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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

Appellate Case No. 2020-001640

Shawn Eubanks,.....Appellant,

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUE ON APPEAL

DID THE ADMINISTRATIVE LAW JUDGE CORRECTLY FIND THAT APPELLANT'S REQUEST TO JOIN THE SOUTH CAROLINA RETIREMENT SYSTEM WAS UNTIMELY BECAUSE IT WAS NOT MADE BEFORE THE FIFTH ANNUAL ANNIVERSARY OF THE DATE OF HIS INITIAL ENROLLMENT IN THE STATE OPTIONAL RETIREMENT PROGRAM?

STATEMENT OF THE CASE

By a request for a contested case hearing filed with the South Carolina Administrative Law Court on May 18, 2020, Appellant Shawn Eubanks ("Eubanks") initiated this matter, in which he seeks 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. (Request for Contested Case Hearing.) In that Final Agency Determination, PEBA denied Eubanks' request to end his participation in the State Optional Retirement Program ("State ORP") and join the South Carolina Retirement System ("SCRS") because his request was not timely made within the period allowed by law. (PEBA's Mot. for Summ. J. Ex. #8.) In particular, PEBA found that Eubanks' January 2020 request to join SCRS was untimely because it was made after the fifth annual anniversary of the date of his initial enrollment in the State ORP in August 2009. (PEBA's Mot. for Summ. J. Ex. #8.) Eubanks does not contest that the date of his initial enrollment in the State ORP occurred in August 2009 and that he did not request to join SCRS within five years of that date. (Eubanks' Mot. for Summ. J. at 2.) Instead, Eubanks contends that his January 2020 request to end his participation in the State ORP and join SCRS was nevertheless timely because the aggregate period of time he had actively made contributions to his State ORP account was less than five years at the time he made his request. (Eubanks' Mot. for Summ. J.)

The contested case proceeding was assigned to the Honorable Deborah Brooks Durden (“ALJ”) on May 26, 2020. On October 5, 2020, and October 13, 2020, respectively, PEBA and Eubanks filed motions for summary judgment in this matter, on the grounds that there was no genuine issue as to any material fact in the case and that the contested case could be decided as a matter of law. (PEBA’s Mot. for Summ. J.; Eubanks’ Mot. for Summ. J.) By an Order dated November 5, 2020, the ALJ granted PEBA’s motion for summary judgment and correspondingly denied Eubanks’ motion. (Order Granting Respondent’s Mot. for Summ. J.) In the Order, the ALJ found that, under the undisputed facts of the case and the clear and unambiguous language of the applicable statute, Eubanks’ request to end his State ORP participation and join SCRS was not timely and was properly denied by PEBA. (Order Granting Respondent’s Mot. for Summ. J. at 5.)

Eubanks filed a motion for reconsideration of the ALJ’s Order on November 10, 2020 (Eubanks’ Mot. for Recons.), and, by an Order dated November 24, 2020, the ALJ denied the motion (Order Den. Petitioner’s Mot. for Recons.). By a Notice of Appeal filed and served on December 17, 2020, Eubanks appealed the ALJ’s decision to this Court, resulting in the instant proceeding.

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 at Section 1-23-610(B) of the Code of Laws. S.C. Code Ann. § 1-23-610(B) (Supp. 2020). Pursuant to that section, this Court

may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

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

Id. Accordingly, under this standard, “[t]he decision of the Administrative Law Court should not be overturned unless it is unsupported by substantial evidence or controlled by some error of law.” Centex Int’l, Inc. v. S.C. Dep’t of Revenue, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) (quoting Original Blue Ribbon Taxi Corp. v. S.C. Dep’t of Motor Vehicles, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008)).

BACKGROUND

Some employees of participating employers in the South Carolina Retirement System (“SCRS”) are eligible to make certain elections regarding their retirement plan participation, such as the election to decline membership in the retirement systems altogether or the election to participate in the State Optional Retirement Program (“State ORP”) defined contribution plan in lieu of the SCRS pension plan. See, e.g., S.C. Code Ann. § 9-1-580(A) (2019) (allowing certain hospital employees to decline membership in SCRS); S.C. Code Ann. § 9-20-40(A) (allowing employees of state agencies, colleges, and school districts to elect to participate in the State ORP). As a general matter, these enrollment elections must be made within thirty days of an employee’s entry into covered employment, and any enrollment decision made by an employee is irrevocable for the employee’s period of employment with the participating employer. See id. §§ 9-1-580(A), 9-20-40(A). In one narrow exception to the general irrevocability of these

enrollment elections, an employee who chooses to participate in the State ORP instead of SCRS may make a later election to join SCRS. Id. § 9-20-40(B). However, by statute, any such election to end participation in the State ORP and join SCRS must be made during a State ORP open enrollment period after the first annual anniversary but before the fifth annual anniversary of the employee's initial date of enrollment in the State ORP. Id. In the matter at hand, Appellant Shawn Eubanks is a participant in the State ORP. As set forth in detail below, Eubanks seeks to end his participation in the State ORP and enroll as a member of SCRS.

On a Retirement Plan Enrollment form executed on August 3, 2009, Eubanks 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. (PEBA's Mot. for Summ. J. Ex. #1.) Notably, the information provided on the form immediately above Eubanks' 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.

(PEBA's Mot. for Summ. J. Ex. #1.) As a result of the submission of the enrollment form, Eubanks was enrolled as a participant in the State ORP, and not SCRS, effective August 3, 2009, and participated in the State ORP during his year of employment as a judicial law clerk.

Approximately two years after leaving employment as a law clerk, Eubanks returned to covered employment under the State ORP upon being hired by the South Carolina Department of Education on July 2, 2012. (PEBA's Mot. for Summ. J. Ex. #2.) By a Retirement Plan Enrollment executed that same day, Eubanks reenrolled in the State

ORP in connection with his employment with the Department of Education. (PEBA's Mot. for Summ. J. Ex. #2.) The enrollment form signed by Eubanks contained the same notice provided on his 2009 enrollment form regarding the irrevocability of his election to participate in the State ORP. (PEBA's Mot. for Summ. J. Ex. #2.) As a result of that reenrollment, Eubanks continued his participation in the State ORP in connection with his employment with the Department of Education from 2012 to 2015.

Most recently, Eubanks returned to covered employment under the State ORP on June 11, 2019, upon being hired as the Deputy General Counsel for the South Carolina State Treasurer's Office. (PEBA's Mot. for Summ. J. Ex. #3.) By an electronic Retirement Plan Enrollment form submitted on June 12, 2019, Eubanks elected to continue his participation in the State ORP in his employment with the Treasurer's Office. (PEBA's Mot. for Summ. J. Ex. #3.) Approximately six months later, by an email to PEBA on December 16, 2019, Eubanks inquired about his eligibility to end his participation in the State ORP and enroll in SCRS during the upcoming 2020 open enrollment period. (PEBA's Mot. for Summ. J. Ex. #4.) By a response email that same day, a PEBA customer service representative explained that Eubanks 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. (PEBA's Mot. for Summ. J. Ex. #4.)

By a Retirement Plan Enrollment form executed January 8, 2020, Eubanks formalized his request to end his ORP participation and enroll in SCRS (PEBA's Mot. for Summ. J. Ex. #5), and, by a letter dated February 7, 2020, PEBA's Enrollment Department notified Eubanks 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 (PEBA's Mot. for Summ. J. Ex. #6). By a letter received February 24, 2020, Eubanks sought further review of the determination that he was not eligible to end his participation in the State ORP and enroll in SCRS (PEBA's Mot. for Summ. J. Ex. #7), and, on May 4, 2020, PEBA issued Final Agency Determination No. 20-009, which affirmed the denial of his request to enroll in SCRS (PEBA's Mot. for Summ. J. Ex. #8).

Eubanks sought review of that Final Agency Determination in a contested case proceeding before the Administrative Law Court. (Request for Contested Case Hearing.) Because there are no material facts in dispute in this case, the parties submitted the case to the ALJ for adjudication on cross-motions for summary judgment. (PEBA's Mot. for Summ. J.; Eubanks' Mot. for Summ. J.). By an Order dated November 5, 2020, the ALJ found in favor of PEBA, concluding that, "under the undisputed facts of this case and the plain language of the applicable statute, [Eubanks] is not eligible to end his State ORP participation and enroll in SCRS, and summary judgment should be granted in favor of Respondent PEBA" (Order Granting Respondent's Mot. for Summ. J. at 5). In particular, the ALJ found that the language of the applicable statute setting out the deadline for a State ORP participant to join SCRS "speaks directly to the issue in this case and its meaning is clear and unambiguous." (Order Granting Respondent's Mot. for Summ. J. at 5.) Eubanks now seeks review before this Court of the determination by PEBA and the ALJ that his January 2020 request to join SCRS was untimely because it was not made before the fifth annual anniversary of the date of his initial enrollment in the State ORP in August 2009.

ARGUMENT

THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT APPELLANT'S REQUEST TO JOIN THE SOUTH CAROLINA RETIREMENT SYSTEM WAS UNTIMELY BECAUSE IT WAS NOT MADE BEFORE THE FIFTH ANNUAL ANNIVERSARY OF THE DATE OF HIS INITIAL ENROLLMENT IN THE STATE OPTIONAL RETIREMENT PROGRAM.

Based upon the undisputed facts in this case and the clear and unambiguous language of Section 9-20-40 of the Code of Laws, the ALJ appropriately granted summary judgment in favor of PEBA in this matter. And, Eubanks' efforts to overturn that decision by advocating a forced construction of Section 9-20-40 and by relying upon a misapprehension of PEBA's administration of that section are unavailing. The decision of the ALJ should be affirmed.

A. The ALJ properly granted summary judgment in favor of PEBA

Summary judgment is proper in a case when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCF; see also, e.g., Henderson v. Allied Signal Inc., 373 S.C. 179, 183, 644 S.E.2d 724, 726 (2007). The purpose of summary judgment is to expedite disposition of cases that do not require the services of a fact finder. Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 34, 659 S.E.2d 122, 123 (2008). As set forth below, there is no genuine dispute regarding the material facts of this case and the ALJ properly granted summary judgment in favor of Respondent PEBA as a matter of law based upon the plain language of the statute governing the eligibility of a participant in the State ORP to enroll in SCRS.

In this matter, Eubanks 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 the date of his initial enrollment in the State ORP in August 2009. Specifically, Eubanks contends that his request should be allowed notwithstanding the fact that his initial enrollment in the State ORP occurred over ten years ago, because the aggregate period of time he had actively contributed to a State ORP account at the time of his request had not yet reached five years. However, Eubanks' request to end his State ORP participation and enroll in SCRS fails as a matter of law such that summary judgment was appropriately granted in favor of PEBA in this case and should be affirmed on appeal.

The election of an eligible employee to participate in the State ORP in lieu of membership in SCRS is governed by the provisions of Section 9-20-40 of the Retirement Code. See 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), in turn, 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

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).

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 date 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. Id. Moreover, the statute also makes it plain that the duration of this enrollment opportunity is determined simply based upon the "annual anniversary" of the employee's initial enrollment date, and not upon aggregate months of contributions, years of employment, or some other measure of duration of participation. Id.

In the instant matter, there is no dispute that Eubanks' 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. (PEBA's Mot. for Summ. J. Ex. #1.) Consequently, as a matter of law, Eubanks' 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 in August 2009. S.C. Code Ann. § 9-20-40(B). And, although Eubanks 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 enrollment 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. § 9-20-40(B). Accordingly, once Eubanks 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 Eubanks 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 as a matter of law 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. Id. § 9-20-40(A), (B).

Further, given the nature of the statutory requirements at issue in this matter, neither PEBA nor the ALJ had the legal authority to ignore the plain language of Section 9-20-40 and to allow Eubanks 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 Revenue, 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 statutes, Eubanks is not eligible to end his State ORP participation and enroll in SCRS, and the ALJ properly granted summary judgment in favor of Respondent PEBA accordingly.

B. Eubanks' argument relies upon a forced—and improper—construction of Section 9-20-40(B)

In order to support his argument that his January 2020 request to end his participation in the State ORP was timely made before the fifth annual anniversary of his initial enrollment in the program in August 2009, Eubanks relies upon a forced construction of Section 9-20-40 of the Code of Laws that would rewrite the statute, such that the period for electing to join SCRS would not be based upon the anniversary of the date of the participant's initial enrollment in the State ORP, but upon some other measure of participation in the program, such as months of active contributions or years of employment. This misconstruction of Section 9-20-40 must fail as a matter of law.

The South Carolina Supreme Court has long recognized that the statutes governing the South Carolina Retirement Systems “should be liberally construed in favor of those to be benefitted and the objective sought to be accomplished.” Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 41, 659 S.E.2d 125, 127 (2008) (citing King v. S.C. Ret. Sys., 319 S.C. 373, 461 S.E.2d 822 (1995)). However, this directive for liberal and remedial construction does not supplant the primary rule of statutory construction, which “is to ascertain and effectuate the intent of the Legislature.” Duvall, 377 S.C. at 42, 659 S.E.2d at 127. Accordingly, in order effectuate the Legislature's intent, “[w]hen a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.” Centex Int'l, Inc., 406 S.C. at 139, 750 S.E.2d at 69. In so doing, “words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.” Id. Further, “[w]hen construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory

law must be construed together and each one given effect.” Duvall, 377 S.C. at 42, 659 S.E.2d at 127. “Moreover, a statute should not be construed by concentrating on an isolated phrase.” Id.

In the matter at hand, the ALJ correctly recognized that Section 9-20-40(B) “speaks directly to the issue in this case and its meaning is clear and unambiguous.” (Order Granting Respondent’s Mot. for Summ. J. at 5.) In that section, the General Assembly clearly and specifically defined the period during which a participant in the State ORP may elect to end his participation in the program and join SCRS without a separation from service by expressly stating that such an election may only be made “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). Under the plain and ordinary meanings of the words used in that section, the time during which a State ORP participant may elect to join SCRS runs from the date of the participant’s initial enrollment in the program and is calculated based upon the annual anniversaries of that date of enrollment. That this time is based upon the discrete date of initial enrollment, and not some other measure of duration of participation, is particularly evident from the language used in the statute. For example, the use of the term “annual anniversary” denotes a discrete date—the “annually recurring date of a past event”—and not some other measurement of ongoing participation in the plan. See The American Heritage College Dictionary 55 (3d ed. 2000). Similarly, the last sentence of Section 9-20-40(B), which addresses how the time for this election is calculated for participants who had participated in predecessor plans to the State ORP, makes it clear

that a participant's "initial enrollment" in the State ORP is a fixed, past date and not an ongoing, continuing state of participation:

For purposes of this subsection, the date of initial enrollment in the State ORP for employees who previously participated in the Optional Retirement Program for Teachers and School Administrators or the Optional Retirement Program for Publicly Supported Four-Year and Postgraduate Institutions of Higher Education is the date of initial enrollment in these programs.

S.C. Code Ann. § 9-20-40(B) (emphasis added). Further, the use of the term "enrollment" elsewhere in the State ORP statutes reflects the use of the word as a discrete plan election, not a state of participation. For example, the statutorily-defined "open enrollment period" for the State ORP is that period between January 1 and March 1 of each year during which a participant may elect to change his service provider or, if eligible, make the one-time election to join SCRS. S.C. Code Ann. § 9-20-10(4) (2019).

Because Eubanks' request to end his participation in the State ORP and join SCRS did not fall within the period allowed by the plain language of Section 9-20-40(B), he resorts to a forced construction of the statute that would extend the period for that election beyond the fifth annual anniversary of the date of his initial enrollment in the State ORP and would instead use some other measure of participation in the program to determine the timeliness of his election. However, any such forced construction would violate the plain and ordinary meaning of the language in Section 9-20-40, would fail to effectuate the intent of the General Assembly in enacting that language, and must, therefore, be rejected in favor of the clear and unambiguous meaning of the statutory language.

C. Eubanks' argument misapprehends PEBA's administration of Section 9-20-40

As additional support for his argument that his request to join SCRS was timely, Eubanks also contends that PEBA had previously adopted an agency interpretation that agrees with his forced construction of Section 9-20-40(B). However, PEBA has not adopted or implemented any such interpretation of the statute. Accordingly, this contention is without merit.

Most notably, PEBA's long-standing plain reading of the provisions of Section 9-20-40(B) is evidenced in at least three prior cases before the Administrative Law Court. In each of those prior cases, the court granted summary judgment in favor PEBA, adopting PEBA's position that, as a matter of law, the opportunity to switch from participation in the State ORP to SCRS without a severance of employment runs from the date of the participant's initial enrollment in the State ORP. See Louis F. Dessau v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0178-CC, 2019 WL 6998820 (S.C. Admin. Law Ct. Dec. 2, 2019); Meleqkasim Shehu v. S.C. Pub. Employee Benefit Auth., Docket No. 19-ALJ-30-0206-CC, 2019 WL 4391702 (S.C. Admin. Law Ct. Sept. 9, 2019); Gary J. Senn v. S.C. Budget & Control Bd., Docket No. 10-ALJ-30-0946-CC (S.C. Admin. Law Ct. Mar. 29, 2011) (available at www.scalc.net). Although the petitioners in those cases did not make the same duration of participation argument made by Eubanks in this matter, the analysis used by PEBA, and adopted by the court, to determine whether the participant in each case had timely elected to end his participation in the State ORP and join SCRS was based upon the annual anniversary of the date of the participant's initial enrollment in the State ORP, and not upon any other measure of duration of participation. In other evidence of how PEBA has administered Section 9-20-

40(B), PEBA's Retirement Plan Enrollment forms, including the forms signed by Eubanks with regard to his plan elections, also contain the plain language from the statute, notifying the employee 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.

(PEBA's Mot. for Summ. J. Ex. #1, Ex. #2.) Again, this language clearly ties the time for making the election to switch from the State ORP to SCRS without a separation from service to the anniversaries of the date of the participant's initial enrollment in the State ORP, and not other measures of duration of participation.

Further, even the language previously used in a portion of PEBA's website related to the State ORP open enrollment period, and cited by Eubanks in his brief, while perhaps inartful, does not ultimately support his argument that PEBA had adopted an agency interpretation of Section 9-20-40(B) that agrees with his position. In particular, although that prior language did make reference to a participant's "participation" in the State ORP with regard to the open enrollment opportunity to switch to SCRS, the language in question further specified the precise period during which the participant's initial enrollment must have occurred in order for the participant to be eligible to elect to join SCRS during that year's open enrollment. For example, in the 2020 website language cited by Eubanks in his motion for summary judgment, the relevant sentence contained a parenthetical clause clarifying that the participant would be eligible for the election to join SCRS only if he or she had an "initial enrollment between January 1, 2015, and March 1, 2019." (Eubanks' Mot. for Summ. J. at 5.) Plainly, such specificity regarding eligibility based upon enrollment dates could not have been provided if the

time for making the election to join SCRS did not run from the date of the participant's initial enrollment in the State ORP, but depended instead upon the participant's actual months of active contributions to the program or some other measure of participation.³

In addition, Eubanks' brief also reflects a misapprehension of how Section 9-20-40 is administered with regard to State ORP participants who have breaks in covered employment. Specifically, the brief raises a concern that an individual who participates in the State ORP for a short period of time and then leaves covered employment would be precluded from ever joining SCRS if the individual does not return to covered employment before the fifth annual anniversary of his or her initial enrollment in the program. See, e.g., Initial Brief of Appellant at 8-10. However, this concern is unfounded—an eligible employee who is entering (or re-entering) covered employment always has the ability to make a plan election upon hire. See S.C. Code Ann. § 9-20-40(A). Rather, the issue in the case at hand is whether an employee, like Eubanks, who has already re-entered into service and re-enrolled in the State ORP may then end that participation and join SCRS without a separation from covered employment. The eligibility for making that change without a separation from employment is what is governed by Section 9-20-40(B) and is at issue in this matter.

³ It is also important to note that Eubanks does not allege that he saw or in any way relied upon the language previously used on PEBA's website when electing to enroll or reenroll in the State ORP. Instead, he states that he did not see that language until after he had already requested to join SCRS. (Eubanks' Mot. for Summ. J., Aff. of Shawn Eubanks ¶ 6.)

CONCLUSION

Based upon the undisputed facts in this case and the clear and unambiguous language of Section 9-20-40 of the Code of Laws, the decision of the ALJ granting summary judgment in favor of PEBA in this matter was appropriate and should be affirmed by this Court.

Respectfully submitted,



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