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SC Court of Appeals

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Shawn Eubanks,

Docket No. 20-ALJ-30-0117-CC

Petitioner,

vs.

South Carolina Public Employee Benefit
Authority, South Carolina Retirement Systems,

ORDER GRANTING
RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT

Respondent.

Appearances: For Petitioner: Shawn Eubanks, *pro se*
For Respondent: Justin R. Werner, Esquire

STATEMENT OF THE CASE

This contested case is before the South Carolina Administrative Law Court (ALC or Court) and arises from the May 4, 2020 decision of the South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems (PEBA or Department) denying Shawn Eubanks eligibility to end his participation in the State Optional Retirement Program (State ORP) and enroll him as a member of the South Carolina Retirement System (SCRS). On October 5, 2020, the Department filed a Notice of Motion and Motion for Summary Judgment stating that there is no genuine issue as to any material fact in this case and it is entitled to judgment as a matter of law. On October 13, 2020, Petitioner filed Notice of Motion and Motion for Summary Judgment and Response to Respondent's Motion for Summary Judgment agreeing that there is no genuine issue as to any material fact in this case and arguing that he is entitled to judgment as a matter of law.

After reviewing the motion, exhibits, and statutory and case law, I conclude that, as a matter of law, that Respondent's Motion for Summary Judgment should be granted.

FACTS

Petitioner is a participant in the State ORP, a defined contribution retirement plan that is available to certain state employees and employees of school districts and state colleges in lieu of membership in the SCRS defined benefit pension plan. As set forth in detail below, Petitioner seeks to end his participation in the State ORP and enroll as a member of SCRS.

On a Retirement Plan Enrollment form filed with PEBA on August 3, 2009, Petitioner elected to participate in the State ORP in connection with his employment as a law clerk with the South Carolina Judicial Department, beginning on August 3, 2009. In electing to participate in the

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State ORP, Petitioner designated TIAA-CREF as the vendor for his ORP account. The information provided on the form immediately above Petitioner's signature notified him that

[t]he election to participate in State ORP is irrevocable, except a State ORP participant may make a one-time irrevocable election to join SCRS during any open enrollment period after the first annual anniversary, but before the fifth annual anniversary of the initial enrollment in State ORP.

As a result of the submission of the enrollment form, Petitioner was enrolled in the State ORP effective August 3, 2009, and participated in the State ORP for his year of employment.

On July 2, 2012, Petitioner returned to covered employment under the State ORP, upon being hired by the South Carolina Department of Education. By a Retirement Plan Enrollment executed that same day, Petitioner reenrolled in the State ORP in connection with that employment and elected The Hartford as the vendor for his ORP account. The enrollment form signed by Petitioner contained the same notice provided on his 2009 enrollment form regarding the irrevocability of his election to participate in the State ORP. On June 11, 2019, Petitioner returned to covered employment under the State ORP, upon being hired as the Deputy General Counsel for the South Carolina State Treasurer's Office. By a Retirement Plan Enrollment executed that same day, Petitioner reenrolled in the State ORP in connection with that employment and elected MetLife as the vendor for his ORP account.

On December 16, 2019, Petitioner contacted PEBA by email to inquire about his eligibility to end his participation in the State ORP and enroll in SCRS during the upcoming 2020 open enrollment period. PEBA informed Petitioner that he was not eligible to end his ORP participation and enroll in SCRS because it had been more than five years since his initial enrollment in the State ORP in August 2009. Petitioner formalized his request to end his ORP participation and enroll in SCRS in a Retirement Plan Enrollment form executed January 8, 2020. By letter dated February 7, 2020, PEBA's Enrollment Department notified Petitioner that his request to enroll in SCRS could not be granted because it was not made during an open enrollment period within five years of his initial enrollment in the State ORP in 2009. Petitioner sought further review of the determination, and, on May 4, 2020, PEBA issued Final Agency Determination No. 20-009, formally denying his request to enroll in SCRS. Petitioner now seeks review of that Determination in this contested case.

STANDARD OF REVIEW

Under ALC Rule 68, this Court may apply the South Carolina Rules of Civil Procedure in contested case proceedings where no ALC rule applies and when practicable. Therefore, Rule 56(c), SCRCF, applies in determining whether summary judgment is proper in this case. Summary

judgment is proper when there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 530 S.E.2d 369 (2000); Rule 56(c), SCRPC. Summary judgment should not be granted, even when there is no dispute as to evidentiary facts, if there is disagreement concerning the conclusions or inferences to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000); Fleming v. Rose, 338 S.C. 524, 236 S.E.2d 732 (2000). To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable ambiguities and inferences in the light most favorable to the non-moving party. Ferguson v. Charleston Lincoln Mercury, Inc., 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). A party may not rest upon the mere allegations or denials of his pleadings. Rule 56(e) SCRPC. A party opposing summary judgment must come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial. Doe v. Batson, 345 S.C. 316, 321, 548 S.E.2d 854, 856 (2001). One may not create a genuine issue of material fact and, thus, avoid summary judgment by asserting that the trier of fact may disbelieve uncontradicted evidence. Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 694 S.E.2d 1 (S.C. 2010).

DISCUSSION

Petitioner requests that he be allowed to end his participation in the State ORP and enroll as a member in SCRS, even though his request to enroll in SCRS was made after the fifth annual anniversary of his initial enrollment in the State ORP in August 2009. In particular, Petitioner contends that his request should be allowed because the aggregate number of months he has actively contributed to a State ORP account over that time has not yet reached five years. Petitioner points to guidance published by PEBA in February 2020 that appears to support his construction of the statute and the interpretation he propounds. In Kiawah Dev. Partners, II v. S. Carolina Dep't of Health &

Envtl. Control, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014), the South Carolina Supreme Court set forth a two-step procedure for interpreting statutes administered by an agency: First, the court must determine whether the language of a statute or regulation directly speaks to the issue. If so, the court must utilize the clear meaning of the statute or regulation without deference to the agency's interpretation. If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference. Kiawah, 411 S.C. at p. 32-33.

The election of an eligible employee to participate in the State ORP in lieu of membership in SCRS is governed by the provisions of Code Section 9-20-40. S.C. Code Ann. § 9-20-40 (2019). Under that section, the election to enroll in the State ORP "must be made in writing and filed with the retirement system and the appropriate officer of the employee's participating employer and is effective on the date of employment." Id. § 9-20-40(A). Further, once made, "[t]he election to participate in the State ORP is irrevocable except as set forth in subsections (B) and (C) [of Section 9-20-40]." ¹ Id. Subsection (B) provides that "[a] State ORP participant may irrevocably elect to join the South Carolina Retirement System during any open enrollment period after the first annual anniversary but before the fifth annual anniversary of the person's initial enrollment in the State ORP." Id. § 9-20-40(B) (emphasis added).² Accordingly, under these statutes, an employee's election to participate in the State ORP or SCRS is generally irrevocable for the duration of the employee's period of employment for the covered employer. And, while there is a limited exception to that irrevocability that allows an ORP participant to enroll in SCRS without a separation from employment, this exception must be exercised within five years of the employee's "initial enrollment in the State ORP." Id. Importantly, by explicitly tying the time for this opportunity to enroll in SCRS to the employee's "initial enrollment in the State ORP," the statute makes it clear this five-year window to enroll in SCRS is not reset with subsequent reenrollments in the State ORP or tolled by intervening periods in which an individual is separated from covered employment. Id. The plain language of the statute provides that the duration of the enrollment opportunity is determined based upon the "annual anniversary" of the employee's initial enrollment date, and not upon aggregate months of contributions or some other measure of duration of participation. Id. Because the language

¹ The exception provided in subsection (C) of Section 9-20-40, which provided former members of the Higher Education ORP with a one-time option to elect membership in SCRS between January and March 2004, is not applicable in the matter at hand.

² This "open enrollment period" is defined as "the period from January first to March first of each year." S.C. Code Ann. § 9-20-10(4) (2019).

of the statute speaks directly to the issue in this case and its meaning is clear and unambiguous, this court must apply that meaning without deference to language published by PEBA which might be interpreted to support another outcome.

There is no dispute that Petitioner's initial election to participate in the State ORP was made in writing, filed with PEBA, and became effective on his August 3, 2009 date of employment with the South Carolina Judicial Department. Consequently, as a matter of law, Petitioner's eligibility to end his participation in the State ORP and enroll in SCRS without a separation from employment ended on March 1, 2014, the last day of the last open enrollment period before the fifth anniversary of his initial enrollment in the State ORP on August 2009. S.C. Code Ann. § 9-20-40(B). Although Petitioner has not continuously contributed to the State ORP since August 2009, and reenrolled in the State ORP in 2012 and 2019, neither his contribution history nor his reenrollments change the date of his initial election to participate in the State ORP or reset his window for making an election to switch from the State ORP to SCRS without a severance from employment. *Id.* Accordingly, once Petitioner reenrolled in the State ORP on June 11, 2019, upon being hired by the State Treasurer's Office, his election to participate in the State ORP is irrevocable so long as he remains so employed, because the last open enrollment period prior to the fifth anniversary of his initial 2009 enrollment in the State ORP has passed. Therefore, when Petitioner inquired about ending his participation in the State ORP and enrolling in SCRS in December 2019 and January 2020, his request was properly denied by PEBA because his election to participate in the State ORP in connection with his employment with the Treasurer's Office is irrevocable under the plain terms of Section 9-20-40. Neither PEBA nor this Court has the authority to ignore the plain language of Section 9-20-40 and to allow Petitioner to enroll in SCRS outside of the period authorized by statute. *See* S.C. Code Ann. § 9-20-40; *S.C. Tax Comm'n v. S.C. Tax Bd. of Rev.*, 278 S.C. 556, 560, 299 S.E.2d 489, 491-92 (1983) (holding that an administrative agency "may not validly act in excess of its powers, nor has it any discretion as to the recognition of or obedience to a statute," but rather the agency "must obey a law found upon the statute books") (quoting 2 Am. Jur. 2d Administrative Law § 188 (1962)).

In sum, under the undisputed facts of this case and the plain language of the applicable statute, Petitioner is not eligible to end his State ORP participation and enroll in SCRS, and summary judgment should be granted in favor of Respondent PEBA. Accordingly, I find that Respondent's Motion for Summary Judgment should be granted and Petitioner's Motion for Summary Judgment should be denied.

ORDER

IT IS THEREFORE ORDERED that Respondent's Motion for Summary Judgment is **GRANTED**, Petitioner's Motion for Summary Judgment is **DENIED**, and this matter is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that the hearing scheduled for Monday, February 8, 2021 is hereby cancelled.

AND IT IS SO ORDERED.



Deborah Brooks Durden, Judge
S.C. Administrative Law Court

November 5, 2020
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Robin E. Coleman, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Robin E. Coleman
Judicial Aide to Judge Deborah Brooks Durden

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