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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Deborah Brooks Durden, Administrative Law Judge

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

Appellate Case No.: 2020-001640

Shawn Eubanks,.....Appellant,

v.

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

INITIAL BRIEF OF APPELLANT

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ISSUES ON APPEAL

- I. Did the Administrative Law Court err in finding that Appellant's election to join the South Carolina Retirement System was not timely because the deadline for a State Optional Retirement Plan participant to elect to join the South Carolina Retirement System is calculated from the date of the participant's election to join the State Optional Retirement Plan, without regard to the length of time during which the individual has actually participated in the State Optional Retirement Plan?

- II. In the alternative, did the Administrative Law Court err in failing to find that S.C. Code Ann. § 9-20-40(B) is ambiguous or fails to address whether the deadline for electing to join the South Carolina Retirement System is calculated according to cumulative participation, and, therefore, err in failing to consider Respondent's published interpretive guidance as to the meaning of the statute, which supports Appellant's interpretation thereof?

STATEMENT OF THE CASE

Appellant Shawn Eubanks ("Appellant") initiated this matter by filing a request for a contested case with the South Carolina Administrative Law Court ("ALC") seeking review of Final Agency Determination No. 20-009 issued by Respondent South Carolina Public Employee Benefit Authority, South Carolina Retirement Systems ("PEBA") on May 4, 2020. (**R. pp.**) (Appellant's Req. for Contested Case Hr'g). In that Final Agency Determination, PEBA found that Appellant was ineligible to elect membership in the South Carolina Retirement System ("SCRS") during the 2020 open enrollment period because his initial election into the State Optional Retirement Plan ("State ORP") occurred on August 3, 2009, and more than five calendar years had passed since that date, despite the fact that Appellant was not a State ORP participant for that entire period. Appellant does not dispute the date of his initial election into the State ORP, but contends that, because he has accrued less than five years of active enrollment in the State ORP since his 2009 election, he was and is entitled to elect to join SCRS during the 2020 open enrollment period.

The contested case was assigned to the Honorable Deborah Brooks Durden, Administrative Law Judge ("ALJ"). Both Appellant and PEBA filed motions for summary judgment, and on

November 5, 2020, the ALJ issued an Order granting PEBA's motion and denying Appellant's motion without a hearing ("Summary Judgment Order"). (**R. pp.**).

In the Summary Judgment Order, the ALJ interpreted S.C. Code Ann. § 9-20-40(B) to mean that Appellant was ineligible to elect to join SCRS because the time for such an election is not tolled by an intervening period during which an individual is separated from covered state employment. (**Id.**).

Appellant timely filed a Motion for Reconsideration on November 10, 2020. (**R. pp.**). In that motion, Appellant requested that the ALJ amend the Summary Judgment Order to reflect that Appellant was eligible to elect to join SCRS pursuant to S.C. Code Ann. § 9-20-40(B) because he had accrued less than five years of enrollment in the State ORP, and to liberally construe the statutory language in favor of participation in SCRS. The motion further requested that, to the extent the statute is ambiguous or does not directly address the question of whether the window of time for such an election runs only with participation in the State ORP, to consider PEBA's own guidance as determinative of the matter in favor of Appellant. The ALJ denied Appellant's Motion for Reconsideration on November 24, 2020, again without a hearing, stating that all of these arguments were ruled upon in the previous order (**R. pp.**) (Order Den. Mot. for Recons.).

By a Notice of Appeal filed and served on December 17, 2020, Appellant appealed the ALJ's decision to this Court.

STATEMENT OF THE FACTS

Appellant Shawn Eubanks is currently employed by an agency of the State of South Carolina, and seeks to elect to join the SCRS, having timely filed a request with PEBA to do so.

Over the course of his career, Appellant has been employed by three agencies of the State of South Carolina. First, from August 2009 to July 2010, Appellant served as a law clerk to the

Hon. J. Mark Hayes, II of the South Carolina Circuit Court. (**R. p.**) (Appellant Summary Judgment Affidavit ¶ 4.). Second, Appellant served as Deputy General Counsel for the South Carolina Department of Education from July 2012 to March 2015. (**Id.**) Third, Appellant served and continues to serve as Deputy General Counsel for the State Treasurer’s Office, beginning in June 2019. (**Id.**) During each of these periods, Appellant was enrolled in the State ORP.¹ (**Id.**)

On January 8, 2020, Appellant submitted an election to join the SCRS within the open enrollment period. (**R. p.**) (Appellant Summary Judgment Affidavit ¶ 2). At the time Appellant made the election, he had accumulated approximately four years and two months of enrollment in the State ORP through his state government employment. (**R. p.**) (See id. ¶ 5).

It is undisputed that, at the time of Appellant’s election to join SCRS, Appellant’s cumulative or aggregate time of “enrollment” as a “State ORP participant” was more than one year but less than five years. See S.C. Code Ann. § 9-20-40(B) (2019).

STANDARD OF REVIEW

The standard of review for an appeal to this Court of a final decision of an ALJ is set out in the Administrative Procedures Act, S.C. Code Ann. § 1-23-610(B) (2019). Pursuant to that statutory section, while this Court is constrained from reweighing the evidence presented to the ALJ, the Court may reverse or modify the ALJ’s decision if the ALJ’s findings or conclusions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

¹ An individual’s State ORP funds are transferrable to certain retirement accounts offered by private employers, such as 401(k)s and IRAs, without penalty. Thus, initial election to join the State ORP may be more attractive to younger individuals entering the workforce (such as judicial law clerks) who will wish to seek different, often private, employment in the future.

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.; see also Kiawah Dev. Partners II v. S.C. Dep't of Health & Env't Control, 422 S.C. 632, 636, 813 S.E.2d 691, 693 (2018). In particular, in reviewing whether an ALJ's decision is in violation of a statutory provision or affected by an error of law, the South Carolina Supreme Court has recognized that "questions of statutory interpretation are questions of law, which [appellate courts] are free to decide without any deference to the court below." Centex Int'l v. S.C. Dep't of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013).

ARGUMENT

I. Appellant is entitled to elect to join the SCRS because his request to do so was timely made after his first anniversary of enrollment but before his fifth anniversary of enrollment, as required by S.C. Code Ann. § 9-20-40.

Appellant is entitled to elect to join the SCRS because his request to do so was made during an open enrollment period occurring after his first anniversary of enrollment but before the fifth anniversary of his enrollment in the State ORP; thus, Appellant's election was timely made under the requirements of S.C. Code Ann. § 9-20-40(B). That statutory provision reads as follows:

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

S.C. Code Ann. § 9-20-40(B).

In interpreting statutes, a court must first determine whether the language of the statute "directly speaks to the issue" in dispute, and if so, it must "utilize the clear meaning of the statute." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 32, 766 S.E.2d 707, 715 (2014). If the statute is silent or ambiguous, the court "must give deference to the agency's interpretation of the statute . . . assuming the interpretation is worthy of deference." *Id.*

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. State v. Scott, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002). The legislature’s intent should be ascertained primarily from the plain language of the statute. State v. Landis, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). A statute must receive a practical and reasonable interpretation consistent with the “design” of the legislature. Smith v. S.C. Ins. Co., 350 S.C. 82, 87, 564 S.E.2d 358, 361 (Ct. App. 2002). “Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation.” Santee Cooper Resort v. S.C. Pub. Serv. Comm’n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). “The terms must be construed in context and their meaning determined by looking at the other terms used in the statute.” Hinton v. S.C. Dep’t of Prob., Parole & Pardon Servs., 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004). “[T]he court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law.” S.C. Coastal Council v. S.C. Ethics Comm’n, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991).

Further, the South Carolina Supreme Court has stated specifically that “retirement statutes should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished.” Stuckey v. State Budget & Control Bd., 339 S.C. 397,401, 529 S.E.2d 706, 708 (2000).

- a. The plain language of S.C. Code Ann. § 9-20-40(B) explicitly ties the statutory clock for SCRS election to an individual’s actual participation in the State ORP, and the timeframe does not run during a period in which an individual is not a participant in the State ORP.

S.C. Code Ann. § 9-20-40(B) establishes the window of time during which a State ORP participant may elect to join the SCRS. By its plain language, Section 9-20-40(B) explicitly ties the passage of that one- to five-year window directly to participation in the State ORP program,

and thus to employment with the state. See § 9-20-40(B) (“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 . . .*” (emphasis added)). Therefore, the statutory clock for a State ORP participant’s election to join the SCRS does not run while an individual is not employed with the state, or otherwise not enrolled in the State ORP.

Indeed, the phrase “State ORP participant” indicates that an individual must be presently participating or enrolled in the State ORP. “Participant” in this context is defined as “an eligible employee who participates in the optional retirement program provided by [Chapter 20].” S.C. Code Ann. § 9-20-10(3). The opportunity to elect to join the SCRS is directly tied to an individual’s employment, eligibility, and participation in the State ORP, and must therefore be construed to allow the individual access to the full five-year window for electing to join the SCRS. § 9-20-40(B).

Similarly, the window of time to elect to join the SCRS occurs during enrollment: “A State ORP participant may irrevocably elect to join the South Carolina Retirement System . . . after the first annual anniversary but before the fifth annual anniversary of the person’s initial enrollment in the State ORP.” § 9-20-40(B). The term “enrollment” refers to the status of a State ORP participant being actively enrolled, having begun such period of enrollment by electing to join the State ORP. Notably, the statute does not establish a deadline to join SCRS based on a person’s “initial election.” The moment of “election” is distinguished from the continued state of “enrollment” referenced in Section 9-20-40(B). The word “elect” or “election” refers to the act of selecting the State ORP or the SCRS. S.C. Code Ann. § 9-20-40(A) defines the act of election as a moment in time: “an election . . . is effective on the date of employment.” The terms “election”

and “enrollment” have different meanings, and they are employed accordingly in the statute. These terms “must be construed in context and their meaning determined by looking at the other terms used in the statute.” Hinton, 357 S.C. at 333, 592 S.E.2d at 338. Thus, the rule that a “State ORP participant” must make an election to join SCRS “after the first annual anniversary but before the fifth annual anniversary of the person’s initial enrollment in the State ORP” denotes a window of time that is dependent upon enrollment and participation in the State ORP, and which does not run when the person is not enrolled or participating in the State ORP. See § 9-20-40(B).²

This plain-language reading is also consistent with guidance PEBA published on its website during the relevant open enrollment period:

State ORP participants are eligible to change from the State ORP to SCRS during the 2020 open enrollment period if at any point during the open enrollment period they **have at least 12 months, but no more than 60 months, of participation** from their initial enrollment in the State ORP (i.e., initial enrollment between January 1, 2015, and March 1, 2019).

(R. p.) (Appellant Summary Judgment Affidavit ¶ 6) citing “State ORP Annual Open Enrollment,” Feb. 24, 2020, peba.sc.gov/sorpopenenrollment (emphasis added).³

Simply, if the General Assembly had intended the deadline to join SCRS to occur after a period of time unrelated to a person’s actual participation or enrollment in the State ORP, it would have used different language to tie the deadline to initial “election” or initial “entry into service,” as these are particular moments in time. In fact, the General Assembly did exactly that when it established another deadline in the very same Code section requiring that “[a]ll eligible employees

² The term “anniversary” denotes the date upon which participation and enrollment have continued in effect for one year, just as a wedding anniversary indicates that a couple remained married, and a work anniversary indicates that an individual remained employed. The common usage of the term “anniversary” is necessarily tied to a continued state of participation. Thus, if the person’s State ORP participation stops, so too does the passage of “anniversaries.”

³ The applicability and effect of PEBA’s guidance is discussed further in Section II of this brief.

shall elect either to join the South Carolina Retirement System or to participate in the State ORP . . . within thirty days after entry into service” § 9-20-40(A). This type of deadline—that is, establishing an unqualified and independent window of time for action—is used throughout Title 9 of the South Carolina Code. See, e.g., S.C. Code Ann. § 9-1-1850 (“[T]he member must terminate employment within ninety days after electing the option provided by this section.”); S.C. Code Ann. § 9-9-50 (“[W]ithin six months of the date he becomes a member of the [SCRS] System”). However, the Legislature chose not to use this language, instead articulating a deadline that is dependent upon the foreseeable starting, stopping, and restarting of state employment, and, thus, of State ORP participation, over the course of time.

In sum, the timeline for election to join SCRS must be viewed differently than the simple passage of calendar days and years, and cannot be discerned without regard to continued participation in the State ORP.

- b. Appellant is entitled to a liberal construction of S.C. Code Ann. § 9-20-40(B) which favors the individuals who have elected to join the State ORP, and accomplishes the objectives of the statute.

The construction of S.C. Code Ann. § 9-20-40(B) discussed above is further bolstered by the South Carolina Supreme Court’s mandate that retirement statutes be liberally construed in favor of those to be benefitted and the objectives to be accomplished thereby. Indeed, this construction adheres to the language, meaning, and intent of the statute at issue, while preserving the rights and access of state employees to elect into the SCRS, in accordance with the Supreme Court’s directive that “retirement statutes should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished.” Stuckey v. State Budget & Control Bd., 339 S.C. 397, 401, 529 S.E. 2d 706, 708 (2000).

Appellant’s construction of the statute ensures that a state employee has the opportunity to join SCRS, and has reasonable time to evaluate which retirement system benefits him or her most.

It allows a state employee with a break in employment the same opportunity to observe and evaluate retirement plan value and growth during participation during the one- to five-year statutory period, just as any other state employee without a break in service would have.

PEBA's position not only runs contrary to the plain language and meaning of S.C. Code Ann. § 9-20-40(B), but its construction of the statute also violates the directive that such statutes be construed "in favor of those to be benefitted and the objective sought to be accomplished." Stuckey, 339 S.C. at 401, 529 S.E.2d at 708. In fact, in applying this construction, PEBA inappropriately excludes those individuals who would otherwise benefit from a five-year window of opportunity to elect into the SCRS after initially choosing to participate in the State ORP.

PEBA contends, contrary to its own published guidance, that the one- to five-year window established in Section 9-20-40(B) runs independently of an individual's participation in the State ORP, and expires five years from the individual's election to join the State ORP, regardless of whether he or she was even a State ORP participant during the one- to five-year period. PEBA's position creates the counterintuitive and inequitable outcome that a state employee, such as judicial law clerk, might elect into the State ORP for one year of service, then enter private practice (as is common) for a period of four or more years, and then, while not even participating in the State ORP, be forever barred from returning to state employment and participating in the SCRS, which is one of the state's most attractive recruitment tools. In fact, applying PEBA's reading, for one-year positions such as judicial clerkships, a State ORP participant may never have the opportunity to elect to join SCRS, because the election must be made "after the first annual anniversary" § 9-20-40(B).

Obviously, a break in service or participation has various consequences as it relates to retirement programs and employment benefits. Most notably, during a break in service, an

individual ceases to accrue earned service toward a retirement benefit in SCRS, as well as retiree health, dental, and vision coverage through PEBA. See S.C. Code Ann. § 9-1-10(9). The statute presently at issue contemplates the possibility that an individual may have a break in service, employing the phrase “initial enrollment.” This language acknowledges the fact that an employee might have a break in service, and clarifies that the SCRS election timeframe begins with the initial enrollment, remains tied to enrollment and participation, and does not start over with each subsequent period of enrollment and participation. This is further evidence that the General Assembly expected that the election window would be tolled during periods in which a person is not enrolled or participating in the State ORP, and resumed upon re-enrollment, with the cumulative time of enrollment being the operative period.

PEBA’s door-closing interpretation appears to be contrary to legislative intent, is inconsistent with a liberal interpretation benefitting participants as required by the Supreme Court, and serves no public purpose other than to arbitrarily minimize the opportunity to elect into SCRS for employees with a break in service. Further, PEBA’s position runs counter to the larger policy goal of having an attractive retirement system to reward and attract talented individuals to state government service—a goal which these statutory provisions were designed to achieve. Thus, PEBA’s interpretation simply cannot be what the General Assembly intended.

The better and correct interpretation of S.C. Code Ann. § 9-20-40(B) is that Appellant is entitled to elect to join the SCRS because at the time of Appellant’s election to participate in SCRS, he had accrued approximately four years and two months of enrollment, which is more than one year, but less than five years, of enrollment in the State ORP. His election was made during an open enrollment period which fell within this one- to five-year period of State ORP participation and enrollment.

Therefore, Appellant's request to join SCRS was timely made pursuant to the statute, and his election to participate in SCRS cannot be denied as untimely.

II. To the extent S.C. Code Ann. § 9-20-40(B) is ambiguous, PEBA's own agency interpretation confirms that Appellant is entitled to elect to join SCRS.

To the extent that the statute in question is ambiguous as applied directly to the case at bar, PEBA's own agency interpretation clarifies the meaning of S.C. Code Ann. § 9-20-40(B) in a manner which entitles Appellant to elect to join SCRS.

In interpreting statutes, a court must first determine whether the language of the statute "directly speaks to the issue" in dispute, and if so, it must "utilize the clear meaning of the statute." Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). If the statute is silent or ambiguous, the court must "give deference to the agency's interpretation of the statute . . . assuming it is worthy of deference." Id. "[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons. [The courts] defer to an agency interpretation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" Id. at 34-35.

For the reasons stated *supra*, the plain language of the statute unambiguously entitled Appellant to join the SCRS because his cumulative enrollment in the State OPR was less than five years. However, to the extent this Court determines that S.C. Code Ann. § 9-20-40(B) is ambiguous, the guidance published by PEBA during the relevant open enrollment period indicates precisely the same construction of the statute advanced by Appellant in this case:

State ORP participants are eligible to change from the State ORP to SCRS during the 2020 open enrollment period if at any point during the open enrollment period they **have at least 12 months, but no more than 60 months, of participation** from their initial enrollment in the State ORP (i.e., initial enrollment between January 1, 2015, and March 1, 2019).

(R. p.) (Appellant Summary Judgment Affidavit ¶ 6) citing “State ORP Annual Open Enrollment,” Feb. 24, 2020, peba.sc.gov/sorpopenenrollment (emphasis added). PEBA continued to publish this interpretation on its website until as recently as November 6, 2020; its website provided the exact same interpretation in reference to the 2021 open enrollment period.

According to PEBA, for the 2020 open enrollment period, the timeframe for a State ORP participant to elect to join the SCRS was dependent upon the length of time “of participation” in the State ORP. Based on PEBA’s published guidance, the word “enrollment” as used in S.C. Code Ann. § 9-20-40(B) is interpreted to mean “participation”—exactly the interpretation which Appellant has argued is the appropriate construction of the statute. This guidance should be given deference because the construction is not “arbitrary, capricious, nor manifestly contrary to the statute.” Kiawah, 411 S.C. at 35. Further, this interpretation is “reasonable and consistent with its statutory authority.” Id. at 35.

PEBA neither addressed nor acknowledged the language of its published guidance in the proceedings before the ALJ; however, the ALJ notes that “[Appellant] points to guidance published by PEBA in February 2020 that appears to support his construction of the statute and the interpretation he propounds.” **(R. p.)** (Summary Judgment Order at 3).⁴

Notably, however, PEBA has recently changed its published guidance for State ORP members for the 2021 open enrollment period, and now provides that “[d]uring the annual open enrollment period you may . . . [e]lect to irrevocably switch to SCRS if it has been at least one year, but not more than five years, since your initial enrollment in the State ORP.” (January 4, 2021, peba.sc.gov/state-orp). PEBA’s change in position, from tying the passage of the SCRS

⁴ The ALJ did not reach the issue of applying PEBA’s guidance because it found that the statutory language was unambiguous.

election timeframe to “participation,” to now counting the years “*since* [a State ORP participant’s] initial enrollment,” without regard to participation, evidences PEBA’s confusion about the language and meaning of S.C. Code Ann. § 9-20-40(B). Id. (emphasis added).

Appellant does not believe that the statute is ambiguous; however, to the extent this Court finds S.C. Code Ann. § 9-20-40(B) to be ambiguous, PEBA’s 2020 published guidance ought to be considered in interpreting the statute, and Appellant’s eligibility for the SCRS election should be determined based on whether he made the election during an open enrollment in which he had “at least 12 months, but no more than 60 months, of participation from [his] initial enrollment in the State ORP,” consistent with PEBA’s published guidance.

Accordingly, based on PEBA’s published guidance and interpretation of S.C. Code Ann. § 9-20-40(B), Appellant is entitled to join SCRS because, at the time he elected to join SCRS, he had accrued approximately four years and two months of enrollment in the State ORP through his state government employment, which constitutes “at least 12 months, but no more than 60 months, of participation from [his] initial enrollment in the State ORP.”

CONCLUSION

For the foregoing reasons, Appellant requests that this Court reverse the Administrative Law Judge and declare that Appellant is entitled to elect to join, and did so elect to join the SCRS, retroactively effective as of January 1, 2020, with all accruals counted toward him as though he has been enrolled continuously in SCRS since that date.

[Signature on next page]

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CERTIFICATE OF SERVICE

This is to certify that today undersigned counsel served one (1) copy of the INITIAL BRIEF OF APPELLANT by electronic mail delivery of same to the recipients listed, and at their Attorney Information System provided email addresses below, via the attached E-mail:

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