $40,000 AFC x 5 years.

12 32 years x .0182 (statutory denominator) x $45,470 (AFC) x 5 years.

13 Notably, this demonstration does not take into account cost of living adjustments that are calculated each year to increase retirement allowances. However, these being consistent among each employee, we do not believe it substantially affects the analysis.

14 As stated by Cy Wentworth, the Human Resources Manager for the South Carolina Judicial Department, himself a working retiree: "The employee agreed to retire and not make any further contributions to the Retirement System and the State continued to be able to employ a seasoned, experienced employee for a cost which saved the State money."

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EXHIBIT B

368 S.C. 631
Supreme Court of South Carolina.

Nancy S. LAYMAN; David M. Fitzgerald, Vicki K. Zelenko, Wyman M. Looney and Nancy Ahrens, on behalf of themselves and all others similarly situated, Petitioners,
v.
The STATE of South Carolina and The South Carolina Retirement System, Respondents.

No. 26146. | Heard Dec. 1, 2005. | Decided May 4, 2006. | Order Denying Rehearing June 1, 2006.

Synopsis

Background: Participants in the South Carolina Retirement System that elected to continue working for the State after retirement brought action against State and the retirement system, alleging breach of contract and sought a temporary restraining order to enjoin State from collecting contributions to retirement system. The Circuit Court, Richland County, John L. Breeden, J., granted restraining order. Participant's petitioned for original jurisdiction.

Holdings: Upon grant of petition, the Supreme Court, Toal, C.J., held that:

[1] prior version of the Teacher and Employee Retention Incentive Program (TERI) created contractual rights;

[2] enactment of amendments to TERI constituted a breach of contract with old program participants; and

[3] prior version of working retiree statute did not create contractual rights.

Ordered accordingly.

West Headnotes (7)

[1] **Statutes**
⇐Creation of contractual or other rights

Generally, statutes do not create contractual rights; however, if the statute indicates that the legislature intended to bind itself contractually, a contract may be found to exist.

2 Cases that cite this headnote

[2] **Statutes**
⇐Creation of contractual or other rights

In South Carolina, contractual rights are created by statute only when they are expressly found in the language of the legislation.

2 Cases that cite this headnote

[3] **States**
⇐Funds and contributions

The prior version of the Teacher and Employee Retention Incentive Program (TERI), which allowed retiring State employees to continue working for up to five years after retirement without having to make further contributions to the retirement system out of their paycheck, created a contractual right; statute fixed obligations, required affirmative actions by both the State and the retiring employee, and contained contractually significant language. Code 1976, § 9–1–2210(2004).

4 Cases that cite this headnote

[4] **Contracts**
⇐Contracts subject to modification
Contracts
⇐Necessity

Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration.

4 Cases that cite this headnote

[5] **States**
⇐Funds and contributions

Enactment of amendments to Teacher and Employee Retention Incentive Program (TERI), which amendments required retired State employees who chose to continue working to contribute a portion of their paycheck to the retirement system, constituted a breach of contract with old program participants; State could not unilaterally alter its agreement with program participants under the old TERI statute, which allowed retired employees to continue working without making retirement system contributions, by forcing the participants to contribute to the retirement system. Code 1976, § 9–1–2210 (2004).

4 Cases that cite this headnote

[6] **States**
⇐Funds and contributions

Prior working retiree statute, which allowed retired members of the South Carolina Retirement System to return to employment and earn up to $50,000 per year without affecting their retirement allowance, did not evidence an intent by the legislature to be bound to any terms related to the old working retiree program, and thus, the prior statute did not create a binding contract between old working retirees and the State that prohibited the State from altering the statute exempting old working retirees from further contributions to the retirement system. Code 1976, § 9–1–1790(A) (2004).

4 Cases that cite this headnote

[7] **Attorney and Client**
⇐Allowance and payment from funds in court

Participants in state retirement system, who prevailed in action alleging that state and retirement system breached their contract with certain participants by forcing them to make retirement system contributions, were not entitled to an award of attorney fees under the common fund doctrine; fees were not to come from the retirement contributions made by the affected participants or the interest accumulated thereon.

2 Cases that cite this headnote

Attorneys and Law Firms

****266** A. Camden Lewis, Keith M. Babcock, and William A. McKinnon, all of Lewis & Babcock, of Columbia; and Richard A. Harpootlian, of Columbia, for Petitioners.

Stephen Van Camp and Sarah G. Major, of Columbia; and Thornwell F. Sowell, Robert E. Stepp, Roland M. Franklin, Jr., and Tina Cundari, all of Sowell Gray Stepp Todd & Laffitte, of Columbia, for Respondents.

Andrew F. Lindemann and William H. Davidson, III, of Davidson Morrison & Lindemann, of Columbia, for Amicus Curiae State Retirees Association.

Eric C. Schweitzer, of Ogletree Deakins Nash Smoak & Stewart, of Columbia, for Amicus Curiae South Carolina Chamber of Commerce.

Philip J. Mace, of Columbia, for Amicus Curiae State Employees Association.

Chief Justice TOAL:

***634** Petitioners[1] brought this action in response to the enactment on July 1, 2005 of ****267** the State Retirement System Preservation and Investment Reform Act[2] (Act 153). Act 153 amends several statutes relating to the operation of the South Carolina Retirement System. Specifically, Act 153 brought about significant changes for employees who participate in TERI.[3] In addition, Act 153 affected employees who are not TERI participants but have retired and returned to work for the State in positions covered by the retirement system (working retiree program).[4]

In January of 2001, the South Carolina General Assembly enacted the Teacher and Employee Retention Incentive Program. *635 (TERI). Hereinafter, we will refer to this statute as "old TERI." In addition, we will refer to those who elected to participate in the old TERI program before July 1, 2005 as "old TERI participants." Further, those eligible to retire but not participating in TERI could participate in the working retiree program. We will refer to this program as the "old working retiree program" and its participants as "old working retirees."

Pursuant to the old TERI program, old TERI participants could retire, but continue to work for the State for up to five years following their retirement. During these five years, the State withheld the normal pension benefits due to old TERI participants. Under the old TERI program the State paid these accrued benefits either as a lump sum at the end of five years or the old TERI participant could roll the accrued benefits over into a qualifying retirement fund. Under the old TERI statute, an old TERI participant made no further employee contributions to the retirement system. In return, the State was able to utilize experienced, well-trained employees for up to five years after they retired. In addition, the old TERI participants did not accrue further service credit during their participation in the old TERI program and were not eligible for group life insurance or disability retirement benefits.

In contrast, under the old working retiree statute, the statute considered a working retiree to be retired and did not require the old working retiree to make further employee contributions to the system. However, the old working retiree statute limited the old working retiree to making no more than $50,000 per year in salary.

Petitioners (old TERI program participants and old working retiree participants) who retired before July 1, 2005 under the old TERI program or pursuant to the old working retiree statute brought this action against the State of South Carolina and South Carolina Retirement System (Respondents or the State), alleging breach of contract. In addition, the old TERI program participants and old working retiree participants argue the State should be estopped from retroactively applying new legislation to Petitioners. Finally, the old TERI program participants and old working retiree participants *636 claim violations of the Takings and Due Process Clauses of the State and Federal Constitutions. This Court granted Petitioners' request for the case to be heard in the Court's original jurisdiction. We hold that the State unlawfully breached its contract with those Petitioners participating in the old TERI program. In addition, we remand the old working retiree participants' breach of contract claim to the trial court for action consistent with this opinion.

FACTUAL / PROCEDURAL BACKGROUND

The portion of Act 153 at the center of this controversy pertains to a financial contribution that old TERI and old working retiree participants are now required to submit to the retirement system. The changes wrought by Act 153 dramatically alter the former versions of the TERI and working retiree statutes. Under the prior enactment of the TERI and working retiree programs, neither the old TERI participants nor the old **268 working retiree participants were required to contribute to the retirement system. Under the terms of the prior programs, for all intents and purposes, both the old TERI participants and the old working retiree participants were considered to be retired.

Petitioners claim that the requirement that they now contribute 6.25% of their annual salary to the retirement program constitutes a breach of contract.[5] In the alternative, if no contract is found, Petitioners assert that the State should be estopped from requiring further contributions due to Petitioners' reliance on the terms of the former TERI and working retiree programs. Further, Petitioners claim that the enactment of Act 153 constitutes an unconstitutional taking and a deprivation of their property without due process of law.

Previously, Petitioners sought a temporary restraining order seeking to enjoin the State from collecting Petitioners' contributions to the retirement system. The circuit court granted the motion, preventing the State from collecting contributions from the four named Petitioners in this case. Respondents appealed and petitioned for a writ of supersedeas. However, while the motions were pending in the circuit court, the case was certified to the Supreme Court pursuant to Rule *637 204(b), SCACR. As a result, Petitioners filed a petition for original jurisdiction.

This Court denied the State's petition for supersedeas, but granted the petition for original jurisdiction. In addition, Petitioners filed a motion for class certification, which the Court granted. The class was deemed to consist of all participants who had retired under the old TERI program under the former version of § 9–1–2210, and all those participants considered old working retirees under the previous version of § 9–1–1790; all of whom elected to participate in the programs before July 1, 2005. Further, the Court ordered all contributions withdrawn from the class members be transferred into an interest bearing account and escrowed pending the outcome of this

litigation. As a result, the following issues are before the Court:

I. Do the statutory provisions of the former versions of the TERI and the working retiree programs create contracts?

II. Is the State estopped from requiring Petitioners to make contributions to the retirement system?

III. Does the enactment of Act 153 constitute an unconstitutional taking under either the State or Federal Constitution?

IV. Does Act 153 violate the Due Process Clause of the State or Federal Constitution?

LAW / ANALYSIS

I. Breach of Contract

A. TERI Program

Old TERI program participants argue that the statutory provisions governing old TERI participants created contracts which the State breached by requiring previously enrolled TERI participants to contribute to the retirement system. We agree.

[1] [2] Generally, statutes do not create contractual rights. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985). However, if the statute indicates that the legislature ***638** intended to bind itself contractually, a contract may be found to exist. *Id.* In South Carolina, contractual rights are created by statute only when they are expressly found in the language of the legislation. *See S.C. Public Serv. Auth. v. Summers*, 282 S.C. 148, 318 S.E.2d 113 (1984).

[3] With the above guidelines in mind, we turn to the prior version of the TERI statute, enacted in 2001, to determine if a contract existed. In the present case, the relevant portions of the prior statute provide that a member of the State Retirement System eligible to retire may:

> [e]lect to participate in the Teacher and Employee Retention Incentive Program (program). A member electing to participate in the program retires for purposes of ****269** the system, and the member's normal retirement benefit is calculated on the basis of the member's average final compensation and service credit at the time the program period begins. *The program participant shall agree to continue employment with an employer participating in the system for a program period, not to exceed five years.*
>
> ...
>
> (B) During the specified program period, receipt of the member's normal retirement benefit is deferred. The member's deferred monthly benefit must be placed in the system's trust fund on behalf of the member. No interest is paid on the member's deferred monthly benefit placed in the system's trust fund during the specified program period.
>
> ...
>
> (D) *A program participant is retired from the retirement system as of the beginning of the program period. A program participant makes no further employee contributions to the system, accrues no service credit during the program period, and is not eligible to receive group life insurance benefits or disability retirement benefits.* Accrued annual leave and sick leave used in any manner in the calculation of the program participant's retirement benefit is deducted from the amount of such leave accrued by the participant.

S.C.Code Ann. § 9–1–2210 (Supp.2004) (emphasis added).

In sum, the above former statutory authority (old TERI) provided a means for eligible employees to retire, but continue ***639** to work subject to several limitations. Under the old TERI program, an employee could retire, but continue to work for an additional five years after retirement. Instead of receiving their retirement check, the old TERI program participants' retirement money was placed in a non-interest bearing account to be paid out at the end of the five-year program period. During the five year period, under the prior statute, the employees were deemed retired and made no further contributions to the retirement system out of their paycheck. In addition, old TERI program participants gave up the opportunity to accrue further service credit, thus, any increase in salary would not result in an increase in retirement benefits. In return, the State was able to retain a large number of experienced and well-trained employees for a period not to exceed five years.

As a result of the enactment of Act 153, old TERI

participants are now required "to pay to the system the employee contribution as if a program participant were an active contributing member," while gaining no additional service credit. Act No. 153, 2005 S.C. Acts 1697.

We hold that the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute. We find it telling that the legislature used terms that are indicative of a contract: "A ... member who is *eligible* [to retire under TERI] ... and *complies* with the *requirements* of this article ... *shall agree* ...." S.C.Code Ann. § 9–1–2210(A) (emphasis added). Far from simply describing the terms of old TERI participants' employment, the former TERI statute outlined an employment program in which those employees eligible for retirement could enroll for a fixed period of time up to five years.[6] The old TERI statute fixed obligations, required affirmative actions by both the State and old TERI program participants, and contained contractually significant language.

*640 [4] [5] We next consider whether there was a breach of the agreement. When the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created by the relevant statutes. Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration. **270 We find that, as applied to old TERI participants, the enactment of Act 153 constitutes a breach of contract. Therefore, we hold the State may not unilaterally alter its agreement with old TERI program participants by forcing the old TERI participants to contribute to the retirement system.[7]

The State argues that the statutes did not create a binding contract and that this case is "on all fours" with *Alston v. City of Camden*, 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996). In *Alston*, this Court held that employees generally have no contractual rights in their employment merely by virtue of a city ordinance describing the terms of their employment. *Id.* at 45, 471 S.E.2d at 177. We find that *Alston* is distinguishable in several respects. First, the Court held that the benefits affected in *Alston* were "fringe benefits," and that the employee had a reasonable expectation that those benefits might be subject to change. *Id.* at 48, 471 S.E.2d at 179. In addition, the agreement in *Alston* was the type of unilateral contract that is subject to modification at any time. *Id.* at 48–49, 471 S.E.2d at 179.

Our holding in the present case rests not on general principles of contract law, but rather, on the plain meaning of the language used by the legislature in the old TERI statute. Unlike the city ordinance in *Alston*, Act 153 sought to materially alter terms which formed a substantial part of the basis for the bargain struck between the State and old TERI participants. In these limited circumstances, we read the old *641 TERI statute to go beyond terms of employment to create a defined employment program. While our rule has been, and continues to be, that statutes do not create contracts that bind the State, the State may not utilize such significant contractual language and disregard its plain meaning and practical effect.

Further, our holding today does not hamper the legislature's ability to govern. The new TERI program will continue in its current form and all participants in the new TERI program, enacted via Act 153, will be subject to the terms of that statute. Further, and contrary to the State's suggestion, our holding will not place the actuarial soundness of the retirement system in ruins. The State's contention that the unfunded accounting liability amortization period will be close to reaching its thirty year limits is based on an assumption that 100 percent of eligible retirees will participate in the old TERI program. This is inaccurate in two respects. First, old TERI participants do not contend that the program cannot be changed with respect to future participants enrolled after July 1, 2005. As a result, the study fails to recognize that under the new TERI program, new TERI participants enrolled after July 1, 2005 will contribute to the retirement system as set forth in Act No. 153. In fact, the study relied upon by the State is based upon an incorrect assumption. This inaccuracy is outlined in the record before this Court in an affidavit relied upon heavily by the State in the claim that the retirement system will reach near crisis. The affidavit of a consulting actuary from Milliman, Inc. stated: "if current and ***future*** TERI retirees and reemployed retirees do not pay the member contribution ...." (emphasis added). The opinion of this Court does not affect the decision of the State to require new or future TERI participants, those enrolled after July 1, 2005, to make retirement contributions.

Second, the contention that the number of old TERI participants is growing at a rapid pace is a complete misrepresentation. The numbers of participants in the old TERI program is diminishing with each passing day and by June 30, 2010, the number of old TERI program participants will be zero. Any new TERI participants (those enrolled after July 1, 2005) are covered by Act 153 and will make contributions to the system as directed by the new requirements of Act 153.

**271 *642 Based on the above, we find that the provision of the old TERI statute created a binding

contract and hold that the State breached that contract by applying the requirements of Act 153 to old TERI participants enrolled prior to July 1, 2005.[8]

B. Working Retirees

[6] Petitioners argue that the statutory provisions governing old working retirees created contracts which the State breached by requiring previously enrolled working retirees to contribute to the retirement system. We disagree.

A person eligible for retirement could have elected to become a working retiree. A working retiree is outlined under the former statute as:

> [A] retired member of the system who has been retired for at least sixty days may return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system.

S.C.Code Ann. § 9–1–1790(A) (Supp.2004). As an old working retiree, a person would be paid their retirement check. Instead of having the retirement check placed in an escrow account like the old TERI program, the old working retiree received the monthly check and could invest the money as he or she saw fit. An old working retiree was also considered to ***643** be retired, and as a result, did not make further contributions to the retirement system. However, in order to retain both his retirement check and normal pay, an old working retiree was limited to earning $50,000 in salary.

As outlined above in this opinion, absent clear statutory language indicating an intent by the legislature to bind itself contractually, a statute does not create a contract. *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465–66, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985).

In the present case, the old working retiree statute does not use the same contractually significant language as utilized in the old TERI statute. As a result, we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees prohibiting the State from altering the statute exempting old working retirees from further contributions to the retirement system. Stated differently, the old working retiree statute does not evidence an intent by the legislature to be bound to any terms related to the old working retiree program.

However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the terms of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

As a result, we remand the issue of breach of contract as to the old working retirees to the trial court for a case by case factual determination of whether any actions of the ****272** State with regard to individual old working retirees constituted a breach of contract.

Issues II, III, and IV

Because we find that the old TERI statute created a binding contract, we do not address the remaining issues.

*644 CONCLUSION

Based on the above reasoning, we hold that the State breached its contract with Petitioners who were enrolled as old TERI participants by forcing those old TERI participants to make retirement system contributions. Accordingly, all retirement system contributions withheld from old TERI participants enrolled prior to July 1, 2005 shall be returned with interest to such TERI participants and no further contributions from TERI participants enrolled prior to July 1, 2005 shall be required.

It should be noted that our decision today is a very narrow one which affects only those TERI participants who joined the old TERI program, originally enacted in 2001, prior to July 1, 2005. This Court has previously ordered that all disputed contributions be escrowed in an interest bearing account during this litigation and as a result this money is available to be returned to the TERI participants. Both the State and the old TERI participants

were protected by this Court in its order requiring the disputed funds be escrowed in an interest bearing account. Thus, under this Court's previous order, the disputed retirement system contributions have been segregated in a separate account during the course of this litigation, and now the State has the funds readily available to accomplish the refund ordered herein.

The new TERI program as adopted by the legislature in Act 153 continues to be valid and all those participants joining after July 1, 2005 are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that impact future participants, but as outlined in this opinion, the State breached its contract with the old TERI participants by changing the terms of the existing statutory agreement after participants agreed to those terms by electing to retire.

Finally, we remand the issue of breach of contract as related to the old working retirees to the trial court. The record before this Court does not allow us to make the factual or legal inquiry necessary to determine if a binding contract existed between the State and the old working retirees regarding *645 the making of further retirement system contributions.

MOORE, BURNETT, JJ., and Acting Justices PERRY M. BUCKNER and D.L. JEFFERSON, concur.

ORDER

On May 4, 2006, this Court issued an opinion holding that respondents breached their contract with TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005 (old TERI participants), by forcing them to make retirement system contributions. *Layman v. State of South Carolina*, Op. No. 26146, 630 S.E.2d 265 (S.C.2006). We further ordered that all retirement system contributions withheld from those TERI participants be returned to them with interest and that no further contributions from them shall be required. *Id.* Finally, we remanded the issue of breach of contract as it relates to working retirees to the trial court because the record before us does not allow us to make the factual or legal inquiry necessary to determine if a binding contract existed between the State and the working retirees regarding the making of further retirement system contributions. *Id.*

The parties have now filed several motions. We will address respondents' petition for rehearing first. We deny the petition with regard to Arguments I and II.

We also deny the petition as to Argument III, but will analyze the arguments made therein. Respondents contend this Court impugned the integrity of counsel by labeling as a complete misrepresentation the assertion that the growing number of TERI participants was part of the reason for requiring contributions from previously enrolled TERI participants. At page 26 of their brief respondents state, "Act 153 was adopted in the face of increasing liabilities in the Retirement System." The sentence is accompanied by a **273 reference to pages 754 and 755 of the record. Those pages in the record contain a portion of the Milliman study describing the increase in the number of participants corresponding to the increase in the liabilities of the retirement system. The numbers are reflected in chart form, depicting the liabilities increasing *646 significantly, almost off the charts. We did not intend to impugn the character of counsel, but we did find fault in the analysis used with respect to the entire Milliman report. Respondent's reliance on the report was inaccurate because by the time respondents prepared the briefs for presentation before this Court, we had previously certified the plaintiff class to include *only* those retirees enrolled *prior* to July 1, 2005. The Milliman report included both current and future TERI participants.

Further, this Court pointed to flawed analysis by stating that 100 percent of eligible retirees were used in arriving at the figures in the report. This sentence, when taken out of context, is incorrect. To clarify, the Milliman report did assume that only 80 percent of *all* eligible retirees (as opposed to 100 percent of eligible retirees) would participate in TERI.[1]

In Arguments IVA and IVB, respondents maintain the Court should amend the class definition to exclude working retirees or, in the alternative, decertify the entire class. Respondents state that class treatment is not necessary because "if the Court lets its decision stand, respondents will comply with the law as declared and provide appropriate relief to all persons entitled to it." Respondents also point out that if the *647 class is not decertified, class notice will be required.[2] We are persuaded by this argument. Accordingly, we grant respondents' request to decertify the classes in this matter. Thus, petitioners' Motion for Approval of Notice to Class is denied as moot.

In Argument IVC, respondents maintain the Court failed to prescribe the procedures for making refunds pursuant

to the opinion, specifically, how or when such refunds will be made.[3] Respondents state, "This is one of the reasons that the class definition must be amended to prevent confusion regarding who is entitled to relief, should the Court maintain the same result in this case." Finally, respondents maintain, as they have in the past, that there is a delay in collecting the contributions and in allocating them to specific persons who are members of the class.

We find there should be no confusion as to who is entitled to relief in this matter—all TERI participants who joined the TERI program, originally enacted in 2001, prior to July 1, 2005, from whom retirement system contributions have been collected since the **274 effective date of Act 153. As to when such refunds are to be made, we hereby order that all retirement system contributions withheld from the old TERI participants shall be returned to them, with interest at the rate of 6%, within thirty (30) days of the date of this order. Specifically how this refund will be effectuated is to be decided by respondents, not this Court. The post judgment interest on the amounts to be returned shall begin to accrue at the rate of 11.25%, set forth by order of this Court dated January 4, 2006, *648 for post-judgment interest, if not returned within this thirty (30) day period.

In Argument IVD, respondents maintain the Court must clarify its ruling as to the working retirees and provide for appropriate procedures on remand to deal with whatever claims are permitted. Our opinion orders that the issue of breach of contract as it relates to the working retirees is remanded to the trial court. Because we have now decertified the class, only petitioner Ahrens' case is remanded to the circuit court, specifically, to the Honorable John L. Breeden. Judge Breeden shall have full authority to decide whether to certify a class or deal with the cases individually. Judge Breeden has the authority to fully explore the issue of whether the working retirees entered into a binding contract and all other issues involved in the working retiree action(s).

[7] Finally, respondents assert in Argument IVE that this Court must prescribe procedures for determining petitioners' request for fees and costs. We consider petitioners' Petition for Costs to Include S.C.Code 15–77–300 Attorney's Fees and Motion for Attorney's Fees (Common Fund Doctrine) in conjunction with Argument IVE of respondents' petition for rehearing. We deny petitioners' Motion for Attorney's Fees (Common Fund Doctrine), as we find attorney's fees in this matter should not come from the retirement contributions made by the old TERI participants, or the interest accumulated thereon. However, we remand petitioners' request for costs, to include attorneys' fees pursuant to section 15–77–300, to Judge Breeden to determine if petitioners are entitled to recover reasonable attorneys' fees to be taxed as court costs against the State of South Carolina and the South Carolina Retirement System, and if so, the amount of attorneys' fees they are entitled to based on the actual amount of work performed, expenses incurred, and the benefit obtained for all of the old TERI participants.

IT IS SO ORDERED.

s/ Jean H. Toal, C.J.

s/ James E. Moore, J.

s/ John H. Waller, Jr., J.

*649 s/ Perry M. Buckner, A.J.

s/ Deadra L. Jefferson, A.J.

All Citations

368 S.C. 631, 630 S.E.2d 265

Footnotes

1 Petitioners consist of a class defined as:
> All persons currently employed by an employer participating in the South Carolina Retirement System who elected prior to July 1, 2005, the effective date of Act 153, to participate in the Teacher and Employee Retention Incentive Program (TERI) pursuant to S.C.Code Ann. § 9–1–2210, *et seq.*, as well as all retired members of the System who have returned to employment covered by the System prior to July 1, 2005, and are not currently TERI participants.

2 Act No. 153, 2005 S.C. Acts 1697.

3 The TERI program is codified at S.C.Code Ann. § 9–1–2210 (Supp.2004).

4 Terms of employment for Retiree participants are codified at S.C.Code Ann. § 9–1–1790 (Supp.2004).

5 The contribution will increase to 6.5% in 2006.

6 Most of the TERI participants are continuing contract teachers and each year the employment contracts of the participants in TERI are subject to renewal, unless the teacher is fired for cause. But the TERI program was available for those employees eligible to participate for up to five years. *See* S.C.Code Ann. § 59–26–40 (Supp.2004) (explaining the various contract levels for teachers).

7 The State should have treated the retirement contributions by old TERI participants in the same manner in which the State treated the old TERI participants with regard to the grievance system. In Act 153, Section 3, the State exempted old TERI participants from the change in Act 153 related to the grievance procedure for employees. The State should have exempted old TERI participants from all portions of Act 153 related to the new TERI program, instead of applying *new* legislation to *old* TERI participants.

8 This holding has almost the same effect on the old TERI participants as envisioned under H. 4544, introduced to the House of Representatives in January of 2006. *See* S.C. H. 4544, 116th Gen. Assembly, 2nd Reg. Sess. (Jan. 31, 2006) (stating that persons who began participation in the Teacher and Employee Retention Incentive Program (TERI) before July 1, 2005, or who were reemployed retirees who returned to employment of employers covered under the South Carolina Retirement System (SCRS) or the South Carolina Police Officers Retirement System (SCPORS) before July 1, 2005, are exempt from the payment of employee contributions otherwise due SCRS or SCPORS with respect to employment after June 30, 2005. The exemption continues for these employees through the termination of TERI participation and while a reemployed retiree remains employed in the position held before July 1, 2005. SCRS and SCPORS shall refund without interest the employee contributions made by the TERI program participants and reemployed retirees receiving the exemption allowed pursuant to this joint resolution). However, this Court ordered the withheld contributions be placed in an interest bearing account during this litigation.

1 Respondents contend in their Introduction, that "[t]his case represents a dramatic departure from ordinary procedural and substantive standards" and that "[i]t is doubtful that there is another case in the history of South Carolina jurisprudence with such a procedural history." Many cases this Court has elected to entertain in its original jurisdiction, which by their very nature involve issues of public interest or special emergency, *see* Rule 229(a), SCACR, have taken the same efficient and expeditious path as the case at hand, and have not included an opportunity for the parties to engage in discovery. *See e.g. South Carolina State Ports Authority v. Jasper County,* 629 S.E.2d 624 (S.C.2006) (order accepting matter in Court's original jurisdiction filed March 2, 2005, opinion issued April 3, 2006); *Sloan v. Wilkins,* 362 S.C. 430, 608 S.E.2d 579 (2005) (order accepting matter in Court's original jurisdiction filed May 14, 2004, opinion issued January 28, 2005); *Sloan v. Sanford,* 357 S.C. 431, 593 S.E.2d 470 (2004) (order accepting matter in Court's original jurisdiction filed May 30, 2003, opinion issued February 9, 2004). The case at hand was certified to this Court by order dated August 4, 2005. The opinion was issued on May 4, 2006, nine months later. Accordingly, this case does not mark a dramatic departure from procedures and time periods in other similar cases before this Court.

2 By order dated November 3, 2005, this Court deferred the issue of class notice until after a decision was rendered in the case.

3 Respondents take issue with this Court's statements in its opinion that the amounts contributed by old TERI participants have been escrowed in a separate interest-bearing account. By order dated August 31, 2005, this Court granted respondents' request for the escrowed funds to be held within the Retirement Trust Fund, but subject to separate accounting for individual contributions, and also ordered that the escrowed funds bear interest at the current rate established by the State Budget and Control Board pursuant to S.C.Code Ann. § 9–1–280 (1986). Further, we note that the description of the interest bearing escrow account was borrowed in large part from pages 2–3 of respondents' brief.

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EXHIBIT C

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 05-CP-40-2785
NANCY AHRENS , ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM, Defendants.	)	**FOURTH AMENDED COMPLAINT** **(Breach of Contract)** **(Unlawful Taking)** **(Unconstitutional Impairment of Contract)** **(Promissory Estoppel)** **(Violation of Due Process)** **(Declaratory Judgment)** **(Injunctive Relief)** **(Equitable Estoppel)** **(JURY TRIAL DEMANDED)**

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this Court as follows:

THE PARTIES

1. Plaintiff Nancy Ahrens is a citizen and resident of Richland County, South Carolina.

2. Plaintiff Ann Mercer is a citizen and resident of Georgetown County, South Carolina.

3. Plaintiff Gary M. McCombs is a citizen and resident of Charleston County, South Carolina.

4. Plaintiffs Ahrens, Mercer and McCombs are persons who were employed by the State of South Carolina or its agencies or political subdivisions and who retired from employment and, after taking the required break in service, returned to work for the State pursuant to S. C. Code § 9-1-1790 ("Working Retiree Plaintiffs") prior to June 30, 2005.

5. The Defendants are the State of South Carolina and the statutorily-created South Carolina Retirement System.

JURISDICTION AND VENUE

6. Jurisdiction and venue are proper in the instant case under Article V, § 7, of the South Carolina Constitution and South Carolina Code Annotated § 14-1-80.

PLAINTIFF CLASS

7. Plaintiffs Nancy Ahrens, Ann Mercer and Gary M. McCombs (hereinafter "Working Retiree Plaintiffs") bring this action on behalf of themselves and, pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, as representatives of a class defined as follows:

> All persons currently employed by the State of South Carolina or its agencies or political subdivisions who subdivisions who retired and returned to employment prior to July 1, 2005, and who accepted re-employment through Form 1104 or an equivalent method. Excluded from the class are persons who are current participants in the TERI program.

8. Individually named Working Retiree Plaintiffs are all state employees who retired and returned to work for the State or its agency or subdivision that participate in South Carolina Retirement System prior to July 1, 2005, pursuant to S.C. Code § 9-1-1790.

9. Upon retiring, the Working Retiree Plaintiffs and the Plaintiff class elected to be non-members of the South Carolina Retirement System under S.C. Code Ann. § S.C. Code § 9-1-1790 by signing a Form 1104 or by an equivalent method. Defendants and the individual employers of Working Retiree Plaintiffs and the Plaintiff Class accepted this election of employment as set forth in Form 1104. When the Working Retiree Plaintiffs returned to work for the State, they were considered non-members of the South Carolina Retirement System and were to make no retirement contributions nor get any new retirement benefits.

10. Members of the plaintiff class are so numerous as to make joinder of all members impracticable. Plaintiff Class is informed and believes that class membership will exceed nine thousand persons.

11. There are questions of law and fact that are common to Working Retiree Plaintiffs and to all members of the Plaintiff Class; and these questions predominate over questions, if any, that may affect only individual plaintiffs or individual members of Plaintiff Class inasmuch as the unlawful and unconstitutional activity alleged herein is of a character that is generally applicable to the Working Retiree Plaintiffs and Plaintiff Class members. Among the questions of law and fact common to Working Retiree Plaintiffs and the Class they represent are:

(a) Whether Act No. 0153, Session 116 ("Act No. 153") is an unconstitutional impairment of contract rights under the South Carolina and United States Constitutions;

(b) Whether Act No. 153 is an unconstitutional taking of Working Retiree Plaintiffs' property;

(c) Whether Act No. 153 violates Working Retiree Plaintiffs' due process rights under the South Carolina and United States Constitutions;

(d) Whether Act No. 153 breaches the contract between the State and Working Retiree Plaintiffs;

(e) Whether the State is estopped from applying Act No. 153 to Working Retiree Plaintiffs.

12. Working Retiree Plaintiffs' claims are typical of the claims of the members of the Plaintiff Class that they represent, as Working Retiree Plaintiffs and members of the Plaintiff Class will lose clearly ascertainable amounts of money in excess of One Hundred Dollars ($100.00) each by having retirement contributions taken from their salaries when such contributions will not inure to the benefit of Working Retiree Plaintiffs.

13. Working Retiree Plaintiffs will fairly and adequately protect the interest of the Plaintiff Class that they seek to represent. The interests of the Working Retiree Plaintiffs are coincident with, and not antagonistic to, those of the Plaintiff Class. Working Retiree Plaintiffs are

represented by counsel who are experienced and competent in the prosecution of complex class action litigation.

14. Class action treatment of the matters at issue in this controversy is superior to the alternatives, if any, for the fair and efficient adjudication of such issues, because such treatment will permit a larger number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would entail. Class action treatment in this case will have the added virtue of permitting the adjudication of what may be relatively small claims by certain members of the Plaintiff Class, for whom it would otherwise not be financially feasible to litigate their claims as individual actions against the Defendants.

15. As to each class member, the amount in controversy exceeds One Hundred Dollars ($100.00), and/or the action is one for declaring a South Carolina statute unconstitutional.

16. Working Retiree Plaintiffs are aware of no difficulty in the management of this action that would preclude it from being maintained as a class action.

GENERAL ALLEGATIONS

17. Working Retiree Plaintiffs are all employees of the State of South Carolina, its agencies or political subdivisions.

18. The Working Retiree Plaintiffs all retired from the State of South Carolina, its agencies or political subdivisions, and returned to work for the State of South Carolina, its agencies or political subdivisions prior to July 1, 2005, pursuant to S.C. Code § 9-1-1790.

19. As a part of their retirement, the Working Retiree Plaintiffs elected to be non-members of the South Carolina Retirement System under S.C. Code Ann. § S.C. Code § 9-1-1790 by completing a Form 1104 or by an equivalent method. Defendants and the individual employers of Working Retiree Plaintiffs accepted this election of non-membership.

20. According to S.C. Code § 9-1-1790, prior to July 1, 2005, a state employee could retire and then return to employment for the State or its agencies or subdivisions after a 60-day break in service.

21. As retirees who have returned to work, the Working Retiree Plaintiffs' retirement benefits would be paid to the Working Retiree Plaintiffs immediately. The Working Retiree Plaintiffs could also return to work, but their earnings were limited to $50,000 per fiscal year.

22. As a "Working Retiree", an employee contracted to and/or was entitled to make no further employee contributions to the retirement system, as Working Retirees had elected non-membership in the retirement system, the employee would also accrue no additional service credit, and the ability to continue employment as a non-retired employee.

23. In exchange for the benefits of being a Working Retiree, the Working Retiree Plaintiffs gave up significant rights, including, but not limited to, the right to participate in State life insurance or disability retirement programs and the ability to accrue service credit during their employment.

24. The enactment of Act No. 153 dramatically altered the Working Retiree statute, to the detriment of the Working Retirees at that time, and in breach of their contracts with the State and in violation of their vested entitlements.

25. Pursuant to Act No. 153, South Carolina Code § 9-1-1790 was amended to read

> A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system the contributions required pursuant to this subsection and subsection (B) of this section.

26. Therefore, Act No. 153 alters the contract between the Working Retiree Plaintiffs and the State and/or eliminates a vested entitlement so that instead of formally retiring and locking in their retirement benefits, and no longer having Retirement System deductions made from their

salaries, the Working Retiree Plaintiffs now have their retirement locked in, but are forced to continue paying money into the Retirement System. Money is being illegally taken from the Working Retirees.

27. These continuing payments into the Retirement System by the Working Retiree Plaintiffs provide them with no benefit, since these funds are forfeited to the Retirement System, effectively serving as an unconstitutional tax.

28. Furthermore, upon information and belief, by providing for such continuing payments into the Retirement System by the Working Retiree Plaintiffs which payments are forfeited to the Retirement System, Act No. 153 may remove the entire South Carolina Retirement System from the tax exempt provisions of Title 26, Sections 401 and 411 of the United States Internal Revenue Code.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

29. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

30. The retirement statutes, including S.C. Code § 9-1-1790, and/or the forms completed by Working Retiree Plaintiffs constituted a binding contract between Defendants and Working Retiree Plaintiffs.

31. Defendants have breached this contract by now demanding that Working Retiree Plaintiffs continue to make payments into the Retirement System although they are officially retired and such payments were not required by the contract and are illegal.

32. Working Retiree Plaintiffs retired pursuant to a contract that fixed their retirement benefits, and barred them from accruing new service credit if they returned to work, in exchange

for the State paying them their pension and salary without deducting a retirement contribution in the event of a return to work.

33. Defendants breached the contract of the Working Retiree Plaintiffs by deducting retirement contributions for the Working Retiree Plaintiffs even though their retirement benefits are fixed and, in fact, are already being paid out.

34. Working Retiree Plaintiffs have suffered damages as a direct and proximate result of the breach of contract by Defendants.

FOR A SECOND CAUSE OF ACTION
(Unlawful Taking)

35. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

36. Act No. 153's amendments to the retirement program require Working Retiree Plaintiffs to continue paying money into the Retirement System even though they have officially retired, their benefits have been vested, and they will receive no benefit of any kind from these required payments.

37. Act No. 153 oppressively, arbitrarily, capriciously and unreasonably deprives Working Retiree Plaintiffs of their property and/or vested entitlement.

38. Act No. 153, as applied to Working Retiree Plaintiffs, violates the protections afforded all citizens against unlawful takings contained in both the United States and South Carolina Constitutions.

FOR A THIRD CAUSE OF ACTION
(Unconstitutional Impairment of Contract)

39. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

40. Defendants induced the Working Retiree Plaintiffs to retire and give up the right to accrue further years of service pursuant to a contract that when the Working Retiree Plaintiffs were rehired by the State, they would not have retirement contributions deducted.

41. By causing the deduction of retirement contributions even though the Working Retiree Plaintiffs' benefits are fixed and are currently being paid, Act No. 153 retroactively impairs the contractual rights and obligations of Working Retiree Plaintiffs and therefore violates Article I, § 4 of the South Carolina Constitution and Article I, § 10, of the United States Constitution.

FOR A FOURTH CAUSE OF ACTION
(Promissory Estoppel)

42. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

43. When the Working Retiree Plaintiffs retired, Defendants unambiguously set forth the terms and conditions of a possible return to work after retirement, through S.C. Code 9-1-1790 and through Form 1104 or comparable forms, which included the provision that retirement contributions would not be deducted from the Working Retirees' salary.

44. The Working Retiree Plaintiffs relied on and accepted these terms and conditions.

45. The Working Retiree Plaintiffs relied on the fact that they would no longer be required to make retirement contributions in deciding to retire and give up certain employment rights as a consequence thereto.

46. It was expected and foreseeable that the Working Retiree Plaintiffs would rely on the terms of the retirement program as set forth by Defendants when they retired.

47. In a reliance on the promise of Defendants, Working Retiree Plaintiffs have been injured as they are now required by Act No. 153 to contribute money into the State Retirement System,

even though their retirement benefits are fixed and they will receive no benefit from their contributions.

FOR A FIFTH CAUSE OF ACTION
(Violation of Due Process)

48. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

49. By retroactively altering the terms of state retirement, and requiring Working Retiree Plaintiffs to begin again contributing to the Retirement System, even though their state retirement benefits are fixed and they will receive no benefit from these contributions, Working Retiree Plaintiffs are being deprived of the use and enjoyment of their property without due process of law.

50. Act No. 153, as applied to Working Retiree Plaintiffs, is arbitrary, capricious, and is so constitutionally infirm as to require that it be stricken and not enforced as to Working Retiree Plaintiffs.

FOR SIXTH CAUSE OF ACTION
(Declaratory Judgment)

51. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

52. As set forth above, there exists and actual dispute within the parties as to the enforceability of Act No. 153 to Working Retiree Plaintiffs.

53. The application of Act No. 153 to Working Retiree Plaintiffs constitutes a breach of contract, and unconstitutional impairment of contract, a violation of Working Retiree Plaintiffs' due process rights, an unconstitutional taking, and Defendants should be estopped from applying Act No. 153 to Working Retiree Plaintiffs.

54. A declaratory judgment defining the rights, privileges and duties of and between the parties is appropriate pursuant to South Carolina Code § 15-53-10, *et seq.*

FOR A SEVENTH CAUSE OF ACTION
(Injunctive Relief)

55. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

56. As a result of the enactment of Act No. 153, Working Retiree Plaintiffs have suffered and will continue to suffer irreparable and immediate harm and injury to their property and rights under the South Carolina common law, South Carolina Code, and the Constitutions of the State of South Carolina and of the United States, and they have no adequate remedy at law.

57. Pursuant to the retirement program and contract with the State, Working Retiree Plaintiffs' retirement benefits are already fixed. Working Retiree Plaintiffs retired pursuant to then effective statutes providing that because the Working Retiree Plaintiffs were formally retired and their benefits were fixed, they would no longer be required to contribute into the State Retirement System. The application of Act No. 153 to Working Retiree Plaintiffs deprives them of income which they reasonably expect and which provided the incentive for Working Retiree Plaintiffs to participate in the retirement program.

58. Working Retiree Plaintiffs are therefore entitled to a preliminary and permanent injunction enjoining Defendants from applying Act No. 153 to Working Retiree Plaintiffs.

59. The balance of harm favors of Working Retiree Plaintiffs because an injunction would merely require Defendants to enforce the terms of the retirement program as they existed when Working Retiree Plaintiffs elected to participate. There is no imminent threat to public health, safety or welfare such that would justify the imposition of such an arbitrary, onerous and harmful amendment without the merits of this litigation being concluded. The granting of an

injunction will cause no harm to Defendants, but substantial and irreparable harm and suffering has occurred and will to occur to Working Retiree Plaintiffs, and those similarly situated, without injunctive relief.

FOR AN EIGHTH CAUSE OF ACTION
(Equitable Estoppel)

60. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

61. When the Working Retiree Plaintiffs retired, Defendants unambiguously set forth the terms and conditions of a possible return to work after retirement, through S.C. Code 9-1-1790 and through Form 1104 or comparable forms, which included the provision that retirement contributions would not be deducted from the Working Retirees' salary.

62. The Working Retiree Plaintiffs had no knowledge or means of knowledge to question the terms and conditions of the programs, or to know that Defendants would refuse to honor the terms and conditions.

63. The Working Retiree Plaintiffs justifiably relied on the Defendants' statements of the terms and conditions of the Working Retiree program.

64. In relying upon the fact that they would no longer be required to make retirement contributions, the Working Retiree Plaintiffs made certain unalterable decisions about their employment and certain employment rights.

65. As a result, the Working Retiree Plaintiffs have been injured they are now required by Act No. 153 to contribute money into the State Retirement System, even though their retirement benefits are fixed and they will receive no benefit from their contributions, and they cannot "unretire."

WHEREFORE, Working Retiree Plaintiffs pray for an Order from this Court certifying the class, awarding damages to Working Retiree Plaintiffs as to causes of action one through eight in an amount to be determined at trial, as well as a judgment declaring Act No. 153 unenforceable as to Working Retiree Plaintiffs, an injunction barring the application of Act No. 153 to Working Retiree Plaintiffs, as well as such further relief as the Court deems just and appropriate.

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6/7/8, 2008

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
NANCY AHRENS, ANN MERCER, and GARY MC McCOMBS, on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF SOUTH CAROLINA and THE STATE OF SOUTH CAROLINA RETIREMENT SYSTEM, Defendants.	)	C/A NO. 05-CP-40-2785R CERTIFICATE OF SERVICE

I, Kathy A. Collins, an employee with the law firm of Lewis & Babcock, L.L.P., hereby certify that I have this 13th day of June, 2008, served the **Fourth Amended Complaint** the above-captioned action upon the defendants herein by hand-delivering a copy of same to opposing counsel at the following address:

Thornwell F. Sowell, Esquire
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Kathy A. Collins

Columbia, South Carolina

June 27, 2008.

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO.: 2005-CP-22-756

James B. Arnold, Jr., Nelson E. Brown, William M. Tisdale, Jr., Bobby Pack, Mitch Anderson, Lorenza Cobb, Ivan Holden, Phillip White, Jamie Harrelson, Dan Furr, Johnnie R. Deas, Marion E. Sealy, Jr., and T. L. Wetherington, Jr., individually and as Class Representatives,

Plaintiffs,

vs.

The South Carolina Police Officers Retirement System and The South Carolina Retirement System and The State of South Carolina,

Defendants.

Class Action Pursuant to SCRCP 23

THIRD AMENDED COMPLAINT (Declaratory Judgment/ Unlawful Taking/ Impairment of Contractual Rights/ Violation of Due Process/ Injunctive Relief/Promissory Estoppel/ Quantum Meruit/Breach of Contract Equitable Estoppel)

The Plaintiffs, complaining of the Defendants, would respectfully allege unto this Court as follows:

FIRST CAUSE OF ACTION

(Declaratory Judgment)

1. The Plaintiff, James B. Arnold, Jr., is a citizen and resident of Georgetown County, South Carolina.

2. The Plaintiff, Nelson E. Brown, is a citizen and resident of Georgetown County, South Carolina.

3. The Plaintiff, William M. Tisdale, Jr., is a citizen and resident of Georgetown County, South Carolina.

4. The Plaintiff, Bobby Pack, is a citizen and resident of Georgetown County, South Carolina.

5. The Plaintiff, Mitch Anderson, is a citizen and resident of Georgetown County, South Carolina.

6. The Plaintiff, Lorenza Cobb, is a citizen and resident of Georgetown County, South Carolina.

7. The Plaintiff, Ivan Holden, is a citizen and resident of Georgetown County, South Carolina.

8. The Plaintiff, Phillip White, is a citizen and resident of Georgetown County, South Carolina.

9. The Plaintiff, Jamie Harrelson, is a citizen and resident of Georgetown County, South Carolina.

10. The Plaintiff, Dan Furr, is a citizen and resident of Georgetown County, South Carolina.

11. The Plaintiff, Johnnie R. Deas, is a citizen and resident of Georgetown County, South Carolina.

12. The Plaintiff, Marion E. Sealy, Jr., is a citizen and resident of Richland County, South Carolina.

13. The Plaintiff, T. L. Wetherington, Jr., is a citizen and resident of Aiken County, South Carolina.

14. The Defendants, The Police Officers Retirement System and The South Carolina Retirement System, are political subdivisions of the Defendant State of South Carolina and are responsible for calculating retirement benefits for the Plaintiffs.

15. That each of the Plaintiffs is a member of the South Carolina Police Officers Retirement System (PORS) and that all of their retirement benefits are administered by the South Carolina Retirement System, a governmental entity of the State of Carolina.

16. That all of the Plaintiffs retired from their respective State jobs prior to July 1, 2005 and that each of the Plaintiffs had been rehired by their respective State agencies prior to July 1, 2005.

17. That pursuant to their retirement contracts which were reached before each Plaintiff retired, each of the Plaintiffs was not required to pay active employee contributions into the State Retirement System until the General Assembly changed the law on July 1, 2005 when Senate Rule 618 came into effect which provided that all employees who had previously retired had to pay into the system 6.25% of their paycheck. That this is required of past retirees despite the fact that they will not receive any additional retirement benefits for the additional contributions.

18. That each of the Plaintiffs had previously retired from their respective agencies and each of the Plaintiffs had signed an agreement with the Defendants and their government respective agency wherein they would not participate through making employee contributions into the State Retirement System.

19. That on July 1, 2005 the Defendants, through a new statute (Senate 618), have now taken 6.25% out of each Plaintiff's paycheck despite the fact that each Plaintiff had previously retired and had vested property benefits in their retirement.

20. That each of the named Plaintiffs had previously agreed to return after retiring to their respective employers and each had agreed that the Defendants would not take out money from the Plaintiff's pay check for additional employee contributions for the State Retirement System.

21. That the Plaintiffs and thousands of other retired police officers who have returned to various police agencies and other state, city and county agencies throughout the state have been required to pay in 6.25% of their gross income into the South Carolina Retirement System and the Police Officer Retirement System as of July 1, 2005.

22. That prior to July 1, 2005, the retired police officers did not have to pay into the retirement system as did any retired State employees and that this was part of the retirement agreement.

23. That Plaintiffs have vested property rights since all the Plaintiffs retired prior to July 1, 2005 and all had agreed with Defendants that there would be no contributions by Plaintiffs to the retirement system.

24. That Plaintiffs bring this case individually and as a class action pursuant to South Carolina Rule of Civil Procedure 23 which provides that Plaintiffs may bring a class action if the court finds the following: (a) the class is so numerous that joinder of all members is impractical; (b) there are common questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; (d) the representative parties will fairly and adequately protect the interests of the class; (e) the relief sought is more than $100.00.

25. That the class is defined as those city, state, county and other municipal employees who retired before July 1, 2005 and who have had 6.25% of their gross income taken out of their paycheck each week pursuant to the new law enacted July 1, 2005.

26. That as has been stated above, Plaintiffs believe that there are many retired police officers and firefighters who belong to the Police Officer Retirement System which is a part of the

South Carolina Retirement System and who are affected by Senate Resolution 618 which was signed into law by the Governor effective July 1, 2005.

27. That Plaintiffs and thousands of others (non police retirees) have had monies taken from their paycheck each week commencing July 1, 2005 and that Plaintiffs and others believe such action is illegal and unconstitutional.

28. That Plaintiffs request that the court issue an order finding the Plaintiffs have vested rights and that such action by the Defendants is illegal as to retirees who retired before July 1, 2005. Further, such action by the Defendants violates the South Carolina and United States Constitution.

FOR A SECOND CAUSE OF ACTION

(Unconstitutional Taking)

29. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

30. That the United States and South Carolina Constitutions both provide that Plaintiffs have certain vested rights to property under the due process clause of the South Carolina and United States Constitutions.

31. That Plaintiffs, in reliance upon their government, did retire with the specific understanding that Plaintiffs could be rehired within fifteen days thereafter and that there would be no other employee contributions to the Police Officer Retirement System or the other retirement systems of the State because Plaintiffs were already retired.

32. That South Carolina changed this statute (S618) on July 1, 2005.

33. That such change is illegal, unconstitutional and violates the United States and South Carolina Constitutions and the due process and equal protection clauses and constitutes a taking of property.

34. That Plaintiffs ask this court for an order holding that such actions are illegal, improper and inappropriate and that the court find Senate 618 as signed by the Governor to be illegal and void *ab initio*.

35. That Plaintiffs request this court for a declaratory judgment that such is illegal and further requests that this court issue its order declaring such and requiring that all contributions which have been made be returned to the Plaintiffs.

36. That Plaintiffs further request that those monies taken from the retirees be paid into an interest bearing account outside of the South Carolina Retirement System and the Police Officers Retirement System and be held there until such time as a court makes a final decision in this case.

37. That Plaintiffs as a class ask for a refund of all contributions taken out by the State Retirement System, for actual damages and attorney's fees.

FOR A THIRD CAUSE OF ACTION

(Impairment of Contractual Rights)

38. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

39. That the Plaintiffs and Defendants entered into a contract whereby Plaintiffs agreed to retire and to be rehired fifteen days later at various state agencies throughout the state.

40. That Plaintiffs also believe that part of the agreement was that Defendants would not continue to require Plaintiffs to make contributions to the Police Officers Retirement Systems.

41. That on July 1, 2005 the General Assembly of South Carolina changed the law and now requires Plaintiffs to make contributions which are of no benefit to the Plaintiffs.

42. That Plaintiffs believe Defendants have breached their contract with the Plaintiffs who have materially changed their position and that Plaintiffs are entitled to a judgment against

Defendants both individually and as a class for all monies paid and/or taken by Defendants from Plaintiffs' checks.

43. That the actions of the Defendants impair Plaintiffs' contracts and violate the United States and South Carolina Constitutions.

44. That Plaintiffs ask for judgment against Defendants for actual damages, attorney's fees and the costs of this action.

FOR A FOURTH CAUSE OF ACTION

(Violation of Due Process)

45. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

46. That the Defendants by illegally retroactively changing the retirement plans and/or programs of the Plaintiffs have violated due process clauses of the South Carolina and United States Constitutions by taking Plaintiffs' property.

47. That this violation of due process culminated with the General Assembly passing Senate Bill 618 which took away vested property rights of the Plaintiffs.

48. That Plaintiffs individually and as a class request an order of this court finding the actions of the General Assembly to be violative of due process and require that all contributions forceably taken from the Plaintiffs' checks be returned and for actual damages, attorney's fees and the costs of the action.

FOR A FIFTH CAUSE OF ACTON

(Injunctive Relief)

49. That Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

50. The Plaintiffs bring this cause of action as an injunctive class action pursuant to South Carolina Rule of Civil Procedure 23 in that Plaintiffs individually and on behalf of all others similarly situated in the Police Officers Retirement System request injunctive relief for all others similarly situated and request of the court a mandatory class wide injunction enjoining the Defendants from taking any money from Plaintiffs' paychecks through the payroll deduction.

51. That Plaintiffs request the court issue a mandatory class wide injunction and that it certify a class at the same time since all individuals are similarly situated would meet SCRCP 23 and its prerequisites.

FOR A SIXTH CAUSE OF ACTION

(Attorney's Fees)

52. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

53. That Plaintiffs bring this cause of action for attorney's fees and costs pursuant to South Carolina law.

FOR A SEVENTH CAUSE OF ACTION

(Promissory Estoppel)

54. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

55. The Plaintiffs bring this cause of action under the doctrine of promissory estoppel.

56. That the Defendants made a promise which was unambiguous in its terms.

57. That in relying upon the promise, Plaintiffs and Plaintiff class did retire and thereabout become rehired by the various governmental entities they work for.

58. That the reliance was expected and foreseeable by the Defendants who made the promises in certain brochures and documents.

59. That the Plaintiffs and the Plaintiff class have suffered injury in reliance upon the promise in that now monies are being drafted out of their checks and that they are unable to recover any of the benefits.

60. That Plaintiffs bring this cause of action for breach of promissory estoppel and for actual damages for the Plaintiff class and for the Plaintiffs individually.

FOR AN EIGHTH CAUSE OF ACTION

(Quantum Meruit)

61. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

62. The Plaintiffs bring this cause of action under the doctrine of quantum meruit.

63. That Plaintiffs believe that the Plaintiff class entered into agreements with the Defendants all of which Plaintiff class relied upon.

64. That Defendants now refuse to follow through with the agreements and that Plaintiffs bring this cause of action against Defendants for quantum meruit for failure to follow through with the agreements and/or contracts made between Plaintiff class and the Defendants.

65. That Plaintiffs ask for actual damages and the costs of this action.

FOR A NINTH CAUSE OF ACTION

(Breach of Contract)

66. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

67. That Plaintiffs bring this cause of action for breach of contract in that Defendants made an offer to Plaintiffs which was accepted and that there was a meeting of the minds and Plaintiff class agreed to retire and be rehired and that no money would be taken out of their checks as per the agreement.

68. That Defendants have breached the contract and that Plaintiffs ask for damages for the Plaintiff class for actual damages and the costs of this action.

FOR A TENTH CAUSE OF ACTION

(Equitable Estoppel)

69. The Plaintiffs reallege and reiterate each and every allegation as fully as repeated verbatim herein.

70. That Plaintiffs bring this cause of action based on the doctrine of equitable estoppel.

71. That Defendants made representations to Plaintiff which was conduct amounting to a false representation or concealment of material facts.

72. That the intention or expectation that such conduct shall be acted upon by the Plaintiff and Plaintiff class.

73. That Defendants had actual or constructive knowledge of the real facts.

74. That Plaintiffs and Plaintiff class changed its position and agreed to retire based upon reliance upon the conduct of the Defendants.

75. That Plaintiffs and Plaintiff class had no reason to find out the truth as to the facts in question.

76. That Plaintiffs ask for judgment on this cause of action for actual damages and the costs of this action.

WHEREFORE, Plaintiffs pray for judgment as follows:

A. That a class be certified on behalf of all members of the Police Officers Retirement System and any others who have paid.

B. That the court declare Senate Bill 618 signed into law by the Governor to be unconstitutional as to people retired prior to July 1, 2005.

C. That the court require refunds of all monies taken from the Plaintiffs checks.

D. That the court require all monies be placed in an independent escrow account until this litigation is ended.

E. That the court enjoin the Defendants from taking monies permanently from the Plaintiffs' checks for retirement contributions.

F. On the First Cause of Action for refund of all contributions and attorney's fees and costs.

G. On the Second Cause of Action for refund of all contributions and attorney's fees and costs.

H. That the Plaintiffs have judgment on the Third Cause of Action for actual damages and the costs of this action.

I. That the Plaintiffs have judgment on the Fourth Cause of Action for actual damages and the costs of this action.

J. On the Fifth Cause of Action for injunctive relief for all those similarly situated.

K. That the Plaintiffs have judgment on the Sixth Cause of Action for attorney's fees and costs.

L. On the Seventh Cause of Action for actual damages.

M. On the Eighth Cause of Action for actual damages and the costs of this action.

N. On the Ninth Cause of Action for actual damages and the costs of this action.

O. On the Tenth Cause of Action for actual damages and the costs of this action.

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January 29, 2008
Surfside Beach, South Carolina

EXHIBIT E

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-40-2785

NANCY AHRENS , ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM,

Defendants.

ORDER

FILED
GEORGETOWN COUNTY, S.C.
2009 JUN 25 AM 10:37
ALMA Y. WHITE
CLERK OF COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-22-756

JAMES B. ARNOLD, JR., et al., individually and as Class Representatives,

Plaintiffs,

vs.

THE SOUTH CAROLINA POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEM, AND THE STATE OF SOUTH CAROLINA

Defendants.

ORDER

1

This matter comes before the Court upon the Plaintiffs' Motion for Declaratory Judgment/Summary Judgment and Defendants' Motion for Summary Judgment. Rule 56, SCRCP, allows a party to seek partial summary judgment when the material facts are not contested. Rule 57, SCRCP, states that a court may order a speedy hearing of an action for a declaratory judgment and that the existence of other remedies does not preclude a judgment for declaratory relief. Such is appropriate especially when mixed questions of law and fact are involved and there is no factual dispute. A hearing was held on May 5, 2009 to consider the motions.

HISTORY OF THE LITIGATION

This case centers on the State's[1] "old working retiree program"[2] which includes members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS).[3] The "old working retiree program" allowed eligible employees to retire and return to work and, *inter alia,* no longer be required to pay retirement contributions.[4] The core issue here is whether or not the State is required to continue the provision which permits those employees

[1]In keeping with the Supreme Court's opinions referring to the defendant entities as "the State," this Order refers to the State of South Carolina and the South Carolina Retirement System are referred to as "the State." See, *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006) and *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

[2]The existence of the "old working retiree program" was recognized in *Layman v. State*, 368 S.C. 631, 643 630 S.E.2d 265 (2006).

[3]This Order is for two cases- *Ahrens v. State*, pending in Richland County, and *Arnold v. State*, pending in Georgetown County. Ahrens involves members of the South Carolina Retirement System while Arnold involves members of the Police Officers Retirement System. However, the issues raised in the cases are the same.

[4]See, S.C. Code § 9-1-1790 (Supp. 2004).

who retired and returned to work before July 1, 2005 to make no additional retirement contributions. This case does not involve those employees that were enrolled in the TERI program prior to July 1, 2005.[5]

In June 2005, the General Assembly enacted Act 153 of 2005 ("Act 153"), which became effective on July 1, 2005, and which changed the "old working retiree program." Prior to the enactment of Act 153, state employees who formally retired and who returned to work for the State received their retirement benefits and earned a paycheck for their continued employment. These Plaintiffs were not required to make contributions into the South Carolina Retirement System as they were under the "old working retiree program."

The enactment of Act 153 altered the situation for the Plaintiffs. Under the new working retiree program, the Plaintiffs must now pay contributions into the State Retirement System but they would receive no additional credit from the continued contributions into the South Carolina Retirement System and are classified by the System as "non-members." As the State declared, "[a] retired member must be excluded from membership...."[6] Prior to Act 153, the "active members" (and not the non-members) were the only ones "earning service credit and making regular contributions to an SCRS retirement account." SCRS Member Handbook, July 2003. Again, retired employees who returned to work for the State under the "old working retiree program" were not required to make any further retirement contributions.

The Plaintiffs filed this lawsuit challenging the requirement that they now make

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[5]See, S.C. Code § 9-1-2210 (Supp. 2004).

[6]SCRS Participating Employer Procedure Manual, October, 2003 Edition.

p3

additional retirement contributions. The *Ahrens* Plaintiffs were originally part of prior lawsuit brought, *inter alia,* by participants of the old TERI program.[7] The Supreme Court decided the TERI issues in the original jurisdiction, and "remanded the breach of contract as to the old working retirees to the trial court...." *Layman v. State,* 368 S.C. 631, 630 S.E.2d 265 (2006).[8] In a subsequent Order dated May 7, 2007, the Supreme Court set forth that this Court had the "full authority to fully explore the issue of whether the working retirees entered into a binding contract and all other issues involved in the working retiree action(s)." *Layman v. State,* Order of May 7, 2007. The Supreme Court also assigned the *Arnold* case to this Court, combining it with the *Ahrens* case.

The Plaintiffs in both *Ahrens* and *Arnold* have set forth multiple causes of action. However, there is really one central issue in the case – whether or not the Defendants can change the terms of the "old working retiree program" after the Plaintiffs and the members of the Plaintiff classes have enrolled in it and accepted the terms by retiring and returning to work.

As instructed by the opinion in *Layman v. State,* I am to rule on "the breach of contract as to the old working retirees." I find that no contract exists. However, the estoppel question raised by the *Ahrens* Plaintiffs' Fourth Amended Complaint and *Arnold* Plaintiffs' Amended

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[7] The *Arnold* Plaintiffs were not a part of that lawsuit, but initiated their own lawsuit challenging the contribution requirement.

[8] While the Plaintiffs set forth multiple causes of action on behalf of both TERI participants and Working Retirees, the Supreme Court only asked for briefing and argument on the issues regarding breach of contract. Thus, this Court now has before it the Working Retiree breach of contract issue remanded by the Supreme Court as well as the other Working Retiree claims contained in the pleadings that the Supreme Court did not consider.

Complaint deserves the Court's inquiry. For the reasons set forth herein, I find that the State should be estopped from changing the terms of the "old working retiree program" as to Plaintiffs and the Plaintiff Class (i.e., those who retired and returned to work prior to July 1, 2005).

Because of my rulings on these issues, I do not need to address the remaining causes of action.[9]

FACTS

First, a review of the uncontradicted facts is in order. Those facts are:

1. Prior to July 1, 2005, S.C. Code § 9-1-1790 (hereinafter "prior S.C. Code § 9-1-1790") allowed a State retiree to return to work under certain conditions:

> A retired member of the system who has been retired for at least sixty days may be hired and return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system.

Prior S.C. Code § 9-1-1790. This allowed the employees in South Carolina Retirement System earning under $50,000[10] to greatly increase their compensation by joining the "old working retiree program."[11] Employees in the Police Officers Retirement System ("PORS") could also join the "old working retiree program" and not make further contributions. See, prior S.C. Code § 9-11-90.

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[9] The remaining causes of action in *Ahrens* are: unlawful taking, impairment of contract, violation of due process, and injunctive relief. The remaining causes of action in *Arnold* are: unlawful taking, impairment on contract, violation of due process, injunction, and quantum meruit.

[10] TERI, at the time, was for employees earning over $50,000. In *Layman v. State*, the Supreme Court ruled that the TERI program could not be changed as to the old TERI participants.

[11] The "old working retiree program" has existed for almost 40 years. See, §61-126 of the 1975 Cumulative Supp. to the 1962 Code.

2. The South Carolina Supreme Court has recognized the existence of the "old working retiree program", but noted that the terms of the program were not fully set out by statute:

> Stated differently, the old working retiree statute does not evidence an intent by the legislature to be bound to any terms related to the **old working retiree program**. However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the terms of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

Layman v. State, 368 S.C. 631, 643 630 S.E.2d 265 (emphasis added).

3. Under the terms set out in prior S.C. Code § 9-1-1790, retirees in the South Carolina Retirement System ("SCRS") could return to work under a salary cap of $50,000 and also collect their retirement benefit for four years. After four years, the old working retirees could rejoin SCRS or keep working under the "old working retiree program." See, prior S.C. Code § 9-1-1590. Under prior S.C. Code § 8-17-370, old working retirees also had grievance rights. No other terms of the Program were specified by statute. The prior version of S.C. Code § 9-11-90 applied to retirees in the Police Officers Retirement System ("PORS") and like § 9-1-1790, allowed to retire and to return to work and make no further retirement contributions. They could rejoin PORS after four years. Prior S.C. Code § 9-11-90.

4. The mechanisms by which a person enrolled in the "old working retiree program" were designed and implemented by the State.

5. It is undisputed that the State included as a term of the "old working retiree

program" the same term that was in the old TERI program -- that no further retirement contributions by participating employees were required. In other words, the "old working retiree program" gave this same benefit to the employees earning under $50,000 as those higher salaried employees who entered the old TERI program.

6. The Supreme Court, in recognizing the existence of the "old working retiree program," acknowledged the need for additional evidence as to its terms, such as the written contracts (forms) issued by SCRS. *Id.* The Supreme Court also said:

> However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the **terms** of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

Id. at 643 (emphasis added).

7. The forms created by the State and signed by the working retirees were:

(a) Form 1104, which stated:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements not to become a member of the Retirement Systems, and I hereby exercise my option to become a non-member.
>
> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment **since I have elected non-membership and, as such, will not be making retirement contributions.**

(b) Form 3A, a precursor to Form 1104, which stated the same thing.

> I hereby notify you that I am an employee of the State of South Carolina

or its political subdivisions, and that I meet the requirements not to become a member of the South Carolina Retirement System or the Police Officers Retirement System, and I hereby exercise my option to become a non-member.

I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment **since employee and employer contributions shall not be forwarded to the Retirement System.**

(c) The forms were required to be signed by all working retirees:

A service retiree (TERI or non-TERI) or a disability retiree **must** complete an Election of Non-Membership (Form 1104) upon returning to work for an employer covered by the Retirement System.

SCRS Participating Employer Procedure Manual, October 2003 Edition.

8. Every retiree in the Program prior to the passage of the statute at issue (i.e., all members of the Plaintiff Class) returned to work and did not have contributions taken out of their paychecks until Act 153 took effect on July 1, 2005.

9. There are approximately 10,600 SCRS working retirees and 2,088 PORS working Retirees who retired prior to July 1, 2005 and who were in the "old working retiree program." See, Defendants' Supplemental Discovery Responses to Requests for Production, September 10, 2007; Arnold Plaintiffs' Brief in Support of Motion for Class Certification, dated July 14, 2008. Of these, there are 5,800 SCRS working retirees and 987 PORS working retirees with forms that specifically state no retirement contributions would be required. Id. There are approximately 4,800 SCRS working retirees and 1,000 PORS working retirees without forms. Id.

10. Some SCRS and PORS working retirees (both those with forms and without forms) paid additional monies in order to obtain enough service credit to retire and join the "old

working retiree program." Approximately 3,300 working retirees paid such additional monies. See, Defendants' Discovery Responses to Plaintiffs' Seventh Interrogatories, dated July 7, 2008. Approximately 600 PORS working retirees paid such additional monies. See, Plaintiffs' Brief in Support of Motion for Class Certification, dated July 14, 2008.

11. It is uncontradicted that the members of the Plaintiff Class returned to work under the "old working retiree program," which did not require any further retirement contributions.

12. It is uncontradicted that the Plaintiffs and the Plaintiff Class could not rejoin SCRS (or PORS) until they had completed four years under the "old working retiree program."

ISSUES

Based on the above fact, this Court looks at two issues:

1) Has the State breached a contract with the working retirees; (Section I – Contract) and

2) Is the State estopped from changing the terms of the "old working retiree program" to require the working retirees to make additional retirement contributions without receiving additional service credit? (Section II – Estoppel).

In deciding the issues, the Court is mindful of the case of *King v. S.C. Retirement Systems*, 319 S.C. 373, 461 S.E.2d 822 (1995). In that case, the Supreme Court, in noting that certain terms in the code were not defined, held:

> The purposes of the State's retirement act are remedial and beneficent. *Knight v. Board of Trustees of Firemen's Retirement & Pension Board*, 269 S.C. 671, 239 S.E.2d 720 (1977). Accordingly, the statute should be liberally construed in favor of those to be benefited and the objects sought to be accomplished.

King, 461 S.E.2d at 823.

I. CONTRACT

Plaintiffs Do Not Have a Contract.

Plaintiffs contend that the retirement statutes, the forms completed by Plaintiffs, oral conversations between Plaintiffs and Defendants, or the purchase of additional service credit gave rise to a binding contract between Plaintiffs and Defendants. The Court finds, however, that neither sections 9-1-1790 or 9-11-90(4) of the South Carolina Code gave rise to a binding contract. In addition, the Court finds that neither the forms, conversations, or the purchase of additional service credit gave rise to a binding contract. Accordingly, the Court concludes that Plaintiffs are not entitled to relief on the basis of a breach of contract.

A. The retirement statutes do not form the basis of a contract.

In *Layman v. State*, the Supreme Court held that section 9-1-1790 ("the old working retiree statute") does not create a binding contract between the State and the old working retirees. 368 S.C. 631, 643, 630 S.E.2d 265, 271 (2006). The Court finds and concludes that this holding precludes a finding by this Court that the old working retiree statute formed the basis of a contract or that Defendants breached a contract arising from the terms of the old working retiree statute. Indeed, the Supreme Court's holding is the law of the case and this Court has no discretion to disturb or modify that holding. *Ackerman v. McMillan*, 324 S.C. 440, 443, 477 S.E.2d 267, 268 (Ct. App. 1996) ("Matters decided by the appellate court cannot be reheard, reconsidered, or relitigated in the trial court, even under the guise of a different form.").

p 10 JWD

B. Neither the forms, oral conversations or purchase of additional service credit form the basis of contractual rights.

The Court finds that the determination in *Layman* that the old working retiree statute did not create contractual rights also precludes a finding that the statutory rights created under the old working retiree statute were converted into contractual rights by subsequent actions of the Retirement System or anyone else.

The Supreme Court expressly made clear that an agent of the State cannot convert statutory rights into contractual rights in *McKinney v. South Carolina Police Officers Retirement System*, 311 S.C. 372, 429 S.E.2d 797 (1993). In *McKinney*, the South Carolina Police Officers Retirement System terminated the plaintiff's retirement benefits because the plaintiff failed to establish twenty-five years of creditable service as required by statute. *Id.* at 373, 429 S.E.2d at 797. On appeal, the plaintiff contended that certain correspondence from the Retirement System created a binding contract between himself and the Retirement System entitling plaintiff to benefits not authorized by statute. Rejecting this argument, the Supreme Court found that the plaintiff "misconstrue[d] the nature of his right to retirement benefits: the source of his right is the statute, not a contract." *Id.* at 375, 429 S.E.2d at 798. Thus, the court held that "[n]either [plaintiff] nor [the Retirement System] have the authority to convert this statutory right into a contractual one." *Id.* Yet, in the present case, Plaintiffs make the same argument as the plaintiff in *McKinney*.

Plaintiffs urged this Court to find that the statutory rights of Plaintiffs were converted into contractual rights. The Court finds, however, *McKinney* makes clear that if the General Assembly did not create a contractual right to non-payment of retirement contributions in section

9-1-1790, then neither the Retirement System nor any other person or agency could have converted the statutory policy of section 9-1-1790 into a contractual right. Thus, the Court finds and concludes that no such contract could have been created as a matter of law by forms signed by Plaintiffs, oral communications had by Plaintiffs and agents of the Retirement System, or the purchase of additional service credit.

Statutory "[p]olicies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Alston v. City of Camden*, 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996) (citing *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985)). Indeed, it has long been the law of this State that "the state can only act under its Constitution and through its legislative enactments, and that, therefore, contracts cannot be created against the state except under such sanctions." *Ehrlich v. Jennings*, 78 S.C. 276, ___, 58 S.E. 922, 924 (1907). The Court finds and concludes that no such sanction is present in this case.

I find that no contract exists.

II. ESTOPPEL

A governmental entity may be equitably estopped in matters that do not affect the exercise of its police power or the application of public policy. *Grant v. City of Folly Beach*, 346 S.C. 74, 801, 551 S.E.2d 229, 232 (2001). The doctrine of estoppel applies when "actions, conduct, words, or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." *Rushing v. McKinney,* 370 S.C. 280, 293, 633 S.E.2d 917, 924 (Ct.App.2006).

Brading v. County of Georgetown, 327 S.C. 107, 114, 490 S.E.2d 4, 7 (1997), identified some elements of estoppel in that case as to the party being estopped: (1) conduct calculated to convey the impression that the facts are different or inconsistent with those that the party subsequently attempts to assert; (2) intention or expectation that the conduct will be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. *Brading* also listed some elements that might be considered as to the party claiming estoppel: (1) lack of knowledge that promise would not continue and no way to determine that they would lose the promise; (2) acceptance of the promise; and (3) prejudicial change in position.

The application of estoppel depends upon the circumstances of each case. *Quail Hill, LLC v. County of Richland,* 379 S.C. 314, 324, 665 S.E.2d 194, 199 (Ct. App. 2008). "[E]stoppel is an equitable doctrine, essentially flexible, and therefore to be applied or denied as equities between the parties may preponderate." *Id.* Estoppel applies to enforce contract-like promises made unenforceable by technical defects or defenses. *Higgins Constr. Co. v. Southern Bell,* 276 S.C. 663, 281 S.E.2d 469, 470 (1981); *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State,* 210 S.C. 136, 41 S.E.2d 780 (1944). The promise should be enforced to avoid an injustice. Id. In fact, the purpose of estoppel is "to prevent manifest wrong and injustice." *Davis v. Monteith,* 289 S.C. 176, 181, 345 S.E.2d 724, 727 (1986).

The case of *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State, supra,* is similar to the facts in this matter. In *Powell,* the plaintiff was a deputy sheriff who was admitted into the Police Insurance and Annuity Fund ("Fund") in 1937. The deputy regularly paid dues to the Fund. As a deputy, the plaintiff was assigned to work in a mill and his salary was paid by a private corporation. In 1940, the State enacted a statutory amendment which

p13

defined a police officer as one who received his salary from the State or a political subdivision. In 1946, the plaintiff became disabled and made a claim for monthly benefits under the Fund. Plaintiff's claim was denied based on the 1940 statutory amendment. The Supreme Court held that it would be unreasonable and "manifestly unjust" for the Fund to have accepted the dues paid by the deputy and then take the position that the deputy was not covered by the Fund. The court also noted that it was an "apt case" to the application of estoppel "in order to prevent injustice." *Id.* at 783. This case clearly indicates that the State can be estopped from applying a change in the law to the "old working retiree program."

Similarly, in *Oswald v. County of Aiken*, 281 S.C. 298, 315 S.E.2d 146 (Ct. App.1984), the Court of Appeals applied the doctrine of estoppel to prevent the application of a detrimental change in the law to the plaintiff. In that case, Oswald was a police officer who was told to track his uncompensated time, as it would be designated as compensatory time. Then, subject to the needs of the county sheriff's department, Oswald could take time off from work using his accumulated compensatory time. Due to the county's demands for his services, Oswald was unable to use the compensatory time and upon his resignation, he had accumulated 1,188 hours of uncompensated time. The county denied Oswald's request for payment for that time because County Council had recently passed an ordinance prohibiting payments for compensatory time. Prior to the enactment of that ordinance, terminating employees had received payment for compensatory time. The Court of Appeals held that the county was estopped and that a government authority is not immune from the application of the doctrine of estoppel. Thus, Oswald was entitled to receive payment.

Furthermore, our appellate courts have already recognized that the doctrine of estoppel

can be applied in retirement matters. *See, e.g. McKinney v. South Carolina Police Officers Ret. System*, 311 S.C. 372, 429 S.E.2d 797 (1993)(Toal, J., concurring in part, dissenting in part).[12] In *McKinney*, the plaintiff paid into the retirement system and relied on this buy-in to leave his employment. After receiving retirement payments for several months, he was then informed that his retirement benefits would be terminated because he did not actually have the required amount of creditable service. While the majority in *McKinney* determined the case on the basis of the plaintiff's contract claim, Chief Justice Toal filed a separate opinion (concurring in part and dissenting in part) which considered the issue of estoppel. Chief Justice Toal noted that, the plaintiff, having relied on the State's terms to retire:

> is now unable to return to his employment to complete the requisite service to requalify for retirement.

Id. at 376. Chief Justice Toal concluded that it was:

> wholly inequitable to prevent Mr. McKinney from receiving any retirement benefit and to deny the opportunity to complete the requisite service.

Id. at 276.

Similarly, the Plaintiffs retired and enrolled in the "old working retiree program," whose terms, at that time, required no further retirement contributions. The Plaintiffs cannot now "unretire" and are essentially captives of the program for at least four years. It is "wholly inequitable" to now require retirement contributions when the Plaintiffs are unable to return to their employment status or gain more credit for the contributions now required. This case presents a classic example for the application of estoppel.

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[12] *See also, Morgan v. S.C. Budget and Control Board*, 377 S.C. 313, 659 S.E.2d 263 (Ct. App. 2008)(recognizing that estoppel could apply to the retirement system but finding the

p/5

In other jurisdictions, courts have applied the doctrine of estoppel to retirement systems. For example, the North Carolina Court of Appeals applied the doctrine of estoppel against that state's retirement system, finding it appropriate "if an estoppel is necessary to prevent the loss to another...." *Fike v. Board of Trustees, Teachers' and State Employees' Ret. System*, 179 S.E.2d 910 (N.C. App. 1981) (internal citations omitted).

Similarly, in *Hudkins v. State of West Va. Consolidated Public Ret. Board,* 647 S.E.2d 711 (W.Va. 2007), the West Virginia Supreme Court found that to deny estoppel in that case would permit a "manifest injustice." In *Hudkins*, the court considered the issue of whether unused sick time could be used for retirement service credit for the purposes of calculating pension benefits. The court noted that the retirement board had given the plaintiff assurances that she could indeed receive credit for unused sick time. The plaintiff then decided to separate from her employment on March 31, 2000. In September 2002, more than two years after her separation from employment, the plaintiff learned that she would not be permitted to convert her unused sick time to service credit. In October 2002, the retirement board responded to her inquiry, claiming that only employees who actually retire and began drawing retirement benefits at the time of the termination of employment could convert unused sick leave and that the unused sick leave could not be converted by employees, like plaintiff, who terminated their employment before they became eligible for retirement benefits. The Supreme Court of West Virginia held that "estoppel may operate against a state government with regard to unused sick leave." *Id.*, 647 S.E.2d at 713. The West Virginia Supreme Court acknowledged the plaintiff's dilemma in that, since she had terminated employment 2 years prior, she no longer had the ability to

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plaintiff in that case failed to show the proper basis).

reconsider. *Id.*

The case of *Christensen v. Minneapolis Municipal Employee's Retirement Board,* 1983.MN.95, 331 N.W.2d 740 (1983) is applicable to the facts of this case. In *Christensen,* the plaintiff retired and became eligible to collect pension benefits in 1974. In 1980, the retirement board suspended his monthly benefits until he obtained the age of 60 because of the enactment of a Minnesota law which imposed a new minimum age requirement for entitlement to benefits.

Thereafter, the plaintiff brought a declaratory and injunctive relief suit against the retirement board. The Court held:

> We think today a public employee's interest in a pension is best characterized in terms of promissory estoppel. This approach is presaged, to a degree, by our previous holdings using the contract approach to which promissory estoppel is related.
>
> Promissory estoppel is the name applied to a contract implied in law where no contract exists in fact. The effect of promissory estoppel is to imply a contract from a unilateral or otherwise unenforceable promise coupled by detrimental reliance on the part of the promisee. In other words, promissory estoppel precisely applies where, as here, there are no "contract rights."

Christensen, 331 N.W.2d at 741. The Court further noted:

> The state reasonably expects its promise of a retirement program to induce persons to accept and remain in public employment, and the persons are so induced, and the injustice can be avoided only by enforcement of that promise. Promissory estoppel, like equitable estoppel, may be applied against the state to the extent that justice requires.

Id., 331 N.W.2d at 741. The Court continued:

> ...what the state had promised, what its employees had relied on, and what, therefore, the law will enforce, is a pension program the terms of which are protectable subject to a reasonable legislative modification from time to time.

Id., 331 N.W.2d at 741. In this case, a similar situation has occurred.

p17 Plaintiff

Other courts have enforced similar rights on different theories. In *Simpson v. N.C. Local Government Employees' Retirement System*, 88 N.C.App. 218, 363 S.E.2d 90 (1987), North Carolina employees who were vested members of the retirement system questioned whether they were subject to adverse legislative modification after they had retired. The plaintiffs had qualified for disability benefits under the retirement system until a change in the law occurred in 1981. While adopting a reasonable and necessary approach, the court noted that various jurisdictions throughout the United States had a range of approaches to the question of legislative modification after a retiree had vested in a pension plan. I will also briefly discuss some of those approaches.

A number of jurisdictions apply the traditional common law in holding that public employees' pensions are gratuities and create no contractual rights until the member satisfies all his retirement requirements. See *Etherton v. Wyatt*, 155 Ind. App. 440, 293 N.E.2d 43 (1973). However, it appears this theory is subject to criticism and is not favored by the majority of the courts. A majority of the courts favor a theory which accords more protection to such pension rights. The case most often cited is *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (1983), discussed above. A large number of states, have construed public pension plans as giving rise to contractual rights--even in the absence of a clear statement of legislative intent to contract. See *Pineman v. Oechslin*, 494 F.Supp. 525 (D.Conn. 1980). Some states have held that such pension rights vest unconditionally at the moment of employment. See *Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965).

In *Simpson*, the North Carolina Court of Appeals considered a variety of approaches including the relative weaknesses and strengths of each. That court went on to decide that the

approach known as the *Hughes* approach from the case of *Maryland State Teachers Association v. Hughes*, 594 F.Supp. 1353 D.Md. (1984) was the best approach. The court noted that this theory allows for amendment to a pension only if it was reasonable and necessary to serve an important public purpose. The *Simpson* court adopted this approach because it accorded some protection to plaintiff's pension rights without substantially derogating from the General Assembly's prerogative.

Indeed, under any of these views, it would be appropriate to apply estoppel to the State, and I do so.

LAW AND ANALYSIS

In this case, it is clear that if a person entered the "old working retiree program," he or she was promised that no retirement contributions would be required. The State has even admitted that a term of the "old working retiree program" was that no additional retirement contributions were required:

Q: And that they retired with understanding they wouldn't pay contributions. You understand that.

A: At the time--if they retired prior to July 1, 2005, they did not have to make contributions. That's correct.

Q: And they retired understanding that, didn't they?

A: That was the statutory provisions at the time and that was disclosed to them when they retired.

Q: It was disclosed that they wouldn't have to pay?

A: If they retired prior to July 1, 2005, yes.

Dep. of Peggy Boykin, p. 94:9-23. Again, the State acknowledged the promise made:

p19 JMW

Q: ...Make sure I understand this now. You recognize that people had retired and were told they wouldn't have to make contributions, correct?

A: If they retired prior to July 1, 2005, they were told that contributions were not required on employment.

Dep. of Peggy Boykin, p. 110:12 - 111:21. Under the law prior to Act 153, the "old working retiree program" would not allow participants to "unretire" and become a member of the retirement system for four years. There was no way for any Plaintiffs to know that the "old working retiree program" would be changed. All Plaintiffs joined the "old working retiree program" with the promise that no further retirement payments would be required. They are now prejudiced with no right to reconsider.

The State included in the "old working retiree program," and Plaintiffs and the Class were told, that contributions were not required on employment. Plaintiffs and the Class entered employment under the "old working retiree program" only to have the State change its promise and require contributions.

All of the above facts above give rise to estoppel, which is founded on the principal of justice and good conscience. *Holland Group Inc. v. North Carolina*, 504 S.E.2d 300 (N.C. 1998). It applies when it would be inequitable for the party to whom the doctrine is asserted to take advantage of the situation it created. *Powell v. Board of Commissioners of Police Ins. & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (1944).

I find that it would be manifestly unfair and unjust to allow Plaintiffs and the Plaintiff Class to retire and return to work upon the promise that they would not have to pay retirement contributions and thereafter allow the State to break that promise and require the payment of

retirement contributions while giving no additional credit to the Plaintiffs Class. The State is estopped from collecting retirement contributions from the Plaintiffs and the members of the Plaintiff Classes after July 1, 2005. This Order is also the notice to the class, as described below.

III. NOTICE TO CLASS

I further order the Plaintiff Class in both *Ahrens* and *Arnold* be given notice of the status of the case and the ruling hereby entered. Notice should be given as soon as is practicable after the filing of this Order. The Notice should state, at a minimum, that judgment has been entered in favor of the class, that one or both sides have appealed or will appeal, and that a final decision will be entered by an appellate court. The notice should also provide that if the final appellate decision is in favor of the class, a petition for fees payable from the class fund will be filed and the class members will be given notice and the right to object to the fees. The notice should also state that any members may opt out of the class at the time of the notice, but if they fail to do so, they will be bound by the result on appeal. After the hearing on the attorney's fees and any objections, the contributions to date, minus attorney's fees, shall be returned to the class.

CONCLUSION

Having fully considered the record, memoranda of law, and the arguments of counsel, I find that the State is estopped from changing the terms of the "old working retiree program" as to the Plaintiffs and the Plaintiff Classes. I further order that the State, after a hearing on attorney's fees and objections, return all retirement contributions wrongfully withheld from the Plaintiff Class since July 1, 2005 minus attorney's fees. I further order that the State cease withholding retirement contributions from the Plaintiffs and Plaintiff Classes in the future. Finally, I order that Notice be given to the Plaintiff Class as set forth in this Order.

21

p21 fhwd

AND IT IS SO ORDERED.

James C. Williams, Jr.
Presiding Judge

Orangeburg, South Carolina
June 22, 2009

22 p22 filed

EXHIBIT F

STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Nancy Ahrens, Ann Mercer and Gary M. McCombs, on behalf of themselves and all others similarly situated, Plaintiffs, vs. The State of South Carolina and The South Carolina Retirement System, Defendants.	Civil Action No.: 05-CP-40-2785R

RICHLAND COUNTY
FILED
2009 JUL -9 PM 2:01
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)) COUNTY OF GEORGETOWN)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
James B. Arnold, Jr., Nelson E. Brown, William M. Tisdale, Jr., Bobby Pack, Mitch Anderson, Lorenza Cobb, Ivan Holden, Phillip White, Jamie Harrelson, Dan Furr, Johnnie R. Deas, Marion E. Sealy, Jr., and T. L. Wetherington, Jr., individually and as class representatives, Plaintiffs, vs. The South Carolina Police Officers Retirement System and The South Carolina Retirement System and The State of South Carolina, Defendants.	Civil Action No.: 2005-CP-22-756

DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants The State of South Carolina ("the State") and The South Carolina Retirement System ("Retirement System") hereby move for reconsideration of, amendment of, and relief from the Court's Orders in the above actions dated June 22, 2009, finding that the State is estopped from changing alleged terms of the old working retiree statute as to the Plaintiffs and the Plaintiff class members. The State and the Retirement System received written notice of the entry of the Orders on June 29, 2009, and this motion is made within ten (10) days of receipt of written notice of entry of judgment.

This motion is made on the following grounds:

1. This Court erred in finding and/or concluding that Plaintiffs' statutory reemployment opportunities as they existed at the time Plaintiffs retired were retirement benefits that could not be altered by subsequent legislation.

The Supreme Court specifically held that section 9-1-1790 (Supp. 2004) ("the old working retiree statute") codified "[t]erms of employment for Retiree participants . . . ." *Layman v. State of South Carolina*, 368 S.C. 631, 634, 630 S.E.2d 265, 267, n.4 (2006). This Court strayed from that holding and followed the inapplicable contractual-pension analysis found in the case law relied on in its decision. (*See* Orders at 18 ("A large number of states, have construed public pension plans as giving rise to contractual rights—even in the absence of a clear statement of legislative intent to contract.")). However, this case has nothing to do with pension rights.

Section 9-1-1790 outlined the terms of employment for working retiree as follows:

> [A] retired member of the system *who has been retired for at least sixty days may return to employment* covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system.

S.C. Code Ann. § 9-1-1790(A) (Supp. 2004) (emphasis added). By statute, a person who retired from employment with the State had to be separated from service for at least 60 days before he or she could become eligible for the opportunity to become employed as a working retiree. There was no guarantee that the retiree would become reemployed by the State at the end of the required separation of service. Simply stated, the State was not obligated to offer post-retirement reemployment to Plaintiffs, and Plaintiffs were not required to accept such employment. It is therefore error for this Court to conclude that the State is estopped from altering the terms of employment for working retirees. As one court has noted:

> [U]nless a statute or a contract provides otherwise, post retirement reemployment with the State is always optional with both parties: the State is not obligated to offer it, and the retirees are not obligated to accept it if it is offered. But if they do accept, they must accept it on terms that the State is then willing to include as part of its offer.

Retired Adjunct Professors of the State of Rhode Island v. Almond, 690 A.2d 1342, 1345 (R.I. 1997) (reversing trial court's determination that the State could not change the terms on which it offered reemployment opportunities to retirees).

This Court erred in both placing too much emphasis on the working retiree statute as it existed at the time Plaintiffs and members of the Plaintiff classes retired and in viewing the statutory scheme as unalterable and something other than a statute describing terms of employment. "South Carolina law is clear that public employees generally have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment." *Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996). Thus, under the law of this State, the terms of Plaintiffs' employment, including the amount of retirement contributions, was subject to change by the General Assembly.

2. Likewise, this Court erred in failing to recognize that the requirement to make contributions is a term of at-will public employment that is subject to change at any time. South Carolina has long recognized the doctrine of at-will employment. *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C. 219, 225, 337 S.E.2d 213, 216 (1985); *Baril v. Aiken Reg'l Med. Ctrs.*, 352 S.C. 271, 281, 573 S.E.2d 830, 836 (Ct. App. 2002). "This doctrine provides that a contract for employment is terminable at the pleasure of either party when unsupported by any consideration other than the employer's duty to provide compensation in exchange for the employee's duty to perform a service or obligation." *Baril*, 352 S.C. at 281, 573 S.E.2d at 836. "'At-will employment is generally terminable by either party at any time, for any reason or no reason at all.'" *Id.* (quoting *Prescott v. Farmers Tel. Coop., Inc.*, 335 S.C. 330, 334, 516 S.E.2d 923, 925 (1999)). This Court overlooked or failed to consider that the State was and is free to alter the terms of employment for working retirees in the most drastic way—e.g., terminate the employment relationship altogether if it saw fit to do so. It is anomalous for the Court to find that although the State could terminate the employment relationship after it began, the State could not alter the terms in other, less prejudicial ways.

The non-contractual nature of at-will employment apparently precluded any finding by this Court that that Plaintiffs had a protectable property interest in their employment that was unlawfully taken by the State. This same reasoning should also have precluded this Court from finding that the General Assembly could not alter the legislative policy of the State as reflected in the old working retiree statute.

3. The Court erred by explicitly or implicitly recognizing that the General Assembly had the authority to amend the old working retiree statute, but simultaneously concluding that the

State and the Retirement System were liable to Plaintiffs and the Plaintiff class members as a result of the amendment.

4. In announcing its ruling before issuing its Orders, the Court expressly stated that neither the State nor the Retirement System made any misrepresentations to Plaintiffs or the Plaintiff class members. The Court's Orders, however, do not reflect this express finding, and therefore this Court should amend its Orders to include this finding.

5. In finding the State and the Retirement System liable for amending the terms of the old working retiree statute, this Court's decision is an unconstitutional intrusion into the lawmaking authority of the legislative branch.

6. This Court erred in applying the doctrine of estoppel to the facts and circumstances of this case.

Although the Court concludes that the State is estopped from changing the terms of the old working retiree statute, the Court fails to identify the estoppel doctrine it applied to reach its erroneous conclusion. Under the broad heading of "estoppel," this Court begins its discussion by noting that "[a] governmental entity may be *equitably estopped* in matters that do not effect the exercise of its police power or the application of public policy." (Orders dated June 22, 2009 at 12. (Emphasis added.)) But the Court relies on case law that addresses the issue of *promissory* estoppel. *See Higgins Constr. Co. v. S. Bell*, 276 S.C. 663, 281 S.E.2d 469 (1981); *Christensen v. Minneapolis Mun. Employees Ret. Bd.*, 331 N.W.2d 740 (Minn. 1983). Under both estoppel doctrines, however, the Court erred.

7. This Court erred in its implicit finding that section 9-1-1790 (A) and section 9-11-90(4) of the South Carolina Code (Supp. 2004) gave rise to an implied contract and that the State was therefore estopped from altering the terms of those statutes.

In *Layman*, the South Carolina Supreme Court held that the old working retiree statute "does not create a binding contract between the State and the old working retirees prohibiting the State from altering the statute exempting old working retirees from further contributions to the retirement system." 368 S.C. at 643, 630 S.E.2d at 271. The Court further stated that "the old working retiree statute does not evidence an intent by the legislature to be bound to *any terms* related to the old working retiree program." *Id.* (Emphasis added.) This Court was therefore compelled to presume and find that no such rights were intended and that the General Assembly was free to amend the "old working retiree program" at any time and in any way it saw fit. *See Abraham v. Palmetto Unified Sch. Dist. No. 1*, 343 S.C. 36, 45, 538 S.E.2d 656, 661 (Ct. App. 2000) (quoting *Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996), quoting in turn *Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937) ("'[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'")).

In reaching the erroneous conclusion that the State is estopped from altering the terms of the old working retiree statute, this Court places considerable reliance on *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740 (Minn. 1983). In *Christensen*, the Minnesota Supreme Court recognized that the doctrine of promissory estoppel applies only to agreements "'implied in law where no contract exists in fact.'" *Id.* at 748 (quoting *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 593 (1975)). But the State is liable only upon contracts authorized by law. *Carolina Nat'l Bank of Columbia v. State*, 60 S.C. 465, ___, 38 S.E.2d 629, 633 (1901). Thus, "no . . . estoppel arises against the state as a basis for

an implied contract, and the state cannot be made liable as for an implied contract when there was no power to make an express contract . . . ." *Id.*

Layman expressly finds that no contract exists—neither express nor implied in law. Indeed, if an implied contract existed with respect to the working retirees, the Supreme Court would have found so in *Layman*, but it did not. This Court therefore erred in implicitly finding a contract implied in law and applying principles of estoppel when the Supreme Court precluded that possible finding in *Layman*. In so doing, the Court impermissibly converted legislative policy of the State into guaranteed contractual rights. *See Retired Adjunct Professors*, 690 A.2d at 1346. This conclusion is directly contrary to the holding in *Layman*. The Court's Order grants relief to the same group that the Supreme Court denied relief, and finds a quasi-contract where the Supreme Court found no contract at all.

8. This Court erred in finding that estoppel applies to the facts and circumstances of this case while also finding, as it had to, that no contract exists.

In correctly holding that neither the old working retiree statute, nor the forms, nor the alleged oral conversations, nor the purchase of additional service credit forms the basis of contractual rights, this Court found that the old working retiree statute is a statutory policy that "'unlike [a] contract, [is] inherently subject to revision and repeal . . . .'" (Orders at 12 (quoting *Alston v. City of Camden*, 322 S.C. 38, 46, 471 S.E.2d 174, 178 (1996)). The Court further observed that "'to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body.'" *Id.* Embodied in this finding is the right of the General Assembly to amend the old working retiree statute. But the Court later contradicts itself in holding that the State is estopped

from changing the terms of what this Court admits is a legislative policy of the State without incurring liability.

9. This Court erred in granting Plaintiffs' motions for summary judgment on the basis of estoppel because it failed to make any findings of fact that support the legal conclusions reached with respect to the Plaintiffs and the Plaintiff classes.

On November 11, 2008, this Court granted Plaintiffs' Motions for Class Certification. Relief to the Plaintiffs and Plaintiff class members on the basis of estoppel can only be premised on specific findings of fact, however. This Court's Orders granting summary judgment in favor of Plaintiffs and the Plaintiff class members on the basis of estoppel is devoid of any findings with respect to each of the elements of estoppel. The failure of the Court to set forth specific findings with respect to each of the elements of estoppel deprives the State and the Retirement System of "meaningful appellate review." *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 237, 536 S.E.2d 86, 88 (Ct. App. 2000) (holding that "a trial court's order on summary judgment must set out facts and accompanying legal analysis to permit meaningful appellate review").

10. This Court erred in granting summary judgment on the basis of promissory and/or equitable estoppel because the assumed facts upon which the Court's Orders are based are not established in the record for any Plaintiff or Plaintiff class member.

In its Orders, the only "findings of fact" with respect to estoppel are found in the following summary statements:

- "There was no way for any Plaintiffs to know that the 'old working retiree program' would be changed." (Orders at 20.)
- "All Plaintiffs joined the 'old working retiree program' with the promise that no further retirement payments would be required." (*Id.*)

- "[Plaintiffs] are now prejudiced with no right to reconsider." (*Id.*)
- "Plaintiffs and the Class were told, that contributions were not required on employment." (*Id.*)

"Questions of estoppel . . . are fact-intensive inquiries." *City of Tucson v. Clear Channel Outdoor, Inc.*, 181 P.3d 219, 237 (Ariz. App. 2008). Not only did this Court fail to make any findings of fact with respect to each element of promissory and/or equitable estoppel as it applied to Plaintiffs and the Plaintiff class members, there is no record before the Court upon which it could possibly make such findings for all Plaintiffs and Plaintiff class members.

To the contrary, the limited record before the Court establishes that (1) not all Plaintiffs and Plaintiff class members were told the same things with respect to the working retiree program; (2) to the extent they were told anything, not all Plaintiffs and Plaintiff class members relied on those alleged representations; and (3) none of the Plaintiffs and Plaintiff class members were prejudiced. The clearest example in support of this assertion is Gary McCombs, a class representative for the *Ahrens* Plaintiffs. The record establishes that he knew that the law was going to change, and in order to prevent his salary from being reduced significantly, he elected to become a working retiree *after* Act 153 was passed. (McCombs Dep. p. 19, ll. 9-22; p. 37, ll. 7-11.) Thus, McCombs cannot assert that he had a reasonable expectation that the law would not change. His situation, as reflected in the record, is not typical or common with the alleged situation of other class members. Nor can McCombs claim that he detrimentally relied on an alleged contract not to pay retirement contributions in making a decision to become a working retiree because by the time he became a working retiree, the law requiring contributions to be made had already been adopted. He cannot therefore claim any misunderstanding about the effect of his becoming a working retiree, yet he chose to do so anyway. Under these

circumstances, the Court cannot justify its assumption that all class members are similarly situated and had consistent understandings and expectations regarding the terms of their urn to covered employment. It was therefore error for the Court to grant class wide relief on the basis of assumed facts that are contradicted in the record.

11. To the extent this Court found that the State and the Retirement System are liable to Plaintiffs and the Plaintiff class members based on promissory estoppel or equitable estoppel, the Court erred in its reliance on and application of those doctrines.

a. The elements of promissory estoppel are: "'(1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.'" *Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 925 (Ct. App. 2006) (quoting *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993)). To the extent the Court applied promissory estoppel to conclude that that the State is estopped from changing the terms of the old working retiree statute, the Court erred as follows:

i. In *Layman*, the Supreme Court concluded that the old working retiree statute did not contain contractually significant language binding the State to any terms of the old working retiree program. 368 S.C. at 643, 630 S.E.2d at 271. Thus, an alleged promise could not arise from the terms of section 9-1-1790. In its Orders, this Court found that the forms, alleged oral conversations, and purchase of additional service credit are not the bases of a contractual promise. (Orders at 11-12.) This Court therefore erred in finding that an unambiguous promise was made to Plaintiffs and members of the Plaintiff classes. Whereas estoppel may apply "to enforce contract-like promises," (Orders at 13), "[t]he circumstances

which may trigger the application of promissory estoppel . . . cannot be tortured into the requisite elements of a traditional contract." *Duke Power Co. v. South Carolina Pub. Serv. Comm'n*, 284 S.C. 81, 101, 326 S.E.2d 395, 406 (1985).

ii. Even if agents of the Retirement System informed members of the Plaintiff class that they would never have to make additional contributions in their capacity as working retirees—which there is no support for in the record—the Court erred in overlooking the fact that an individual's status as a working retiree is governed by statute, and under *McKinney v. South Carolina Police Officers Retirement System*, if the General Assembly did not create a contractual right to non-payment of retirement contributions in section 9-1-1790, then the Retirement System could not have converted the statutory policy of the old working retiree statute into a contractual right. 311 S.C. 372, 375, 429 S.E.2d 797, 798 (1993).

iii. Additionally, the Court overlooked or failed to consider that any agent of the Retirement System who stated that the terms of the old working retiree statute would never change lacked the authority to contradict the terms of the old working retiree statute. *Morgan v. South Carolina Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008). If the agent did not have the power to act, "his action is not state action, and so affords no basis upon which to predicate estoppel against the state." *Carolina Nat'l Bank v. State*, 60 S.C. 465, ____, 38 S.E.2d 629, 632 (1901).

Accordingly, to the extent this Court applied the doctrine of promissory estoppel, it was error for the Court to do so.

b. The elements of equitable estoppel with regard to the party estopped are: "(1) conduct amounting to a false representation or concealment of material facts . . . .; (2) the intention or expectation that such conduct shall be acted upon by the other party; and (3) actual

or constructive knowledge of the real facts." *Rushing*, 370 S.C. at 293-94, 633 S.E.2d at 924. As to the party claiming estoppel, the elements are: "'(1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position.'" *Id.* at 294, 633 S.E.2d at 924 (quoting *S. Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993)). To the extent this Court applied equitable estoppel to conclude that the State is estopped from changing the terms of the old working retiree statute, the Court erred as follows:

i. This Court erred in applying the doctrine of equitable estoppel because it failed to make any findings with respect to the elements pertaining to the party estopped.

ii. To the extent the Court concluded that Plaintiffs and all members of the Plaintiff classes lacked knowledge that the old working retiree statute would be changed, the Court overlooked or failed to consider that in order to establish this element under South Carolina law, Plaintiffs must show that the State acted in a way that misled or deprived complainants of knowledge. *E.g., Landing Dev. Corp. v. City of Myrtle Beach*, 285 S.C. 216, 329 S.E.2d 423 (1985). Plaintiffs failed to produce any evidence that they were misled by the State and this Court did not have a record upon which to make this assessment with respect to any Plaintiff or member of the Plaintiff classes. Moreover, the Court's failed to make such a finding supported by the record in its Order.

iii. The Court erred in assuming that Plaintiffs relied on an alleged promise made by the State or agents of the Retirement System. Plaintiffs presented no evidence of alleged reliance by themselves or the class members. In fact, the evidence before the Court

established that the Retirement System regularly informed Plaintiffs and Plaintiff class members that section 9-1-1790 was subject to change.

Moreover, even if Plaintiffs relied on the then-existing terms of section 9-1-1790 when they decided to retire, "they were not entitled to conclude that these provisions were fossilized in legislative amber." *Retired Adjunct Professors*, 690 A.2d at 1345. "On the contrary, lacking any guarantee of reemployment or of any right to be offered reemployment, they should have known that the State would be free to fiddle with the terms on which it might decide to offer such reemployment opportunities to them at any time." *Id.*

iv. This Court erred in impliedly concluding that the alleged reliance was foreseeable by the State and the Retirement System when the only evidence before the Court was that as early as 2002, the Retirement System published pamphlets describing the working retiree program and stating that "[t]he information contained in this publication is meant to serve as a guide, but does not constitute a binding representation of the South Carolina Retirement Systems." The pamphlets further advised that "state statutes are subject to change by the South Carolina General Assembly."

v. This Court erred in finding that the Plaintiffs and Plaintiff class members reasonably relied on the old working retiree statute remaining unchanged as to the making of contributions when the statute contained no contractually significant language regarding contributions to the Retirement System, and Article X, section 16 the South Carolina Constitution requires the General Assembly to change member contributions annually to ensure the fiscal stability of the Retirement System.

c. To the extent that the Court relied on the doctrine of promissory estoppel, it erred by finding injury to Plaintiffs or the Plaintiff class in the absence of a record.

12. This Court erred by entering Orders that do not expressly dispose of all issues in this case. The Court's Orders should reflect that this Court considered and denied all other grounds for relief set forth in Plaintiffs' Amended Complaints in order to facilitate a single appeal in this matter. Specifically:

a. The Court's Orders should be amended to enter judgment in favor of the State and the Retirement System on Plaintiffs' unlawful takings claims because Plaintiffs do not have a protectable or vested property interest as a matter of law since there can be no property interest when a vested right is completely dependent on the law. *See Rick's Amuse., Inc. v. State*, 351 S.C. 352, 359, 570 S.E.2d 155, 158-59 (2001) (holding that owners of video poker machines did not have a right to cash payouts because continued cash payouts were completely dependent on licensing);

b. The Court's Orders should be amended to enter judgment in favor of the State and the Retirement System on Plaintiffs' due process claims because no provision in Act 153 applies retroactively and the General Assembly is permitted to enact legislation encumbering vested retirement funds as well as prospectively adjust the terms and conditions of public employment. *See McMaster v. South Carolina Ret. Sys.*, 362 S.C. 362, 608 S.E.2d 843 (2005) (upholding a retroactive application of a statute that permitted a lien to apply on vested state retirement funds);

c. The Court's Orders should be amended to enter judgment in favor of the State and the Retirement System on Plaintiffs' impairment of contract claims because there is no contract between Plaintiffs and Plaintiff class members and the State or the Retirement System; the Court did not have a record before it to determine whether the passage of Act 153 amounted to an impairment of contract or whether the passage of Act 153 was reasonable and necessary to

accomplish a legitimate public purpose; and there was not record before the Court in which it could assess that Plaintiffs had a reasonable expectation that the State would continue *ad infinitum* with its policy exempting working retirees from making contributions to the Retirement System; and

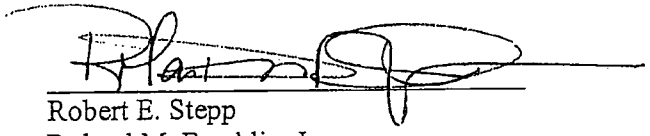
d. The Court's Order in *Arnold* should be amended to enter judgment in favor of the State and the Retirement System on Plaintiffs' quantum meruit / unjust enrichment claim because all retirement contributions collected from Plaintiffs go to the Retirement Trust Fund and are used to fund Plaintiffs' (and all other retirees') retirement benefits and cost-of-living increases. The benefit is therefore exclusively enjoyed by the retirees and not by the State. Additionally, unjust enrichment requires a consideration of facts that were not before the Court on the present record. Accordingly, this Court cannot provide class-wide relief on the basis of unjust enrichment.

12. Finally, in *Layman*, the Supreme Court remanded only one issue—breach of contract as to the old working retirees—to this Court "for a case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract." 368 S.C. at 643, 630 S.E.2d at 271-72. It was therefore error for this Court to find the State and the Retirement System liable to Plaintiffs and Plaintiff class members on a theory different from the issue remanded by the Supreme Court.

[Signature page follows]

Respectfully submitted,

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

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Attorneys for Defendants The State and the South Carolina Retirement System

Columbia, South Carolina
July 9th, 2009

CERTIFICATE OF SERVICE

I, the undersigned Paralegal, of the law offices of Sowell Gray Stepp & Laffitte, L.L.C., attorneys for the Defendants do hereby certify that I have caused all counsel in this action to be served with a copy of the pleading(s) hereinbelow by depositing a copy of same in the U.S. Mail, postage prepaid, to the addresses listed below.

Pleadings: Defendants' Motion to Alter or Amend Judgment

FILED
2009 JUL -9 PM 2:01
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C.C.P. & G.S.

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Karen S. Anders

July 9, 2009

EXHIBIT G

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2005CP4002785

Nancy S Layman *vs.* **State of South Carolina**

Plaintiff Defendant

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ Other: _____

RICHLAND COUNTY FILED 2009 SEP 14 PM 2:20 JEANETTE W. McBRIDE C.C.P. & G.S.

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this 15th day of Sept., 2009, to attorneys of record or to parties (when appearing pro se) as follows:

A. Camden Lewis
Richard A Harpootlian

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert E. Stepp
William H Johnson

ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride

Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-40-2785

NANCY AHRENS, ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM,

Defendants.

ORDER DENYING RULE 59 MOTION

RICHLAND COUNTY
FILED
2009 SEP -8 AM 10:30
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
)
COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 05-CP-22-756

JAMES B. ARNOLD, JR., et al., individually and as Class Representatives,

Plaintiffs,

vs.

THE SOUTH CAROLINA POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEM, AND THE STATE OF SOUTH CAROLINA

Defendants.

ORDER DENYING RULE 59 MOTION

These cases are before the Court on Defendants' motions pursuant to SCRCP 59 to alter or amend the judgments previously entered by the Court on the merits in each case. A consolidated hearing on the motions was held on August 18, 2009, at which counsel for all parties were present.

After hearing arguments of counsel, the Court declines to alter or amend its previous judgment, except in one respect. Defendants argued that the existing Orders on the merits did not expressly rule on the theories of relief pleaded by Plaintiffs other than breach of contract and estoppel. The Court agrees with the Defendants' position as to these claims and, therefore, denies relief to Plaintiffs on all theories other than estoppel. With this exception, the motions to alter or amend the judgments are denied.

AND IT IS SO ORDERED.

James C. Williams, Jr.
Presiding Judge

Sept 3, 2009
Walhalla, South Carolina.

EXHIBIT H

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 05-CP-40-2785
NANCY AHRENS , ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated; Plaintiffs, vs. THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM, Defendants.	)	PLAINTIFFS' MOTION TO ALTER OR AMEND

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 05-CP-22-756
JAMES B. ARNOLD, JR., et al., individually and as Class Representatives, Plaintiffs, vs. THE SOUTH CAROLINA POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEM, AND THE STATE OF SOUTH CAROLINA Defendants.	)	PLAINTIFFS' MOTION TO ALTER OR AMEND

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiffs hereby move to alter or amend the Court's order entered September 3, 2009. Plaintiffs received notice

of the entry of the order on September 3, 2009 and this motion is made within ten days. The motions is based on the grounds set forth herein.

In its Order filed June 25, 2009, the court found that it did not have to rule on Plaintiffs' other causes of action: impairment of contract,[1] unconstitutional taking, violation of due process, and quantum meruit. Order (June 25, 2009), Footnote 9. However, in the order ruling on Defendants' Motion for Reconsideration, the court ruled in favor of the Defendants on these claims. Order (September 3,2 009). While the issues of impairment of contract and quantum meruit had been argued before the court, the claims of unconstitutional taking and violation of due process have not been fully briefed and argued before the court. Therefore, in an abundance of caution, Plaintiffs hereby submit this Motion for Reconsideration.

1. THE COURT FAILED TO RECOGNIZE THAT ACT NO. 153 REPRESENTS AN UNCONSTITUTIONAL TAKING UNDER BOTH THE SOUTH CAROLINA AND FEDERAL CONSTITUTIONS.

Act 153 seizes the property (money) of the Working Retirees based on a retroactive change to the statutes governing the State Retirement System which were in effect when Plaintiffs and the Plaintiff Class made their decisions to enter the old Working Retiree program. As a result of change, twice every month, 6.5% of each Working Retiree's salary is seized by the State.[2] Although constitutional takings jurisprudence is more frequently concerned with regulatory takings and condemnation, direct expropriation of money is an even more egregious form of taking. Act 153 is such an expropriation and flatly violates the

[1]The court found that there was no contract, an in so ruling, effectively found that there was no impairment of contract.

[2]From July 1, 2005 - July 1, 2006, the amount withheld was 6.25% of each Working Retiree's pay. On July 1, 2006, the amount increased to 6.5 percent.

Fifth Amendment to the United States Constitution under the United States Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).[3]

Eastern Enterprises involved the application of the Coal Act of 1992 to Eastern Enterprises, a company which no longer was in the mining business. As a result of acrimonious labor disputes over pension and medical benefits in the early twentieth century, coal mining companies executed a series of "National Bituminous Coal Wage Agreements (NBCWA)" beginning in 1947 and concluding with the final agreement executed in 1978. *Id.* at 505-51 1. Although these plans worked well at first, eventually an increase in the benefits combined with a decline of coal production and a large number of retired miners put the financial status of the NBCWA retirement plans in jeopardy. *Id.* at 510. In response, the final 1978 agreement "shifted from a defined contribution obligation, under which employers were responsible only for a predetermined amount of royalties, to a form of defined benefit obligation, under which employers were to fund specific benefits." *Id.* at 510-5 11. The enormous benefit increases in 1978 led more and more coal operators to abandon the business, forcing the remaining coal operators to shoulder more and more of the financial burden. Id. at 511.

In response, Congress passed the Coal Act in 1992, which created a new health plan called the "United Mine Workers of American Combined Benefit Fund." The premiums were assigned on a per capita basis to the companies that employed the miners before they retired. Importantly, if a miner's employer was no longer in business, the premiums could be assessed

[3]Eastern was a plurality opinion in which four justices found the Coal Act was an unconstitutional taking. Justice Kennedy (the fifth justice in the majority) concurred in the judgment, holding there was a violation of the Due Process Clause.

against successors in interest or related business entities. See 26 U.S.C. §§ 9706(a) and 9701(c)(2)(A). Id. at 514.

Eastern Enterprises transferred all of its coal mining operations to a subsidiary in which it retained stock in 1963, and it ceased doing any mining. In 1987, Eastern sold its stock in its coal mining subsidiary and completely left the coal business. Id. at 516. Following the enactment of the Coal Act in 1992, Eastern was assessed a one year premium of $5 million to cover the health benefits of miners who had worked for the company prior to 1966. Id. at 517. Eastern brought an action challenging the constitutionality of the $5 million annual assessment and the United States Supreme Court held that the Coal Act violated the takings clause and was unconstitutional. Id. at 538. Act 153 has exactly the same infirmities found unconstitutional by the Supreme Court in *Eastern Enterprises* as set forth below.

The three factors the Supreme Court examined to determine whether a taking had occurred are: (1) the economic impact of the law; (2) the extent to which the law interferes with investment-based expectations; and (3) the character of the governmental action. Id. at 526-527.

The first factor assesses the economic impact on the party. In Eastern, the Supreme Court found that the $5 million annual payments were "substantial" and found "the company is clearly deprived of the amounts it must pay the Combined Fund . . . [and] [i]t is clear that the act requires Eastern to turn over a dollar amount established bythe commissioner under a timetable set by the Act, with a threat of severe penalty if Eastern fails to comply." Id. at 529.

The economic impact of Act 153 on Petitioners is even more severe. Petitioners are required to pay 6.25% of their income as a so-called "contribution" for which they will receive no benefit whatsoever. The maximum personal income tax rate in South Carolina is 7%. S.C.

Code Ann. 8 12-6-510. Thus, Act 153 forces TERI participants and Working Retirees to pay additional sum almost as great as the maximum income tax rate in this State. That is an enormous burden, and it is obviously "substantial."

The next factor considered by the Supreme Court is interference with the "reasonable investment expectations" of the party. Id. at 532. In Eastern, the Supreme Court found that although benefit payments would only begin with the enactment of the statute, the Coal Act was retroactive because it attached new legal consequences to an act completed before the enactment of the law. Id. at 532. The Court noted that "retroactivity is generally disfavored in the law" and found that the "Constitution does not permit a solution to the problem of funding miner's benefits that imposes such a disproportionate and severely retroactive benefit upon Eastern." Id. at 536. Act 153 is similarly retroactive. It imposes a significant financial burden - 6.25 % of gross pay - on Petitioners based on conduct (retirement or entry into TERI) that occurred prior to the enactment of Act No. 1 53.

The final factor is the nature of the governmental action. Although the Court recognized that Congress was seeking "a legislative remedy for what it conceived to be a grave problem" in Eastern, the Supreme Court held that the Takings Clause was violated when the government "singles out certain employers" to bear burdens based on past conduct unrelated to any commitment the employers made. Id. at 537. Once again, the same analysis applies to Act 153. Even assuming for the purposes of argument that the State was attempting to respond to what it perceived as a funding problem with the Retirement Systems, instead of increasing the contribution level for all State employees, the State singled out TERI participants and Working

Retirees as a source of new funds.[4] Although Act 153 required new contributions from Working Retirees, other state employees' contributions were unaffected.[5] This discriminatory selection is compounded by the fact that Act 153 is retroactive and alters the consequences of decisions made when the employees chose to retire. Just as the Coal Act did, Act 153 impermissibly retroactively singles out a small group of people and forces them to pay for the solution to an alleged wider problem.[6]

For the same reasons the Coal Act in *Eastern* did not pass constitutional muster, Act No. 153 does not pass constitutional muster in this case. Act 153 is retroactive and imposes a burden on a small group of retirees that should properly have been borne by all employees in the Retirement System. It is unconstitutional.

2. THE COURT FAILED TO CONSIDER THAT ACT 153 VIOLATES THE DUE PROCESS CLAUSES OF BOTH THE SOUTH CAROLINA CONSTITUTION AND UNITED STATES CONSTITUTION.

Anglo-American jurisprudence has always been skeptical of retroactive laws. "Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with fundamental principles of the social compact." 2 J Story, Commentaries on the Constitution 5 1398 (5th Ed. 1891). Because Act 153 imposes a retroactive

---

[4]The Budget and Control Board, without any legislative action, can raise the level of employer contributions if the status of the System is in question. See S.C. Code Ann. 9-1-1050 et seq.

[5]Singling out TERI participants and Working Retirees to pay for any alleged infirmities in the finances of the System is even more egregious when one considers the beneficiaries of "stabilizing"the finances are the younger members, not the TERI participants and Working Retirees who are paying for it.

[6]Furthermore, the Working Retirees benefits were fixed as of retirement, so they receive no benefits from these forced contributions.

burden on the old Working Retirees by imposing 6.5% forced contribution on the salaries of affected employees, it violates the due process guarantees of the South Carolina Constitution (Art. I, 5 3).

Since at least 1955, it has been the law of this State that retroactive legislation may not expropriate vested property rights. "The General Assembly may enact retrospective legislation, unless it has the effect of impairing the obligation of a contract, or divesting vested rights of property." *Shoemaker v. Chapin*, 228 S.C. 77, 88 S.E.2d 874, 879 (1955). This principle was reaffirmed by this Court in 1984. "The State has no power to divest or impair vested rights, whether such an attempt to do so be made by legislative enactment, by municipal ordinance, or by changing the Constitution of the State." *Wilson v. Jones*, 281 S.C. 230,233,314 S.E.2d 341,343 (1984).

The pension benefits received by Working Retirees are unquestionably defined benefits that were given and earned upon retirement. These benefits are the property of the Working Retirees. Working Retirees have retired from State employment and are having those benefits paid to them. Act 153 is patently retroactive, because the Working Retirees made their irrevocable decision to retire prior to the enactment of Act 153. The Act then altered the terms of the old Working Retiree program. Consequently, under settled South Carolina law, Act 153 retroactively alters the consequences of economic decisions the Working Retirees have made and divested them of their vested right to 6.5% of their paycheck in violation of the South Carolina Constitution.

The analysis under the Federal Constitution is similar. As under the South Carolina Constitution, vested rights are protected against deprivation without due process. *See, e.g., Scott v. Greenville County*, 716 F.2d 1409, 1417-141 8 (4th Cir. 1983). As Justice Kennedy observed

in his Eastern concurrence, "degree of retroactive effect is a significant determinant" of whether a statute violates the Due Process Clause. Eastern, 524 U.S. at 549 (Kennedy, J., concurring). The retroactive imposition of costs by the government, for which a litigant is "not responsible," is a violation of due process. Id. at 550. Here, the Working Retirees are not responsible for any alleged funding concerns with the Retirement Systems and retroactively forcing them to pay to correct these alleged problems is not permitted by the Due Process Clause of either the State or Federal Constitutions.

CONCLUSION

For the reasons set forth herein, the Motion to Alter or Amend should be granted, and judgment should be entered for Plaintiffs.

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Attorneys for the Plaintiffs

Columbia, South Carolina
September 9, 2009

EXHIBIT I

Form 4

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2005CP4002785

Nancy S Layman *vs.* **State of South Carolina**

Plaintiff Defendant

FILED
RICHLAND COUNTY
2009 SEP 14 AM 9:34
JEANETTE W. McBRIDE
C.C.P. & G.S.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*:
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other
NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2009.

_____
PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this 15th day of Sept., 2009, to attorneys of record or to parties (when appearing pro se) as follows:

A. Camden Lewis
Richard A Harpootlian
ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert E. Stepp
William H Johnson
ATTORNEY(S) FOR THE DEFENDANT(S)

Jeanette W. McBride
Clerk of Court

SCRCP APP-24/FORM 4

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT CIVIL ACTION NO. 05-CP-40-2785
NANCY AHRENS, ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated, Plaintiffs, vs. THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM, Defendants.	)	ORDER

STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO. 05-CP-22-756
JAMES B. ARNOLD, JR., et al., individually and as Class Representatives, Plaintiffs, vs. THE SOUTH CAROLINA POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEM, AND THE STATE OF SOUTH CAROLINA Defendants.	)	ORDER

RICHLAND COUNTY
FILED
2009 SEP 11 AM 11:38
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before me on Plaintiffs' Motion to Alter or Amend, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Plaintiffs sought to alter or amend the Order entered September 3, 2009.

After fully considering the arguments contained therein, I hereby DENY the Motion.

James C. Williams, Jr.
Presiding Judge

Orangeburg, South Carolina
Sept 10, 2009

EXHIBIT J

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 05-CP-40-2785R
Op. No. 26966, filed May 2, 2011

NANCY AHRENS , ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated,

Respondents-Appellants

v.

THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM,

Appellants-Respondents.

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

James C. Williams, Jr., Circuit Court Judge

Case No. 05-CP-22-00756
Op. No. 26966, filed May 2, 2011

JAMES B. ARNOLD, JR., CYNTHIA A. THOMPKINS-HART, NELSON E. BROWN, WILLIAM M. TISDALE, JR., BOBBY PACK, MITCH ANDERSON, LORENZA COBB. IVAN HOLDEN PHILLIP WHITE, JAMIE HARRELSON, DAN FURR, JOHNNIE R. DEAS, KATIE DANIELS, BARBARA DURFEY, PANDA J. DUNCAN, JANET KLEE, JOHN LOCKLAIR, CAROL ANN WILLIAMSON, AND LEON BELLAMY, on behalf of themselves and all others similarly situated,

Respondents-Appellants

v.

THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM,

Appellants-Respondents.

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Table of Contents

Table of Authorities iii

Argument 1

I. The opinion ignores the fact that SCRS has the powers of a corporation. 1

II. The majority opinion misapprehended the Working Retirees' arguments regarding the forms. 2

III. Estoppel applies even if there is no contract. 3

IV. The Working Retirees' other causes of action could proceed in the absence of a contract because pensions are a property right protected under the Fifth and Fourteenth Amendments of the United States Constitution. 4

V. The Court erred in finding that the Retirees did not raise the issue of quantum meruit in their brief. 6

VI. The court failed to address *Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (S.C. 1947) which mandates refunds. 8

VII. This Court can fashion an equitable remedy for all old Working Retirees. 10

VIII. North Carolina Supreme Court has found contractual benefits under a similar situation. 12

IX. Class Certification should be considered on the merits and granted. 13

Conclusion 13

Table of Authorities

Cases

Ahrens v. State, Op. No. 26966 (S.C. Sup. Ct. May 2, 2011) Shearouse Adv. Sh. No. 15 ..... 1, 3

Blakeslee v. Davoudi, 54 Or. App. 9, 633 P.2d 857 (Or. Ct. App. 1981) 3

Board of Regents v. Roth, 408 U.S. 564, 577 (1972) 4

Chapman v. Citizens and Southern National Bank of S.C., 302 S.C. 469, 395 S.E.2d 446 (1992) 1

County of Orange v. Association of Orange County Deputy Sheriffs, 192 Cal. App. 4th 21 - Cal: Court of Appeals, 2nd Appellate Dist., 1st Div. 2011 ..... 5, 13

Estate of Collins v. McKinney, 936 N.E.2d 252, 259 (Ind. Ct. App. 2010) 3

Higgins Constr. Co. v. Southern Bell, 276 S.C. 663, 281 S.E.2d 469 (1981) 4

Hooper v. Ebenezer Senior Services and Rehabilitation Center, 386 S.C. 108, 687 S.E.2d 29 (2009) 11

Key Corp. Capital v. County of Beaufort, 360 S.C. 513, 602 S.E.2d. 104 (S.C.App. 2004) 10

McKinney v. South Carolina Police Officer Retirement System, 311 S.C. 373, 429 S.E.2d 797 (1993) 3

Moore v. Palmetto State Life Ins. Co., 73 S.E.2d 688, 222 S.C. 492 (1952) 7

Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000) 7

Oregon State Police Officers Assoc. v. State of Oregon, 918 P.2d 765 (Ore. 1996) 5

Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State, 210 S.C. 136, 41 S.E.2d 780 (S.C. 1947) 8, 9

Rivers v. State, 327 S.C. 271, 275, 490 S.E.2d 261(1997) 6

Shorb v. Shorb, 372 S.C. 623, 643 S.E.2d 124 (Ct. App. 2007) 4

Smothers v. U.S. Fidelity and Guaranty Co., 322 S.C. 207, 470 S.E.2d 858 (S.C. App. 1996) 10

South Carolina Mental Health Comm'n v. May, 226 S.C. 108, 83 S.E.2d 713 (1954) 6

Stanley Smith & Sons v. Limestone College, 322 S.E.2d 474, 283 S.C. 430 (1984) 7

State ex rel. Callison v. Nat'l Linen Serv. Corp., 225 S.C. 232, 81 S.E.2d 342 (1954) 1

Wiggs v. Edgecombe County, 361 N.C. 318, 643 S.E.2d 904 (N.C. 2007) 2

Withers v. Register, 369 S.E.2d 431(Ga. 1980) 5

Statutes

S.C. Code § 9-1-20 ..... 1, 3

S.Code § 9-1-290 2

ARGUMENT

According to the decision in this case, the maintenance workers, sanitation workers, secretaries, paramedics, road workers, fireman and policemen are not entitled to the same rights as their higher paid counterparts in TERI. As Justice Hearn recognized, the Court cannot, "in good conscience, treat the working retirees differently than this Court treated the TERI participants in Layman." *Ahrens v. State*, Dissent of Judge Hearn, Shearouse Adv. Sh. No. 15, p. 46 The majority opinion overlooked established case law and state statutes in finding that the old Working Retirees are required to make retirement contributions. Therefore, pursuant to Rule 221(a), SCACR, Respondents-Appellants hereby respectfully petition this Court for a rehearing of the Court's May 2, 2011 decision. As set forth more fully below, the judgment should be vacated and a decision in favor of Respondents entered.

I. The opinion ignores the fact that SCRS has the powers of a corporation.

The majority opinion could not have been written if this Court considered S.C. Code § 9-1-20, which states:

> The System so created shall have the power and privileges of a corporation and shall be known as the South Carolina Retirement System, and by such name all of its business shall be transacted, all of its funds invested and all of its cash, securities and other property held.

As a corporation, SCRS can (and does) contract with suppliers, employees, auditors, secretaries, maintenance workers, attorneys, and members. The basis for these contracts is the authority granted in S.C. Code § 9-1-20. It is apodictic that a corporation can only act through its agents, officers and directors. *State ex rel. Callison v. Nat'l Linen Serv. Corp.*, 225 S.C. 232, 235, 81 S.E.2d 342, 344 (1954)("A corporation can act as such only through its agents and employees.). The majority failed

to address that code section and found that SCRS agents could not bind the State.[1] Because SCRS has the powers of a corporation, the promises and representations made by Peggy Boykin and others bind the State under a contract, for the purposes of estoppel or under equitable principles.

II. The majority opinion misapprehended the Working Retirees' arguments regarding the forms.

The majority takes the position that the forms are not contractual because they are derived from the Retirement Act and that the Layman Court found that the Retirement Act did not create a contractual right. The majority also found that the old Working Retiree statutes provided "a mere option to retirees, rather than an offer."[2] However, the fact that the forms were created in light of the retirement statutes does not mean that the forms cannot be contracts themselves. The forms clearly provided:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements to elect non-membership in the Retirement Systems, and I hereby exercise my option to elect non-membership.
>
> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment **since I have elected non-membership and, as such, will not be making retirement contributions.**

R.p. 1012.

In other words, the forms are a manifestation of the intent of the statute-- to offer an option to the old Working Retirees to enter the program and no longer make retirement contributions. The

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[1]State law also provides that SCRS shall ensure that there are no injustices in the system. S.C. Code § 9-1-290. Where is the justice in treating the lesser-paid Working Retirees differently than the higher-paid old TERI participants?

[2]What offer is not an option?

majority attempts to differentiate between an "option" and "offer." However, an option is simply a continuing offer[3] which the old Working Retirees accepted. As Justice Hearn noted, the statute "most certainly constituted a legally significant offer" to the old Working Retirees. By signing the mandatory forms, the old Working Retirees indicated "acceptance of the State's offer of re-employment contained in the working retiree statutes." *Ahrens v. State*, Dissent of Justice Hearn, Shearouse Adv. Sh. No. 15, p. 45. Again, S.C. Code § 9-1-20, if followed, would demand a finding of contract.

Furthermore, the majority's reliance *on McKinney v. South Carolina Police Officer Retirement System*, 311 S.C. 3736, 429 S.E.2d 797 (1993), is misplaced. That case held that certain correspondence from SCRS could not create a contract in contravention of statute. As Justice Hearn notes, "[t]hat is a totally different situation than what is presented here where the retirement system generated the forms to carry out the intent and purpose of the original statutes, and the participants were required to execute those forms prior to being rehired." *Ahrens v. State*, Dissent of Justice Hearn, Shearouse Adv. Sh. No. 15, p.46. Again, because SCRS has the powers of a corporation under S.C. Code § 9-1-20, the forms are the binding contracts of a corporation.

III. Estoppel applies even if there is no contract.

The majority acknowledges that SCRS told the old Working Retirees that they would not be required to make contributions to the system. Despite this recognition, the Court mistakenly concludes that the representations of SCRS cannot support estoppel because the old working retiree

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[3] *Estate of Collins v. McKinney*, 936 N.E.2d 252, 259 (Ind. Ct. App. 2010); *Blakeslee v. Davoudi*, 54 Or. App. 9, 633 P.2d 857 (Or. Ct. App. 1981)

statute did not create a binding contract and thus, the representations were outside SCRS's authority. The Court overlooked the critical principle that estoppel applies where the elements of contract are not met. Estoppel applies to enforce contract-like promises made unenforceable by technical defects or defenses. See, e.g., *Higgins Constr. Co. v. Southern Bell*, 276 S.C. 663, 281 S.E.2d 469, 470 (1981).[4] In addition, as already noted, S.C. Code § 9-1-20 provides SCRS with "the power and privileges of a corporation." The agents of the corporation can and do bind the corporation, SCRS, for the purposes of estoppel.

IV. The Working Retirees' other causes of action could proceed in the absence of a contract because pensions are a property right protected under the Fifth and Fourteenth Amendments of the United States Constitution.

The Court erred in concluding that it need not consider the alternative causes of action asserted by the Working Retirees because those claims were based on the existence of a contract. However, Court has failed to recognize that the actions for an unconstitutional taking and violation of a due process are *alternatives* to a contract action and are valid regardless of the existence of a contract.

As noted in Appellants-Respondents' Brief, even if there is no contract, the old Working Retirees have vested rights or entitlements that are constitutionally protected against a taking. A property right exists when a person has a "legitimate claim of entitlement" to the right arising from such sources as state statutes, local ordinances, and employment contracts. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (establishing the test for determining what constitutes a property interest protected by the Due Process Clause). Courts have routinely recognized that retirement benefits can be constitutionally protected. *See, e.g., Shorb v. Shorb*, 372 S.C. 623, 643 S.E.2d 124 (Ct. App.

[4]In this respect, estoppel is interchangeable with quantum meruit in this case.

2007)(vested pension rights are the joint investment of both parties and constitute and earned property right); *Withers v. Register*, 369 S.E.2d 431(Ga. 1980)(finding that if the employee performed services, the benefits under the plan were constitutionally vested, precluding legislative repeal as to the employee); *Oregon State Police Officers Assoc. v. State of Oregon*, 918 P.2d 765 (Ore. 1996) (once an employee accepts an initial retirement plan offer, he had a vested contractual right in the offer which cannot be altered by a second plan put into effect after the initial plan has been accepted by the employee).[5]

Because the old Working Retirees have a "legitimate claim of entitlement," arising out of the terms of the "old working retiree program," they have a constitutionally-protected property interest. By applying Act 153 to earlier decision of the old Working Retirees, the Act has a retroactive effect that deprives the old Working Retirees of that vested entitlement. Thus, this Court misapprehended the law when it found that the old Working Retirees' takings claim depended on the existence of a contract.

Likewise, the majority opinion ignores the fact that due process also applies where an act retroactively affects the vested rights (even if not contractual) of the old Working Retirees that were

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[5]In a case similar to the one at bar, *County of Orange v. Association of Orange County Deputy Sheriffs*, 192 Cal. App. 4th 21 - Cal: Court of Appeals, 2nd Appellate Dist., 1st Div. 2011 (cert denied by California Supreme Court on April 13, 2011),a California Appellate Court found deputies had a vested contractual right to pension benefits. In that case, the County approved an enhanced retirement formula for prior years of police service. The rule approved by the County Board of Supervisors allowed deputies to retire as soon as age 50 with 90% of their salary after 30 years of service. This agreement was adopted by a memo of understanding. When the recession hit, the County sued to rescind the agreement. The court found that any changes to vested pension rights must be accompanied by "comparable new advantages" to the employee. Here, of course, the old Working Retirees receive no benefit from the additional retirement contributions.

in existence prior to July 1,2005. This Court ruled on a similar loss of a benefit in *Rivers v. State*, 327 S.C. 271, 275, 490 S.E.2d 261, 265 (1997), holding that the retroactive repeal of legislation providing for a tax refund violated due process.[6] Even though the *Rivers* case involved a vested right, and not a contractual right, the court found that the retroactive legislation violated due process. Here, the Court overlooked the *Rivers* case and found that the old Working Retirees' due process claim depended upon the existence of a contract.

V. The Court erred in finding that the Retirees did not raise the issue of quantum meruit in their brief.

The Court, in its decision, held:

> Further, Retirees raise the issue of quantum meruit, but failed to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *State v. Hiott*, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981).

In the Reply Brief of Respondents-Appellants, at page 14, Respondents-Appellants clearly set out that the quantum meruit/unjust enrichment cause of action was improperly or improvidently dismissed by the Circuit Court. Respondents-Appellants noted in their brief:

> ...the State has clearly been unjustly enriched because it is imposing contributions on "old working retirees" in order to shore up the retirement systems.

Further, Respondents-Appellants stated in their brief:

> The State ignores the fact that the retirees who do not work for the State will receive those same increases, and current, non-retired employees receive service credit for their contributions. The "old working retirees," however, are forced to make contributions to fund other benefits and yet receive no service credit for such contributions. Under the equitable doctrines of quantum meruit/unjust enrichment, it would be inequitable to allow the State to retain the contributions. See *Gignilliat v. Gignilliat, Savitz & Bettis*, LLP, 385 S.C. 452, 684 S.E.756 (2009) (quantum

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[6] *See also, South Carolina Mental Health Comm'n v. May*, 226 S.C. 108, 83 S.E.2d 713 (1954)(holding that vested rights are not destroyed by repeal of statute).

> meruit is an equitable doctrine to allow recovery for unjust enrichment and a defendant's retention of a benefit without paying for it is inequitable).

(Brief of Respondents-Appellants, p. 14). The Court should have not have overlooked the equitable issues of quantum meruit, unjust enrichment and implied contract, which were raised in Respondents-Appellants' Brief.

South Carolina law has long recognized that equitable remedies in certain circumstances in South Carolina See *Myrtle Beach Hospital, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (S.C. 2000). In *Myrtle Beach Hospital*, found that the quantum meruit theory is an equitable matter and that "the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff." (*Myrtle Beach Hospital*, 532 S.E.2d at 869). This Court has repeatedly held that contracts may be implied from circumstances as well as by written papers and oral agreements. *See, Moore v. Palmetto State Life Ins. Co.*, 73 S.E.2d 688, 222 S.C. 492 (1952). The Court has found that a "contract implied in fact arises when consent of the parties is manifested by conduct or words while a quasi contract or one implied in law is no contract at all but an obligation created by law in absence of any agreement between the parties." *Stanley Smith & Sons v. Limestone College*, 322 S.E.2d 474, 283 S.C. 430 (1984).

The facts of this case clearly show an implied contract in law and that the State has been unjustly enriched. The State told retirees that upon entering the Working Retiree program they would not be required to make contributions to the system and had the old Working Retirees sign an election of non-membership form which was permanent. Finally, many old Working Retirees bought time and/or credit in order to be eligible to accept the State's offer. It is undisputed that Mr.

Arnold, Mrs. Mercer, and other Working Retirees bought time to be eligible to retire and return to work (R.p. 673, 687;882, 896). Mr. Arnold's deposition indicates he borrowed $59,000 to meet the program requirements and retire (R.p. 673, 687)--all before the law changed on July 1, 2005. In other words, the old Working Retirees have been significantly prejudiced by the State's action while the State has been unjustly enriched at their expense.

The issue of the implied contract/quantum meruit between the parties was raised and that the elements of an implied contract have been met based on the conduct of the parties.

VI. The court failed to address *Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (S.C. 1947) which mandates refunds.

The majority opinion failed to address the case of *Powell v. Board of Commissioners of Police Insurance & Annuity Fund of State*, 210 S.C. 136, 41 S.E.2d 780 (S.C. 1947) which is similar to the facts of this case.

In *Powell*, the legislature created a Board of Commissioners of Police Insurance. The Board was elected by the South Carolina Peace Officers Association with the consent of the Governor and made decisions on applications for insurance. The plaintiff, a deputy sheriff, worked at a private mill in the upstate which paid his salary. The plaintiff applied for membership in the South Carolina Peace Officers Association and the Board accepted his membership despite the fact that his salary was paid by the mill (a private entity). Upon his acceptance, a letter was sent by the defendant advising him of his membership and he continued to work at the mill. In 1940 the Legislature passed Act 844 which stated that police officers needed to have their salaries paid from the State of South Carolina to be eligible. Powell then brought a claim for disability which was denied pursuant to Act 844 because his salary was paid

by a private entity. In *Powell*, the Court noted that he could not be completely dislodged from membership since a contrary interpretation would take plaintiff's property (his membership dues) without due process. *Powell*, 41 S.E.2d at 782. Further, the Court held that the State had voluntarily entered into this relationship and that the legislation could not be retroactive. This Court also noted if the legislature wanted to expel the plaintiff who had previously been accepted for membership, it could have said so in the Act. In holding that Powell was entitled to benefits the Court stated:

> The conclusion reached is confirmed by a study of the Act of 1940 (41 Stat. 1709) which we think is reasonably susceptible only of the finding of the legislative intention that its term should be prospectively applied by the Board.

Powell, 41 S.E.2d at 784. The Court also noted:

> It would be unreasonable, to say the least, to conclude that the Legislature intended to expel the respondent and others similarly situated without expressly dealing with the subject and providing for refund of the dues and assessments which had been regularly paid for the preceding period of approximately three years.

Powell, 41 S.E.2d at 784.

The *Powell* decision is factually and legally analogous to this case and the Court should have considered the *Powell* case in making its decision, especially in light of the Court's citation to *Baker v. State Highway Dept.*, 166 S.C. 481, 165 S.E. 197 (1932) in this Opinion. Just as in *Powell*, estoppel and quantum meruit should operate to prevent injustice. Just as in *Powell*, agents of the State, pursuant to the law existing, approved the relationship and a new legislature cannot now divest the old Working Retirees since to do so is a retroactive application which deprives them of due process.

VII. This Court can fashion an equitable remedy for all old Working Retirees.

Under the principals of equity, fairness and justice that this Court could award and/or order refunds less than full amount paid based on the circumstances of this case. This Court has the authority to do equity in this case. In fact, the Court has said so in the Standard of Review section of the majority opinion, in which it states that this Court may find facts in accordance with its own view of the preponderance of the evidence. Because this case has equitable connotations, this Court should consider two maxims of equity in deciding this case and the remedies for the old Working Retirees.

First, equity abhors a wrong without a remedy. Here all members of this Court agree the State offered the Working Retirees the right to return to work after retiring and not make retirement contributions. After the Working Retirees retired, retiree contributions were imposed leaving the retirees in a prejudicial position. This Court is in a unique position to fashion a fair remedy for both sides. Because there are equitable claims, the Court can administer true justice to both parties without the restrictions of a judgment at law.

The second maxim of equity which applies to this case is equity treats that as done which in good conscience ought to be done. Here Respondents-Appellants' claims are that this Court sitting in equity should find that the old Working Retirees have followed all the rules laid down by the State and in good conscience are entitled to some measure of relief.

There are many examples of this Court providing equitable solutions when there was no adequate remedy at law. *See, Key Corp. Capital v. County of Beaufort*, 360 S.C. 513, 602 S.E.2d. 104 (S.C.App. 2004) (ordering interest paid to successful bidders under restitution theory when statute was silent); *Smothers v. U.S. Fidelity and Guaranty Co.*, 322 S.C. 207, 470 S.E.2d

858 (S.C. App. 1996) (Courts of equity protect those who are unable to protect themselves); *Chapman v. Citizens and Southern National Bank of S.C.*, 302 S.C. 469, 395 S.E.2d 446 (1992) (when matters of conscience are decided improvidently, equity stands ready to rectify); *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 386 S.C. 108, 687 S.E.2d 29 (2009) (equitable power of court is not bound by cast iron rules but exists to do fairness when in view of all circumstances to deny it would permit one party to suffer gross wrong at hand of another).

Some of the solutions under the equitable powers of the Court that could be approved are as follows:

1. The Court could find that the contributions would be credited to the old Working Retirees upon full retirement. This option gives the old Working Retiree credit for the contributions he continues to make and avoids the issue of retroactive legislation affecting the old Working Retirees' due process rights.

2. The Court could find that those Working Retirees who retired prior to July 1, 2005 would be entitled to a refund of those monies paid in, but if they wanted to continue to work, any additional contributions from the date of this decision would go to the SCRS. This solution would correct the manifest injustice of allowing the State Retirement System to retain contributions but would also provide the Working Retirees with notice that, should they continue employment, future contributions would go SCRS without recourse. In effect, this alternative is a prospective application of the Court's ruling that as of the date of the Opinion all future contributions would be retained by the State Retirement System.

These are just two examples of potential equitable remedies. The equitable theories which have been raised by working retirees allow the Court to consider equitable remedies to rectify

this wrong. Further by fashioning such a remedy as suggested above, the due-process implications in this case would be resolved by this equitable resolution.

VIII. North Carolina Supreme Court has found contractual benefits under a similar situation.

Respondents-Appellants present to the Court *Wiggs v. Edgecombe County*, 361 N.C. 318, 643 S.E.2d 904 (N.C. 2007). In *Wiggs*, the North Carolina Supreme Court was faced with a situation similar to this case. Wiggs, a Deputy Sheriff for Edgecombe County, retired, and after he began receiving benefits, decided that he wanted to apply for a part-time position with the Raleigh-Durham Airport Authority. Wiggs was advised that his retirement payments would terminate if the was reemployed in any capacity by any local government participating in the North Carolina Local Government Employees Retirement System.

The North Carolina Supreme Court found:

> ... at the time plaintiff's rights under this agreement vested, there was no restriction in place that would have prevented his reemployment with another member of the Local Retirement System. He was entitled to payment according to the law at the time his rights vested, and these rights may not be taken from him by legislative action. Defendants were obligated to make payment to him in the form of a special separation allowance pursuant to Section 143-166.42, and the resolution seeking to relieve defendants of that duty impaired that contractual obligation. That is not to say defendants were unable, consistent with their incidental powers to implement the mandate of Section 144-166.42 to pass a resolution which would apply prospectively to those whose rights to the specific separation allowance had not yet vested. *See, e.g., Campbell v. City of Laurinburg*, 168 N.C.App. 566, 608 S.E.2d 98 (2005). However, the issue in this case is whether the defendants resolution can be retroactively applied to plaintiffs vested contractual right to receipt of the special separation allowance payment.

Wiggs, 643 S.E. 2d at 908 (emphasis added). The Court also noted that "[m]erely because a governmental actor believes the money can be better spent or should now be conserved does not provide a sufficient interest" for the state to retroactively change the terms and conditions of the

benefits afforded to the plaintiff.[7] Id.

IX. Class Certification should be considered on the merits and granted.

This Court found it did not have to determine the issue on class certification. If the petition for rehearing is granted and the decision reversed, this Court should determine the issues of class certification on the merits.

CONCLUSION

Respondents-Appellants respectfully suggest that the Court rehear this matter and find for the Working Retirees on the issues of contract and estoppel. In the alternative, this Court should consider and rule for Working Retirees on the alternative causes of action and equitable remedies, which would prevent the injustice and inequity of this Court's Opinion and thus not run afoul of due process violations discussed in this Petition.

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[7]Similarly, in a recent case on pension laws in California, the court there noted that should not sit in judgment of the County's financial situation. *County of Orange v. Association of Orange County Deputy Sheriffs*, 192 Cal. App. 4th 21 - Cal: Court of Appeals, 2nd Appellate Dist., 1st Div. 2011 (cert denied by California Supreme Court on April 13, 2011)

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EXHIBIT K

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Nancy S. Ahrens, Ann Mercer, and Gary M. McCombs, on behalf of themselves and all others similarly situated, Respondents/Appellants,

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The State of South Carolina and the South Carolina Retirement System, Appellants/Respondents,

and

James B. Arnold, Jr., Cynthia A. Thompkins-Hart, Nelson E. Brown, William M. Tisdale, Jr., Bobby Pack, Mitch Anderson, Lorenza Cobb, Ivan Holden, Phillip White, Jamie Harrelson, Dan Furr, Ann U. Mercer, Sharon C. Fulton, Johnnie R. Deas, Katie Daniels and Barbara Durfey, Panda J. Duncan, Janet Klee, John Locklair, Carol Ann Williamson and Leon Bellamy, Individually and as Class Representatives, Respondents/Appellants,

v.

The South Carolina Police Officers Retirement System, The South Carolina Retirement System, and the State of South Carolina,

Appellants/Respondents.

Appeal from Richland County
James C. Williams, Jr., Circuit Court Judge

Opinion No. 26966
Heard November 3, 2010 – Filed May 2, 2011

AFFIRMED IN PART; REVERSED IN PART

Robert E. Stepp, Roland M. Franklin, Jr., Amy L.B. Hill, and Tina Cundari, all of Sowell, Gray, Stepp & Laffitte, of Columbia, for Appellants-Respondents.

A. Camden Lewis, Keith M. Babcock and Ariail E. King, all of Lewis & Babcock, of Columbia; Brana J. Williams, of Conway; David K. Avant and Justin R. Werner, both of Columbia; Gene McCain Connell, Jr., of Kelaher, Connell & Connor, of Surfside Beach and Richard A. Harpootlian, of Columbia, for Respondents-Appellants.

CHIEF JUSTICE TOAL: In 2006, this Court decided *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006), remanding to the circuit court the issue of whether a contract existed between the South Carolina Retirement System (SCRS) and certain retirees.[1] This case is an appeal from the circuit court's decision on remand. In this case, the South Carolina Police Officers Retirement System (PORS), the SCRS, and the State of South Carolina (collectively, the State) appeal the circuit court's order that the State is estopped from collecting retirement contributions from the certified class of "old working retirees" (Retirees), and that the State must return the contributions withheld from those Retirees since July 1, 2005. The State additionally appeals the circuit judge's certification of the class of Retirees. Finally, the State argues that Retirees failed to exhaust administrative remedies. The Retirees appeal the circuit court's holding that no contract existed between the State and the Retirees to prevent the State from changing the terms of sections 9-1-1790(A) and 9-1-90(4)(a) of the South Carolina Code (the Working Retirees statutes) after the employees' retirement. Retirees additionally appeal the circuit court's grant of summary judgment on the constitutional issues raised. This Court consolidated for review the cases brought against the PORS[2] and the SCRS[3] (together, the Retirement Systems), and is reviewing the circuit court order pursuant to Rule 204(b), SCACR.

FACTS/PROCEDURAL BACKGROUND

This case involves the State's working retiree program, and the propriety of its withholding retirement contributions from eligible Retirement

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[1] Nancy Ahrens, Ann Mercer, and Gary McCombs, on behalf of themselves and all others similarly situated.

[2] *Arnold v. S.C. Police Officers Ret. Sys.*, No. 05-CP-22-756 (Ct. Comm. Pl., filed June 25, 2009).

[3] *Ahrens v. State of S.C. & S.C. Retirement Sys.*, No. 05-CP-40-2785 (Ct. Comm. Pl., filed June 25, 2009).

Systems members who returned to covered employment with the State prior to July 1, 2005. Prior to this date, the old working retiree program allowed employees to retire and then, after a 60 day break for SCRS members, and a 15 day break for PORS members, those employees could be re-hired at an employer's discretion and receive both retirement benefits and a salary up to $50,000 per year, without being required to contribute to the Retirement Systems. S.C. Code Ann. §§ 9-1-1790(A) (Supp. 2001) & 9-11-90(4)(a) (Supp. 2002). In 2005, the State Retirement System Preservation and Investment Reform Act (Act 153) amended these statutes to require that retired members pay the employee contribution as if they were active members, but without accruing additional service credit. 2005 S.C. Acts 153. In filing these actions, the Retirees' chief contention is that it is unlawful for the State to change the terms of the old working retiree program after the Retirees irreversibly retired, and with the understanding that contributions to the Retirement Systems would not be required.

This Court first considered the issue in *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006). In that case, participants in the Teacher and Employee Retention Incentive Program (TERI), along with the *Ahrens* plaintiffs,[4] brought an action contesting the contribution requirement created by Act 153. As to the TERI program, this Court ruled in favor of the plaintiffs, finding that "the language in the old TERI statute demonstrates, in unambiguous terms, the intent of the legislature to bind itself to the terms in the statute," and therefore, "[w]hen the State, through Act 153, sought to collect retirement contributions from the old TERI participants, it was in clear breach of the contract it created by the relevant statutes." *Id.* at 639–40, 630 S.E.2d at 269. As to the old working retirees statute, this Court found the statute

> does not use the same contractually significant language as utilized in the old TERI statute. As a result, we hold that the old working retiree statute does not create a binding contract between the State and the old working retirees prohibiting the State from

[4] The *Arnold* plaintiffs initiated a separate lawsuit challenging the contribution requirement.

altering the statute exempting old working retirees from further contributions to the retirement system.

Id. at 643, 630 S.E.2d at 272.

Still, the Court found evidence in the record that some working retirees may have had written contracts detailing the terms of the program, while others who did not have signed documents may have relied on statements made by the State when deciding whether to retire and enter the working retiree program. *Id.* Therefore, this Court remanded that issue to the circuit court for a "case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract." *Id.* at 643, 630 S.E.2d at 272–73.

On remand, the circuit court considered whether Election of Non-Membership forms signed by employees electing to enter the working retiree program created a contract between the State and Retirees. The circuit court found they did not. However, the court provided the Retirees equitable relief, ruling the State is estopped from changing the terms of the working retirees program for those employees who retired prior to July 1, 2005, and further ordering the State to return funds previously withheld.[5] The circuit court also ordered that notice be given to the certified class of *Ahrens* and *Arnold* plaintiffs that a judgment has been made in favor of the class.[6] This appeal follows.

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[5] Having found for the plaintiffs with an estoppel order, the circuit court declined to reach the additional issues raised. Both the *Ahrens* and *Arnold* plaintiffs argued that the State's action in withholding retirement contributions was: (1) an unlawful taking, (2) impairment of contract, and (3) a violation of due process. In raising these issues, both sets of plaintiffs requested injunctive relief. The *Arnold* plaintiffs additionally argued quantum meruit.

[6] By order dated Nov. 17, 2008, Judge Williams certified the *Ahrens* class as the following: "[a]ll persons currently employed by the State of South Carolina or its agencies or political subdivisions who retired and returned to work prior to July 1, 2005 ("Working Retirees"). Excluded from the classes

ISSUES

I. Did the circuit court err in holding that no contract exists between the Retirees and the State?

II. Did the circuit court err in ruling that the State is estopped from requiring Retirees to contribute to the Retirement Systems?

III. Did the circuit court err in certifying the class of Retirees?

IV. Did the circuit court err in granting summary judgment in favor of the State on the Retirees' causes of action for unconstitutional taking, violation of due process, impairment of contract, and quantum meruit?

V. Did the circuit court err in denying the State's motion to dismiss based on the State's claim that Retirees failed to exhaust their administrative remedies under the Claims Procedure Act before bringing the dispute to the circuit court?

STANDARD OF REVIEW

An action seeking damages for breach of contract is an action at law. *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 476, 642 S.E.2d 726, 729 (2007). However, the doctrine of estoppel is equitable in nature. *Knight v. Stroud*, 212 S.C. 39, 42–43, 46 S.E.2d 169, 170 (1948). When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Corley v. Ott*, 326 S.C. 89, 92, 485 S.E.2d 97, 99 (1997). In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. *Inlet Harbour v. S.C. Dep't of Parks, Rec. & Tourism*, 377 S.C. 86, 91, 659 S.E.2d

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are persons who are participants in the TERI program." In an order dated Nov. 11, 2008, Judge Williams certified the *Arnold* class with a similar class definition.

151, 154 (2008). However, the appellant is not relieved of its burden of convincing the appellate court the circuit judge committed error in his findings. *Pinkney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). When an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision. *Dearybury v. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367, 369 (2002). In an action at law tried by a judge, an appellate court's scope of review extends merely to the correction of errors of law. *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599–600, 675 S.E.2d 414, 415 (2009).

ANALYSIS

I. Whether a Contract Exists Between the State and Retirees

Retirees argue that where the statute did not create a contract, the Retirement Systems had the authority to "fill up the details" by requiring Retirees sign forms stating they would not be required to pay into the Retirement Systems, and in doing so, these forms created a contract between the State and Retirees, which was then breached when the State began requiring these contributions. We disagree.

This Court has often described a state agency's rulemaking power as its authority to "fill up the details" of the laws promulgated by the General Assembly. *Heyward v. S.C. Tax Comm'n*, 240 S.C. 347, 355, 126 S.E.2d 15, 19–20 (1962); *S.C. Hwy. Dept. v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955). While "[t]he Legislature has the right to vest in the administrative officers and bodies of the state a large measure of discretionary authority . . . to make rules and regulations," an agency may not make rules that "conflict with, or . . . change in any way the statute conferring such authority." *Fisher v. J.H. Sheridan Co., Inc.*, 182 S.C. 316, 326, 189 S.E. 356, 360 (1936). Accordingly, an agency does not have the power to convert a right that is merely statutory into a contractual right. *McKinney v. S.C. Police Officers Ret. Sys.*, 311 S.C. 372, 375, 429 S.E.2d 797, 798 (1993).

Therefore, to fully address Retirees' argument that the Retirement Systems created a contract by filling up the details of the statute, it is necessary to examine this Court's basis in *Layman* for determining that the

legislature intended to create a contractual right in the TERI statute, but did not intend the same when drafting the Working Retirees statutes.

Ordinarily, statutes do not create contractual rights. *Layman*, 368 S.C. at 637, 630 S.E.2d at 268. In South Carolina, the legislature may only create contractual rights in a statute through the express language of the statute. *Id.* at 638, 630 S.E.2d at 268. This Court found in *Layman* that the old TERI statute outlined the rights and responsibilities of each party. *Id.* at 639, 630 S.E.2d at 269. In exchange for the right to lock in a retirement benefit based on the average final compensation of the member, "a program participant *shall agree* to continue employment with an employer participating in the system for a program period, not to exceed five years." S.C. Code Ann. § 9-1-2210(A) (Supp. 2001) (emphasis added). During this term of employment, the receipt of retirement benefits was deferred, and placed in a non-interest bearing trust account. *Id.* § 9-1-2210(B). A program participant was not required to make any further retirement contributions, accrued no service credit, and was not eligible to receive certain employment benefits. *Id.* § 9-1-2210(D). This Court found the following terms used in the old TERI statute as "indicative of a contract: 'A . . . member who is *eligible* [to retire under TERI] . . . and *complies* with the *requirements* of this article . . . . *shall agree* to continue employment . . . .'" *Layman*, 368 S.C. at 639, 630 S.E.2d at 269 (*quoting* S.C. Code Ann. § 9-1-2210(A)) (emphasis added).

In contrast, this Court found that the General Assembly did not outline the rights and responsibilities of each party in the SCRS statute. *See* S.C. Code Ann. § 9-1-1790(A) (Supp. 2001). The SCRS statute provided that sixty days after a state employee officially retires, he "*may* return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without affecting the monthly retirement allowance he is receiving from the system." *Id.* (emphasis added). Under this statute, an employee's decision to return to work after retiring was optional, as was an employer's decision to re-hire that employee. The question of whether the PORS statute created a contractual right was not before this Court in *Layman*. However, because the language of the PORS statute is largely similar to the SCRS

statute,[7] we find our analysis of the SCRS statute in *Layman* to be binding precedent with regard to the PORS statute.

With this in mind, we disagree with Retirees' contention that the Retirement Systems filled up the details and created binding contracts between the State and Retirees through the use of signed forms. The various forms that were required to be signed by employees wishing to enter the old working retirees program contained substantially the same language:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements not to become a member of the South Carolina Retirement System or the Police Officers Retirement System, and I hereby exercise my option to become a non-member.
>
> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected non-membership and, as such, will not be making retirement contributions.

Retirees argue that the language of these forms is contractual in nature and is similar to the language used in the TERI statute. However, we believe the language used in the form supports the contrary. The form states that the authority to enter the working retiree program is derived from "the provisions of the Retirement Act"—the statute that this Court held in *Layman* did not create a contractual right. *See Layman*, 368 S.C. at 643, 630 S.E.2d at 271.

Even assuming these forms, on their own, were binding contracts, we do not believe that the Retirement Systems had the authority to create contracts without the statutory directive of the legislature. In *McKinney v. South Carolina Police Officers Retirement System*, this Court decided this

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[7] Section 9-11-90 (4)(a) provides, in pertinent part, "a retired member of the system who has been retired for at least fifteen consecutive calendar days may be hired and return to employment covered by this system . . . without affecting the monthly retirement allowance he is receiving from this system."

exact issue. 311 S.C. 372, 429 S.E.2d 797 (1993). In that case, the PORS terminated the plaintiff's retirement benefits, finding that the plaintiff did not establish twenty-five years of creditable service as required by the statute. On appeal, the plaintiff argued that certain correspondence from the Retirement Systems created a binding contract entitling the plaintiff to benefits not authorized by the statute. *Id.* This Court found that the source of the plaintiff's right "is the statutes, not a contract," and that neither the plaintiff nor the PORS "have the authority to convert a statutory right into a contractual one." *Id.* at 375, 429 S.E.2d at 798. Despite the dissent's contention that the facts of *McKinney* do not apply here, we believe the important premise that an agency cannot convert a statutory right to a contractual right maintains in this case. Any other holding would permit an executive agency to usurp the essentially legislative function of amending laws by binding the legislature through contract where it had no intention of being bound. We cannot support such a result.

Additionally, in stating there is no basis for treating the TERI statute and the Working Retirees statutes differently, the dissent overlooks important distinctions that weighed heavily on our determination in *Layman* that the TERI statute created a contract and the SCRS statute did not. Employees who retired under TERI were *required*, as a condition of their retirement, to continue employment with an employer participating in the TERI system for the program period. S.C. Code Ann. § 9-1-2210(A) (Supp. 2001). Importantly, state employees who retired under the Working Retirees statutes were not bound by this same obligation. Under those statutes, when an eligible employee retired, that employee had the option of returning to employment after having retired for sixty days or fifteen days (depending on the statute); and even their return was conditioned on whether an employer in the system chose to hire that employee. *Id.* § 9-1-1790(A) (Supp. 2001) & 9-11-90(4)(a) (Supp. 2002). The dissent claims that the Working Retirees statutes constituted a valid offer to eligible participants that was then accepted by the signing of Election of Non-Membership forms. We respectfully disagree. Because there was no guarantee of re-hire, and because these retirees were under no obligation to return to work after retirement, we view the language of the Working Retiree statutes as providing a mere option to retirees, rather than an offer. Additionally, the TERI statute specifically provided in its text that "a program participant makes no further employee

contributions into the system." *Id.* § 9-1-2210(D). The Working Retirees statutes are void of this express guarantee that retirement contributions would not be required. With an absence of consideration in the Working Retirees statutes, these statutes provide no framework to which a contractual right can attach. *See Alston v. City of Camden*, 322 S.C. 38, 45, 471 S.E.2d 174, 177 (1996) ("South Carolina law is clear that public employees generally have no contractual rights in their employment merely by virtue of a statute describing the terms of that employment.").

II. Estoppel

The State argues that the circuit court erred in holding that the Retirement Systems were estopped from applying Act 153 to Retirees because, under these circumstances, estoppel cannot lie against the State, and because the Retirees failed to establish the elements of equitable estoppel. We agree.

A. Estoppel Against the State

Generally, "estoppel will not lie against a governmental body for the unauthorized acts of its officers and agents." *Townes Assoc., Ltd.v. City of Greenville*, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976). However, under certain circumstances, the State can be subject to the estoppel doctrine. *Id.* When agents or officers of a governmental body act within the proper scope of their authority, the government "cannot escape liability on a contract within its power to make." *Id.* Additionally, the government may be estopped in matters that do not affect the exercise of its police power or the application of public policy. *Grant v. City of Folly Beach*, 346 S.C. 74, 81, 551 S.E.2d 229, 232 (2001).

In determining whether an agent of the State acted within its authority, the law is clear that "[a] public officer derives his authority from statutory enactment, and all persons are in law held to have notice of the extent of his powers, and therefore, as to matters not really within the scope of his authority, they deal with the officer at their peril." *Baker v. State Highway Dep't*, 166 S.C. 481, 490, 165 S.E. 197, 201 (1932), *rev'd on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 349 S.E.2d 741 (1985).

The record is replete with testimony that Retirement Systems agents told Retirees that upon entering the working retiree program, they would not be required to make contributions to the system. These agents were, no doubt, representing the law as it stood at the time. However, even if this Court found that the Retirement Systems and its agents made representations that caused the Retirees to prejudicially rely, because this Court has ruled that the Working Retiree statute did not create a binding contractual right, estoppel cannot lie against the state, as these representations were made outside of the agency's authority. Therefore, we reverse the circuit court's estoppel holding.

B. The Elements of Estoppel

Although the issue of estoppel may be disposed of under the State's first argument, for purposes of clarifying the necessary elements to prove estoppel against the government, we address this issue and find that Retirees failed to sufficiently prove these elements. "To prove estoppel against the government, the relying party must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) justifiable reliance upon the government's conduct, and (3) a prejudicial change in position." *Grant*, 346 S.C. at 80–81, 551 S.E.2d at 232. In concluding that the State was estopped from requiring retirement contributions from Retirees, the circuit court judge applied a six element test derived from *Brading v. County of Georgetown*, 327 S.C. 107, 114, 490 S.E.2d 4, 7 (1997). Because the *Grant* elements have been specifically applied by this Court to claims against the government, we believe it is the appropriate test in this case.

As to the first element, it is uncontested that the Retirement Systems provided forms, brochures and, in some cases, made oral statements representing that when the Retirees returned to work, they would not be required to make retirement contributions. However, it is difficult for Retirees to claim they did not know, or had no means of knowing that these terms would ever change.

The form signed by many of the Retirees required them to attest their understanding that the terms of the working retiree program derived from the Retirement Act. Since the Retirement Act was enacted, the SCRS statute has

been amended 29 times and the PORS statute 27 times. In fact, several Retirees testified that they were at least aware that laws could change, and nearly all of the Retirees whose testimony is included in the record stated that they never specifically asked a Retirement Systems agent if the law regarding contribution requirements could ever change.[8] While the majority of amendments to the Retirement Act have afforded working retirees more favorable terms, we do not believe this means that more favorable terms should be legally expected.

In further support that Retirees had knowledge that the terms of the Working Retirees statutes could change, the Retirement Systems regularly published a pamphlet containing an overview of retirement benefits with the following disclaimer:

> The information contained in this brochure is meant to serve as a guide, but does not constitute a binding representation of the South Carolina Retirement Systems. The statutes governing the South Carolina Retirement Systems are found in Title 9 of the South Carolina Code of Law, and should there be any conflict between this brochure and the statutes, the statutes will prevail. Because state statutes are subject to change by the South Carolina General Assembly, please contact us for the most current information.

Finally, even if the Retirees were not aware that the terms of the Working Retiree statutes could change, "citizens are presumed to know the law and are charged with exercising 'reasonable care to protect their interests.'" *Morgan v. S.C. Budget & Control Bd.*, 377 S.C. 313, 320, 659 S.E.2d 263, 267 (Ct. App. 2008) (*quoting Smothers v. U.S. Fidelity & Guar. Co.*, 322 S.C. 207, 210–11, 470 S.E.2d 858, 860 (Ct. App. 1996)).

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[8] The record does not include the testimony of all 23 named plaintiffs. The burden of proving the elements of estoppel, however, lies with its proponent. Retirees have not submitted any information that precludes the finding that Retirees had knowledge, or the means to gain knowledge, that the provisions of the Retirement Act were subject to change.

Second, Retirees did not prove justifiable reliance on representations made by the Retirement Systems. The testimony among the named plaintiffs is varied with regard to whether or not they would have retired had they known they would be required to make retirement contributions without accruing additional service credit. For many of the named plaintiffs, the motivating factor for retiring was the promise of receiving two sources of income, and they stated they would have retired nevertheless. Still, others avidly contended that if they had known contributions would be required, they would not have retired when they did.[9] The presence of reliance in these latter cases, however, is not dispositive unless that reliance was justified. Recognizing the well-established rule that citizens are presumed to know the law and are charged with using care to protect their interests, we find that any reliance created by the representations of the Retirement Systems was not justified; especially in light of the disclaimers included in the Retirement Systems' distributed material, and the Retirees' knowledge that laws are subject to change.

Lastly, we find that any reliance created by the forms, brochures, or statements of the Retirement Systems and its agents did not cause a prejudicial change in position. We sympathize with Retirees' argument that if they had continued working as non-retired employees, the contributions made to the Retirement Systems would have increased the retirement benefits they would eventually receive. However, a comparison of the two options, either entering the working retiree program or continuing with employment, reveals that the monetary benefit of having five years additional service credit is minimal when compared to the effect of simultaneously receiving a salary and a retirement allowance. Therefore, we find that any change in position caused by the alleged misrepresentation was not prejudicial to the Retirees.

The amount of retirement allowance that an SCRS retiree receives is set by statute at "one and eighty-two hundredths percent of his average final compensation, multiplied by the number of years of his credible service."

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[9] Nancy S. Ahrens, Ann Mercer, James B. Arnold, Jamie Harrelson, Johnnie R. Deas, Dan Furr, and Marion E. White, Jr. all testified to this effect.

S.C. Code Ann. § 9-1-1550(B)(1) (Supp. 2009).[10] To demonstrate this point, assume that Employee A and Employee B both work for the State making $40,000 per year and with 28 years of service credit. If Employee A becomes a working retiree, during the five year period of the program he would receive $101,920 in retirement benefits,[11] in addition to his salary. In the five years after Employee A discontinues working he will receive another $101,920 in retirement allowances for a ten year total of $203,840 in retirement benefits. Under the second scenario, Employee B does not retire and accrues five additional years of service credit and merit pay increases of two percent per year. With 32 years of service credit and an AFC of $44,163, Employee B will receive $128,603 in retirement allowances in the five years following retirement,[12] as compared to the $203,840 that Employee A has received in retirement benefits up to the same point in time.[13] In fact, it would take twenty-five years for Employee B to receive a higher lifetime retirement benefit than Employee A. In our opinion, a prejudice that takes twenty-five years to occur, if at all, does not merit an estoppel holding.

Therefore, we do not believe the Retirees adequately proved the elements of estoppel. Consistent with our holding with regard to estoppel against the state, we reverse the circuit court's estoppel order and find that the State is not required to return contributions previously deducted.

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[10] The PORS uses a different calculation; however, plugging the PORS denominator for a Class Two employee into the following scenario yields similar results. *See* S.C. Code Ann. § 9-11-60(2)(a)–(c) (Supp. 2009).

[11] We assume that the Average Final Compensation (AFC) of Employee A is $40,000, and we arrive at this five year retirement allowance total as follows: 28 year service credit x .0182 (statutory multiplier) x $40,000 AFC x 5 years.

[12] 32 years x .0182 (statutory denominator) x $45,470 (AFC) x 5 years.

[13] Notably, this demonstration does not take into account cost of living adjustments that are calculated each year to increase retirement allowances. However, these being consistent among each employee, we do not believe it substantially affects the analysis.

III. Certifying the Class

The State argues that the circuit court erred in certifying the class of Retirees for three reasons: (1) this Court decertified the class definition that the circuit judge ultimately certified, (2) on the merits, the prerequisites of a class action have not been satisfied, and (3) class treatment is not appropriate for claims based on estoppel. Because we conclude that the named plaintiffs have neither a contractual nor an equitable remedy, we decline to address these issues. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

IV. Summary Judgment on Additional Causes of Action

Retirees argue that the circuit court erred in granting summary judgment to the State on the issues of unconstitutional taking, violation of due process, impairment of contract, and quantum meruit. Claims of unconstitutional taking, violation of due process, and impairment of contract are founded on the presumption that a contractual right has been unfairly taken away. Because we find that the Retirees did not have a contractual right to the terms of their employment, we find it unnecessary to address these constitutional issues. *See Futch*, 335 S.C. at 613, 518 S.E.2d at 598.

Further, Retirees raised the issue of quantum meruit, but failed to argue it in their brief. An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court. *State v. Hiott*, 276 S.C. 72, 86, 276 S.E.2d 163, 170 (1981).

Therefore, we affirm the circuit court's grant of summary judgment on these issues.

V. Exhaustion of Remedies

The State argues that the circuit court lacked the statutory authority to hear Retirees' claims because the Claims Procedures Act, S.C. Code Ann. §9-21-10 *et seq.* (Supp. 2009), provides the "exclusive remedy for dispute or controversy between the retirement systems and a member . . . arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina,

1976." S.C. Code Ann. § 9-21-30. Because we rule in favor of the State on both issues of contract and estoppel, we presume that the State will withdraw this issue.

CONCLUSION

We hold that a contract did not exist between the State and Retirees, neither by way of forms signed nor representations made. Accordingly, we conclude that summary judgment was proper as to the constitutional issues raised by Retirees because those issues are premised on the existence of a contract. Additionally, we find the circuit court's estoppel holding to be in error.

AFFIRMED IN PART; REVERSED IN PART.

BEATTY, KITTREDGE, JJ., and Acting Justice James E. Moore, concur. HEARN, J., dissenting in a separate opinion.

JUSTICE HEARN: I concur in the majority's resolution of the issues of estoppel, class certification, summary judgment as to the additional causes of action, and exhaustion of remedies. However, I part company with the majority on whether a contract existed and respectfully dissent. In my view, the old working retirees statutes, together with the mandatory forms signed by the working retirees, created a binding contract between the State and the working retirees which could not be unilaterally rescinded by the State with the passage of Act 153.

In its simplest terms, a contract is formed when a legitimate offer is accepted, accompanied by a valuable consideration. Here, the original working retiree statutes permitted participants to retire, return to work for the State, and continue to receive their retirement. The only retirement contributions required were those by the employer: "An employer shall pay to the system the employer contribution for active members prescribed by law with respect to any retired member . . . ." S.C. Code Ann. § 9-1-1790(B) (as amended through 2004); *see also id.* § 9-11-90.

The old working retirees statutes thus constituted an offer to eligible program participants to retire, be re-hired, and receive their retirement benefits without contributing any further payments into the retirement system. While this Court in *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008), quite rightly found the old working retirees statutes did not in and of themselves establish a contract, they most certainly constituted a legally significant offer to those qualified for the program.

In order to return to work and accept the offer contained in the old working retirees statutes, participants were required to sign a form stating their election of non-membership in the retirement system. The Participating Employer Procedures Manual, published by the South Carolina Retirement Systems, states that "[a] service retiree (TERI or non-TERI) . . . must complete an Election of Non-Membership (Form 1104) upon returning to work for an employer covered by the Retirement Systems." This mandatory form, entitled "ELECTION OF NON-MEMBERSHIP," stated: "I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment

since I have elected non-membership and, as such, will not be making contributions."

When signed by the participant and his employer, this mandatory form constituted the participant's acceptance of the State's offer of re-employment contained in the working retirees statutes. The benefits flowing to the State from being able to re-hire experienced workers without having them accrue additional retirement benefits and the detriment to the participants in foregoing further retirement benefits from the State clearly satisfied the requirement of consideration for the formation of a binding contract.[14] *See McLeod v. Sandy Island Corp*, 265 S.C. 1, 13, 216 S.E.2d 746, 751 (1975) (citing *Furman University v. Waller*, 124 S.C. 68, 117 S.E.2d 356 (1923)) ("A valuable consideration may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.").

There is nothing in the form which the working retirees had to execute prior to re-hiring that indicates their election of non-membership in the retirement system was anything other than permanent. Indeed, Peggy Boykin, head of the South Carolina Retirement Systems, testified that if "[the working retirees] retired prior to July 1, 2005, they did not have to make any contributions." The old adage that the proof is in the pudding hits the bulls-eye here, given the undisputed fact that not one of the working retirees who executed the form and returned to work prior to the passage of Act 153 had any monies taken out of their paychecks. All parties—the working retirees, their State employers, and the State retirement system—all recognized that a legally binding contract existed.

As this Court correctly stated in *Layman*: "Once the bargain is formed, and the obligations set, a contract may only be altered by mutual agreement and for further consideration." 368 S.C. at 640, 630 S.E.2d at 269.

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[14] As stated by Cy Wentworth, the Human Resources Manager for the South Carolina Judicial Department, himself a working retiree: "The employee agreed to retire and not make any further contributions to the Retirement System and the State continued to be able to employ a seasoned, experienced employee for a cost which saved the State money."

Consistent with *Layman*, I would hold that the State may not unilaterally alter its agreement with the working retirees by forcing them to contribute to the retirement system. With all due respect to the majority, I cannot, in good conscience, treat the working retirees differently than this Court treated the TERI participants in *Layman*.

Nor do I agree with the majority's reliance on *McKinney v. South Carolina Police Officers Retirement System*, 311 S.C. 373, 429 S.E.2d 797 (1993), for the proposition that no viable contract could be formed through execution of the forms here. *McKinney* held that certain correspondence from the state retirement system could not create a binding contract with the plaintiff for benefits not authorized by the statute. *Id.* at 375, 429 S.E.2d at 798. That is a totally different situation than what is presented here where the retirement system generated forms to carry out the intent and purpose of the original statutes, and the participants were required to execute those forms prior to being rehired. While I agree with the reasoning expressed in *McKinney* that mere letters from the retirement system could not provide benefits not authorized by statute, I am at a loss to see its application to the facts of this case.

Consistent with the principles enunciated in *Layman*, I would hold that the State created a binding contract with the working retirees through its unambiguous statutory scheme and the participants' execution of mandatory forms which could not be altered unilaterally by the State to the detriment of the working retirees.

EXHIBIT L

UNITED STATES DISTRICT COURT
IN THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

GAIL M. HUTTO, DEBRA J. ANDREWS, ELIZABETH W. HODGE, MARGARET B. LINEBERGER, LYNN R. ROGERS, NANCY G. SULLIVAN, JANE P. TERWILLIGER, JULIAN W. WALLS, and all others similarly situated, Plaintiffs, **VERSUS** **THE SOUTH CAROLINA RETIREMENT SYSTEM, THE POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEMS GROUP TRUST, MARK SANFORD**, Governor of South Carolina, in his official capacity as *ex officio* Chairman of the South Carolina Budget and Control Board, **CONVERSE CHELLIS**, Treasurer of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **RICHARD ECKSTROM**, Comptroller General of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **HUGH K. LEATHERMAN**, Chairman of the South Carolina Senate Finance Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **DANIEL T. COOPER**, Chairman of the South Carolina House of Representatives Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **FRANK FUSCO**, in his official capacity as Executive Director of the South Carolina Budget and Control Board, and **PEGGY G. BOYKIN**, in her official capacity as Director of the Retirement Division of the South Carolina Budget and Control Board, Defendants.	**CLASS ACTION COMPLAINT** **[JURY TRIAL DEMANDED]**

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this Court as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1331, in that all causes of action asserted herein arise under the laws and Constitution of the United States.

2. Venue is proper pursuant to 28 U.S.C. § 1367 because the events giving rise to this civil action occurred in the State of South Carolina, and the property that is the subject of this action is within the State of South Carolina.

II. PARTIES

A. Plaintiffs

3. Plaintiff, Gail M. Hutto, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as the South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

4. Plaintiff, Debra J. Andrews, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants

require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

5. Plaintiff, Elizabeth Hodge, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

6. Plaintiff, Margaret B. Lineberger, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

7. Plaintiff Lynn R. Rogers, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

8. Plaintiff, Nancy G. Sullivan, is an individual citizen and resident of Darlington County, South Carolina. She retired under the South Carolina Retirement System in 2001, and

returned to work in 2006, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

9. Plaintiff Jane P. Terwilliger, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

10. Plaintiff Julian W. Walls, is an individual citizen and resident of Beaufort County, South Carolina. He is a retired member of the South Carolina Police Officers Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as the South Carolina Retirement Systems. Since his return to work, the Defendants require him to forfeit a percentage of his gross earnings to the South Carolina Police Officers Retirement System without receiving any additional service credit or interest for the use of his property.

B. Defendants

11. Defendant, the South Carolina Retirement System, is a multi-employer defined benefit pension plan trust fund with the powers and privileges of a corporation. It was established by the South Carolina General Assembly, S.C. Code Ann. §§ 9-1-10, *et seq.*, to provide retirement and other benefits for employees of public school districts, the State, and political subdivisions thereof. The South Carolina Retirement System is one of five governmental

retirement plans collectively referred to by Defendants as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

12. Defendant, the Police Officers Retirement System, is a multi-employer defined benefit pension plan trust fund with the powers and privileges of a corporation. It was established by the South Carolina General Assembly, S.C. Code Ann. §§ 9-11-10, *et seq.*, to provide retirement and other benefits for state and local law enforcement personnel and firefighters. The Police Officers Retirement System is one of five governmental retirement plans collectively referred to by the Defendants as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

13. Defendant, the South Carolina Retirement Systems Group Trust, holds the assets of the five governmental retirement plans collectively referred to as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

14. Defendant, Mark Sanford, is Governor of the State of South Carolina, and by virtue of that office, he is Chairman of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

15. Defendant, Converse Chellis, is Treasurer of the State of South Carolina, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

16. Defendant, Richard Eckstrom, is the Comptroller General of the State of South Carolina, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

17. Defendant, Hugh K. Leatherman, is Chairman of the South Carolina Senate Finance Committee, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

18. Defendant, Daniel T. Cooper, is Chairman of the South Carolina House of Representatives Ways and Means Committee, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

19. Defendant, Frank Fusco, is Executive Director of the South Carolina Budget and Control Board, and by virtue of that office he is the chief administrative officer for the South Carolina Budget and Control Board. As such, he is responsible for the administration and operation of the Board's divisions, including the Retirement Division, as well as legal matters.

20. Defendant, Peggy G. Boykin, is Director of the Retirement Division of the South Carolina Budget and Control Board, through which the Budget and Control Board acts. As Director of the Retirement Division, Ms. Boykin is responsible for the management and administration of all defined benefit pension plans that comprise the South Carolina Retirement

Systems and the fiduciary stewardship of the Retirement Systems' trust funds, including the funds of the Defendants, the South Carolina Retirement System and the Police Officers Retirement System.

21. Individual Defendants are being sued in their official capacities for injunctive relief only and monetary relief is being sought exclusively against the South Carolina Retirement System, the Police Officers Retirement System, and the South Carolina Retirement Systems Group Trust.

III. NATURE OF THE ACTION

22. Plaintiffs, on behalf of a class of retired contributing members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS), bring this action seeking equitable remedies, including declaratory and injunctive relief for the return of property illegally confiscated by the Defendants.

23. All Plaintiffs and all proposed class members are retired contributing members of either the SCRS or the PORS, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. These persons are commonly referred to by their retirement plans and herein as "Working Retirees."

24. As described in detail below, Plaintiffs allege that the Defendants have confiscated their private property in violation of federal laws and the United States Constitution. By requiring Plaintiffs to contribute part of their gross earnings to the Retirement Systems without service credit or interest and using those contributions for purposes other than for the benefit of the contributing employee, Defendants violate the Due Process Clause and the Takings Clause of the United States Constitution, and Internal Revenue Code 26 U.S.C. § 401(a).

IV. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this class action on behalf of themselves and on behalf of all other similarly situated retired contributing members of the SCRS and the PORS under the provisions of Rule 23 of the Federal Rules of Civil Procedure.

26. The proposed class is defined as follows:

> All retired members of the South Carolina Retirement System and the Police Officers Retirement System, who returned to covered employment with the South Carolina Retirement Systems on or after July 1, 2005, and who are required to contribute a portion of their gross earnings to either the South Carolina Retirement System or the Police Officers Retirement System without receiving any additional service credit or interest on their retirement accounts.

27. This action may properly be maintained as a class action under federal law and satisfies the numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Federal Rule of Civil Procedure 23(a).

28. Members of the class are so numerous as to make joinder of all members impracticable. Plaintiffs are informed and believe that the members of the proposed class will exceed tens of thousands of persons. Joinder of all of these individuals is impracticable because of the large numbers of these persons and the fact that they are dispersed over a large geographical area, throughout the entire State of South Carolina and beyond its borders.

29. Common questions of law and fact exist as to all members of the class. All members of the class are Working Retirees who are required to forfeit a standard percentage of their gross earnings as contributions to either the SCRS or the PORS without receiving any compensation. Issues of fact and law that are common to all Plaintiffs and all members of the class include, but are not limited to the following:

(a) whether the forfeiture of the Working Retirees' earnings to the Retirement Systems violates the Takings Clause of the Fifth Amendment;

of the United States Constitution, applicable to the states through the Fourteenth Amendment of the United States Constitution;

(b) whether the requirement that the Working Retirees who return to work on or after July 1, 2005, must continue paying monies into the Retirement Systems without any compensation for those contributions violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

(c) whether the deduction of monies from the Working Retirees' gross earnings for the use and benefit of persons other than the contributing employees violates Internal Revenue Code 26 U.S.C. § 401(a);

(d) whether to issue a declaratory judgment under 28 U.S.C. § 2201, declaring that:

1) South Carolina Code sections 9-1-1790 and 9-11-90 violate the Fifth and Fourteenth Amendments to the United States Constitution;

2) Plaintiffs and the class are entitled to immediate return of all monies they have been required to pay to the Retirement Systems since July 1, 2005.

(e) Whether to issue an injunction prohibiting for all time the forfeiture of the Working Retirees' earnings and compelling the immediate return of all monies illegally confiscated since July 1, 2005.

30. The claims of the Plaintiffs are typical of the claims of all class members. All Plaintiffs and all class members are Working Retirees who, after retirement with either the SCRS or the PORS, have been required since their return to covered employment on or after July 1, 2005, to forfeit part of their earnings to the Retirement Systems without any compensation. Defendants' policies and practices are directed toward all Plaintiffs and all class members in an identical manner. Their claims arise from this same unlawful and unconstitutional conduct of the Defendants. Consequently, all claims are premised on the same legal theories.

31. Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of the members of the class. Their interests are coincident with and not antagonistic to those of the class members.

32. Plaintiffs have retained the undersigned counsel who have substantial experience and success in the prosecution of class actions, retirement benefit litigation, and complex litigation.

33. Plaintiffs' counsel has the resources, expertise, and experience to successfully prosecute this action against the Defendants. Counsel know of no conflicts among members of the class, or between counsel and members of the class.

34. This action satisfies the requirements for maintaining a class action under Federal Rule of Civil Procedure 23(b)(1). Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for Defendants, or could as a practical matter be dispositive of interests of the other class members or substantially impair or impede their ability to protect their interests. The prosecution of separate actions by individual members of the class could lead to inconsistent results with respect to other members of the class since the forfeitures exacted by the Defendants are either legal or illegal as to all Plaintiffs and class members. For the same reason, an adjudication with respect to Plaintiffs would, as a practical matter, be dispositive of the interests of the members of the class. If the contributions required by the Defendants are illegal as to any single Plaintiff, then they are illegal as to all Plaintiffs and all class members. A decision that the Defendants violated federal laws and the Constitution of the United States would require Defendants to take uniform remedial action. An

individual suit by each Working Retiree to redress the wrong common to all of them would be contrary to the spirit and intent of Rule 23.

35. In addition to certification under Rule 23(b)(1), and in the alternative, Plaintiffs seek certification under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the class. Defendants illegally require all employees retired under the SCRS or the PORS, who return to employment with an employer covered by the South Carolina Retirement Systems on or after July 1, 2005, to forfeit a percentage of their gross earnings to their respective retirement systems without additional service credit or interest. Accordingly, injunctive and declaratory relief with respect to the whole class is appropriate.

V. FACTUAL ALLEGATIONS

36. On July 1, 2005, the South Carolina Legislature enacted the State Retirement System Preservation and Investment Reform Act, Act 153, 2005 S.C. Acts 1697 (now codified at S.C. Code Ann. § 9-1-1790) (applicable to retired members of the SCRS) and S.C. Code § 9-11-90 (applicable to retired members of the PORS).

37. South Carolina Code § 9-1-1790(C) provides: "A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required pursuant to this subsection and subsection (B) of this section."

38. South Carolina Code § 9-11-90(4)(c) provides: "A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not

accrue additional service credit in the system by reason of the contributions required pursuant to this item and item (b) of this subsection."

39. Defendants do not pay any interest on the Working Retirees' contributions to the Retirement Systems nor do they provide any service credit to the contributing employee. **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 19; **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10; **Exhibit C**: Form 1114, Notification of Employed Retiree.

40. The SCRS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account. Working retirees will not earn additional service credit or receive interest on their account." *See* **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 22.

41. The PORS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account; however, as a retiree you will not earn additional service credit or receive interest on your account." **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10.

42. Employers of Working Retirees must notify the Retirement Systems when a retired member is hired. Form 1114, *Notification of Employed Retiree*, must be completed for all Working Retirees. The Retirement Systems shall not post quarterly contributions to retired member accounts without the proper completion of this form. See **Exhibit C**: Form 1114, *Notification of Employed Retiree*; **Exhibit D**: *Covered Employer Procedures Manual*, October 2008 Edition, Revised June 11, 2009, at 7 & **Exhibit E**: *Employer Update*, July 2009, Vol. 1, Issue 1 "Use EES to Key Retiree Return to Work Dates."

43. Form 1114 provides:

> I hereby notify you that I am an employee of the state of South Carolina or its political subdivisions, and that I am a retiree of one

> of the systems covered by the South Carolina Retirement Systems. As a retired member returned to covered employment, I understand that I am required to pay contributions at the same rate as active members. I also understand that I will not accrue any additional service credit. However, the contributions will be credited to my account and upon my death, any remaining contributions that have not been exhausted through benefit payments will be paid to my beneficiary.

Exhibit C: Form 1114, *Notification of Employed Retiree*.

44. Defendants do not recalculate the retirement benefits of a contributing Working Retiree based on his or her required contributions on or after July 1, 2005. **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 19; **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10; **Exhibit C**: Form 1114, *Notification of Employed Retiree*.

45. Working Retirees are required to continue contributing into the Retirement Systems even though they have retired, their benefits have been vested, and they will receive no compensation of any kind from their contributions made on or after July 1, 2005.

46. Defendants use the Working Retirees' monies for financial benefit to the Retirement Systems to the exclusion of the Working Retirees. **Exhibit F**: Letter from Kelli Gowder, Manager, Benefits Payments Department of the South Carolina Retirement Systems, dated October 23, 2009 to Plaintiff, Gail M. Hutto.

47. The monies Defendants confiscate as so-called "contributions" to the Retirement Systems are the private property of the Working Retirees by virtue of their labor.

48. The Working Retirees had no opportunity to challenge the taking of their property without compensation.

49. Internal Revenue Code, 26 U.S.C. § 401(a), governs public pension funds like those established by the South Carolina Retirement Systems. Under section 401(a), contributions to a tax-qualified trust must be non-forfeitable and cannot be diverted for purposes other than the

exclusive use of the employee and his or her beneficiaries. Section 401(a) protects employee contributions to a plan, in provisions such as:

> (1) section 401(a)(1) providing that employer and employee contributions made to the trust must be "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust;"
>
> (2) section 401(a)(2) providing that no part of the corpus or income be used for any purpose other than the exclusive benefit of employees and their beneficiaries;
>
> (3) section 401(a)(8) providing that plan forfeitures may not increase the benefit any employee would otherwise receive under the plan;
>
> (4) section 401(a)(9) providing that required distributions be calculated for each employee based on the entire interest of each employee.

50. Only trust assets held under plans qualified under Internal Revenue Code Section 401(a) are permitted to be held in the Group Trust.

51. Defendants use monies deducted from the Working Retirees' earnings for purposes other than for the exclusive benefit of the contributing employee.

52. The Working Retirees do not obtain credit for their contributions for the purposes of calculating their individual required minimum distributions.

53. Non-working retirees' benefits are based on their entire contributions to the Retirement Systems, whereas, the Working Retirees' benefits are based on less than their entire contributions to the Retirement Systems. The Working Retirees' benefits are fixed based on their past service, and they receive no increase in their monthly annuity (or any other benefit) from the contributions they make after their return to work.

54. The Working Retirees have been targeted to bear an economic burden which is not borne by any other employees in the Retirement Systems.

55. South Carolina Code section 9-1-1310(C) provides that the funds and assets of the various state retirement systems are not funds of the State of South Carolina, but are instead held in a group trust as provided in South Carolina Code section § 9-16-20.

FIRST CAUSE OF ACTION
(Violation of the Takings Clause of the Fifth Amendment – applicable to the states through the Fourteenth Amendment)

56. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

57. Pursuant to South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c), the Defendants take money from the Working Retiree's gross earnings without compensation.

58. The Working Retirees' earnings are private property entitled to federal constitutional protection from arbitrary and unreasonable governmental action.

59. The taking and deprivation of this property interest amounts to a taking of the Working Retirees' property without just compensation, in violation of the Fifth Amendment to the United States Constitution, made applicable to the states in the Fourteenth Amendment.

SECOND CAUSE OF ACTION
(Violation of the Due Process Clause, United States Constitution, Amendment XIV)

60. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

61. Due process protects the Working Retirees from the arbitrary confiscation of their private property.

62. The Working Retirees have a reasonable expectation of not having to forfeit monies earned to a pension plan fund from which they receive no compensation for those contributions.

63. The Defendants' confiscation of the Working Retirees' monies is arbitrary, capricious, and unreasonable in at least the following respects: (a) Defendants require the Working Retirees to make uncompensated contributions to the Retirement Systems even though these employees have retired, their benefits have vested and they will receive no benefit of any kind from continuing to contribute monies to the Retirement Systems; and (b) these forfeitures bear no reasonable relationship to any legitimate purpose of the Retirement Systems.

64. The Defendants' deductions from the Working Retirees' gross earnings for use by the Retirement Systems deprives the Working Retirees of the use and enjoyment of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION
(Declaratory Judgment pursuant to 28 U.S.C. § 2201)

65. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

66. As set forth above, there exists an actual controversy between Plaintiffs and Defendants as to whether Defendants' confiscation of the Working Retirees' earnings for use by the Retirement System without compensation violates the Fifth and Fourteenth Amendments to the United States Constitution.

67. Unless the Court issues an appropriate declaration of rights, Defendants will continue confiscating money from the Working Retirees' earnings, and there will continue disputes and controversy surrounding these actions.

68. It would be inequitable for the Retirement Systems to retain the monies Defendants have confiscated from the Working Retirees.

69. Plaintiffs and the class seek declaratory relief and a judicial determination pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure as follows:

(a) that the requirement that retirees who return to work after July 1, 2005, must pay a portion of their earnings to the Retirement Systems without additional service credit or interest is unconstitutional;

(b) that Defendants are prohibited from enforcing the provisions of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c); and

(c) that Plaintiffs and the class are entitled to immediate return of all funds Defendants have deducted from their earnings for the Retirement Systems since July 1, 2005.

FOURTH CAUSE OF ACTION
(Injunctive Relief)

70. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

71. As a result of Defendants' deduction from the Working Retirees' earnings, Plaintiffs and the class have suffered and will continue to suffer irreparable and immediate harm and injury to their property and rights under the laws and Constitution of the United States, and they have no adequate remedy at law.

72. Defendants' deductions deprive Plaintiffs and the class of their rightfully earned income in violation of federal law and the United States Constitution.

73. Defendants have a duty to refrain from infringing upon Plaintiffs' constitutional rights.

74. Plaintiffs and the class are entitled to a preliminary and permanent injunction against Defendants preventing for all time enforcement of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c), and compelling the immediate return of all monies they have been required to forfeit to the Retirement Systems since July 1, 2005.

75. Unless compelled to refrain from interfering with the Working Retirees' due process rights, Defendants will continue to do so.

76. Plaintiffs have no plain, speedy, or adequate remedy at law to correct Defendants' unlawful conduct.

77. The balance of harm favors Plaintiffs and the class because an injunction would merely require Defendants to stop making deductions and to return the monies contributed by the Working Retirees since July 1, 2005. There is no imminent threat to public health, safety, welfare such that would justify the imposition of such arbitrary, onerous, and harmful forfeitures.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray, on behalf of themselves and all other similarly situated Working Retirees, for:

1. An Order certifying this action as a class action pursuant to Rule 23(b)(1)(A) and/or (B), and appointing Plaintiffs and their counsel to represent the class;

2. A declaration that South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c) violate the Constitution and laws of the United States;

3. An injunction against Defendants preventing for all time enforcement of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c);

4. An Order that Defendants provide Plaintiffs with a full and complete accounting of all funds held by Defendants that they have deducted from Plaintiffs' gross earning as contributions to the Retirement Systems since July 1, 2005;

5. An injunction compelling Defendants to immediately return to Plaintiffs and the class all monies Defendants have deducted as contributions to the Retirement Systems since July 1, 2005;

6. An Order that Defendants pay the costs and reasonable attorneys' fees of Plaintiffs and the class from the common fund pursuant to Federal Rule of Civil Procedure 23(h);

7. An Order that the Court retain jurisdiction over this matter to ensure Defendants' compliance with these mandates;

8. Such other and further relief as this Court may deem just and proper.

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EXHIBIT M

773 F.3d 536
United States Court of Appeals,
Fourth Circuit.

Gail M. HUTTO; Elizabeth W. Hodge; Margaret B. Lineberger; Lynn R. Rogers; Nancy G. Sullivan; Jane P. Terwilliger; Julian W. Walls; Debra J. Andrews, and all others similarly situated, Plaintiffs–Appellants,
v.
The SOUTH CAROLINA RETIREMENT SYSTEM; The Police Officers Retirement System; The South Carolina Retirement Systems Group Trust; Nikki R. Haley, Governor of South Carolina, in her official capacity as ex officio Chairwoman of the South Carolina Budget and Control Board; Curtis M. Loftis, Jr., Treasurer of the State of South Carolina, in his official capacity as an ex officio member of the South Carolina Budget and Control Board; Richard Eckstrom, Comptroller General of the State of South Carolina, in his official capacity as an ex officio member of the South Carolina Budget and Control Board; Hugh K. Leatherman, Chairman of the South Carolina Senate Finance Committee, in his official capacity as an ex officio member of the South Carolina Budget and Control Board; W. Brian White, Chairman of the South Carolina House of Representatives Ways and Means Committee, in his official capacity as an ex officio member of the South Carolina Budget and Control Board; Marcia S. Adams, in her official capacity as Executive Director of the South Carolina Budget and Control Board; David K. Avant, in his official capacity as Executive Director of the South Carolina Public Employee Benefit Authority, Defendants–Appellees.

No. 13–1523. | Argued: Oct. 29, 2014. | Decided: Dec. 5, 2014.

Synopsis
Background: Retired members of pension trust plans providing benefits to employees of the State and its political subdivisions brought action against the plans, the entity that administered them, and state officials, challenging the constitutionality of law requiring the members to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit. Defendants moved to dismiss. The United States District Court for the District of South Carolina, J. Michelle Childs, J., 899 F.Supp.2d 457, granted motion. Plaintiffs appealed.

Holdings: The Court of Appeals, Niemeyer, Circuit Judge, held that:

[1] as matter of first impression, governmental entity invoking Eleventh Amendment immunity bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity;

[2] entity that administered the plans was an arm of the state entitled to sovereign immunity;

[3] Eleventh Amendment barred claims for monetary damages brought against state officials;

[4] *Ex parte Young* exception to Eleventh Amendment sovereign immunity did not apply to claims for prospective injunctive relief; and

[5] as a matter of first impression, Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims.

Affirmed.

West Headnotes (16)

[1] **Federal Courts**
⇐Arms of the state in general

Eleventh Amendment shields a state entity from suit in federal court if, in the entity's operations, the state is the real party in interest, in the sense that the named party is the alter ego of the state. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[2] **Federal Courts**
⇐Immunity

Whether an action is barred by the Eleventh Amendment is a question of law that Court of Appeals reviews de novo. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[3] **Federal Courts**
⇐Waiver by State; Consent

Unlike subject-matter jurisdiction, which cannot be waived, a state can always waive its sovereign immunity and consent to be sued in federal court. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[4] **Federal Courts**
⇐Objections, proceedings, and determination

Court need not raise a state's sovereign immunity defense on its own. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[5] **Federal Courts**
⇐Objections, proceedings, and determination

Governmental entity invoking Eleventh Amendment immunity bears the burden of demonstrating that it qualifies as an arm of the state entitled to share in its immunity. U.S.C.A. Const.Amend. 11.

1 Cases that cite this headnote

[6] **Federal Courts**
⇐Arms of the state in general

In analyzing whether entities are arms of the state entitled to sovereign immunity, the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded; if the state treasury will be called upon to pay a judgment against a governmental entity, then Eleventh Amendment immunity applies to that entity, but if the state treasury will not be liable for a judgment, sovereign immunity applies only where the governmental entity is so connected to the state that the legal action against the entity would, despite the fact that the judgment will not be paid from the state treasury, amount to the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[7] **States**
⇐What are suits against state or state officers

A state treasury is responsible for paying a judgment where the state is functionally liable, even if not legally liable.

2 Cases that cite this headnote

[8] **Federal Courts**
⇐Agencies, officers, and public employees

A judgment in favor of retired members of pension trust plans for employees of the State and its political subdivisions, in their action challenging the constitutionality of law requiring them to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit, had the potential to impact the State's treasury, thus supporting determination that entity that administered the plans was an arm of the State and therefore immune from suit under the Eleventh Amendment; although the plans were part of a fundamentally member-funded retirement system, the State was constitutionally required to appropriate funds to protect the fiscal

integrity of the system, the entity also received funds directly from the State when, as an employer, it made its annual appropriation, and if a monetary judgment created a shortfall in the entity's funds, the State may have to make up the difference. U.S.C.A. Const.Amend. 11; S.C.Const. Art. 1, § 16; S.C.Code 1976, §§ 9–1–1690, 9–11–280.

Cases that cite this headnote

[9] **Federal Courts**
⇐Agencies, officers, and public employees

Entity that administered pension trust plans for employees of the State of South Carolina and its political subdivisions did not function independently of the State, thus supporting determination that the entity was an arm of the State and therefore had Eleventh Amendment immunity from suit brought by retired plan members challenging the constitutionality of law requiring them to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit; although the entity's assets were held in trust and were not considered funds belonging to the State, and the entity was established as a corporation, state officials from the legislative and executive branches were involved in the entity through their participation on the South Carolina Budget and Control Board, which administered and operated the plans' funds, and the plans were highly regulated by a comprehensive statutory scheme. U.S.C.A. Const.Amend. 11; S.C.Code 1976, §§ 9–1–20, 9–5–30(5), 9–11–20.

Cases that cite this headnote

[10] **Federal Courts**
⇐Arms of the state in general

When assessing whether allowing suit against a state entity would offend a state's dignity, Court of Appeals considers (1) the degree of control that the state exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns—whether local or statewide—with which the entity is involved; and (3) the manner in which state law treats the entity.

Cases that cite this headnote

[11] **Federal Courts**
⇐Arms of the state in general

Under the degree-of-state-control factor in determining whether an entity is an arm-of-the-state entitled to sovereign immunity, Court of Appeals considers who appoints the entity's directors or officers, who funds the entity, and whether the state retains a veto over the entity's actions, as well as whether the entity has the ability to contract, sue and be sued, and purchase and sell property, and whether it is represented in legal matters by the state attorney general. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[12] **Federal Courts**
⇐Agencies, officers, and public employees

Eleventh Amendment barred claims for monetary damages brought by retired members of pension trust plans for employees of the State of South Carolina and its political subdivisions against individual officials of the entity that administered the plan, arising from state law requiring the retired members to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit, where the entity itself was an arm of the state and thus immune from suit under the Eleventh Amendment. U.S.C.A. Const.Amend. 11; S.C.Code 1976, §§ 9–1–1790(C), 9–11–90(4)(c).

Cases that cite this headnote

[13] **Federal Courts**
⇐Agencies, officers, and public employees

State officials sued in their official capacities for retrospective money damages have the same sovereign immunity accorded to the state. U.S.C.A. Const.Amend. 11.

4 Cases that cite this headnote

[14] **Federal Courts**
⇐Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine
Federal Courts
⇐Agencies, officers, and public employees

Ex parte Young exception to Eleventh Amendment sovereign immunity, permitting a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, did not apply to allow claims for prospective injunctive relief brought by retired members of pension trust plans for employees of the State of South Carolina and its political subdivisions against individual officials of the entity that administered the plan, arising from state law requiring the retired members to contribute to the plans upon their rehiring by the State without providing them with any additional benefits or service credit, where state officials named as defendants had no connection with the enforcement of the challenged statute. U.S.C.A. Const.Amend. 11; S.C.Code 1976, §§ 9–1–1790(C), 9–11–90(4)(c).

1 Cases that cite this headnote

[15] **Federal Courts**
⇐Suits for injunctive or other prospective or equitable relief; Ex parte Young doctrine
Federal Courts
⇐Agencies, officers, and public employees

Ex parte Young exception to Eleventh Amendment immunity applies only where a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional has some connection with the enforcement of the act. U.S.C.A. Const.Amend. 11.

Cases that cite this headnote

[16] **Federal Courts**
⇐Suits Against States; Eleventh Amendment and Sovereign Immunity

Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims. U.S.C.A. Const.Amends. 5, 11.

2 Cases that cite this headnote

Attorneys and Law Firms

*539 **ARGUED:** Richard Harpootlian, Richard A. Harpootlian, PA, Columbia, South Carolina, for Appellants. Tina Marie Cundari, Sowell, Gray, Stepp, & Laffitte, LLC, Columbia, South Carolina, for Appellees. **ON BRIEF:** Graham L. Newman, Christopher P. Kenney, Richard A. Harpootlian, PA, Columbia, South Carolina; James M. Griffin, Margaret N. Fox, LEWIS, Babcock & Griffin, LLP, Columbia, South Carolina, for Appellants. Robert E. Stepp, Sowell, Gray, Stepp, & Laffitte, LLC, Columbia, South Carolina, for Appellees.

Before NIEMEYER, WYNN, and THACKER, Circuit Judges.

Opinion

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WYNN and Judge THACKER joined.

*540 NIEMEYER, Circuit Judge:

South Carolina public employees commenced this class action challenging the constitutionality of the South Carolina State Retirement System Preservation and Investment Reform Act, 2005 S.C. Acts 1697 ("the 2005 Act"). That Act amended South Carolina's retirement laws by requiring public employees who retire and then return to work to make, beginning on July 1, 2005, the same contributions to state-created pension plans as pre-retirement employees but without receiving further pension benefits. The plaintiffs claimed that the 2005 Act effected a taking of their private property, in violation of the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. They named as defendants two state-created pension plans, in which they are participants; the South Carolina Retirement Systems Group Trust ("the Trust"), which holds the pension plans' assets; and state officials serving as trustees and administrators of the pension plans. For relief, they sought repayment of all contributions withheld since July 1, 2005, and injunctive relief prohibiting the future collection of such contributions.

Pursuant to the defendants' motion, the district court dismissed the complaint on the ground that all of the defendants are entitled to sovereign immunity.

We affirm, albeit on reasoning slightly different from that given by the district court. We conclude, as did the district court, that the pension plans and the Trust are arms of the State of South Carolina and therefore have sovereign immunity. Likewise, we conclude that the state officials sued in their official capacities for repayment of pension-plan contributions have sovereign immunity. Finally, we conclude that the state officials sued in their official capacities for prospective injunctive relief have sovereign immunity because their duties bear no relation to the collection of the public employees' contributions to the pension plans, precluding application of *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In reaching these conclusions, we reject the plaintiffs' argument that their claims under the Takings Clause of the Fifth Amendment are exempt from the protection of the Eleventh Amendment.

I

The plaintiffs are public employees and participants in two pension plans created by South Carolina in 1962—the South Carolina Retirement System and the South Carolina Police Officers Retirement System (collectively, "the Retirement System").[1] *See* S.C.Code Ann. §§ 9–1–20, 9–11–20(1). In their complaint, they alleged that they and others similarly situated are "retired contributing members" of the Retirement System, who returned to work on or after July 1, 2005, when the 2005 Act went into effect, and who are, by reason of the 2005 Act, required "to contribute a portion of their gross earnings" to the Retirement System "without receiving any additional service credit or interest on their retirement accounts." Before July 1, 2005, retired participants could return to work for a salary of up to $50,000 without forfeiting the right to receive retirement benefits and without having to make further contributions to the Retirement System. ***541** *See Ahrens v. State*, 392 S.C. 340, 709 S.E.2d 54, 56–57 (2011). But this changed with the enactment of the 2005 Act, and retired participants who return to work are now required to make the same contributions to the Retirement System as pre-retirement employees but without accruing additional service credit for pension benefits. *See* S.C.Code Ann. §§ 9–1–1790(C), 9–11–90(4)(c). The South Carolina General Assembly made the change to help fund the Retirement System and, in particular, to secure future cost-of-living adjustments.

The plaintiffs commenced this class action in August 2010 on behalf of themselves and all other participating employees who returned to work on or after July 1, 2005, alleging that, by enforcing the 2005 Act, the defendants "confiscated their private property," in violation of the Takings Clause of the Fifth Amendment and their procedural due process rights under the Fourteenth Amendment. In addition to naming as defendants the two pension plans, the plaintiffs named the Trust, which holds the assets of the Retirement System, and a number of state officials in their official capacities who, as members or executive directors of the State Budget and Control Board and the Public Employee Benefit Authority, serve as trustees and administrators of the Retirement System. The State Budget and Control Board and the Public Employee Benefit Authority are the statutorily designated co-trustees of the Retirement System. S.C.Code Ann. § 9–1–1310(A).

For relief, the plaintiffs sought (1) a declaratory judgment that the 2005 Act is unconstitutional; (2) an injunction against its enforcement; (3) an accounting of all contributions they made to the Retirement System since July 1, 2005; (4) an injunction compelling the return of all such contributions; and (5) an order awarding them attorneys fees and costs.[2]

The Retirement System, the Trust, and the state officials filed a motion to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6), asserting numerous grounds for their motion, including sovereign immunity, claim and issue preclusion

based on the prior state litigation, discretionary abstention, and failure to state a claim upon which relief can be granted. The district court granted the motion and dismissed the complaint, relying only on the defendants' sovereign immunity under the Eleventh Amendment. With respect to the institutional defendants, the court determined that "the Retirement Systems should be considered an arm of the State such that Eleventh Amendment immunity ***542** applies to bar [a federal] court from hearing the claim." *Hutto v. S.C. Ret. Sys.*, 899 F.Supp.2d 457, 473 (D.S.C.2012). And "[b]ecause Plaintiffs seek monetary damages," it held that the claims against the individual defendants were similarly barred. *Id.* at 475 n. 14. Having found that all of the defendants were immune by reason of sovereign immunity, the court declined to address the defendants' remaining grounds for seeking dismissal of the action.

The plaintiffs filed a motion for reconsideration under Rule 59(e), asserting that the district court erred in dismissing their claims for a declaratory judgment and injunctive relief against the state officials serving in their official capacities. They relied on *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), which created an exception to Eleventh Amendment immunity with respect to claims for prospective injunctive relief to remedy ongoing violations of federal law. The district court denied the motion because, "in seeking to bar the enforcement of [the 2005 Act], which requires Plaintiffs to pay into the Retirement System, Plaintiffs' requested relief is undeniably monetary" and because an injunction ordering the return of the contributions already withheld "would ultimately impact the State treasury."

This appeal followed.

II

[1] The Eleventh Amendment shields a state entity from suit in federal court "if, in [the entity's] operations, the state is the real party in interest," in the sense that the "named party [is] the *alter ego* of the state." *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n.*, 822 F.2d 456, 457 (4th Cir.1987).

The plaintiffs contend that the Retirement System and the Trust do not have the sovereign immunity afforded a State under the Eleventh Amendment because they are "non-state entit[ies]" and that the district court's contrary conclusion was based on an erroneous application of the factors articulated in *Ram Ditta* for determining whether an entity is an alter ego of the State. They argue, "[T]he District Court should have given effect to the express, unambiguous language of [South Carolina's retirement laws] and concluded that the Retirement Systems are independent corporate entities for which the State has no financial obligation as indemnitor."

The defendants contend that "State law makes the financial obligations of the state Retirement Systems obligations of the State", that the State controls the Retirement System, that the pension plans of the Retirement System "operate on a statewide basis and have statewide concerns", and that South Carolina law treats the pension plans as state agencies. The defendants thus maintain that the Retirement System and the Trust are "arms of the State and [therefore] immune from suit."

[2] Whether an action is barred by the Eleventh Amendment is a question of law that we review *de novo*. *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 222 (4th Cir.2001).

[3] [4] [5] At the outset, we address which party has the burden of proof when sovereign immunity under the Eleventh Amendment is raised. While the Supreme Court has described sovereign immunity as a "jurisdictional bar" that can be raised for the first time on appeal, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), and "a constitutional limitation on the federal judicial power established in Art. III," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), it "ha[s] not decided" whether ***543** Eleventh Amendment immunity goes to a court's subject-matter jurisdiction, *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 391, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998). Unlike subject-matter jurisdiction, which cannot be waived, a State can always waive its immunity and consent to be sued in federal court. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985), and a court need not raise the issue on its own initiative. *Wis. Dep't of Corr.*, 524 U.S. at 389, 118 S.Ct. 2047. Because a defendant otherwise protected by the Eleventh Amendment can waive its protection, it is, as a practical matter, structurally necessary to require the defendant to assert the immunity. We therefore conclude that sovereign immunity is akin to an affirmative defense, which the defendant bears the burden of demonstrating. In so concluding, we join every other court of appeals that has addressed the issue. *See Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237–39 (2d Cir.2006); *Fresenius Med. Care Cardiovascular Res., Inc. v. P.R. & the Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 61 (1st Cir.2003); *Gragg v. Ky. Cabinet for Workforce Dev.*, 289 F.3d 958, 963 (6th Cir.2002);

Skelton v. Camp, 234 F.3d 292, 297 (5th Cir.2000); *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.1995); *Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 734 n. 5 (7th Cir.1994), *superseded by statute on other grounds as recognized in Holmes v. Marion Cnty. Office of Family & Children*, 349 F.3d 914, 918–19 (7th Cir.2003); *ITSI TV Prods., Inc. v. Agric. Ass'ns*, 3 F.3d 1289, 1292 (9th Cir.1993).

[6] In analyzing whether entities such as the Retirement System and the Trust are arms of the State, "the most important consideration is whether the state treasury will be responsible for paying any judgment that might be awarded." *Ram Ditta*, 822 F.2d at 457. Thus, "if the State treasury will be called upon to pay a judgment against a governmental entity, then Eleventh Amendment immunity applies to that entity." *Cash*, 242 F.3d at 223. If, on the other hand, the State treasury will not be liable for a judgment, sovereign immunity applies only where the "governmental entity is so connected to the State that the legal action against the entity would, despite the fact that the judgment will not be paid from the State treasury, amount to 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Id.* at 224 (quoting *Seminole Tribe*, 517 U.S. at 58, 116 S.Ct. 1114). At bottom, even though "state sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens, ... the doctrine's central purpose is to accord the States the respect owed them as joint sovereigns." *Fed. Maritime Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 765, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002) (internal quotation marks and citations omitted).

A

[7] We address first the most important factor—whether South Carolina could be responsible for the payment of a judgment against the Retirement System and the Trust. A State treasury is responsible "where the state is *functionally* liable, even if not legally liable." *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 137 (4th Cir.2014) (quoting *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir.2007)) (internal quotation marks omitted); *see also Ristow v. S.C. Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir.1995) (holding that courts must "[c]onsider [ ] *the practical* *544 *effect* of a putative ... judgment on the state treasury" (emphasis added)).

The plaintiffs argue that "the Retirement Systems Act insulates the state treasury from any judgment entered in this case" because it provides that "[a]ll agreements or contracts" with members" of the Retirement System are "solely obligations" of the individual pension plan and that "the full faith and credit" of South Carolina or its subdivisions "is not, and shall not be, pledged or obligated" beyond the State's contributions as an employer of participating employees. S.C.Code Ann. §§ 9–1–1690, 9–11–280.

[8] This statutory language, however, must be read in the context of Article X, Section 16 of the South Carolina Constitution, which provides that "[t]he General Assembly shall annually appropriate funds and prescribe member contributions for any state-operated retirement system *which will insure the availability of funds to meet all normal and accrued liability of the system on a sound actuarial basis as determined by the governing body of the system.*" S.C. Const. art. X, § 16 (emphasis added). Any possible ambiguity resulting from reading the retirement laws in the context of the South Carolina Constitution was put to rest by the South Carolina Supreme Court in *Wehle v. South Carolina Retirement System*, 363 S.C. 394, 611 S.E.2d 240, 242–43 (2005) (per curiam), where the Court stated that, "should the Board determine that any retirement system is not funded on a sound actuarial basis, the General Assembly must provide funding necessary to restore the fiscal integrity of the System." Thus, in the event that a judgment in this case were to render the Retirement System unable to meet its liabilities, the General Assembly would be obligated to account for any deficiency by increasing appropriations to the Retirement System or by requiring employers, including the State itself, to increase their contributions.

In addition, the State's ultimate responsibility for the financial soundness of the Retirement System is reflected by the fact that the Retirement System's "actuarial valuation is relied upon in the preparation of the State's annual financial statement and by outside entities in rating the State for purposes of issuance of bonds." *Wehle*, 611 S.E.2d at 242. Thus, if a judgment in this case were to render the Retirement System or the Trust insolvent, that insolvency would harm the State's credit rating, making it more expensive for the State to borrow money.

Consequently, we conclude that South Carolina remains functionally liable for any judgment against the Retirement System and the Trust, which is sufficient to make the Retirement System and the Trust arms of the State. *See Oberg*, 745 F.3d at 137.

We reject the plaintiffs' various arguments to the contrary. First, they insist that Article X, Section 16 of the

South Carolina Constitution "merely compels the State to comply with its funding obligations as an employer," a requirement that the General Assembly could not have imposed on future legislatures by legislative act. And they complain that "the District Court unnecessarily construed the state Constitution in a manner that rendered it irreconcilable with Sections 9–1–1690 and 9–11–280." But the South Carolina Supreme Court, which, of course, has the last word on the meaning of the South Carolina Constitution, rejected the plaintiffs' posited construction of Article X, Section 16. *See Wehle*, 611 S.E.2d at 242–43. Moreover, the plaintiffs' argument that we must construe a constitutional provision so as not to conflict with a statute turns the concept of constitutional supremacy on its head.

***545** Second, the plaintiffs maintain that there is no evidence that a judgment in their favor would in fact create a shortfall in the Retirement System's funds. Yet, given that the plaintiffs' complaint alleges that "the members of the proposed class will exceed tens of thousands of persons," it is surely plausible that a favorable judgment could create an actuarial deficit. More importantly, whether or not a judgment would render the Retirement System insolvent is of little consequence to the analysis. As the Supreme Court held in *Regents of the University of California v. Doe*, 519 U.S. 425, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), "it is the entity's *potential* legal liability ... that is relevant." *Id.* at 431, 117 S.Ct. 900 (emphasis added); *see also Owens v. Balt. City State's Att'ys Office*, 767 F.3d 379, 412 (4th Cir.2014) ("When an entity has both state and local characteristics, 'the entity's *potential* legal liability' is relevant to the Eleventh Amendment inquiry." (emphasis added) (quoting *Regents*, 519 U.S. at 431, 117 S.Ct. 900)); *Oberg*, 745 F.3d at 137 ("[I]n assessing [the State treasury] factor, an entity's '*potential* legal liability' is key." (emphasis added) (quoting *Regents*, 519 U.S. at 431, 117 S.Ct. 900)). Consequently, "the proper inquiry is not whether the state treasury would be liable in *this* case, but whether, hypothetically speaking, the state treasury would be subject to 'potential legal liability' *if* the retirement system did not have the money to cover the judgment." *Ernst v. Rising*, 427 F.3d 351, 362 (6th Cir.2005) (quoting *Regents*, 519 U.S. at 431, 117 S.Ct. 900)); *see also Pub. Sch. Ret. Sys. v. State St. Bank & Trust Co.*, 640 F.3d 821, 830 (8th Cir.2011) (similar). Here, as in *Ernst*, the "plaintiffs fail to come to grips with the fiscal reality that the State's funding requirement assuredly *could* increase if the retirement system were to use its current and future funding to pay off a judgment against it." 427 F.3d at 362 (emphasis added).

Third, the plaintiffs read much into the fact that the funds and assets of the Retirement System "are not funds of the State," S.C.Code Ann. § 9–1–1310(C), but instead are held "in a group trust under Section 401(a)(24) of the Internal Revenue Code," *id.* § 9–16–20(C). Section 401(a)(24) of the Internal Revenue Code requires that group trust funds not be "used for, or diverted to, purposes other than for the exclusive benefit of ... employees or their beneficiaries in order to qualify as a group trust." 26 U.S.C. § 401(a)(24). While we have recognized that holding funds in a segregated account apart from general state funds does "counsel [ ] against establishing arm-of-the-state status," *Oberg*, 745 F.3d at 139, that fact is not dispositive. The plaintiffs also argue that South Carolina is violating § 401(a)(24) by diverting the contributions they made to the Retirement System to benefit pre-retirement employees. But even if South Carolina were indeed in violation of federal law by using funds contrary to § 401(a)(24), that fact would be irrelevant to whether a judgment against the Retirement System or the Trust could potentially affect the State treasury. *Accord Ernst*, 427 F.3d at 365.

Fourth, the plaintiffs argue that courts generally, and the district court in particular, should wait until the completion of discovery and the development of a factual record before resolving the sovereign immunity issue. But we have often affirmed Rule 12(b)(6) motions to dismiss on the basis of Eleventh Amendment immunity. *See, e.g., Antrican v. Odom*, 290 F.3d 178, 191 (4th Cir.2002). In *Gray v. Laws*, 51 F.3d 426, 434 (4th Cir.1995), upon which the plaintiffs rely for their argument, we vacated the district court's dismissal under the Eleventh Amendment *not because the* ***546** *district court failed to conduct sufficient factfinding*, but rather because the Supreme Court had changed the applicable Eleventh Amendment standard while the appeal was pending and "the barrenness of the record" rendered us ill-suited to apply the new standard.

Finally, the plaintiffs contend that we are bound by our earlier decision in *Almond v. Boyles*, 792 F.2d 451 (4th Cir.1986). In *Almond*, we rejected, "for the reasons stated by the district court," a claim that the Eleventh Amendment barred a suit by a class of visually handicapped operators of vending stands to recover employer contributions to the North Carolina Teachers' and State Employees' Retirement System, which they claimed were collected in violation of federal law. *Id.* at 456. The district court had found that a judgment against the retirement system would not come from State funds for three reasons, the "most important [ ]" of which was that "the defendants [had] not shown the court that the relief requested by the plaintiffs *would inevitably lead* to an additional appropriation of state funds." *Almond v.*

Boyles, 612 F.Supp. 223, 228 (E.D.N.C.1985) (emphasis added). But Almond's requirement that the defendants show that a judgment "would inevitably" be satisfied by the State is fundamentally at odds with *Regents* ' subsequent less demanding standard of *potential* liability, and therefore *Almond* 's framework is no longer applicable.

As the Supreme Court has framed the Eleventh Amendment inquiry, the question is whether, "*[i]f* the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 51, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994) (emphasis added). In light of *Wehle's* interpretation of Article X, Section 16, the answer to that question here is undoubtedly yes, and we therefore conclude that a judgment against the Retirement System and the Trust would implicate South Carolina's treasury.

B

[9] [10] In addition to South Carolina's potential funding obligation, we also conclude that state-dignity factors weigh in favor of finding that the Retirement System and the Trust are arms of the State. *See Fed. Maritime Comm'n*, 535 U.S. at 765, 122 S.Ct. 1864. When assessing whether allowing suit against a state entity would offend a State's dignity, we consider "(1) the degree of control that the State exercises over the entity or the degree of autonomy from the State that the entity enjoys; (2) the scope of the entity's concerns—whether local or statewide—with which the entity is involved; and (3) the manner in which State law treats the entity." *Cash*, 242 F.3d at 224.

[11] Under the degree-of-state-control factor, we consider "who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions," *Oberg*, 745 F.3d at 137 (quoting *U.S. ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 580 (4th Cir.2012)) (internal quotation marks omitted), as well as "whether an entity has the ability to contract, sue and be sued, and purchase and sell property, and whether it is represented in legal matters by the state attorney general," *id.* (citations omitted).

In this case, the Retirement System does have the "power and privileges of a corporation," S.C.Code Ann. §§ 9–1–20, 9–11–20, including the powers to "sue and be sued," to "make contracts," and to buy and *547 sell property, *id.* § 33–3–102. But, contrary to the plaintiffs' argument, the designation of an entity as a corporation with the power to sue and be sued is not conclusive in establishing its autonomy. *See Oberg*, 745 F.3d at 139 (finding that the autonomy factor "cut both ways," even though the entity had the "power to enter into contracts, sue and be sued, and purchase and sell property in its own name"); *see also State Highway Comm'n v. Utah Const. Co.*, 278 U.S. 194, 199, 49 S.Ct. 104, 73 L.Ed. 262 (1929) ("It is unnecessary for us to consider the effect of the general grant of power to sue or be sued ...—this suit, in effect, is against the state and must be so treated").

And other factors point to state control. The means by which the entities' officers are appointed suggest that the Retirement System is beholden to the State. The State Budget and Control Board and the Public Employee Benefit Authority, which are the co-trustees of the Retirement System, and the Retirement System Investment Commission, which has exclusive authority to invest the Trust's assets, *see* S.C.Code Ann. § 9–16–20(A), are comprised almost entirely of the Governor of South Carolina, the State Treasurer, the Comptroller General, the Chairman of the Senate Finance Committee, the Chairman of the House Ways and Means Committee, the President Pro Tempore of the Senate, the Speaker of the House of Representatives, and persons appointed by these officials. *Id.* §§ 1–11–10, 9–4–10(B)(1), 9–16–315(A). Although several of the appointees are required to be participants in the Retirement System, even those members are selected by state officials. While the trustees and administrators of the Trust are, of course, required to discharge their fiduciary duties "solely in the interest of the retirement systems, participants, and beneficiaries," *id.* § 9–16–40, one would have to be naive to conclude that the State lacks any influence or control when it has the power of appointment. State control is further evidenced by the facts that: (1) the State Treasurer is the custodian of the Trust's funds and has sole authority to issue payments from the funds, *id.* §§ 9–1–1320, 9–11–250; (2) the Retirement System Investment Commission must provide quarterly reports to, among others, the Speaker of the House of Representatives and the President Pro Tempore of the Senate, *id.* § 9–16–90(A); (3) the State must defend and indemnify the members of the Retirement System Investment Commission, *id.* § 9–16–370; and (4) an entire title of the Code of Laws of South Carolina is devoted to the extensive regulation of the Retirement System and the Trust.

In sum, because of the mixed indications as to control, we

conclude that application of the control factor, if not favoring sovereign immunity, is inconclusive. *Accord Oberg*, 745 F.3d at 141 (finding that the control factor "present[ed] a close question" in light of the fact that the board of directors was largely composed of "state officials or gubernatorial appointees" but also "exercise[d] corporate powers including the capacity to contract and sue and be sued"); *Almond*, 612 F.Supp. at 227 (holding that the control factor did "not weigh heavily in favor of either party," after noting the detailed statutory regime, the political nature of the appointment of the members of the board of trustees, the retirement system's corporate status, and the board's powers to sue and be sued and to buy and sell property).

Turning to the factor considering whether the entities' concerns are local or statewide, we conclude that this factor counsels in favor of sovereign immunity. In assessing this factor, courts must consider whether the entity has statewide or localized jurisdiction, *Cash*, 242 F.3d at 226, ***548** and "whether an entity's functions are 'classified as typically state or unquestionably local,' " *Harter v. Vernon*, 101 F.3d 334, 341 (4th Cir.1996) (quoting *Hess*, 513 U.S. at 45, 115 S.Ct. 394). The Retirement System covers public employees throughout the State. And like "educating the [State's] youth," *Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 265 (4th Cir.2005), providing for public employees—many of whom work for the State—upon retirement is an area of statewide concern. *Accord Pub. Sch. Ret. Sys.*, 640 F.3d at 829 ("[T]he Retirement Systems do not furnish the type of local services that political subdivisions typically furnish, such as 'water service, flood control, [or] rubbish disposal' " (quoting *Moor v. Cnty. of Alameda*, 411 U.S. 693, 720, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973))); *Ernst*, 427 F.3d at 361 ("[W]hen, as in this case, the retirement system is funded by annual appropriations from the state legislature, operates in part through the Michigan Treasury and in part through the State's Department of Management and Budget, operates on a statewide basis and serves ... state-wide officials, it is fair to say that the retirement system performs a traditional state function"); *McGinty v. New York*, 251 F.3d 84, 98 (2d Cir.2001) ("Although the Retirement System does not service state employees exclusively, it assists in the business of the state by enabling the state to meet its pension and benefits obligations ...").

Finally, the factor assessing how South Carolina treats the entities points strongly in favor of sovereign immunity. This factor requires courts to consider "the relevant state statutes, regulations, and constitutional provisions which characterize the entity, and the holdings of state courts on the question." *Harter*, 101 F.3d at 342. Title 9 of the Code of Laws of South Carolina repeatedly uses the term "State agency" to refer to the South Carolina Retirement System and the term "State agent" to refer to the Director of the Retirement System. S.C.Code Ann. §§ 9–3–20(4), 9–5–30(5) to –30(6). The Code also describes the South Carolina Public Employee Benefit Authority as "an administrative agency of state government." *Id.* § 9–4–10(H). Similarly, in *Layman*, the South Carolina Supreme Court characterized the Retirement System as a "state agency" for purposes of S.C.Code Ann. § 15–77–300, which permits an award of attorneys fees to the prevailing party in an action brought by or against the State or any political subdivision thereof. 658 S.E.2d at 326. And in *Ahrens*, the Court analyzed whether, as an "agency," the Retirement System created a contract with the working retirees. 709 S.E.2d at 58–60. Indeed, South Carolina courts have frequently referred to the individual pension plans of the Retirement System as agencies. *See, e.g., Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 549 S.E.2d 243, 251 (2001); *S.C. Police Officers Ret. Sys. v. City of Spartanburg*, 301 S.C. 188, 391 S.E.2d 239, 241 (1990).

At bottom, we conclude that the relevant indicators strongly indicate that the Retirement System and the Trust are arms of the State of South Carolina and are therefore protected under the Eleventh Amendment. This conclusion is consistent with the holdings of the overwhelming number of federal courts that have held that similar retirement systems in other States are arms of the State. *See Pub. Sch. Ret. Sys.*, 640 F.3d at 827–33; *Ernst*, 427 F.3d at 359–66; *McGinty*, 251 F.3d at 100; *Mo. State Employees' Ret. Sys. v. Credit Suisse, N.Y. Branch*, No. 09–4224–CV–C–NKL, 2010 WL 318652, at *6 (W.D.Mo. Jan. 21, 2010); *N.M. ex rel. Nat'l Educ. Ass'n of N.M. v. Austin Capital Mgmt. Ltd.*, 671 F.Supp.2d 1248, 1253 (D.N.M.2009); *Cal. Pub. Emps. Ret. Sys. v.* ***549** *Moody's Corp.*, Nos. C 09–03628 SI, C 09–03629 JCS, 2009 WL 3809816, at *6 (N.D.Cal. Nov. 10, 2009); *Turner v. Ind. Teachers' Ret. Fund*, No. 1:07–cv–1637–DFH–JMS, 2008 WL 2324114, at *1 (S.D.Ind. June 5, 2008); *Larsen v. State Employees' Ret. Sys.*, 553 F.Supp.2d 403, 420 (M.D.Pa.2008); *JMB Grp. Trust IV v. Pa. Mun. Ret. Sys.*, 986 F.Supp. 534, 538 (N.D.Ill.1997); *Sculthorpe v. Va. Ret. Sys.*, 952 F.Supp. 307, 309–10 (E.D.Va.1997); *Hair v. Tenn. Consol. Ret. Sys.*, 790 F.Supp. 1358, 1364 (M.D.Tenn.1992); *Mello v. Woodhouse*, 755 F.Supp. 923, 930 (D.Nev.1991); *Reiger v. Kan. Pub. Emps. Ret. Sys.*, 755 F.Supp. 360, 361 (D.Kan.1990); *Retired Pub. Employees' Ass'n of Cal., Chapter 22 v. California*, 614 F.Supp. 571, 573, 581 (N.D.Cal.1984); *United States v. South Carolina*, 445 F.Supp. 1094, 1099–1100 (D.S.C.1977); *21 Props., Inc. v. Romney*, 360 F.Supp. 1322, 1326 (N.D.Tex.1973).

III

Turning to the claims against the state officials, the plaintiffs alleged in their complaint that "[a]s a result of Defendants' deduction from [Plaintiffs'] earnings, Plaintiffs and the class have suffered and will continue to suffer irreparable and immediate harm and injury to their property and rights under the laws and Constitution of the United States." Accordingly, they requested, among other relief, injunctions (1) "compelling Defendants to immediately return to Plaintiffs and the class all monies Defendants have deducted as contributions to the Retirement Systems since July 1, 2005," and (2) "preventing for all time enforcement of [the 2005 Act]." The plaintiffs contend that their requests for injunctive relief against the state officials are excepted from Eleventh Amendment protection under *Ex parte Young*.

[12] [13] First, we interpret the plaintiffs' request for an injunction compelling the return of "all monies Defendants have deducted as contributions to the Retirement Systems" as a claim for money damages. State officials sued in their official capacities for retrospective money damages have the same sovereign immunity accorded to the State. *See Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 n. 10, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Martin v. Wood*, 772 F.3d 192, No. 13–2283 (4th Cir.2014). Therefore, as did the district court, we hold that the plaintiffs' claim against the state officials for the return of their contributions is barred by the Eleventh Amendment.

Second, we agree with plaintiffs that their claim for the second injunction—to prevent "for all time" the enforcement of the 2005 Act—is prospective and seeks to remedy an ongoing violation of federal law. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 645, 122 S.Ct. 1753, 152 L.Ed.2d 871 (2002) ("In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] Complaint [1] alleges an ongoing violation of federal law and [2] seeks relief properly characterized as prospective' " (first alteration in original) (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296, 117 S.Ct. 2028 (O'Connor, J., concurring in part and concurring in the judgment))); *see also Va. Office for Protection & Advocacy v. Stewart*, —— U.S. ——, 131 S.Ct. 1632, 1639, 179 L.Ed.2d 675 (2011); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 496 (4th Cir.2005).

[14] Nonetheless, for a reason supported by the record but not relied on by *550 the district court, we conclude that the district court was also correct in dismissing the claim seeking the second injunction against state officials. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir.2004) ("[W]e 'may affirm the dismissal by the district court upon the basis of any ground supported by the record even if it is not the basis relied upon by the district court' " (quoting *Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir.1999))).

[15] The *Ex parte Young* exception to Eleventh Amendment immunity applies only where a party "defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional" has "some connection with the enforcement of the act." 209 U.S. at 157, 28 S.Ct. 441; *see also S.C. Wildlife Fed'n v. Limehouse*, 549 F.3d 324, 333 (4th Cir.2008); *Lytle v. Griffith*, 240 F.3d 404, 410 (4th Cir.2001). Thus, we have held that a governor cannot be enjoined by virtue of his general duty to enforce the laws, *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir.2001), and that an attorney general cannot be enjoined where he has no specific statutory authority to enforce the statute at issue, *McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir.2010). In contrast, we have held that a circuit court clerk bore the requisite connection to the enforcement of state marriage laws to be enjoined from enforcing them, because the clerk was responsible for granting and denying applications for marriage licenses. *See Bostic v. Schaefer*, 760 F.3d 352, 371 n. 3 (4th Cir.), *cert. denied*, —— U.S. ——, 135 S.Ct. 308, 190 L.Ed.2d 140 (2014).

The requirement that there be a relationship between the state officials sought to be enjoined and the enforcement of the state statute prevents parties from circumventing a State's Eleventh Amendment immunity. *See McBurney*, 616 F.3d at 399; *Lytle*, 240 F.3d at 412 (Wilkinson, C.J., dissenting). As the Court explained in *Ex parte Young*, if the "constitutionality of every act passed by the legislature could be tested by a suit against the governor and attorney general, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes," it would eviscerate "the fundamental principle that [States] cannot, without their assent, be brought into any court at the suit of private persons." 209 U.S. at 157, 28 S.Ct. 441 (quoting *Fitts v. McGhee*, 172 U.S. 516, 530, 19 S.Ct. 269, 43 L.Ed. 535 (1899)).

In this case, the plaintiffs named as defendants members

of the State Budget and Control Board, the Executive Director of the State Budget and Control Board, and the Executive Director of the Public Employee Benefit Authority, seeking to enjoin them from deducting from the plaintiffs' paychecks the contributions mandated by the 2005 Act. The State Budget and Control Board and the Public Employee Benefit Authority serve as co-trustees of the Retirement System, S.C.Code Ann. § 9–1–1310, and South Carolina law vests "general administration and responsibility for the proper operation" of the Retirement System in the Public Employee Benefit Authority, *id.* §§ 9–1–210, 9–11–30. But neither the State Budget and Control Board nor the Public Employee Benefit Authority has responsibility for ensuring that employee contributions to the Retirement System be deducted from the employees' paychecks and transmitted to the Retirement System. Employers of covered employees are required to deduct the requisite contributions from the employees' paychecks and furnish the withheld amounts to the Retirement System, and any person who fails to remit withheld ***551** contributions to the Retirement System is "guilty of a misdemeanor and must be punished by fine or imprisonment, or both." *Id.* § 9–11–210(7); *see also id.* § 9–1–1160(A). The Code of Laws of South Carolina nowhere gives the Retirement System, the Trust, or the trustees and administrators of the Retirement System the authority to deduct or refuse to deduct funds from participating employees' paychecks or to prosecute employers who violate their duties. Instead, the role of the state officials named in the complaint is merely to wait passively for the funds to be transmitted to the Retirement System and, once the funds have arrived, to manage and invest them. As such, the complaint seeks to enjoin the Retirement System's trustees and administrators from participating in a process in which they actually have no role.

Because the state officials named as defendants have no connection with the enforcement of the 2005 Act—specifically S.C.Code Ann. § 9–1–1790(C) and § 9–11–90(4)(c)—we hold that the *Ex parte Young* exception does not apply and that the state officials are thus entitled to Eleventh Amendment immunity on the claims seeking prospective injunctive relief.

IV

The plaintiffs contend that notwithstanding any Eleventh Amendment protection to which the defendants may be entitled, "sovereign immunity *never* bars a constitutional takings claim." They maintain that the Takings Clause provides an absolute guarantee of just compensation when private property is taken for public use and argue that if the States were immune from takings claims in federal court, the Fifth Amendment would be "effectively abrogated" by the Eleventh Amendment.

It is true that under the Eleventh Amendment, States enjoy sovereign immunity except "where there has been 'a surrender of this immunity in the plan of the convention.' " *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267, 117 S.Ct. 2028 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322–23, 54 S.Ct. 745, 78 L.Ed. 1282 (1934)). But the Supreme Court has recognized that "the plan of the convention" or the States themselves have surrendered sovereign immunity in only six contexts: (1) when a State consents to suit; (2) when a case is brought by the United States or another State; (3) when Congress abrogates sovereign immunity pursuant to Section 5 of the Fourteenth Amendment or pursuant to the Bankruptcy Clause; (4) when a suit is brought against an entity that is not an arm of the State; (5) when a private party sues a state official in his official capacity to prevent an ongoing violation of federal law; and (6) when an individual sues a state official in his individual capacity for *ultra vires* conduct. *See S.C. State Ports Auth. v. Fed. Maritime Comm'n*, 243 F.3d 165, 176–77 (4th Cir.2001), *aff'd*, 535 U.S. 743, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002). The plaintiffs now invite us to recognize a seventh exception for claims brought under the Takings Clause of the Fifth Amendment.

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation," U.S. Const. amend. V, and the Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit ..., commenced or prosecuted against one of the United States" by citizens of that State or another State, *id.* amend. XI. While there is arguably some tension between the protections of these amendments, that tension is not irreconcilable.

[16] Just as the Constitution guarantees the payment of just compensation for ***552** a taking, so too does the Due Process Clause provide the right to a remedy for taxes collected in violation of federal law. *See, e.g., McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 51, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990). But despite the constitutional requirement that there be a remedy, the Supreme Court expressly noted in *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547, 130 L.Ed.2d 454 (1994), that "the sovereign immunity [that] States enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought *in that forum*." *Id.* at 110, 115 S.Ct. 547 (second emphasis

added). To ensure that taxpayers possess an avenue for relief, the Court held that *state* courts must hear suits to recover taxes unlawfully exacted, the "sovereign immunity [that] States traditionally enjoy in their own courts notwithstanding." *Id.*; *cf. Alden v. Maine*, 527 U.S. 706, 740, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (holding that Congress cannot subject States to suits in state courts but taking care not to overrule *Reich*). Reasoning analogously, we conclude that the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims.

South Carolina courts have long recognized a right of persons to sue the State for unconstitutional takings. *See Graham v. Charleston Cnty. Sch. Bd.*, 262 S.C. 314, 204 S.E.2d 384, 386 (1974) ("In this jurisdiction neither the State nor any of its political subdivisions is liable in an action ex delicto unless by express enactment of the General Assembly, *except where the acts complained of, in effect, constitute a taking of private property for public use without just compensation* " (emphasis added)), *overruled on other grounds* by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985). Because the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise. But in concluding that the Fifth Amendment Takings Clause does not, in this case, trump the Eleventh Amendment, we do not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim.

The plaintiffs direct our attention to numerous cases in which suits to recover property illegally seized by the government were held not to have been barred by sovereign immunity. But in none of those cases did the plaintiffs sue either the sovereign itself or its alter ego. For example, in *United States v. Lee*, 106 U.S. 196, 222, 1 S.Ct. 240, 27 L.Ed. 171 (1882), the Court permitted an ejectment action to proceed *against federal officers* who served as custodians of the estate of General Robert E. Lee because the suit was not against the United States. In *Tindal v. Wesley*, 167 U.S. 204, 17 S.Ct. 770, 42 L.Ed. 137 (1897), the Court permitted a suit *against two state officials* to recover property wrongly held by them on behalf of the State, because the case was "a suit against individuals," *id.* at 221, 17 S.Ct. 770, and the Court could not perceive how it could "be regarded as one against the state," *id.* at 218, 17 S.Ct. 770. And in *Hopkins v. Clemson Agricultural College of South Carolina*, 221 U.S. 636, 648–49, 31 S.Ct. 654, 55 L.Ed. 890 (1911), the Court permitted a suit alleging a takings claim to proceed *against a university*, but under the law in effect at the time, the fact that the university was set up as a corporation meant that it was not an arm of the State, *see P.R. Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868, 884 (D.C.Cir.2008). ***553** By contrast, in *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), the Court dismissed an action brought against the head of the War Assets Administration alleging that he had refused to deliver coal that he had contracted to sell to the plaintiff and seeking an injunction prohibiting him from selling or delivering that coal to anyone else, because the relief sought was "against the sovereign." And while the Court has sometimes decided takings claims *without considering* Eleventh Amendment immunity, *see, e.g., Brown v. Legal Found. of Wash.*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992), we cannot glean much from that fact given that a State can waive its Eleventh Amendment protection.

Finally, we note that every other court of appeals to have decided the question has held that the Takings Clause does not override the Eleventh Amendment. *See Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir.2008) ("[W]e conclude that the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir.2004) ("Treating DLX's claim as a self-executing reverse condemnation claim, ... we conclude that the Eleventh Amendment's grant of immunity protects Kentucky from that claim ..."); *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1279 (11th Cir.1998) (holding that a takings claim was barred under the Eleventh Amendment, where state courts provided a means of redress for such claims); *John G. & Marie Stella Kenedy Mem'l Found. v. Mauro*, 21 F.3d 667, 674 (5th Cir.1994) (holding that the district court "correctly determined that the Foundation's Fifth Amendment inverse condemnation claim brought directly against the State of Texas" was barred by the Eleventh Amendment); *Citadel Corp. v. P.R. Highway Auth.*, 695 F.2d 31, 33 n. 4 (1st Cir.1982) ("Even if the constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it"); *Garrett v. Illinois*, 612 F.2d 1038, 1040 (7th Cir.1980) ("Even though the Fifth Amendment alone may support a cause of action for damages against the United States, the Eleventh Amendment stands as an express bar to federal power when a similar action is brought against one of the states" (citation omitted)).

* * *

All Citations

773 F.3d 536

For the reasons given, the judgment of the district court is

AFFIRMED.

Footnotes

1 In all, South Carolina has created five pension plans for public employees, each referred to as a "Retirement System"—the South Carolina Retirement System, the Retirement System for Judges and Solicitors of the State of South Carolina, the Retirement System for members of the General Assembly of the State of South Carolina, the National Guard Retirement System, and the South Carolina Police Officers Retirement System. S.C.Code Ann. §§ 9–1–20, 9–8–20, 9–9–20, 9–10–20(A), 9–11–20(1).

2 Before this action was commenced, public employees who retired and then returned to work *before* July 1, 2005, also commenced an action in state court, alleging that the 2005 Act breached a legislatively created contract with the "old working retirees" and violated the Takings Clause and the Due Process Clause of the U.S. Constitution. The South Carolina Supreme Court rejected the argument, holding that the "old working retiree statute [did] not create a binding contract between the State and the old working retirees," but the court did remand the case to the trial court "for a case by case factual determination of whether any actions of the State with regard to individual old working retirees constituted a breach of contract." *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265, 271–72 (2006). In 2011, the South Carolina Supreme Court affirmed the circuit court's conclusion that forms signed by the old working retirees, stating that they would not be required to pay into the pension plans, did not create a contract between the State and the old working retirees. *Ahrens*, 709 S.E.2d at 58–60. Because the employees' claims under the Takings Clause and the Due Process Clause were "founded on the presumption that a contractual right ha[d] been unfairly taken away," the court also affirmed the circuit court's grant of summary judgment on those claims. *Id.* at 63.

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September 23, 2015

VIA HAND DELIVERY
The Honorable Jeanette W. McBride
Clerk of Court, Richland County
Richland County Judicial Center
1701 Main Street, Room 205
Columbia, SC 29201

RE: **Gail M. Hutto et al. v. The South Carolina Retirement System et al.**
Case No.: 2015-CP-40-1728

Dear Mrs. McBride:

Please find enclosed for filing the original and four copies of the Memorandum in Opposition of Motion to Dismiss in the above-referenced matter. Please file these documents and return the clocked in copies to our courier.

By copy of this letter and as evidenced on the attached Certificate of Service, I am serving counsel of record with the same.

With kind regards, I am

Very truly yours,

Jaime Harmon

/jh
Enclosures

cc: The Honorable Tanya A. Gee (Via Hand Delivery)
Robert E. Stepp (Via Hand Delivery)
Tina M. Cundari (Via Hand Delivery)
Richard A. Harpootlian (Via Electronic Mail)
Christopher P. Kenney (Via Electronic Mail)

RICHARD A. HARPOOTLIAN, P.A.
Hand Delivered 1:34 pm
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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Gail M. Hutto, Debra J. Andrews, Elizabeth W. Hodge, Margaret B. Lineberger, Lynn R. Rogers, Nancy G. Sullivan, Jane P. Terwilliger, Julian W. Walls, and all others similarly situated, Plaintiff, vs. South Carolina Retirement System, Police Officers Retirement System, South Carolina Retirement Systems Group Trust, South Carolina Budget and Control Board, and South Carolina Public Employee Benefit Authority, Defendants.	Civil Action No.: 2015-CP-40-01728 **MEMORANDUM IN OPPOSITION OF MOTION TO DISMISS**

Plaintiffs submit this memorandum in opposition to Defendant's motion to dismiss all causes of action and accompanying memorandum of law thereto ("Mot. To Dismiss"). For the reasons set forth herein, Defendants' motion must be denied.

PROCEDURAL HISTORY

Plaintiffs originally filed this action in the United States District Court for the District of South Carolina, Florence Division, on August 2, 2010, pursuant to 28 U.S.C. § 1331, asserting causes of action arising under the United States Constitution and 28 U.S.C. § 2201. See Compl., Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkt. No. 1) (attached as **Exhibit 1**). The Defendants moved to dismiss the Complaint on two grounds: (1) that the Plaintiffs failed to state a cognizable claim for unconstitutional deprivation of their property and (2) that the

Defendants are immune from suit in federal court under the Eleventh Amendment. Defs.' Mot. Dismiss & MIS, Hutto, supra (Dkt. Nos. 11 and 11-1) (attached as **Exhibit 2**). The District Court dismissed the Complaint based upon the Eleventh Amendment sovereign immunity defense and did not address the merits of Plaintiffs' claims for constitutional deprivation. Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457, 465 (D.S.C. 2012). The Fourth Circuit Court of Appeals affirmed the sovereign immunity dismissal by explaining that "[b]ecause the plaintiffs can have their takings claims heard in South Carolina state courts, the Eleventh Amendment does not render the Takings Clause an empty promise." Hutto v. S. Carolina Ret. Sys., 773 F.3d 536, 552-53 (4th Cir. 2014).

Subsequently, on March 20, 2015, Plaintiffs re-filed this action in the Richland County Court of Common Pleas. Defendants have filed a Motion to Dismiss the Complaint pursuant to Rule 12(b)(6), SCRCP asserting that Plaintiffs do not have a property interest in the funds they seek to recover; that Plaintiffs are barred by the doctrines of *res judicata* and collateral estoppel; that Plaintiffs' claims are barred by the statute of limitations and the doctrine of laches, and that Plaintiffs have failed to exhaust their administrative remedies.

PLAINTIFFS' CLAIMS

Eight named Plaintiffs filed this suit on behalf of a class of similarly situated persons to enforce federal constitutional and statutory laws protecting their interests in multi-employer defined benefit pension plan trusts administered by the South Carolina Retirement Systems ("Retirement Systems" or "Systems"). Within the Systems are five pension trust funds, two of which are at issue in this case: the South Carolina Retirement System ("SCRS") and the South Carolina Police Officers Retirement System ("PORS"). South Carolina laws established the SCRS for the purpose of providing retirement benefits to employees of the State and its political subdivisions, including public school districts, charter schools, cities, counties, municipalities, and

other local subdivisions. S.C. Code Ann. §§ 9-1-20; 9-1-10(14). PORS was established for the purpose of providing retirement benefits to police officers. S.C. Code Ann. § 9-11-20. Plaintiffs and the proposed Class are retired members of either the SCRS or the PORS who, on or after July 1, 2005, were rehired by employers covered by either the SCRS or the PORS under what is colloquially known as the "working retiree" program.

The working retiree program went into effect on July 1, 2005, the effective date of the State Retirement System Preservation and Investment Reform Act ("Act 153"). The Act provides that a retiree can return to work while drawing his or her pension, S.C. Code Ann. §§ 9-1-1790(A) (SCRS), 9-11-90(4(a) (PORS), but must contribute a portion of earnings to the Systems "as if the member were an active contributing member ..." and "does not accrue additional service credit in the system" for those contributions. S.C. Code Ann. §§ 9-1-1790(C) (SCRS); § 9-11-90(4)(c) (PORS).

CAUSES OF ACTION

A qualified pension trust fund, like the SCRS and the PORS, must meet the requirements of Internal Revenue Code ("IRC"), 26 U.S.C. § 401(a). Section 401(a) contains several requirements that ensure employee contributions are not used, diverted, or forfeited for purposes other than the exclusive use of the employee and his or her beneficiaries. In addition, the Fifth and Fourteenth Amendments to the United States United States Constitution protect private property from unreasonable and arbitrary government deprivation. U.S. Const. amend. V & XIV. Despite the clear requirements set forth by the IRC and the United States Constitution, South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c) deny Plaintiffs any service credit or interest on their contributions of their property to the Systems.

Accordingly, Plaintiffs filed this action on behalf of themselves and a proposed class comprised of tens of thousands of retired state employees, teachers, city employees, police officers

and other employees who returned to work on or after July 1, 2005, and have been forced to contribute earnings to either the SCRS or the PORS without just compensation. Their Complaint states only causes of action for declaratory and injunctive relief based on violations of the Fifth and Fourteenth Amendments and the IRC provisions governing public defined benefits pension plan trust funds.

LITIGATION IN LAYMAN AND AHRENS

In 2001, the General Assembly established laws enabling public employees who had retired to return to work for covered employers *without* having to make further contributions to the Retirement Systems. Layman v. State, 368 S.C. 631, 635, 630 S.E.2d 265, 267 (2006). At that time, there were two separate avenues for participating as a retiree who had returned to covered employment—under the TERI program or as a working retiree. There were differences in how these retirees received their benefits after returning to work; however, in both programs they were *not* required to make contributions to the Retirement Systems. The employees under these programs are frequently referred to as "old TERI participants" and "old working retirees" because they returned to work *prior* to July 1, 2005.

Four years later, the General Assembly changed the rules by passing Act 153, requiring the working retirees to begin making contributions to the Retirement Systems on or after July 1, 2005. In response, Nancy Layman and Nancy Ahrens, as class representatives on behalf of the old TERI participants and old working retiree participants who retired and returned to work *prior* to July 1, 2005, brought suit in the original jurisdiction of the South Carolina Supreme Court challenging the new law. Layman served as the class representative of the old TERI participants while Ahrens served as the class representative of the old working retirees. Id.

Layman and Ahrens asserted claims for breach of contract, estoppel, takings, and due process. Layman successfully argued that the prior laws created legally binding contracts which

were violated when new legislation forced them to contribute to the Retirement Systems. The Supreme Court thereafter held that "because we find that the old TERI statute created a binding contract, we do not address the remaining issues." Id. at 643, 630 S.E.2d at 272. The Supreme Court remanded all of the old working retiree claims to the trial court, finding the record insufficient to rule on those issues. Id. Ahrens' breach of contract claim was remanded for determination of whether a contract or any other binding agreement existed to prohibit enforcement of Act 153. The Court did not address their estoppel, takings, or due process claims. Id.

The litigation in Layman and Ahrens involved wholly distinct parties and claims from those in the present action. Unlike Layman, the law in effect *prior* to July 1, 2005, has no bearing on the claims in this suit because the Plaintiffs and the Class in this case were hired *after* July 1, 2005. All of the claims asserted in Layman were premised upon the effect of Act 153 on their *pre*-July 1, 2005 employment relationships with the State. Plaintiffs in Layman claimed, and this Court found, that the State breached its contract with the old TERI employees. Similarly, the basis of the Layman due process claim was the retroactive nature of Act 153.

On remand of the "old working retiree" claims, the lead plaintiff became Nancy Ahrens, and the case was styled Ahrens v. State, 2005-CP-40-2785. None of the Ahrens plaintiffs—whether class representatives or class members—are parties to the current lawsuit. The Ahrens plaintiffs all returned to work *prior* to July 1, 2005; the Hutto plaintiffs all returned to work *on or after* July 1, 2005. Thus, none of the parties to this suit—whether class representatives or proposed class members—were parties to either the Layman (old TERI) or Ahrens (old working retirees) actions.

In this action, Plaintiffs allege that the requirement that their wages be contributed to pension plans for which they receive no benefit amounts to an unlawful takings in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Compl. ¶54. Plaintiffs seek declaratory and injunctive relief.

ARGUMENT

I. *Res Judicata* / Collateral Estoppel

Defendants argue Plaintiffs are barred by the doctrines of collateral estoppel and *res judicata* from pursuing this lawsuit as a result of the Layman and/or Ahrens decisions. Mot. To Dismiss at 7-13. South Carolina courts differentiate between *res judicata* and collateral estoppel as follows.

> The doctrines of *res judicata* and collateral estoppel are ... two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of *res judicata* in a second action based on the same claim as to issues actually litigated and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, on the other hand, the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues "actually and necessarily litigated and determined in the first suit."

Liberty Mut. Ins. Co. v. Employers Ins. of Wausau, 284 S.C. 234, 237, 325 S.E.2d 566, 568 (Ct. App. 1985) (quoting Stewart, Res Judicata and Collateral Estoppel in South Carolina, 28 S.C.L.Rev. 451, 452 (1977)); see also, Lowe v. Clayton, 264 S.C. 75, 212 S.E.2d 582 (1975); Hart v. Bates, 17 S.C. 35 (1882). "The modern trend is to refer to collateral estoppel as issue preclusion and to *res judicata* as claim preclusion." Price v. City of Georgetown, 297 S.C. 185, 189, 375 S.E.2d 335, 338 (Ct. App. 1988) (citing 45 Am. Jur. 2d Judgments § 397). Each theory of preclusion is analyzed below.

A. *Res Judicata* (Claim Preclusion)

"*Res judicata* requires three elements be met: 1) a final, valid judgment on the merits; 2) identity of parties; and 3) the second action must involve matters properly included in the first suit." Stone v. Roadway Express, Employer, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006).The burden of proving the elements of *res judicata* lies with the moving party. Plum Creek Dev. Co., Inc. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999).

1. Identity of Parties

"Generally parties are bound by the judgment and non-parties are not bound. To hold otherwise deprives non-parties of due process and an opportunity to be heard." James F. Flanagan, South Carolina Civil Procedure 659 (2d Ed. 1996). The South Carolina Court of Appeals has established that *res judicata* may not apply without a "finding that the parties to the prior suits or their privies and the parties to this action or their privies are identical." Ford v. Watson, 282 S.C. 66, 69, 316 S.E.2d 429, 431 (Ct. App. 1984).

The identity of parties is not established in this case because Plaintiffs were neither named parties in Layman of Ahrens nor were they members of the classes certified in those cases. Plaintiffs' complaint defines each individual plaintiff as "who returned to work on or after July 1, 2005...." Compl. ¶¶ 4-11. Furthermore, the class the plaintiffs seek to certify is defined as follows.

> All retired members of the South Carolina Retirement System and the Police Officers Retirement System, ***who returned to covered employment with the South Carolina Retirement Systems on or after July 1, 2005***, and who are required to contribute a portion of their gross earnings to either the South Carolina Retirement System or the Police Officers Retirement System without receiving any additional service credit or interest on their retirement accounts.

Compl. ¶ 18. In contrast, as the Circuit Court recognized in Ahrens, the members of that class were limited to individuals returning to work prior to July 1, 2005.

> This case centers on the State's "old working retiree program" which includes members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS). The "old working retiree program" allowed eligible employees to retire and return to work and, inter alia, no longer be required to pay retirement contributions. The core issue here is whether or not the State is required to continue the provision which permits ***those employees who retired and returned to work before July 1, 2005*** to make no additional retirement contributions.

Order at 3-4, Ahrens v. State, 05-CP-40-2785 (S.C. Cir. Ct. June 22, 2009) (emphasis added) (attached as **Exhibit 3**). "It is inherent in class-action litigation that every member of the class is a party." Salmonsen v. CGD, Inc., 377 S.C. 442, 458, 661 S.E.2d 81, 90 (2008). It goes without saying that those who are not class members are not bound by the class litigation and even those who fall within the class definition must be given reasonable opportunity to "opt out" of any conclusive effect of the litigation. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985).

Defendants ignore the lack of identity of parties by insisting that " Plaintiffs are identically situated to the plaintiffs in Layman and Ahrens...[because] [t]he date someone retires and returns to work makes no difference for purposes of deciding whether the statutes are constitutional." Mot. to Dismiss at 11. But an *ipse dixit* declaration of similarity should be given no impact here. Very simply, because Plaintiffs and the class they seek to represent have never been parties to the Retirement Systems litigation, *res judicata* does not apply.

2. Identity of Subject Matter

"For the purpose of applying principles of *res judicata,* a fundamental test used for comparing causes of action is to determine whether the primary right and duty and the delict or wrong are the same in each action." Nunnery v. Brantley Const. Co., Inc., 289 S.C. 205, 210, 345 S.E.2d 740, 743 (Ct. App. 1986) (citing 46 Am. Jur. 2d Judgments § 406 at 574-75 (1969)). "*Res judicata* ... bars subsequent actions ... when the claims arise out of the same transaction or

occurrence that was the subject of a prior action between those parties." Pye v. Adcock, 325 S.C. 426, 432, 480 S.E.2d 455, 458 (Ct. App. 1997) (quoting Riedman Corp v. Greenville Steel Structures, Inc., 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992)).

"The 'subject matter of the action,' within the *res judicata* rule, is a matter or thing concerning which a wrong has been done, which is ordinarily property, contract, or other thing involved, or a main primary right from the breach of which a remedial right arises." Id. at 433, 480 S.E.2d at 458. As shown above, the takings and due process claims asserted by the "old working retirees" in Layman/Ahrens stem from the retroactive effect of Act 153 on the preexisting employment agreements between the plaintiffs and the State. No such retroactive effect or preexisting agreements are present in this case. As such, for the purposes of *res judicata* no identity of subject matter exists in this case.

* * *

"The doctrine of *res judicata* is founded on the principle that the public interest requires an end to litigation and that no one should be twice sued for the same cause of action." Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing Winthrop v. Mullins, 211 S.C. 351, 45 S.E.2d 332 (1947)). Very simply, both the parties and the subject matters of the Layman/Ahrens litigation and of the present case are entirely distinct and no final judgment exists in either Layman or Ahrens that would be preclusive here. Thus, Defendants' appeal to *res judicata* must fail.

B. Collateral Estoppel (Issue Preclusion)

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. S. Carolina Dept. of Transp., 385

S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Id. at 554, 684 S.E.2d at 782 (citing Beall v. Doe, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189-90 n.1 (Ct. App. 1984)).

1. Determination in a Prior Action

The primary deficiency in Defendants' appeal to collateral estoppel is their failure to identify exactly what issue was resolved by the prior litigation. As shown above, the Layman court specifically declined to rule upon all constitutional grounds posed by the old TERI employees and old working retirees. Layman, 368 S.C. at 643, 630 S.E.2d at 272. Meanwhile, the circuit court in Ahrens only indirectly referenced *claims* rather than issues. Order at 3, Ahrens v. State, 05-CP-40-2785 (S.C. Cir. Ct. Sept. 3, 2009) ("[t]he Court agrees with the Defendants' position as to these claims...") (attached as **Exhibit** 4).

2. Actual Litigation in a Prior Action

The second requirement of collateral estoppel is a determination that the parties, in previous litigation, actually litigated the issue now sought to be precluded. Unlike *res judicata*, however, the doctrine of collateral estoppel does not require the party seeking preclusion to have been a party in the previous litigation. However, the party who is sought to be estopped must have been a party to the prior litigation.

> In determining the defense of collateral estoppel notwithstanding a lack of privity, the courts have taken into consideration: whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action.

Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 390-91, 287 S.E.2d 495, 496 (1982). Collateral estoppel does, however, require the party being precluded to have been able to contest the issue in the prior litigation.

> Clearly the respondent was not a party to the prior action between his daughter and appellant. The only way he could have been precluded from litigating the issue of punitive damages, therefore, would have been if he was in privity with his daughter in the previous action.

Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986). Citing the United States Supreme Court, Richburg made it clear why a Plaintiff who was a non-party to the first action cannot be collaterally estopped from litigating an issue in a subsequent action.

> Some litigants-those who never appeared in a prior action-may not be collaterally estopped without litigating the issue. They never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Richburg, 290 S.C. at 434-35, 351 S.E.2d at 166 (citing, *intra alia*, Hansberry v. Lee, 311 U.S. 32, 40 (1940)); Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971)).

As has been discussed at length throughout this memorandum, Plaintiffs to this action were neither parties to Layman/Ahrens nor were they in privity, in any way, to those who were. Therefore, because Plaintiffs have not "had a full and fair opportunity to litigate the relevant issue," collateral estoppel does not apply.

II. Failure to State a Claim

Defendants move to dismiss the complaint on the basis that the plaintiffs have failed to state a claim for which relief may be granted. Under Rule 12(b)(6), SCRCP, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 148-49, 714 S.E.2d 537, 539 (2011); Spence v.

Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. Cole Vision, 394 S.C. at 148-49, 714 S.E.2d at 539; Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Id. In reviewing the dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard as the circuit court. Cole Vision, 394 S.C. at 148-49, 714 S.E.2d at 539.

As shown below, Defendants' motion fails to carry the heavy burden of Rule 12(b)(6) and thus must be denied.

A. Unconstitutional Takings

Defendants insist that Plaintiffs' claim for unconstitutional takings must fail because they do not have a constitutionally protected property interest in question. Mot. to Dismiss at 13-14. To the contrary, the Supreme Court has recognized that citizens have a constitutionally protected property interest in their wages. Sniadich v. Family Finance Corp., 395 U.S. 337, 340 (1969). The Fourth Circuit has noted the same. "[P]rivate citizens ordinarily have a constitutionally protected property interest in the wages earned from their labor under employment contracts...." Washlefske v. Winston, 234 F.3d 179, 184 (4th Cir. 2000); see also Orloff v. Cleland, 708 F.2d 372, 378 (9th Cir. 1983) ("It is obvious that [the plaintiff] had a property interest in his salary."). Finally, the District of South Carolina has observed that "the Takings Clause reaches beyond the protection of real property to other forms of private property, such as financial assets." McMahan v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, 858 F. Supp. 529, 539 (D.S.C. 1994).

Furthermore, Internal Revenue Code, 26 U.S.C. § 401(a), creates a constitutionally-protected property interest in all contributions to a qualified pension plan, such as those pertaining to this case. The Supreme Court has recognized that federal statutes may lead to constitutionally-protected property interests. Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (observing "that the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the Fifth Amendment."). Section 401(a) vests the following rights with Plaintiffs, the violation of which (without just compensation) gives rise to Plaintiffs' takings clause cause of action:

- 26 U.S.C. § 401(a)(1) – employee contributions to SCRS and PORS must be "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust."

- 26 U.S.C. § 401(a)(2) – no part of the corpus or income may be used for any purpose other than the exclusive benefit of employees and their beneficiaries.

- 26 U.S.C. § 401(a)(8) – plan forfeitures may not increase the benefit any employee would otherwise receive under the plan.

- 26 U.S.C. § 401(a)(9) – required distributions must be calculated for each employee based on the entire interest of each employee.

Defendants' contention that the General Assembly was adhering to its "constitutional duty to prescribe member contributions to the retirement system" is irrelevant to the existence of a constitutionally-protected property interest. Defs.' Mot. Dismiss at 23, Hutto, 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkt. No. 11-1). To be sure, the General Assembly possesses the authority to prescribe member contributions for the Retirement System, *but not in a manner that conflicts with federal law*. Furthermore, Defendants' insistence that a ruling in favor of Plaintiffs would extend a takings claim to all members of the South Carolina Retirement System—"whether retirees or not"—completely overlooks the fundamental distinction Plaintiffs make here. As "working

retirees," Plaintiffs are required to pay into a public pension fund from which they receive no benefit. In contrast, traditional employees accrue retirement credit.

Defendants, in passing, argue that "the Plaintiffs have waived their right to a return of those funds by continuing to work each and every day under the terms and conditions set forth in the statutes that they now challenge." Defs.' Mot. Dismiss at 23, Hutto, 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkt. No. 11-1). Defendants offer no authority for this assertion. Furthermore, under both state and federal law, the pertinent sections of the IRC are deemed to have been part of the employment agreement between the plaintiffs and the State.). See S.C. Code Ann. § 9-16-20(C) (Supp. 2013) (mandating that the Trustees "hold the assets of the retirement systems in a group trust under Section 401(a)(24) of the [IRC] that meets the requirements of [Treasury] Revenue Ruling 81-100, 1981-1 C.B. 326, as amended by Revenue Ruling 2004-67."). South Carolina courts have long held that "it is true that the laws existing at the time and place of making contracts enter into and form part of them, so that it will be presumed that the parties contracted with reference to them ...." Crawford v. Masters, 82 S.E. 793 (S.C. 1914); see also U.S. Trust Co. of New York v. New Jersey, 431 U.S. 1, 19 n.17 (1977). Thus, because the IRC provisions were part of the retirement pension plan Plaintiffs joined, they could not have waived the provisions they now seek to enforce by agreeing to work for the State.

B. Violation of Due Process

Defendants insist that the plaintiffs' claim for a violation of due process must fail due to the lack of an identifiable property interest sufficient to give rise to substantive due process rights. The analysis necessary for a substantive due process claim is somewhat different from that for a takings clause claim.

> [T]o state a substantive due process claim, "a plaintiff must have been deprived of a *particular quality* of property interest. ...[W]hether a certain property interest embodies this "particular

> quality" is not determined by reference to state law, but rather depends on whether that interest is "fundamental" under the United States Constitution.

Nicholas v. Penn. State Univ., 227 F.3d 133, 140 (3rd Cir. 2000). The Eleventh Circuit further defined "fundamental" interests as "rights that are 'implicit in the concept of ordered liberty.'" McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

As stated above, Plaintiffs possess an identifiable property interest in wages they have earned as "working retirees." Recognition of this fundamental liberty interest predates the Republic itself as evidenced by the Fourth Circuit's reliance on Enlightenment philosopher John Locke to explain:

> [E]very man has a property in his own person.... The labor of his body and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property."

Washlefske, 234 F.3d at 187 n.2 (quoting Locke, Second Treatise of Government ¶ 27 (1690)). The Fourth Circuit's recognition of the property interest in one's wages for his work demonstrates that this principle remains fundamental in our system of liberty. As a result, the seizure of any part of these wages through the arbitrary, capricious, and unreasonable actions of the State gives rise to a claim for the violation of substantive due process.

C. This Action Cannot be Decided on the Pleadings Alone, and therefore, Dismissal is Inappropriate.

Plaintiffs' unconstitutional taking claim is not premised upon the assertion that "working retirees" could not be compelled under state contract law to contribute to the State retirement funds as a condition of their employment. This was the issue presented to the Court in Lehman and Ahrens. Instead, Plaintiffs' claims are grounded in the well-recognized right of an employee's

property interest in his or her own wages which are contributed to a retirement plan out of which they do not receive a benefit in violation of federal law governing pension plans. Sniadich v. Family Finance Corp., 395 U.S. 337, 340 (1969); Washlefske, 234 F.3d at 184; see also, Orloff, 708 F.2d at 378 ("It is obvious that [the plaintiff] had a property interest in his salary.").

The question of whether the requirement that Plaintiffs pay into a public pension fund from which they receive no benefit violates the IRC pension requirements cannot be summarily determined without the development of a full factual record, including expert opinion testimony. For example, it is expected that Defendants will argue that Plaintiffs receive some benefit because their contributions protect the solvency of the retirement systems. Plaintiffs disagree with the assertion and should be given an opportunity to prove that they in fact receive nothing from their contributions.

III. Laches

Defendants also seek dismissal based upon the affirmative defense of laches. Mot. to Dismiss at 15. "Laches imposes on the defendant the ultimate burden of proving '(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.'" White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990) (quoting Costello v. United States, 365 U.S. 265, 282 (1961)).

As an initial matter, the affirmative defense of laches is inappropriate in the format of a motion to dismiss. Affirmative defenses are not properly considered in evaluating a motion to dismiss unless the defense is established in the allegations of the complaint. Spence, 368 S.C. at 123, 628 S.E.2d at 878. This rule arises out of the notion that consideration of an affirmative defense usually requires reference to factual allegations and matters which are beyond the scope of allegations set forth in the complaint. Therefore, because the factual analysis of a Rule 12(b)(6) motion is confined to the four corners of the complaint, an affirmative defense usually must be

pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial. Id.

Defendants' appeal to laches rests upon factual assumptions that stretch beyond the four corners of the pleadings. More specifically, defendants assert that "plaintiffs should have brought this case within three years" of their return to work. Mot. to Dismiss at 15. Of course, there is no evidence before the court as to when the plaintiffs returned to work—only that they did so after the enactment of South Carolina code sections 9-1-1790(C) and 9-11-90(4)(c).

Without evidence of the date of the Plaintiffs' return to work, the defendants are unable to prove the first element of laches: lack of diligence. "An inexcusable or unreasonable delay may occur only after the plaintiff discovers or with reasonable diligence could have discovered the facts giving rise to his cause of action." White v. Daniel, 909 F.2d 99, 102 (4th Cir. 1990); Knox v. Milwaukee Cnty. Bd. of Elections Comm'rs, 581 F. Supp. 399, 402 (E.D. Wis. 1984). There are no facts before the Court as to this element.

As to the second element of laches, Defendants have produced no evidence whatsoever. "The second element—prejudice to the defendant—is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct." White, 909 F.2d at 102 (citing Gull Airborne Instruments, Inc. v. Weinberger, 694 F.2d 838, 844 (D.C. Cir. 1982). Defendants argue that they have been prejudiced because "the retirement system has continued to rely upon the receipt of the funds in question, not knowing that the plaintiffs would eventually object." Defs.' Mot. Dismiss at 25, Hutto, 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkt. No. 11-1). Even assuming *arguendo* that their factual allegations are correct, Defendants' reliance upon Plaintiffs continuing "receipt of funds in question" in no way prejudices Defendants' ability to defend this case. Defs.' Mot.

Dismiss at 25, Hutto, 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkt. No. 11-1). Barring such proof, the defense of laches is inappropriate.

IV. Administrative Remedies

Defendants' fourth argument seeks to dismiss the complaint in favor of an exhaustion of administrative remedies under the South Carolina Retirement Systems Claims Procedures Act, S.C. Code Ann. §§ 9-21-10, et seq. However, Defendants' argument fails because administrative remedies do not apply to questions of constitutionality of statutes or other legislative acts.

The South Carolina Supreme Court has established that "if the sole issue posed in a particular case is the constitutionality of a statute, a court may decide the case without waiting for an administrative ruling." Ward v. State, 343 S.C. 14, 18, 538 S.E.2d 245, 247 (2000). According to Ward, the invalidity of administrative remedies in instances of constitutional questions lies in the agencies' status as executive departments.

> The agency and the [Administrative Law Court] cannot rule on the constitutionality issue. In fact, requiring the agency or [Administrative Law Court] to rule on the constitutionality of [a statute] would violate the separation of powers doctrine. Thus, the statute does not apply in cases where the sole issue is whether a statute or other legislative action is constitutional.

Id. at 19-20, 538 S.E.2d at 248.

The central issue in this case is whether South Carolina Code sections 9-1-1790 and 9-11-90 violate the Fifth and Fourteenth Amendments to the United States Constitution. See Compl. ¶¶ 47-54.[1] Defendants propose litigating the constitutionality of these sections before the South Carolina Retirement Systems and the Administrative Law Court. As shown above, these executive

[1] Defendants rely upon the case of Evans v. State, 344 S.C. 60, 543 S.E.2d 547 (2001), in support of their motion. However, whereas Plaintiffs in this case are challenging the facial validity of the statutory provisions in question (rather than the manner of their application), Evans is inapposite. Id. at 66, 543 S.E.2d at 550.

agencies lack authority to resolve constitutional questions and South Carolina prohibits imposition of an administrative remedy where, as here, the sole issue is a matter of constitutional law.

Furthermore, the administrative remedies to which Defendants refer do not provide for constitutional review of statutes. Section 9-21-50 provides administrative review only for "an administrative decision by the retirement systems arising pursuant to or by virtue of this title." S.C. Code Ann. § 9-21-50(A) (Supp. 2009). Likewise, Section 9-21-60 provides a claimant review in the Administrative Law Court only of "of the retirement systems' final decision." S.C. Code Ann. § 9-21-60 (Supp. 2009). Thus, under the plain language of Sections 9-21-50 and -60, the South Carolina General Assembly has not created an administrative remedy to address facial challenges of statutes such as those in this case.[2]

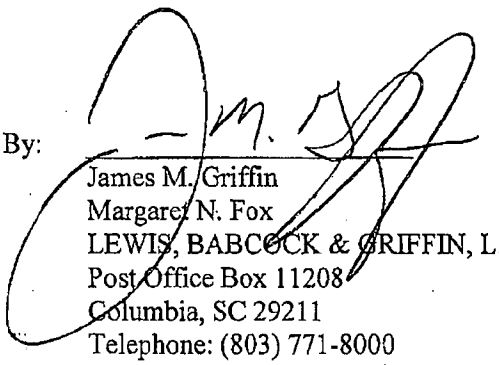
As a result, the Defendants' motion to dismiss the complaint in favor of an exhaustion of administrative remedies must be denied.

CONCLUSION

For the reasons set forth above, Defendants' motion should be denied.

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[2] In Layman, the South Carolina Circuit Court, when considering whether to issue a temporary restraining order, went even further in refusing administrative remedies. According to Judge Breeden, "this matter is not even a dispute between the Plaintiffs and the Retirement System, but rather between Plaintiffs and the State." Order at 5, Layman, 05-CP-40-2785 (S.C. Cir. Ct. July 13, 2005) (Breeden, J.) (attached as **Exhibit 5**). As such, the Retirement Systems Claims Procedures Act was wholly inapplicable.

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September 23, 2015
Columbia, South Carolina

Exhibit 1

Complaint, Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 457 (D.S.C. 2012) (Dkt. No. 1)

UNITED STATES DISTRICT COURT
IN THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

GAIL M. HUTTO, DEBRA J. ANDREWS, ELIZABETH W. HODGE, MARGARET B. LINEBERGER, LYNN R. ROGERS, NANCY G. SULLIVAN, JANE P. TERWILLIGER, JULIAN W. WALLS, and all others similarly situated, Plaintiffs, VERSUS **THE SOUTH CAROLINA RETIREMENT SYSTEM, THE POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEMS GROUP TRUST, MARK SANFORD,** Governor of South Carolina, in his official capacity as *ex officio* Chairman of the South Carolina Budget and Control Board, **CONVERSE CHELLIS,** Treasurer of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **RICHARD ECKSTROM,** Comptroller General of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **HUGH K. LEATHERMAN,** Chairman of the South Carolina Senate Finance Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **DANIEL T. COOPER,** Chairman of the South Carolina House of Representatives Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **FRANK FUSCO,** in his official capacity as Executive Director of the South Carolina Budget and Control Board, and **PEGGY G. BOYKIN,** in her official capacity as Director of the Retirement Division of the South Carolina Budget and Control Board, Defendants.	**CLASS ACTION COMPLAINT [JURY TRIAL DEMANDED]**

The Plaintiffs, complaining of the Defendants herein, would respectfully show unto this Court as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1331, in that all causes of action asserted herein arise under the laws and Constitution of the United States.

2. Venue is proper pursuant to 28 U.S.C. § 1367 because the events giving rise to this civil action occurred in the State of South Carolina, and the property that is the subject of this action is within the State of South Carolina.

II. PARTIES

A. Plaintiffs

3. Plaintiff, Gail M. Hutto, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as the South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

4. Plaintiff, Debra J. Andrews, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants

require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

5. Plaintiff, Elizabeth Hodge, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

6. Plaintiff, Margaret B. Lineberger, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

7. Plaintiff Lynn R. Rogers, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

8. Plaintiff, Nancy G. Sullivan, is an individual citizen and resident of Darlington County, South Carolina. She retired under the South Carolina Retirement System in 2001, and

returned to work in 2006, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

9. Plaintiff Jane P. Terwilliger, is an individual citizen and resident of Darlington County, South Carolina. She is a retired member of the South Carolina Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as South Carolina Retirement Systems. Since her return to work, the Defendants require her to forfeit a percentage of her gross earnings to the South Carolina Retirement System without receiving any additional service credit or interest for the use of her property.

10. Plaintiff Julian W. Walls, is an individual citizen and resident of Beaufort County, South Carolina. He is a retired member of the South Carolina Police Officers Retirement System, who returned to work on or after July 1, 2005, for an employer participating in the group of retirement systems known as the South Carolina Retirement Systems. Since his return to work, the Defendants require him to forfeit a percentage of his gross earnings to the South Carolina Police Officers Retirement System without receiving any additional service credit or interest for the use of his property.

B. Defendants

11. Defendant, the South Carolina Retirement System, is a multi-employer defined benefit pension plan trust fund with the powers and privileges of a corporation. It was established by the South Carolina General Assembly, S.C. Code Ann. §§ 9-1-10, *et seq.*, to provide retirement and other benefits for employees of public school districts, the State, and political subdivisions thereof. The South Carolina Retirement System is one of five governmental

retirement plans collectively referred to by Defendants as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

12. Defendant, the Police Officers Retirement System, is a multi-employer defined benefit pension plan trust fund with the powers and privileges of a corporation. It was established by the South Carolina General Assembly, S.C. Code Ann. §§ 9-11-10, *et seq.*, to provide retirement and other benefits for state and local law enforcement personnel and firefighters. The Police Officers Retirement System is one of five governmental retirement plans collectively referred to by the Defendants as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

13. Defendant, the South Carolina Retirement Systems Group Trust, holds the assets of the five governmental retirement plans collectively referred to as the "South Carolina Retirement Systems," the "Retirement Systems," or the "Systems."

14. Defendant, Mark Sanford, is Governor of the State of South Carolina, and by virtue of that office, he is Chairman of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

15. Defendant, Converse Chellis, is Treasurer of the State of South Carolina, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

16. Defendant, Richard Eckstrom, is the Comptroller General of the State of South Carolina, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

17. Defendant, Hugh K. Leatherman, is Chairman of the South Carolina Senate Finance Committee, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

18. Defendant, Daniel T. Cooper, is Chairman of the South Carolina House of Representatives Ways and Means Committee, and by virtue of that office, he is a member of the South Carolina Budget and Control Board, which is the trustee of the Defendant Group Trust and is vested with responsibility for the general administration and proper operation of the South Carolina Retirement System and the Police Officers Retirement System.

19. Defendant, Frank Fusco, is Executive Director of the South Carolina Budget and Control Board, and by virtue of that office he is the chief administrative officer for the South Carolina Budget and Control Board. As such, he is responsible for the administration and operation of the Board's divisions, including the Retirement Division, as well as legal matters.

20. Defendant, Peggy G. Boykin, is Director of the Retirement Division of the South Carolina Budget and Control Board, through which the Budget and Control Board acts. As Director of the Retirement Division, Ms. Boykin is responsible for the management and administration of all defined benefit pension plans that comprise the South Carolina Retirement

Systems and the fiduciary stewardship of the Retirement Systems' trust funds, including the funds of the Defendants, the South Carolina Retirement System and the Police Officers Retirement System.

21. Individual Defendants are being sued in their official capacities for injunctive relief only and monetary relief is being sought exclusively against the South Carolina Retirement System, the Police Officers Retirement System, and the South Carolina Retirement Systems Group Trust.

III. NATURE OF THE ACTION

22. Plaintiffs, on behalf of a class of retired contributing members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS), bring this action seeking equitable remedies, including declaratory and injunctive relief for the return of property illegally confiscated by the Defendants.

23. All Plaintiffs and all proposed class members are retired contributing members of either the SCRS or the PORS, who returned to work on or after July 1, 2005, for an employer participating in the South Carolina Retirement Systems. These persons are commonly referred to by their retirement plans and herein as "Working Retirees."

24. As described in detail below, Plaintiffs allege that the Defendants have confiscated their private property in violation of federal laws and the United States Constitution. By requiring Plaintiffs to contribute part of their gross earnings to the Retirement Systems without service credit or interest and using those contributions for purposes other than for the benefit of the contributing employee, Defendants violate the Due Process Clause and the Takings Clause of the United States Constitution, and Internal Revenue Code 26 U.S.C. § 401(a).

IV. CLASS ACTION ALLEGATIONS

25. Plaintiffs bring this class action on behalf of themselves and on behalf of all other similarly situated retired contributing members of the SCRS and the PORS under the provisions of Rule 23 of the Federal Rules of Civil Procedure.

26. The proposed class is defined as follows:

> All retired members of the South Carolina Retirement System and the Police Officers Retirement System, who returned to covered employment with the South Carolina Retirement Systems on or after July 1, 2005, and who are required to contribute a portion of their gross earnings to either the South Carolina Retirement System or the Police Officers Retirement System without receiving any additional service credit or interest on their retirement accounts.

27. This action may properly be maintained as a class action under federal law and satisfies the numerosity, commonality, typicality, and adequacy requirements for maintaining a class action under Federal Rule of Civil Procedure 23(a).

28. Members of the class are so numerous as to make joinder of all members impracticable. Plaintiffs are informed and believe that the members of the proposed class will exceed tens of thousands of persons. Joinder of all of these individuals is impracticable because of the large numbers of these persons and the fact that they are dispersed over a large geographical area, throughout the entire State of South Carolina and beyond its borders.

29. Common questions of law and fact exist as to all members of the class. All members of the class are Working Retirees who are required to forfeit a standard percentage of their gross earnings as contributions to either the SCRS or the PORS without receiving any compensation. Issues of fact and law that are common to all Plaintiffs and all members of the class include, but are not limited to the following:

(a) whether the forfeiture of the Working Retirees' earnings to the Retirement Systems violates the Takings Clause of the Fifth Amendment

of the United States Constitution, applicable to the states through the Fourteenth Amendment of the United States Constitution;

(b) whether the requirement that the Working Retirees who return to work on or after July 1, 2005, must continue paying monies into the Retirement Systems without any compensation for those contributions violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution;

(c) whether the deduction of monies from the Working Retirees' gross earnings for the use and benefit of persons other than the contributing employees violates Internal Revenue Code 26 U.S.C. § 401(a);

(d) whether to issue a declaratory judgment under 28 U.S.C. § 2201, declaring that:

1) South Carolina Code sections 9-1-1790 and 9-11-90 violate the Fifth and Fourteenth Amendments to the United States Constitution;

2) Plaintiffs and the class are entitled to immediate return of all monies they have been required to pay to the Retirement Systems since July 1, 2005.

(e) Whether to issue an injunction prohibiting for all time the forfeiture of the Working Retirees' earnings and compelling the immediate return of all monies illegally confiscated since July 1, 2005.

30. The claims of the Plaintiffs are typical of the claims of all class members. All Plaintiffs and all class members are Working Retirees who, after retirement with either the SCRS or the PORS, have been required since their return to covered employment on or after July 1, 2005, to forfeit part of their earnings to the Retirement Systems without any compensation. Defendants' policies and practices are directed toward all Plaintiffs and all class members in an identical manner. Their claims arise from this same unlawful and unconstitutional conduct of the Defendants. Consequently, all claims are premised on the same legal theories.

31. Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of the members of the class. Their interests are coincident with and not antagonistic to those of the class members.

32. Plaintiffs have retained the undersigned counsel who have substantial experience and success in the prosecution of class actions, retirement benefit litigation, and complex litigation.

33. Plaintiffs' counsel has the resources, expertise, and experience to successfully prosecute this action against the Defendants. Counsel know of no conflicts among members of the class, or between counsel and members of the class.

34. This action satisfies the requirements for maintaining a class action under Federal Rule of Civil Procedure 23(b)(1). Prosecution of separate actions by individual class members would create a risk of inconsistent or varying adjudications with respect to individual class members which would establish incompatible standards of conduct for Defendants, or could as a practical matter be dispositive of interests of the other class members or substantially impair or impede their ability to protect their interests. The prosecution of separate actions by individual members of the class could lead to inconsistent results with respect to other members of the class since the forfeitures exacted by the Defendants are either legal or illegal as to all Plaintiffs and class members. For the same reason, an adjudication with respect to Plaintiffs would, as a practical matter, be dispositive of the interests of the members of the class. If the contributions required by the Defendants are illegal as to any single Plaintiff, then they are illegal as to all Plaintiffs and all class members. A decision that the Defendants violated federal laws and the Constitution of the United States would require Defendants to take uniform remedial action. An

individual suit by each Working Retiree to redress the wrong common to all of them would be contrary to the spirit and intent of Rule 23.

35. In addition to certification under Rule 23(b)(1), and in the alternative, Plaintiffs seek certification under Rule 23(b)(2) because Defendants have acted or refused to act on grounds generally applicable to the class. Defendants illegally require all employees retired under the SCRS or the PORS, who return to employment with an employer covered by the South Carolina Retirement Systems on or after July 1, 2005, to forfeit a percentage of their gross earnings to their respective retirement systems without additional service credit or interest. Accordingly, injunctive and declaratory relief with respect to the whole class is appropriate.

V. FACTUAL ALLEGATIONS

36. On July 1, 2005, the South Carolina Legislature enacted the State Retirement System Preservation and Investment Reform Act, Act 153, 2005 S.C. Acts 1697 (now codified at S.C. Code Ann. § 9-1-1790) (applicable to retired members of the SCRS) and S.C. Code § 9-11-90 (applicable to retired members of the PORS).

37. South Carolina Code § 9-1-1790(C) provides: "A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required pursuant to this subsection and subsection (B) of this section."

38. South Carolina Code § 9-11-90(4)(c) provides: "A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not

accrue additional service credit in the system by reason of the contributions required pursuant to this item and item (b) of this subsection."

39. Defendants do not pay any interest on the Working Retirees' contributions to the Retirement Systems nor do they provide any service credit to the contributing employee. **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 19; **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10; **Exhibit C**: Form 1114, Notification of Employed Retiree.

40. The SCRS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account. Working retirees will not earn additional service credit or receive interest on their account." *See* **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 22.

41. The PORS plan provides that: "Retired members who return to covered employment contribute a tax-deferred 6.5% of their gross pay into their retirement account; however, as a retiree you will not earn additional service credit or receive interest on your account." **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10.

42. Employers of Working Retirees must notify the Retirement Systems when a retired member is hired. Form 1114, *Notification of Employed Retiree,* must be completed for all Working Retirees. The Retirement Systems shall not post quarterly contributions to retired member accounts without the proper completion of this form. See **Exhibit C**: Form 1114, *Notification of Employed Retiree*; **Exhibit D**: *Covered Employer Procedures Manual*, October 2008 Edition, Revised June 11, 2009, at 7 & **Exhibit E**: *Employer Update*, July 2009, Vol. 1, Issue 1 "Use EES to Key Retiree Return to Work Dates."

43. Form 1114 provides:

> I hereby notify you that I am an employee of the state of South Carolina or its political subdivisions, and that I am a retiree of one

> of the systems covered by the South Carolina Retirement Systems. As a retired member returned to covered employment, I understand that I am required to pay contributions at the same rate as active members. I also understand that I will not accrue any additional service credit. However, the contributions will be credited to my account and upon my death, any remaining contributions that have not been exhausted through benefit payments will be paid to my beneficiary.

Exhibit C: Form 1114, *Notification of Employed Retiree.*

44. Defendants do not recalculate the retirement benefits of a contributing Working Retiree based on his or her required contributions on or after July 1, 2005. **Exhibit A**: *SCRS Member Handbook*, 2010 Edition, at 19; **Exhibit B**: *PORS Member Handbook*, 2009 Edition, at 10; **Exhibit C**: Form 1114, *Notification of Employed Retiree.*

45. Working Retirees are required to continue contributing into the Retirement Systems even though they have retired, their benefits have been vested, and they will receive no compensation of any kind from their contributions made on or after July 1, 2005.

46. Defendants use the Working Retirees' monies for financial benefit to the Retirement Systems to the exclusion of the Working Retirees. **Exhibit F**: Letter from Kelli Gowder, Manager, Benefits Payments Department of the South Carolina Retirement Systems, dated October 23, 2009 to Plaintiff, Gail M. Hutto.

47. The monies Defendants confiscate as so-called "contributions" to the Retirement Systems are the private property of the Working Retirees by virtue of their labor.

48. The Working Retirees had no opportunity to challenge the taking of their property without compensation.

49. Internal Revenue Code, 26 U.S.C. § 401(a), governs public pension funds like those established by the South Carolina Retirement Systems. Under section 401(a), contributions to a tax-qualified trust must be non-forfeitable and cannot be diverted for purposes other than the

exclusive use of the employee and his or her beneficiaries. Section 401(a) protects employee contributions to a plan, in provisions such as:

> (1) section 401(a)(1) providing that employer and employee contributions made to the trust must be "for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust;"
>
> (2) section 401(a)(2) providing that no part of the corpus or income be used for any purpose other than the exclusive benefit of employees and their beneficiaries;
>
> (3) section 401(a)(8) providing that plan forfeitures may not increase the benefit any employee would otherwise receive under the plan;
>
> (4) section 401(a)(9) providing that required distributions be calculated for each employee based on the entire interest of each employee.

50. Only trust assets held under plans qualified under Internal Revenue Code Section 401(a) are permitted to be held in the Group Trust.

51. Defendants use monies deducted from the Working Retirees' earnings for purposes other than for the exclusive benefit of the contributing employee.

52. The Working Retirees do not obtain credit for their contributions for the purposes of calculating their individual required minimum distributions.

53. Non-working retirees' benefits are based on their entire contributions to the Retirement Systems; whereas, the Working Retirees' benefits are based on less than their entire contributions to the Retirement Systems. The Working Retirees' benefits are fixed based on their past service, and they receive no increase in their monthly annuity (or any other benefit) from the contributions they make after their return to work.

54. The Working Retirees have been targeted to bear an economic burden which is not borne by any other employees in the Retirement Systems.

55. South Carolina Code section 9-1-1310(C) provides that the funds and assets of the various state retirement systems are not funds of the State of South Carolina, but are instead held in a group trust as provided in South Carolina Code section § 9-16-20.

FIRST CAUSE OF ACTION
(Violation of the Takings Clause of the Fifth Amendment – applicable to the states through the Fourteenth Amendment)

56. The allegations of the preceding paragraphs above are incorporated herein by reference as if set forth herein verbatim.

57. Pursuant to South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c), the Defendants take money from the Working Retiree's gross earnings without compensation.

58. The Working Retirees' earnings are private property entitled to federal constitutional protection from arbitrary and unreasonable governmental action.

59. The taking and deprivation of this property interest amounts to a taking of the Working Retirees' property without just compensation, in violation of the Fifth Amendment to the United States Constitution, made applicable to the states in the Fourteenth Amendment.

SECOND CAUSE OF ACTION
(Violation of the Due Process Clause, United States Constitution, Amendment XIV)

60. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

61. Due process protects the Working Retirees from the arbitrary confiscation of their private property.

62. The Working Retirees have a reasonable expectation of not having to forfeit monies earned to a pension plan fund from which they receive no compensation for those contributions.

63. The Defendants' confiscation of the Working Retirees' monies is arbitrary, capricious, and unreasonable in at least the following respects: (a) Defendants require the Working Retirees to make uncompensated contributions to the Retirement Systems even though these employees have retired, their benefits have vested and they will receive no benefit of any kind from continuing to contribute monies to the Retirement Systems; and (b) these forfeitures bear no reasonable relationship to any legitimate purpose of the Retirement Systems.

64. The Defendants' deductions from the Working Retirees' gross earnings for use by the Retirement Systems deprives the Working Retirees of the use and enjoyment of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

THIRD CAUSE OF ACTION
(Declaratory Judgment pursuant to 28 U.S.C. § 2201)

65. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

66. As set forth above, there exists an actual controversy between Plaintiffs and Defendants as to whether Defendants' confiscation of the Working Retirees' earnings for use by the Retirement System without compensation violates the Fifth and Fourteenth Amendments to the United States Constitution.

67. Unless the Court issues an appropriate declaration of rights, Defendants will continue confiscating money from the Working Retirees' earnings, and there will continue disputes and controversy surrounding these actions.

68. It would be inequitable for the Retirement Systems to retain the monies Defendants have confiscated from the Working Retirees.

69. Plaintiffs and the class seek declaratory relief and a judicial determination pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure as follows:

> (a) that the requirement that retirees who return to work after July 1, 2005, must pay a portion of their earnings to the Retirement Systems without additional service credit or interest is unconstitutional;
>
> (b) that Defendants are prohibited from enforcing the provisions of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c); and
>
> (c) that Plaintiffs and the class are entitled to immediate return of all funds Defendants have deducted from their earnings for the Retirement Systems since July 1, 2005.

FOURTH CAUSE OF ACTION
(Injunctive Relief)

70. Plaintiffs reallege the allegation set forth in Paragraphs 1 through 55 of this Complaint as if set forth herein verbatim.

71. As a result of Defendants' deduction from the Working Retirees' earnings, Plaintiffs and the class have suffered and will continue to suffer irreparable and immediate harm and injury to their property and rights under the laws and Constitution of the United States, and they have no adequate remedy at law.

72. Defendants' deductions deprive Plaintiffs and the class of their rightfully earned income in violation of federal law and the United States Constitution.

73. Defendants have a duty to refrain from infringing upon Plaintiffs' constitutional rights.

74. Plaintiffs and the class are entitled to a preliminary and permanent injunction against Defendants preventing for all time enforcement of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c), and compelling the immediate return of all monies they have been required to forfeit to the Retirement Systems since July 1, 2005.

75. Unless compelled to refrain from interfering with the Working Retirees' due process rights, Defendants will continue to do so.

76. Plaintiffs have no plain, speedy, or adequate remedy at law to correct Defendants' unlawful conduct.

77. The balance of harm favors Plaintiffs and the class because an injunction would merely require Defendants to stop making deductions and to return the monies contributed by the Working Retirees since July 1, 2005. There is no imminent threat to public health, safety, welfare such that would justify the imposition of such arbitrary, onerous, and harmful forfeitures.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray, on behalf of themselves and all other similarly situated Working Retirees, for:

1. An Order certifying this action as a class action pursuant to Rule 23(b)(1)(A) and/or (B), and appointing Plaintiffs and their counsel to represent the class;

2. A declaration that South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c) violate the Constitution and laws of the United States;

3. An injunction against Defendants preventing for all time enforcement of South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c);

4. An Order that Defendants provide Plaintiffs with a full and complete accounting of all funds held by Defendants that they have deducted from Plaintiffs' gross earning as contributions to the Retirement Systems since July 1, 2005;

5. An injunction compelling Defendants to immediately return to Plaintiffs and the class all monies Defendants have deducted as contributions to the Retirement Systems since July 1, 2005;

6. An Order that Defendants pay the costs and reasonable attorneys' fees of Plaintiffs and the class from the common fund pursuant to Federal Rule of Civil Procedure 23(h);

7. An Order that the Court retain jurisdiction over this matter to ensure Defendants' compliance with these mandates;

8. Such other and further relief as this Court may deem just and proper.

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Exhibit 2

Defendants' Motion & MIS to Dismiss Plaintiff's Complaint, Hutto v. S. Carolina Ret. Sys., 899 F. Supp. 2d 457 (D.S.C. 2012) (Dkts Nos. 11 and 11-1)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

GAIL M. HUTTO, DEBRA J. ANDREWS, ELIZABETH W. HODGE, MARGARET B. LINEBERGER, LYNN R. ROGERS, NANCY G. SULLIVAN, JANE P. TERWILLIGER, JULIAN W. WALLS, and all others similarly situated, Plaintiffs, vs. **THE SOUTH CAROLINA RETIREMENT SYSTEM, THE POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEMS GROUP TRUST, MARK SANFORD,** Governor of South Carolina, in his official capacity as *ex officio* Chairman of the South Carolina Budget and Control Board, **RICHARD ECKSTROM,** Comptroller General of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **HUGH K. LEATHERMAN,** Chairman of the South Carolina House of Representatives Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **DANIEL T. COOPER,** Chairman of the South Carolina Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **FRANK FUSCO,** in his official capacity of Executive Director of the South Carolina Budget and Control Board, and **PEGGY G. BOYKIN,** in her official capacity as Director of the Retirement Division of the South Carolina Budget and Control Board, Defendants.	**Civil Action No. 4:10-cv-02018-JMC** **MOTION TO DISMISS**

Defendants move to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(3), and 12(b)(6). The grounds for this motion are as follows:

1. The court should abstain from hearing this case because this case relates to an ongoing state court matter that is pending before the South Carolina Supreme Court, that involves the very same constitutional questions raised here, and that involves important state interests. At a minimum, this court should stay the present matter until the state-court action has been resolved.

2. The court should exercise its discretion under the Declaratory Judgment Act, 28 U.S.C. § 2201, and decline to hear this case because the State of South Carolina has a strong interest in having issues related to the terms and conditions of state employment resolved in state court; the issues raised here have been and can continue to be more efficiently resolved in the state court system; and litigation of the federal action will lead to unnecessary entanglement between the state and federal court systems.

3. The complaint should be dismissed because the defendants are immune from suit under the Eleventh Amendment of the United States Constitution.

4. The complaint should be dismissed because the plaintiffs have failed to exhaust their remedies under the South Carolina Retirement Claims Procedures Act, which provides the exclusive remedy for claims between retirees and the retirement system.

5. The complaint should be dismissed based on the doctrines of res judicata and collateral estoppel given that state courts have decided and will continue to decide the issues raised here.

6. The complaint should be dismissed because the plaintiffs do not have a constitutionally protected property interest in the funds in question and therefore cannot state a claim for unconstitutional taking or violation of due process.

7. The complaint should be dismissed because the claims are barred by the doctrine of laches.

8. The complaint should be dismissed for improper venue, or in the alternative, should be transferred to the Columbia Division.

Respectfully submitted,

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September 14, 2010

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

GAIL M. HUTTO, DEBRA J. ANDREWS, ELIZABETH W. HODGE, MARGARET B. LINEBERGER, LYNN R. ROGERS, NANCY G. SULLIVAN, JANE P. TERWILLIGER, JULIAN W. WALLS, and all others similarly situated, Plaintiffs, vs. **THE SOUTH CAROLINA RETIREMENT SYSTEM, THE POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEMS GROUP TRUST, MARK SANFORD,** Governor of South Carolina, in his official capacity as *ex officio* Chairman of the South Carolina Budget and Control Board, **RICHARD ECKSTROM,** Comptroller General of the State of South Carolina, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **HUGH K. LEATHERMAN,** Chairman of the South Carolina House of Representatives Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **DANIEL T. COOPER,** Chairman of the South Carolina Ways and Means Committee, in his official capacity as an *ex officio* member of the South Carolina Budget and Control Board, **FRANK FUSCO,** in his official capacity of Executive Director of the South Carolina Budget and Control Board, and **PEGGY G. BOYKIN,** in her official capacity as Director of the Retirement Division of the South Carolina Budget and Control Board, Defendants.	**Civil Action No. 4:10-cv-02018-JMC** **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Defendants submit the following memorandum in support of the motion to dismiss the complaint. The court should abstain from hearing this case because it raises the very same legal questions that have been raised in a case that is currently pending in the South Carolina Supreme Court. In the alternative, the court should dismiss this case for other reasons, including lack of subject matter jurisdiction, failure to state a claim, and improper venue.

FACTS

This case concerns the constitutionality of two state statutes that govern the terms and conditions of employment for people who have retired from positions covered by the South Carolina Retirement System or the South Carolina Police Officers Retirement System and who have returned to work for an employer that participates in one of those two systems. The statutes being challenged state as follows:

> A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required . . . .

S.C. Code Ann. § 9-1-1790(C) (Supp. 2009).[1]

> A retired member shall pay to the system the employee contribution as if the member were an active contributing member if an employer participating in the system employs the retired member. The retired member does not accrue additional service credit in the system by reason of the contributions required . . . .

S.C. Code Ann. § 9-11-90(4)(a) (Supp. 2009).[2]

These statutes were passed as part of the South Carolina General Assembly's constitutional duty to "annually appropriate funds and prescribe member contributions for any

[1] This statute appears in Chapter 1 of Title 9, which governs the South Carolina Retirement System.

[2] This statute appears in Chapter 11 of Title 9, which governs the South Carolina Police Officers Retirement System.

state-operated retirement system which will insure the availability of funds to meet all normal and accrued liability of the system on a sound actuarial basis as determined by the governing body of the system." S.C. Const. art. X, § 16. By passing the statutes, the General Assembly obviously determined that the fiscal soundness of the retirement system depended on the receipt of contributions from all employees who work for employers covered by the system, regardless of whether the employee previously retired under the system.

Nonetheless, the plaintiffs contend that the statutes are unconstitutional because they require retirees who have returned to work for a covered employer to pay into the system just as active, non-retired members do. The plaintiffs—who are often referred to as "working retirees"—argue that they should no longer have to pay into the system because they have already retired and do not get anything in return for such payments. (Compl. ¶¶ 24, 29, 39, 45.) Stated differently, the plaintiffs contend that prior to their retirement, they made all the contributions into the retirement system that they should ever have to make, and that it is unconstitutional to require them to further contribute to the system upon their return to work following retirement.

These very same arguments regarding these very same statutes have been made by working retirees who filed an action in South Carolina state court in 2005. The state court action was decided in the original jurisdiction of the South Carolina Supreme Court in 2006, and a portion of the case was remanded to the trial court for further review. The trial court has entered a judgment on the remanded portion of the case, which is awaiting review in the South Carolina Supreme Court.

The state court case

In 2005, retirees of the South Carolina Retirement System filed a lawsuit in South Carolina state court in response to the enactment of the State Retirement Systems Preservation and Investment Reform Act (Act 153). Exhibits A and B.[3] Act 153 amended several statutes relating to the operation of the South Carolina Retirement System, including the two statutes that are being challenged in the present case. At the center of the dispute was a provision under the Act requiring employees who retired and returned to work for a covered employer, including those employees who signed up for the Teacher and Employee Retention Incentive Program (TERI), to contribute a portion of their salary to the retirement system. Under prior law, a person could retiree, begin drawing his or her retirement check, and then return to work for covered employers without having to make any further contributions to the system. Under the new law, a person could still retire, begin drawing his or her retirement check, and then return to work for covered employers, but would have to contribute to the system just as active members do, regardless of the fact that he or she had previously retired. Because of this change in the law, the working retirees alleged, among other things, that the new law violated the takings and due process clauses of the state and federal constitutions.

In 2006, the South Carolina Supreme Court decided the case in its original jurisdiction. Exhibit C. In its written opinion, the court outlined the legal issues presented as follows:

I. Do the statutory provisions of the former version of the TERI and working retiree programs create contracts?

II. Is the State estopped from requiring Petitioners to make contributions to the retirement system?

[3] This court can take judicial notice of pleadings filed in state court proceedings without converting this motion into a motion for summary judgment. *See* Fed. R. Evid. 201; *Tellabs, Inc. v. Makor Issues & Rights, ltd.*, 551 U.S. 308, 322 (2007); *Briggs v. Newberry County Sch. Dist.*, 838 F. Supp. 232, 234 (D.S.C. 1992).

III. Does the enactment of Act 153 constitute an unconstitutional taking under either the State or Federal Constitution?

IV. Does Act 153 violate the Due Process Clause of the State or Federal Constitution?

Id. (emphasis added).

The South Carolina Supreme Court concluded that Act 153 breached a contract between the TERI participants and the state. Because the court decided the case based on principles of contract law, the court did not specifically address the constitutional questions presented. Nonetheless, the court concluded: "The new TERI program as adopted by the legislature in Act 153 *continues to be valid and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program in Act 153. It is fully within the power of the legislature to make changes to laws that affect future participants . . . .*" *Id.* (emphasis added).

A portion of the case was remanded, however. The court found that certain of the plaintiffs—the "working retirees" or non-TERI participants—did not have a legislative contract with the state. As a result, the court remanded the claims of the working retirees to the trial court for further factual review and development. *Id.*

On remand, the plaintiffs filed amended complaints containing numerous causes of action, including causes of action for unconstitutional taking and violation of due process. Exhibits D and E. Following discovery and a hearing on cross-motions for summary judgment, the trial court granted relief in favor of the plaintiffs based on the equitable principle of estoppel. Exhibit F. The defendants moved for reconsideration, arguing, among other things, that the court's order did not address all grounds for relief raised by the plaintiffs in their complaints, including the causes of action for unconstitutional taking and violation of due process. Exhibit

G. The court agreed with the defendants, and denied relief on all remaining grounds, including the constitutional ones. Exhibit H. The plaintiffs moved for reconsideration, arguing that the trial court erred by not finding that the statutes in question resulted in an unconstitutional taking and violated the due process clauses of the state and federal constitutions. Exhibit I. The trial court denied the motion. Exhibit J. The plaintiffs have since appealed the issues that were decided against them.

On appeal, the plaintiffs have outlined their arguments as follows:

I. There is a contract with the Working Retirees, the terms of which were established by the State.

II. The lower court erred in granting summary judgment to the State on the Working Retirees' causes of action for unconstitutional taking, violation of due process, impairment of contract and quantum meruit.

a. The lower court did not need to reach the constitutional issues because it disposed of the case by ruling on the estoppel claims.

b. The lower court failed to recognize that Act 153 represents an unconstitutional taking under both the South Carolina and federal constitutions.

c. *The court lower [sic] failed to consider that Act 153 violates the due process clauses of both the South Carolina Constitution and United States Constitution.*

Exhibit K (emphasis added).

The defendants have responded to these contentions, fully briefing all issues, including the constitutional ones, before the South Carolina Supreme Court. Exhibit L. The plaintiffs replied. Exhibit M. The parties are currently awaiting notice of oral argument and review by the supreme court.

The present case

While the state court case is pending in the South Carolina Supreme Court, the present case was filed. Like the plaintiffs in the state court case, the plaintiffs in the present case contend that South Carolina Code sections 9-1-1790(C) and 9-11-90(4)(c)[4] violate the takings clause of the Fifth Amendment and the due process clause of the Fourteenth Amendment. Like the plaintiffs in the state court case, the plaintiffs here contend that the statutes are unconstitutional because they require the plaintiffs to pay a portion of their salary (6.5%) into the retirement system just as non-retired employees do, without giving the plaintiffs anything in return, such as additional service credit or interest payments.

Like the plaintiffs in the state court case, the plaintiffs in the present case retired from employment covered by the either the South Carolina Retirement System or the South Carolina Police Officers Retirement System and have since returned to work for an employer that participates in the state retirement system. The difference between these plaintiffs and the plaintiffs in the state court action is that these plaintiffs decided to return to work for a covered employer *after* July 1, 2005, when they *knew* that they would have to contribute to the retirement system, just as their colleagues who are not retirees do. The handbooks and Form 1114 attached to the complaint are examples of ways in which the plaintiffs were notified of these terms and conditions of their employment. The plaintiffs in the state court action, however, returned to work before the new laws went into effect, and presumably did not know that the law would subsequently change to provide that if they returned to work after retiring, they would have to contribute to the system just as active members do.

[4] These statutes were amended pursuant to Act 153, which was passed in 2005, and which is being challenged in the state court case.

Despite the fact that they accepted their present jobs knowing that they would have to contribute a portion of their salary to the retirement system, the plaintiffs in this case seek declaratory and injunctive relief asking this court to (1) determine that the statutes in question are unconstitutional; (2) order the defendants to provide an accounting of all contributions made by the plaintiffs to the retirement system since July 1, 2005; (3) require the defendants to return the money received; and (4) prohibit the defendants from enforcing the statutes in the future. In addition, the plaintiffs seek attorneys' fees and costs associated with this litigation.

STANDARD

A defendant may move to dismiss a complaint for a variety of reasons, including lack of subject matter jurisdiction, improper venue, or failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(1), 12(b)(3), and 12(b)(6). When ruling on such a motion, the court must "accept the allegations of the complaint as true and view the complaint in the light most favorable to the plaintiff." *Darcangelo v. Verizon Commc'ns, Inc.*, 292 F.3d 181, 189 (4th Cir. 2002). "Motions raised via Rules 12(b)(1) and 12(b)(6) are governed by different legal standards," however. *Richland-Lexington Airport Dist. v. Atlas Props., Inc.*, 854 F. Supp. 400, 407 (D.S.C. 1994). The plaintiff has the burden of persuasion to show that subject matter jurisdiction exists. *Id.* The defendant has the burden of persuasion to show that the plaintiff has failed to state a claim. *Id.* Further, a ruling on a motion to dismiss for lack of subject matter jurisdiction does not require a ruling on the merits, whereas a ruling on a motion to dismiss for failure to state a claim does. *Id.*

ARGUMENT

I. The Court should abstain from hearing this case.

The court should exercise its discretion and abstain from hearing this case because it involves the very same legal questions that are pending in the South Carolina Supreme Court and implicates important state interests.

Although the doctrine of abstention "has many different forks and prongs, its central idea has always been one of simple comity." *Johnson v. Collins Enter. Co., Inc.*, 199 F.3d 710, 718-19 (4th Cir. 1999). "Notwithstanding the overlapping obligations of state and federal courts with regard to both state and federal law, the federal judiciary has always maintained some modicum of respect for state public policies in areas of paramount state concern." *Id.* at 719. In fact, the United States Supreme Court "has admonished the federal courts to respect the efforts of state governments to ensure uniform treatment of essentially local problems." *Id.*

There are several different abstention doctrines that could apply in this case and that support abstention.[5] First, under the *Pullman*[6] doctrine, "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959). The concern under this doctrine is that "a federal court will be forced to interpret state law without the benefit of state court consideration and therefore under circumstances where a constitutional determination is predicated on a reading of the statute that is not binding on state

[5] A court may find that abstention is appropriate under more than one abstention doctrine. *See, e.g., Meredith v. Talbot County, Md.*, 828 F.2d 228, 231-33 (4th Cir. 1987) (finding that abstention was appropriate under two different abstention doctrines).

[6] *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

courts and may be discredited at any time—thus rendering the federal-court decision advisory and the litigation underlying it meaningless." *Moore v. Sims*, 442 U.S. 415, 428 (1979).

Second, under the *Younger*[7] doctrine, a federal court must "abstain from interfering in state proceedings, even if jurisdiction exists, if there is: (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity for the plaintiff[8] to raise the federal constitutional claim advanced in the federal lawsuit." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir. 2008). The policy behind *Younger* is to command federal restraint when the federal action is duplicative of the state court action, casts aspersion on the capabilities and good faith of state appellate courts, disrupts important state enforcement efforts, and is designed to annul or trample on the results in a state proceeding. *Moore v. City of Asheville, N.C.*, 396 F.3d 385, 394 (4th Cir. 2005). *Younger* also invokes "a broader rule of comity: namely, that federal courts should abstain from the decision of constitutional challenges to state action, however meritorious the complaint may be, whenever the federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Cinema Blue of Charlotte, Inc. v. Gilchrist*, 887 F.2d 49, 52 (4th Cir. 1989) (internal quotations omitted). *See also Harper v. Pub. Serv. Comm'n of W. Va.*, 396 F.3d 348, 354 (4th Cir. 2005) (recognizing numerous areas that constitute important state interests, including education, family relations, land use and zoning, public health, and corporate law).

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[7] *Younger v. Harris*, 401 U.S. 37 (1971).

[8] The parties in the state and federal court proceedings need not be identical in order for *Younger* to apply. *Cedar Rapids Cellular Tele. v. Miller*, 280 F.3d 874 (8th Cir. 2002).

Third, under the *Burford*[9] doctrine, a federal court should abstain from deciding cases "(1) that present difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar or (2) whose adjudication in a federal forum would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Johnson v. Collins Enter. Co., Inc.*, 199 F.3d 710, 719 (4th Cir. 1999) (internal quotations omitted).[10]

The court should abstain from deciding the present case because it involves a challenge to the constitutionality of state statutes that are part of a larger statutory scheme governing the terms and conditions of employment for people who have retired from the state retirement system and have returned to work for an employer covered by the system, and because it relates directly to the South Carolina General Assembly's constitutional duty[11] to appropriate annually funds and prescribe member contributions to ensure the availability of funds and the fiscal soundness of the retirement system so that retirement benefits can be paid over the long term. The State of South Carolina has a strong interest in having its state courts determine how state employment and the state retirement system operate and whether the laws affecting such employment are constitutional and fairly applied. The state should be permitted to do this without interference from the federal courts. In fact, South Carolina law requires that disputes

[9] *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

[10] There is even a fourth abstention doctrine that could apply. The *Colorado River* doctrine applies "where a federal case duplicates contemporaneous state proceedings and wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation clearly favors abstention." *Vulcan Chem. Techs., Inc. v. Barker*, 297 F.3d 332, 340-41 (4th Cir. 2002) (internal quotations omitted). This doctrine is stricter than *Younger*, however, in that it requires the parties in the state and federal suit to be "almost identical." *Chase Brexton Health Servs., Inc. v. Md.*, 411 F.3d 457, 464 (4th Cir. 2005).

[11] S.C. Const. art. X, § 16.

arising under Title 9 of the South Carolina Code be resolved in accordance with the procedures and provisions provided in the South Carolina Retirement Systems Claims Procedures Act. S.C. Code Ann. § 9-21-30 (Supp. 2009). To adjudicate the claims raised here in a federal forum would not only run contrary to the Claims Procedures Act, but would disrupt state efforts to establish a coherent statutory scheme and policy related to state employment and retirement.[12]

Further, there are ongoing state judicial proceedings that were instituted in 2005 that involve the very same constitutional questions and that should continue to be decided in a state forum. The constitutional questions have been fully briefed in the South Carolina Supreme Court and are awaiting review. The terms and conditions of state employment and the availability of funds to pay state retirement benefits are important, substantial, and vital state interests. The state proceedings have provided a more-than-adequate forum and opportunity for working retirees to raise the constitutional questions advanced here. Principles of comity and federalism would be trivialized if this court were to find otherwise.

The present case is not only duplicative of the state court action, but it casts aspersions on the capabilities and good faith of the state trial and appellate courts, is disruptive of the state's important interests in ensuring the fiscal soundness of the retirement trust fund and regulating the terms and conditions of employment for state employees, and is designed to annul the results of the state court decisions. A ruling in this case would have the effect of either affirming or overruling the state court decisions, which is not the role of federal district courts. *See, e.g., Plyer v. Moore*, 129 F.3d 728, 731 (4th Cir. 1997) (explaining that "lower federal courts generally do not have jurisdiction to review state court decisions; rather, jurisdiction to review

[12] The defendants further contend, in Section IV of this brief, that the complaint should be dismissed because the South Carolina Retirement Systems Claims Procedures Act provides the exclusive remedy for disputes arising under Title 9.

such decisions lies exclusively with superior state courts and, ultimately, the United States Supreme Court").

On top of this, neither the South Carolina Supreme Court nor the trial court has yet to find that the statutes in question are unconstitutional. The South Carolina Supreme Court had the opportunity to declare the statutes unconstitutional but did not do so. The court did, however, find that a similar statute governing the TERI program "continues to be valid, and all those participants joining after July 1, 2005, are subject to the entirety of the requirements outlining the new TERI program." Those requirements expressly included the obligation of retirees who return to work for a covered employer to contribute to the retirement system just as other employees do. Exhibit C. Moreover, the trial court has twice denied relief on the constitutionally-based grounds. Exhibits H and J. If the statutes have not been found to be unconstitutional as to the plaintiffs in the state court case, who retired and returned to covered employment before the statutes went into effect, then they are most certainly not unconstitutional as to the plaintiffs in this case, who actually began working for a covered employer after the statutes became law, knowing that they would have to contribute to the retirement system as active members do, and fully accepting that term of employment each and every day that they went to work for the state. In any event, this court should avoid ruling on the constitutionality of statutes that have been and continue to be reviewed by the state courts in South Carolina so as to avoid unnecessary entanglement between the state and federal courts.

Because the present case raises the very same constitutional questions that are pending in the South Carolina Supreme Court and the questions concern matters of important state interests,

this Court should abstain from hearing this case and should dismiss the complaint with prejudice.[13]

II. The Court should decline to hear this case in its discretion under the Declaratory Judgment Act.

The court should also decline to hear this case because the relief sought will not serve a useful purpose, and the state has a strong interest in having the issues raised here decided in state court.

The Declaratory Judgment Act provides that "[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). The Declaratory Judgment Act is an enabling statute that "confers a discretion on courts rather than an absolute right upon the litigant." *Penn-America Ins. Co. v. Coffey*, 368 F.3d 409, 412 (4th Cir. 2004) (internal quotations omitted).

Thus, "a declaratory judgment action is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and . . . when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* "When a related state court proceeding is pending, however, considerations of federalism, efficiency, and comity should inform the district court's decision whether to exercise jurisdiction over a declaratory judgment action." *Id.*

In determining whether to proceed with a federal declaratory judgment action when a parallel state action is pending, district courts consider these four factors: "(1) whether the state

[13] At a minimum, the court should stay this case until the South Carolina Supreme Court has had the opportunity to decide once again the constitutional questions pending before it.

has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of overlapping issues of fact or law might create unnecessary entanglement between the state and federal courts; and (4) whether the federal action is mere procedural fencing, in the sense that the action is merely the product of forum-shopping." *Id.*

The same arguments related to abstention apply here. The court is not required to hear this declaratory judgment action and should exercise its discretion to not do so because the state has a strong interest in having issues related to the operation of the state retirement system and the terms and conditions of state employment decided in state courts. The issues can be more efficiently and uniformly decided in the state forum, especially given that disputes arising under Title 9 are required to be handled through the state administrative courts, and then the state circuit and appellate courts only if necessary. S.C. Code Ann. §§ 9-21-10 *et seq.* (Supp. 2009). Decisions by the federal courts on discrete issues such as those raised in this case will create piecemeal litigation that will result in the unnecessary entanglement between the state and federal courts. Further, a decision by this court will not serve any useful purpose. If this court decides that the statutes are constitutional, then that decision will simply affirm what the state courts have already decided. If this court decides that the statutes are unconstitutional, then the result will be contrary to state court decisions and will result in the unnecessary entanglement between the state and federal courts. Neither of these results is useful. This is especially true given that the plaintiffs here have an adequate forum—the administrative law and circuit courts of South Carolina—in which to raise these claims, and of which similarly situated plaintiffs represented by the same counsel have availed themselves in the past.

Thus, there is no reason for this case to continue in federal court, and the court should exercise its discretion and dismiss it.

III. The defendants are immune from suit.

In the alternative, the court should dismiss the complaint for lack of subject matter jurisdiction because the defendants are immune from suit under the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment provides that the "judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. Accordingly, "absent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). This bar extends to actions seeking compensation under the Fifth and Fourteenth Amendments for a taking of property by a state. *E.g., Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir. 2008).

It is well-settled that the Eleventh Amendment's reference to sovereign immunity "encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). The key inquiry in determining whether immunity applies is whether the state is the "real, substantial party in interest." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). When there is a question about whether a state instrumentality may invoke the state's immunity, courts examine the relationship between the state and the entity in question, and consider, among other things, whether a judgment would have to be paid from the state's treasury, whether and to what extent the state has control over

the entity, whether the entity's concerns are local or state-wide, and how state law treats the entity. *Cash v. Granville County Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir. 2001).

With respect to state officials, the general rule is that a suit brought against a state official in his or her official capacity is barred because it is not a suit against the official but is a suit against the office itself and is no different than a suit against the state. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). There is an exception to this rule, however. The Eleventh Amendment does not protect a public official from suits seeking prospective, injunctive relief. *Ex Parte Young*, 209 U.S. 123 (1908); *Gray v. Laws*, 51 F.3d 426, 430 n.1 (4th Cir. 1995). The rationale behind this exception is that a state official does not act under the authority of the state when he or she enforces an unconstitutional law. *Ex Parte Young*, 209 U.S. at 159. Thus, a court may order the official to stop violating the constitution in the future. *Id.*

In the case at hand, the plaintiffs' claim for money damages against the South Carolina Retirement System and the South Carolina Police Officers Retirement System is barred because these two systems are arms of the state and enjoy the same immunity as the state.[14] *See Pringle v. S.C. Retirement Sys.*, No. 2:06-3294-PMD, 2007 WL 295626 (D.S.C. Jan. 29, 2007) (ruling that the South Carolina Retirement System is immune from suit)[15]; *United States v. State of S.C.*, 445 F. Supp. 1094, 1099-1100 (D.S.C. 1978) (ruling that the South Carolina Retirement System and the South Carolina Budget and Control Board are immune from suit). The entities were created by the South Carolina General Assembly and are managed by the South Carolina State Budget and Control Board. S.C. Code Ann. §§ 9-1-20, 9-11-20, 9-11-30 (1986). They have state-wide concerns and their operation is completely controlled by the state. A money judgment

[14] The third entity named in the complaint, the South Carolina Retirement Systems Group Trust, is not a legal entity capable of being sued, and therefore the case against it should be dismissed.

[15] This decision is attached as Exhibit N.

against them could operate against the state if it exceeded the amount of money available in the retirement system trust fund. Accordingly, the claims against them are barred.

The claims against the individual defendants are also barred. The claims against the individual defendants in their official capacities are the equivalent of an action against the state. Sanford, Chellis, Eckstrom, Leatherman, and Cooper have been sued as *ex officio* members of the South Carolina Budget and Control Board. Fusco has been sued in his official capacity as the executive director and chief administrative officer of the board, and Boykin has been sued in her official capacity as the director of the retirement division of the board. Because an action against these officials in their official capacities is really an action against the state, all claims for money damages or retroactive relief are barred.

Moreover, the plaintiffs' claim for prospective injunctive relief preventing the individual defendants from enforcing the laws in question in the future is also barred. The complaint does not allege any facts tying the individual defendants to the enforcement of the statutes being challenged. There are no allegations that the individual defendants actually collect the contributions from the employees, or are specifically responsible for implementing the law. Instead, the individuals have been sued merely because they are members of a state board or one of its divisions that oversees the general administration and proper operation of the state retirement system. Because the individual defendants are not directly responsible for the implementation of the laws in question, the individual defendants are not necessary parties to this lawsuit. This lawsuit can proceed without them. To illustrate this point, if this court were to declare the statutes unconstitutional, then all citizens in South Carolina, including the members of the board and the employees of the retirement system, will have to follow the law as declared

by this court, and no one individual would be responsible for the implementation or enforcement of this court's decision.

For these reasons, the court should dismiss this case for lack of subject matter jurisdiction.

IV. The South Carolina Retirement Systems Claims Procedure Act provides the exclusive remedy for the plaintiffs.

The complaint should also be dismissed because the plaintiffs' exclusive remedy lies in the South Carolina Retirement Systems Claims Procedures Act.

The procedures outlined in the South Carolina Retirement Systems Claims Procedures Act "constitute the exclusive remedy for a dispute or controversy between the retirement systems and a member . . . arising pursuant to or by virtue of Title 9 of the Code of Laws of South Carolina, 1976." S.C. Code Ann. § 9-21-30 (Supp. 2009). "A claim presenting a dispute or controversy arising pursuant to or by virtue of this title *must* be resolved in accordance with the procedures and provisions provided in this chapter." *Id.* (emphasis added). Accordingly, "[i]f a claimant brings an action covered by this chapter in the court of common pleas, the court *must* dismiss the case without prejudice." S.C. Code Ann. § 9-21-70 (Supp. 2009) (emphasis added). *Cf. Evans v. State*, 543 S.E.2d 547, 551 (S.C. 2001) (holding that state retirees were required to pursue administrative procedures before bringing their constitutional claims to circuit court).

The claims asserted in the case at hand arise pursuant to or by virtue of Title 9. The plaintiffs contend that statutes in Title 9 are being applied and enforced with respect to a particular class of plaintiffs in an unconstitutional manner. Such claims must be resolved in accordance with the procedures and provisions provided in the Claims Procedures Act. Instead of availing themselves of those procedures, the plaintiffs have come directly to this court. This is not the proper procedure under South Carolina law.

Because the proper administrative procedures have not been followed, the complaint should be dismissed.

V. This case is barred by the doctrines of res judicata and collateral estoppel.

To the extent that the issues raised here have already been decided by South Carolina state courts, the plaintiffs are barred from relitigating those issues here.

"Res judicata, also known as claim preclusion, bars a party from relitigating a claim that was decided or could have been decided in an original suit." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 161 (4th Cir. 2008). "The doctrine was designed to protect litigants from the burden of relitigating an identical issue with the same party or his privy and [to promote] judicial economy by preventing needless litigation." *Id.* at 161-62 (internal quotations and citations omitted). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties [or their privies]; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Plum Creek Dev. Corp. v. City of Conway*, 512 S.E.2d 106, 108 (S.C. 1999). Thus, a litigant is barred from raising any issues that were raised or might have been raised in the former suit. *Id.*

Similarly, "[u]nder the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." *Richburg v. Baughman*, 351 S.E.2d 164, 166 (S.C. 1986). A party is in privity to another if his legal interests were litigated in the former proceeding. *Id.* "Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand unless some compelling countervailing consideration necessitates relitigation." *Shelton v. Oscar Mayer Foods Corp.*, 481 S.E.2d 706, 708 (S.C. 1997).

"The test for deciding whether the causes of action are identical for claim preclusion purposes is whether the claim presented in the new litigation arises out of the same transaction or series of transactions as the claim resolved by the prior judgment." *Laurel Sand & Gravel*, 519 F.3d at 162. "Newly articulated claims based on the same transactional nucleus of facts may still be subject to res judicata finding if the claims could have been brought in the earlier action." *Id.*

The elements of res judicata and collateral estoppel have been satisfied here. This case arises out of the same transaction as the case that is pending in the South Carolina Supreme Court. Both this case and the state court case resulted from a change in the law that occurred on July 1, 2005. Both this case and the state court case allege that the requirement that working retirees have to contribute a percentage of their salary to the retirement system is unconstitutional. Both this case and the state court case were brought by working retirees. The only difference between the two groups of working retirees is the date that the retirees returned to work, which does not impact the constitutional analysis. If anything, the plaintiffs in the state court action have a stronger argument than the plaintiffs here because they returned to work before the law changed, and yet no state court has been willing to agree with the constitutional challenges raised by those plaintiffs. In any event, the constitutional analysis is exactly the same for both sets of plaintiffs, because neither has a protected property interest in the contributions made, as explained more fully below.

In addition, the defendants in this case are practically the same as the defendants in the state court case. Both this case and the state court case are actions against the state. The defendants named in the state court action are the South Carolina Retirement System, the South Carolina Police Officers Retirement Systems, and the State of South Carolina. The defendants named in this case are the South Carolina Retirement System, the South Carolina Police Officers

Retirement System, a group trust that cannot be sued, and members of the State Budget and Control Board. This expanded list does not change the fact that the plaintiffs are suing for a declaratory judgment that the statutes in question are unconstitutional. The additional defendants add nothing. Moreover, the issues raised here have been and continue to be litigated in the state courts, and have been twice rejected by the circuit court.

Finally, the State of South Carolina and its instrumentalities and agents should not have to continue defending the very same laws on the very same grounds, especially when the state courts have addressed and continue to address the issues raised. The state should be protected from the burden of having to re-litigate identical issues with the same parties in different forums. Principles of judicial economy and the prevention of needless litigation should be preserved.

VI. The complaint fails to state a claim on the merits.

Should the court choose to hear this case and find that it has subject matter jurisdiction to do so, the court should dismiss the case for failure to state a claim because the plaintiffs have failed to identify a constitutionally protected property interest.

A. Taking

According to the Fifth Amendment to the United States Constitution, private property shall not be taken for public use without just compensation. U.S. Const. amend. V. In order to state a cognizable claim under the Fifth Amendment, a plaintiff must have a constitutionally protected property interest. *In re Premier Auto. Servs. Inc.*, 492 F.3d 274, 283 (4th Cir. 2007). "[P]roperty interests are not created by the Constitution." *Id.* at 282. (internal quotations omitted). "Rather, they must arise from an independent source such as state law rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Id.* The plaintiff must have more than an "abstract need or desire for" the alleged

property interest and must have more than "a unilateral expectation of it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The plaintiff must "have a legitimate claim of entitlement to it." *Id.*

The plaintiffs in this case do not have a constitutionally protected property interest in the funds in question. They have cited no independent source such as state-law rules or understandings that secure their entitlement to not pay contributions to the retirement system. To the contrary, the plaintiffs do not even have a constitutionally protected property interest in continued employment, *Dew v. City of Florence*, 303 S.E.2d 664, 667 (S.C. 1983), much less have a constitutionally protected property interest in a term or condition of that employment. Moreover, the terms and conditions of the plaintiffs' employment are largely a function of state statutory law, which is subject to change as necessary to meet the policy interests and constitutional obligations of the state, including the General Assembly's constitutional duty to prescribe member contributions to the retirement system. S.C. Const. art. X, § 16. Given this constitutional duty, neither the General Assembly nor any arm of the state can be said to have violated the takings clause by requiring the plaintiffs to contribute to the system. If this Court were to find otherwise, then *all* employees working in positions covered by the system, whether retirees or not, would have viable takings claims. It is no more a taking for the General Assembly to impose a duty to contribute to the retirement system upon working retirees than it is for the General Assembly to increase the percentage of contributions required from every employee, which has been done from time to time. Even if the plaintiffs did have a constitutionally protected property interest to the funds in question, the plaintiffs have waived their right to a return of those funds by continuing to work each and every day under the terms and conditions set forth in the statutes that they now challenge.

As a result, the plaintiffs' unconstitutional taking claim fails.

B. Due Process

Similarly, "[i]n order to state a substantive due process claim, plaintiffs must demonstrate: (1) that they had property or a property interest; (2) that the state deprived them of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that no process could cure the deficiency." *S. Blasting Servs. Inc. v. Wilkes County, N.C.*, 288 F.3d 584, 594 (4th Cir. 2002). "Substantive due process protections run only to state action so arbitrary and irrational, so unjustified by any circumstances or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post deprivation state remedies." *Id.*

As explained above, the plaintiffs do not have an identifiable, protected property interest because any right they may have related to contributing or not contributing to the retirement system upon their return to work is a function of state law. There is no right to any particular terms or conditions of public employment, or to the continuation of any particular benefit provided by virtue of that employment. Additionally, the state's action in amending the laws in question is not only within the limits of legitimate governmental action but is prescribed by it.

Accordingly, the plaintiffs cannot state a claim for violation of the due process clause.

VII. The claims are barred by the doctrine of laches.

"A constitutional claim can become time-barred just as any other claim can." *Block v. N.D. ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 292 (1983). When a claim is primarily equitable in nature, the doctrine of laches applies. *See White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990). To establish laches, a defendant must show lack of diligence by the party against

whom the defense is asserted and prejudice to the defendant. *Id.* Whether the defense bars an action depends on the circumstances of the case. *Id.* "The defendant may show lack of diligence either by proof that the action was not commenced within the period provided by the applicable statute of limitations or by facts otherwise indicating a lack of vigilance." *Id.* Under South Carolina law, "an action for taking, detaining, or injuring any goods or chattels including an action for the specific recovery of personal property," must be brought within three years of the alleged taking. S.C. Code Ann. § 15-3-530 (2005).

The case at hand is barred by the doctrine of laches. The plaintiffs could have and should have brought this lawsuit within three years of their return to work. Instead, the plaintiffs waited until 2010, over five years after the statutes became law, to file the present case. This delay is inexcusable for several reasons. First, the plaintiffs are represented by the very same counsel who represent the plaintiffs in the state court action. Second, the plaintiffs knew that they would have to contribute to the retirement system upon their return to work for a covered employer. Third, the plaintiffs have continued working under this term and condition of employment every day, without objection.[16] In the meantime, the retirement system has continued to rely upon the receipt of the funds in question, not knowing that the plaintiffs would eventually object.

For these reasons, the plaintiffs' claims should be barred by the doctrine of laches.[17]

[16] As mentioned earlier, the plaintiffs have waived their right to collect contributions made in the past because the plaintiffs have accepted that term and condition of their employment by going to work every day.

[17] To the extent that the plaintiffs are not seeking equitable relief, their claims are barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-530, depending on when the plaintiffs returned to work, which is not specifically set forth in the complaint.

VIII. The complaint should be dismissed for improper venue.

Finally, this case should be dismissed for improper venue pursuant to 28 U.S.C. § 1391, or in the alternative, transferred to the Columbia Division pursuant to 28 U.S.C. § 1404, because the defendants are not located in the Florence Division and do not perform their official duties there.

A case based on federal question jurisdiction may "be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391. For purposes of venue, public officials reside in the judicial district where they perform their official duties. *Buffalo Teachers Fed., Inc. v. Helsby*, 426 F. Supp. 828, 829 (S.D.N.Y. 1976) (citing treatise and multiple cases). *See also Taylor v. White*, 132 F.R.D. 636, 640 (E.D. Pa. 1990) (providing that state officials who are sued in their official capacities should be deemed for venue purposes to reside in the place where they maintain their official offices; place of personal residence is irrelevant) (citing *Butterworth v. Hill*, 114 U.S. 128 (1885)). In the alternative, the court has the discretion to transfer a case to another district for the convenience of the parties and witnesses, in the interest of justice. 28 U.S.C. §§ 1404(a) and (b).

The present case should either be dismissed for improper venue or at least transferred to the Columbia Division. The South Carolina Retirement System and the South Carolina Police Officers Retirement System are located in Columbia. The individual defendants have been sued in their official capacities and perform their official duties in Columbia. The event giving rise to

this action—the amendment of statutes requiring working retirees to pay into the retirement system—took place in Columbia. Moreover, the state court action containing the very same legal questions raised in this case is pending in Columbia. Venue is therefore improper in the Florence Division, and this case should either be dismissed or transferred to the Columbia Division.

CONCLUSION

The court should exercise its discretion and decline to hear this case because it raises the very same legal questions that are pending in a parallel proceeding before the South Carolina Supreme Court. This court should avoid the unnecessary entanglement that would inevitably result between the state and federal courts if this court were to issue a judgment in this case. Even if this court chooses to exercise its discretion, the court should dismiss this case because the defendants are absolutely immune from suit in federal court and should not have to defend yet again the issues raised and decided in the state court action. In addition, the plaintiffs have waited too long to raise these claims and cannot even state a claim on the merits because the plaintiffs do not have a constitutionally protected property interest in the funds in question. Finally, should the court even get this far, the court should dismiss the case for improper venue or transfer it to the Columbia Division because that is where the defendants reside for purposes of venue analysis and that is where the events leading up to this case occurred.

For these reasons, the complaint should be dismissed with prejudice.

Respectfully submitted,

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September 14, 2010

Exhibit 3

Order, Ahrens v. State, 05-CP-40-2785
(S.C. Cir. Ct. June 22, 2009)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND) CIVIL ACTION NO. 05-CP-40-2785

NANCY AHRENS, ANN MERCER and GARY M. McCOMBS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

THE STATE OF SOUTH CAROLINA and THE SOUTH CAROLINA RETIREMENT SYSTEM,

Defendants.

ORDER

RICHLAND COUNTY
FILED
2009 JUN 25 AM 9:27
JEANETTE W. McBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF GEORGETOWN) CIVIL ACTION NO. 05-CP-22-756

JAMES B. ARNOLD, JR., et al., individually and as Class Representatives,

Plaintiffs,

vs.

THE SOUTH CAROLINA POLICE OFFICERS RETIREMENT SYSTEM, THE SOUTH CAROLINA RETIREMENT SYSTEM, AND THE STATE OF SOUTH CAROLINA

Defendants.

ORDER

1

This matter comes before the Court upon the Plaintiffs' Motion for Declaratory Judgment/Summary Judgment and Defendants' Motion for Summary Judgment. Rule 56, SCRCP, allows a party to seek partial summary judgment when the material facts are not contested. Rule 57, SCRCP, states that a court may order a speedy hearing of an action for a declaratory judgment and that the existence of other remedies does not preclude a judgment for declaratory relief. Such is appropriate especially when mixed questions of law and fact are involved and there is no factual dispute. A hearing was held on May 5, 2009 to consider the motions.

HISTORY OF THE LITIGATION

This case centers on the State's[1] "old working retiree program"[2] which includes members of the South Carolina Retirement System (SCRS) and the Police Officers Retirement System (PORS).[3] The "old working retiree program" allowed eligible employees to retire and return to work and, *inter alia*, no longer be required to pay retirement contributions.[4] The core issue here is whether or not the State is required to continue the provision which permits those employees

[1]In keeping with the Supreme Court's opinions referring to the defendant entities as "the State," this Order refers to the State of South Carolina and the South Carolina Retirement System are referred to as "the State." See, *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006) and *Layman v. State*, 376 S.C. 434, 658 S.E.2d 320 (2008).

[2]The existence of the "old working retiree program" was recognized in *Layman v. State*, 368 S.C. 631, 643 630 S.E.2d 265 (2006).

[3]This Order is for two cases- *Ahrens v. State*, pending in Richland County, and *Arnold v. State*, pending in Georgetown County. Ahrens involves members of the South Carolina Retirement System while Arnold involves members of the Police Officers Retirement System. However, the issues raised in the cases are the same.

[4]See, S.C. Code § 9-1-1790 (Supp. 2004).

who retired and returned to work before July 1, 2005 to make no additional retirement contributions. This case does not involve those employees that were enrolled in the TERI program prior to July 1, 2005.[5]

In June 2005, the General Assembly enacted Act 153 of 2005 ("Act 153"), which became effective on July 1, 2005, and which changed the "old working retiree program." Prior to the enactment of Act 153, state employees who formally retired and who returned to work for the State received their retirement benefits and earned a paycheck for their continued employment. These Plaintiffs were not required to make contributions into the South Carolina Retirement System as they were under the "old working retiree program."

The enactment of Act 153 altered the situation for the Plaintiffs. Under the new working retiree program, the Plaintiffs must now pay contributions into the State Retirement System but they would receive no additional credit from the continued contributions into the South Carolina Retirement System and are classified by the System as "non-members." As the State declared, "[a] retired member must be exoluded from membership...."[6] Prior to Act 153, the "active members" (and not the non-members) were the only ones "earning service credit and making regular contributions to an SCRS retirement account." SCRS Member Handbook, July 2003. Again, retired employees who returned to work for the State under the "old working retiree program" were not required to make any further retirement contributions.

The Plaintiffs filed this lawsuit challenging the requirement that they now make

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[5]See, S.C. Code § 9-1-2210 (Supp. 2004).

[6]SCRS Participating Employer Procedure Manual, October, 2003 Edition.

p3

additional retirement contributions. The *Ahrens* Plaintiffs were originally part of prior lawsuit brought, *inter alia*, by participants of the old TERI program.[7] The Supreme Court decided the TERI issues in the original jurisdiction, and "remanded the breach of contract as to the old working retirees to the trial court...." *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006).[8] In a subsequent Order dated May 7, 2007, the Supreme Court set forth that this Court had the "full authority to fully explore the issue of whether the working retirees entered into a binding contract and all other issues involved in the working retiree action(s)." *Layman v. State*, Order of May 7, 2007. The Supreme Court also assigned the *Arnold* case to this Court, combining it with the *Ahrens* case.

The Plaintiffs in both *Ahrens* and *Arnold* have set forth multiple causes of action. However, there is really one central issue in the case – whether or not the Defendants can change the terms of the "old working retiree program" after the Plaintiffs and the members of the Plaintiff classes have enrolled in it and accepted the terms by retiring and returning to work.

As instructed by the opinion in *Layman v. State*, I am to rule on "the breach of contract as to the old working retirees." I find that no contract exists. However, the estoppel question raised by the *Ahrens* Plaintiffs' Fourth Amended Complaint and *Arnold* Plaintiffs' Amended

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[7] The *Arnold* Plaintiffs were not a part of that lawsuit, but initiated their own lawsuit challenging the contribution requirement.

[8] While the Plaintiffs set forth multiple causes of action on behalf of both TERI participants and Working Retirees, the Supreme Court only asked for briefing and argument on the issues regarding breach of contract. Thus, this Court now has before it the Working Retiree breach of contract issue remanded by the Supreme Court as well as the other Working Retiree claims contained in the pleadings that the Supreme Court did not consider.

Complaint deserves the Court's inquiry. For the reasons set forth herein, I find that the State should be estopped from changing the terms of the "old working retiree program" as to Plaintiffs and the Plaintiff Class (i.e., those who retired and returned to work prior to July 1, 2005). Because of my rulings on these issues, I do not need to address the remaining causes of action.[9]

FACTS

First, a review of the uncontradicted facts is in order. Those facts are:

1. Prior to July 1, 2005, S.C. Code § 9-1-1790 (hereinafter "prior S.C. Code § 9-1-1790") allowed a State retiree to return to work under certain conditions:

> A retired member of the system who has been retired for at least sixty days may be hired and return to employment covered by the system and earn up to fifty thousand dollars a fiscal year without effecting the monthly retirement allowance he is receiving from the system.

Prior S.C. Code § 9-1-1790. This allowed the employees in South Carolina Retirement System earning under $50,000[10] to greatly increase their compensation by joining the "old working retiree program."[11] Employees in the Police Officers Retirement System ("PORS") could also join the "old working retiree program" and not make further contributions. See, prior S.C. Code § 9-11-90.

---

[9] The remaining causes of action in *Ahrens* are: unlawful taking, impairment of contract, violation of due process, and injunctive relief. The remaining causes of action in *Arnold* are: unlawful taking, impairment on contract, violation of due process, injunction, and quantum meruit.

[10] TERI, at the time, was for employees earning over $50,000. In *Layman v. State*, the Supreme Court ruled that the TERI program could not be changed as to the old TERI participants.

[11] The "old working retiree program" has existed for almost 40 years. See, §61-126 of the 1975 Cumulative Supp. to the 1962 Code.

p5 fwd

2. The South Carolina Supreme Court has recognized the existence of the "old working retiree program", but noted that the terms of the program were not fully set out by statute:

> Stated differently, the old working retiree statute does not evidence an intent by the legislature to be bound to any terms related to the old working retiree program. However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the terms of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

Layman v. State, 368 S.C. 631, 643 630 S.E.2d 265 (emphasis added).

3. Under the terms set out in prior S.C. Code § 9-1-1790, retirees in the South Carolina Retirement System ("SCRS") could return to work under a salary cap of $50,000 and also collect their retirement benefit for four years. After four years, the old working retirees could rejoin SCRS or keep working under the "old working retiree program." See, prior S.C. Code § 9-1-1590. Under prior S.C. Code § 8-17-370, old working retirees also had grievance rights. No other terms of the Program were specified by statute. The prior version of S.C. Code § 9-11-90 applied to retirees in the Police Officers Retirement System ("PORS") and like § 9-1-1790, allowed to retire and to return to work and make no further retirement contributions. They could rejoin PORS after four years. Prior S.C. Code § 9-11-90.

4. The mechanisms by which a person enrolled in the "old working retiree program" were designed and implemented by the State.

5. It is undisputed that the State included as a term of the "old working retiree

program" the same term that was in the old TERI program – that no further retirement contributions by participating employees were required. In other words, the "old working retiree program" gave this same benefit to the employees earning under $50,000 as those higher salaried employees who entered the old TERI program.

6. The Supreme Court, in recognizing the existence of the "old working retiree program," acknowledged the need for additional evidence as to its terms, such as the written contracts (forms) issued by SCRS. *Id.* The Supreme Court also said:

> However, the record contains evidence indicating that some of the old working retirees may have written contracts detailing the terms of the old working retiree program, including the promise that the old working retirees would not have to make further contributions to the retirement system. These documents, if signed by both parties upon enrollment in the old working retiree program, might reflect what agreement, if any, was made. In addition, some of the old working retirees who do not have signed documents may have relied upon statements made by the State in making a decision to retire and become a working retiree under the prior statute.

Id. at 643 (emphasis added).

7. The forms created by the State and signed by the working retirees were:

(a) Form 1104, which stated:

> I hereby notify you that I am an employee of the State of South Carolina or its political subdivisions, and that I meet the requirements not to become a member of the Retirement Systems, and I hereby exercise my option to become a non-member.
>
> I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since I have elected non-membership and, as such, will not be making retirement contributions.

(b) Form 3A, a precursor to Form 1104, which stated the same thing.

> I hereby notify you that I am an employee of the State of South Carolina

or its political subdivisions, and that I meet the requirements not to become a member of the South Carolina Retirement System or the Police Officers Retirement System, and I hereby exercise my option to become a non-member.

I take this action under the provisions of the Retirement Act with full knowledge that I will not be credited with retirement service for this period of employment since employee and employer contributions shall not be forwarded to the Retirement System.

(c) The forms were required to be signed by all working retirees:

A service retiree (TERI or non-TERI) or a disability retiree must complete an Election of Non-Membership (Form 1104) upon returning to work for an employer covered by the Retirement System.

SCRS Participating Employer Procedure Manual, October 2003 Edition.

8. Every retiree in the Program prior to the passage of the statute at issue (i.e., all members of the Plaintiff Class) returned to work and did not have contributions taken out of their paychecks until Act 153 took effect on July 1, 2005.

9. There are approximately 10,600 SCRS working retirees and 2,088 PORS working Retirees who retired prior to July 1, 2005 and who were in the "old working retiree program." See, Defendants' Supplemental Discovery Responses to Requests for Production, September 10, 2007; Arnold Plaintiffs' Brief in Support of Motion for Class Certification, dated July 14, 2008. Of these, there are 5,800 SCRS working retirees and 987 PORS working retirees with forms that specifically state no retirement contributions would be required. Id. There are approximately 4,800 SCRS working retirees and 1,000 PORS working retirees without forms. Id.

10. Some SCRS and PORS working retirees (both those with forms and without forms) paid additional monies in order to obtain enough service credit to retire and join the "old